ASIC
Australian Securities & Investments Commission

Australian Law Reform Commission Inquiry: Corporate Criminal Responsibility

Submission by the Australian Securities and Investments Commission

7 January 2020

Contents

A Introduction

1 On 10 April 2019 the Attorney-General referred to the Australian Law Reform Commission (**ALRC**) for inquiry and report a review into the corporate criminal responsibility regime in Part 2.5 of Schedule 1 to the *Criminal Code Act 1995* (**Criminal Code**).

2 Under the terms of reference, the ALRC was asked to consider whether any reforms were necessary or desirable to Australia's corporate criminal liability regime. The ALRC was asked to consider options for reforming Part 2.5 of the Criminal Code or alternatives such as introducing or strengthening other statutory regimes.

3 The ALRC released Discussion Paper 87, *Corporate Criminal Responsibility* on 15 November 2019 (**Discussion Paper**)[1], which called for submissions on 23 proposals and nine questions by **31 January 2020**. The final ALRC report is to be provided on **30 April 2020**.

4 ASIC makes this submission in response to the Discussion Paper.

[1] Australian Law Reform Commission, *Corporate Criminal Responsibility*, Discussion Paper 87, November 2019.

B Executive Summary

5 ASIC supports many of the principles underlying the proposals in the ALRC's Discussion Paper – in particular, ensuring greater accountability for the misconduct of corporations and key individuals within them.

6 As Australia's corporate, markets, financial services and consumer credit regulator, ASIC's vision is for a a fair, strong and efficient financial system for all Australians. In order to effectively carry out our role, we need a broad and effective regulatory and enforcement toolkit.

7 The ALRC's proposals if implemented, would constrain ASIC's ability to take the most appropriate and effective enforcement action in response to misconduct, reducing ASIC's effectiveness in achieving those regulatory objectives and greater accountability for corporate misconduct in Australia's markets, financial services and consumer credit sectors.

8 The recommendations of the ASIC Enforcement Review and the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Royal Commission**),[2] which the Government is committed to implementing,[3] identified gaps in ASIC's enforcement toolkit that have contributed to less than optimal enforcement outcomes against corporate misconduct.

9 The Government has commenced implementing those recommendations, with the passage of the *Treasury Laws Amendment (Strengthening Corporate and Financial Penalties) Act 2019* (**Penalties Act**) and the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019*. The amendments brought about by the Penalties Act which came into effect on 14 March 2019 in particular, will have a substantial impact on ASIC's effectiveness in tackling corporate misconduct, as they significantly increased the maximum penalties for the commission of criminal offences and for the contravention of civil penalty provisions by corporations. The amendments also expanded the regulatory pathways available to ASIC, by increasing the number of civil penalty provisions for which there is a corresponding criminal offence and increased the number of contraventions that can be dealt with by way of an infringement notice.

10 There is a number of other Bills currently before Parliament, the passage of which would further increase ASIC's effectiveness in taking enforcement action in response to corporate misconduct, including a deferred prosecution agreement scheme in the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 and amendments to support ASIC's regulatory response to illegal phoenix activity in the Treasury Laws Amendment

[2] Australian Government, *Review into Australia's corporate criminal responsibility regime*, Media Release, 10 April 2019.
[3] Australian Government, *Restoring Trust in Australia's Financial System: Financial Services Royal Commission Roadmap*, August 2019.

(Combating Illegal Phoenixing) Bill 2019. ASIC supports the passage of those Bills through Parliament in their current form. Their effectiveness can be better assessed after a period of operation.

11 Prior to the completion of its final report, ASIC welcomes consideration by the ALRC of options for the implementation of the recommendations of the ASIC Enforcement Review Taskforce and the Royal Commission as referred to by the Attorney- General in announcing the ALRC's review into corporate criminal responsibility.[4]

Proposed New Model of Corporate Regulation

12 The ALRC's first suite of proposals recommend the introduction of a new model of corporate regulation in which contraventions in existing legislation would be 'recalibrated' so that misconduct falls into three entirely distinct categories in a descending order of seriousness: criminal offences, civil penalty proceeding provisions (**CPP**) and civil penalty notice provisions (**CPN**). CPNs will be akin to infringement notices.

13 Corporate contraventions will predominantly result in civil outcomes and criminal offences will be reserved for the most serious misconduct. A CPP will be available for misconduct that does not meet the requirements for 'designation' as a criminal offence. A CPN will be reserved for misconduct requiring no evaluative judgement and the contravention is prima facie evident.

14 This proposed new model of corporate regulation would result in many criminal offences being decriminalised and would prescribe the enforcement pathways available to regulators to address corporate contraventions. The proposed model, contrary to the recommendations of the ASIC Enforcement Review, would constrain ASIC's use of our enforcement toolkit and result in less effective regulatory responses to corporate misconduct.

15 ASIC's enforcement response would be dictated by a characterisation of the seriousness of the conduct, without regard to other relevant considerations including: the regulatory environment, community and industry expectations, and ASIC's statutory obligations, priorities and resources. The enforcement response would also be without regard to factors specific to the corporate actor who has engaged in the misconduct. Corporate actors in ASIC's regulatory environment can range from natural persons and small businesses, to large financial institutions and multi-national corporations. The impact of those actors and their misconduct on the stability of Australia's financial system and the confidence of investors and consumers in that system, are vastly different. A tailored enforcement response to misconduct, considering all the above factors, benefits both the regulator and

[4] Attorney-General of Australia, *Review into Australia's Corporate Criminal Responsibility Regime*, Media Release, 10 April 2019.

the regulated as a consistent, fair and principled response to misconduct does not equate to an identical response to a contravention regardless of circumstance.

Attribution of Criminal Liability

16 The key focus of the Attorney- General's terms of reference to the ALRC was the corporate criminal responsibility regime in Part 2.5 of the Criminal Code contained in the Criminal Code which attributes criminal liability to corporations.

17 Part 2.5 of the Criminal Code and other legislative provisions provide for the attribution of criminal liability to corporations as corporations, being fictional legal entities, can only act through the individuals within them.

18 The ALRC proposes the existing legislative provisions attributing criminal responsibility to a corporation be replaced by a single corporate attribution model. The proposed single model would blend the model in Part 2.5 of the Criminal Code and the 'TPA model', based on the *Trade Practices Act 1974,* for which there are versions throughout Commonwealth legislation.

19 ASIC supports a single attribution model for corporate criminal liability that blends the two existing models. ASIC agrees with the ALRC that a single model would simplify the existing law and provide greater certainty for regulators, prosecutors and corporations. However, ASIC does not support some aspects of the model proposed by the ALRC. In particular, ASIC does not support the due diligence defence being available beyond the circumstances where it is currently, or the removal of the corporate culture provisions.

20 The corporate culture provisions currently in Part 2.5 of the Criminal Code, enable the fault element of a criminal offence to be attributed to a corporation that authorised or permitted the commission of the offence through a poor corporate culture. The Royal Commission described corporate culture as 'what people do when no-one is watching' and highlighted that poor corporate culture in Australia had been the underlying cause of much corporate misconduct in recent times.[5] In ASIC's view a single model of corporate criminal attribution should include the corporate culture provisions in accordance with community expectations of corporate accountability.

[5] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report*, February 2019, vol 1, 334 ('*Financial Services Royal Commission, Final Report*') citing G30, *Banking Conduct and Culture: A Call for Sustained and Comprehensive Reform*, July 2015, 17

Other Proposals

21 ASIC supports the ALRC proposals to: broaden the types of orders courts can make when sentencing a corporation for criminal offences and in response to a contravention of a civil penalty provision; enable a court to consider a victim impact statement made by a representative of a group of victims; and create a unified Australian debarment regime. In ASIC's view these proposals will strengthen accountability for corporate misconduct.

22 As stated above, a number of the ALRC's proposals concern issues addressed in recently enacted or proposed legislative amendments currently before Parliament. Each of these proposed amendments has been the subject of extensive prior consultation and ASIC supports the passage of the Bills through Parliament in their current form.

C Appropriate and effective corporate regulation

Key points

ASIC does not support Proposals 1–6.

ASIC supports Proposal 7 to the extent it could be implemented without Proposal 6.

ASIC does not agree with the ALRC's depiction of the existing corporate regulatory pyramid.

ASIC does not support the recalibration of corporate contraventions into three categories in descending order of seriousness.

ASIC considers the proposed regulatory pyramid will not enable a regulator to take the most effective regulatory action in all the circumstances.

ASIC considers existing dual-track regulatory pathways should remain.

ASIC disagrees that criminal offences should only be reserved for the most serious misconduct and that strict and absolute liability regulatory offences should be decriminalised.

ASIC considers the existing availability of infringement notices for civil or criminal contraventions should remain.

Proposal 1: Recalibrate the regulatory pyramid

ALRC Proposal 1

Commonwealth legislation should be amended to recalibrate the regulation of corporations so that unlawful conduct is divided into three categories (in descending order of seriousness):

(a) criminal offences;

(b) civil penalty proceeding provisions; and

(c) civil penalty notice provisions.

23 In paragraph 4.15 of the Discussion Paper, the ALRC recommends Proposals 1–7 as a package of reforms, to be read and implemented together.

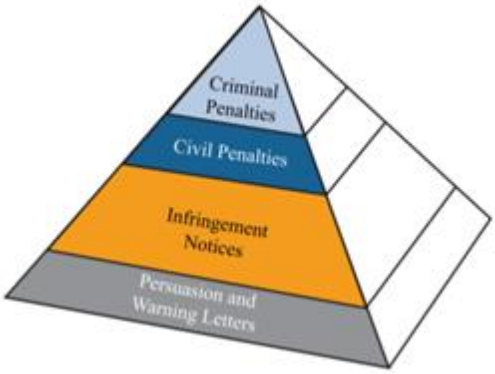
24 ASIC does not support Proposals 1–6 and does not support Proposal 7 in its entirety as it considers they will be detrimental to effective corporate regulation.

Enforcement Pyramid

25 The ALRC proposes the introduction of a new model of corporate regulation in which the enforcement action taken is primarily civil. Contraventions in existing legislation would be 'recalibrated' so that they fall into three entirely distinct categories, in a descending order of seriousness: criminal offences, civil penalty proceeding provisions (**CPP**) and civil penalty notice provisions (**CPN**). CPNs will be akin to infringement notices (**INs**).

26 The ALRC refers to responsive regulation theory as conceptualised by Professors Ian Ayers and John Braithwaite[6] as the foundation of modern corporate regulation in Australia. The ALRC provides Figure 1 as a diagram representing the existing regulatory pyramid.

Figure 1: Existing regulatory pyramid for corporations



Source: Australian Law Reform Commission, *Corporate Criminal Responsibility*, Discussion Paper 87, November 2019, Figure 4-1, p. 86.

27 The ALRC proposes that there should be a clear distinction between conduct that is subject to a criminal penalty, where the degree of moral wrongdoing is suggestive of criminality and conduct that is dealt with by way of civil penalty, where the objective is to promote compliance and deter further contraventions. In paragraph 4.5 of the Discussion Paper, the ALRC states in relation to Proposals 1–7 that:

> The key premise behind the regulatory pyramid is that more serious contraventions should be met with a more serious response.

[6] I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, New York, Oxford University Press, 1992.

28 The ALRC's proposed recalibrated regulatory pyramid is set out in Figure 2.

Figure 2: Proposed recalibrated regulatory pyramid for corporations

Source: Australian Law Reform Commission, *Corporate Criminal Responsibility*, Discussion Paper 87, November 2019, Figure 4-2, p. 91.

29 In ASIC's view, Figure 1: Existing regulatory pyramid for corporations does not accurately reflect a regulatory pyramid based on responsive regulation theory, nor does it reflect ASIC's approach to corporate regulation.

30 Braithwaite described the operation of responsive regulation theory as follows:

> My contention is that compliance is most likely when the regulatory agency displays an explicit enforcement pyramid. … Most regulatory action occurs at the base of the pyramid where initially attempts are made to coax compliance by persuasion. The next phase of enforcement escalation is a warning letter; if this fails to secure compliance civil monetary penalties are imposed; if this fails, criminal prosecution ensues; if this fails the plant is shut down or a licence to operate is suspended; if this fails, the licence to do business is revoked. The form of the enforcement pyramid is the subject of the theory, not the content of the particular pyramid.[7]

31 The ALRC cited the above passage in its 2003 report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia Report* (**Principled Regulation Report**) and described its effect as follows:

> On this model, the ideal approach of the regulator is described as 'the benign big gun'; that is, the regulator should have access to severe punishments but should rarely use them in practice. Ayres and Braithwaite's model requires the regulator to behave as though the organisations being regulated wish to cooperate and ensure that it is economically rational for them to cooperate. Where breaches occur, the initial response should be to persuade and educate them as to the appropriate behaviour. Such an approach promotes self-regulation and the wish to preserve reputation that allows more effective enforcement of the

[7] Quoted in F Haines, *Corporate Regulation: Beyond 'punish or persuade'*, Clarendon Press, 1997, p. 218; cited in Australian Law Reform Commission, Principled Regulation: Federal Civil and Administrative Penalties in Australia, Report 95, December 2002, p. 112, paragraph 3.33.

> regulatory regime and does not impose undue regulatory burdens on business.[8]

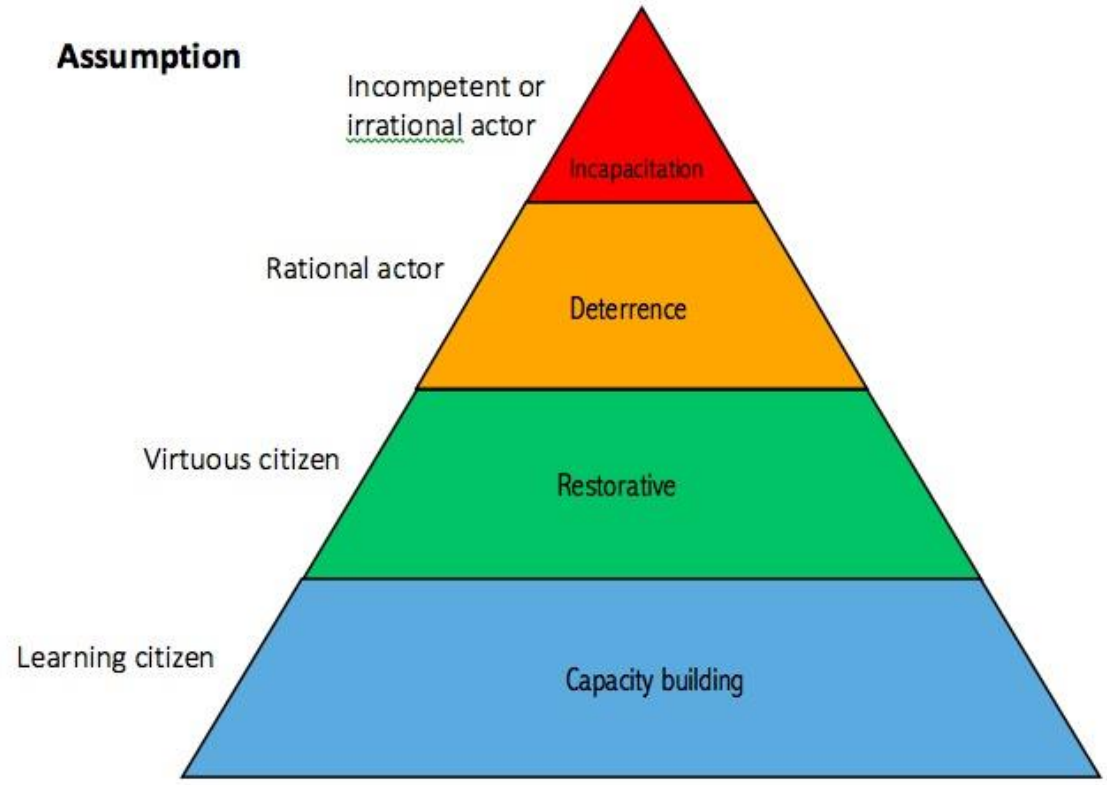
32 As ASIC stated during the *Review into the Enforcement Regime of ASIC* (**ASIC Enforcement Review**), our focus is on the appropriate regulatory response:

> We acknowledge and draw upon the model of responsive regulation based on the work of Professors Ayres and Braithwaite in the work that we do. ASIC's enforcement staff adopt an approach consistent with the notion of the 'enforcement pyramid' in responding to misconduct. We consider that it is fundamental to our effectiveness that the regulatory tools we have allow us the flexibility to take appropriate regulatory responses to misconduct and enable us to escalate our response commensurate with the seriousness of non-compliance. We support a model whereby we have ready access to lower level regulatory responses such as infringement notices and higher level responses such as civil penalty and criminal proceedings.[9]

33 There is not one enforcement or regulatory pyramid for corporations that can be said to encapsulate responsive regulation theory as applied to different regulatory contexts; the theory will operate to create different pyramids in different regulatory contexts.[10] Braithwaite provides the following diagram as an example of a responsive regulation pyramid: see Figure 3.

[8] *Principled Regulation: Federal Civil and Administrative Penalties in Australia*: see footnote 7. See also ASIC Enforcement Review, *Strengthening Penalties for Corporate and Financial Sector Misconduct*, Positions Paper 7, October 2017, p. 7.
[9] ASIC, *Submission to ASIC Enforcement Review, Strengthening Penalties for Corporate and Financial Sector Misconduct: Positions Paper 7*, November 2017, p. 10, paragraphs 21–23.
[10] See examples of regulatory pyramids in other regulatory contexts: Braithwaite, 'Responsive Regulation', John Braithwaite, War, Crime, Regulation Website.

Figure 3: Responsive Regulation Pyramid

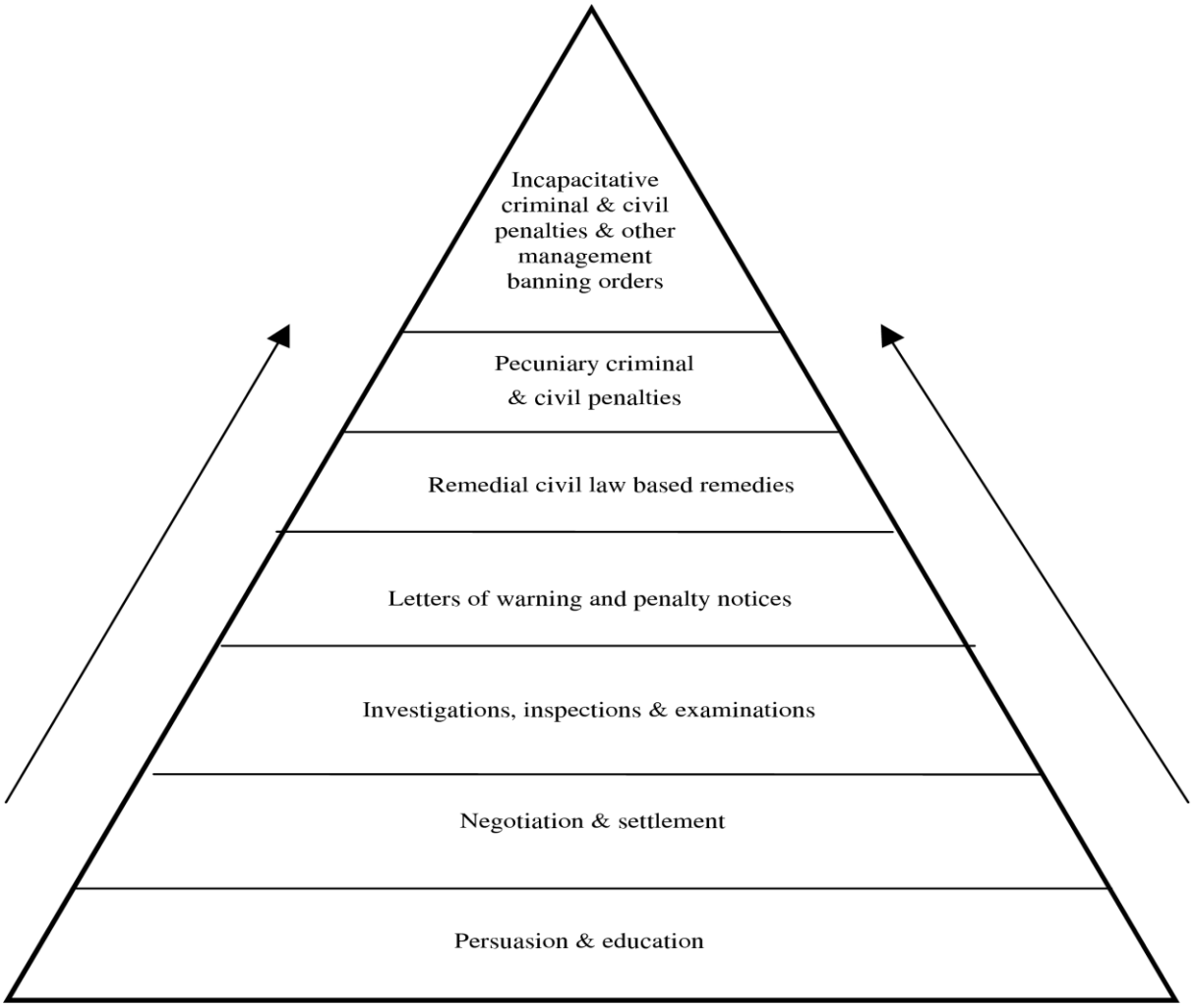


Source: Braithwaite, 'Responsive Regulation' *John Braithwaite, War, Crime, Regulation* (online 28 January 2020) <http://johnbraithwaite.com/responsive-regulation/>

34 The pyramid at Figure 3 and others based on responsive regulation theory do not establish a hierarchy of regulatory tools or sanctions (i.e. criminal penalties, civil penalties, infringement notices, persuasion and warning letters as set out in Figure 1) – they create a hierarchy of regulatory outcomes or impacts (i.e. incapacitation, deterrence, restorative, capacity building as set out in Figure 3). A regulatory outcome or impact can be achieved through the use of one or more regulatory tools or responses. The responsive regulation pyramid is not and should not be understood to be a hierarchy of legal responses.

35 Under the responsive regulation (or strategic regulatory) approach, enforcement action which incapacitates an individual or firm from further participation in the industry sits at the top the responsive regulation pyramid, and is used in response to "incompetent or irrational actors". This is illustrated by the example below at Figure 4 of an enforcement pyramid depicting the enforcement options available to ASIC in relation to directors duties under the Corporations Act. As can be seen, as the ultimate incapacitating action, administrative banning orders sit above *pecuniary* criminal and civil orders.

Figure 4: Enforcement Pyramid Regarding Directors' Duties Under the Corporations Law



Source: Braithwaite, Gilligan, Bird and Ramsay, Civil Penalties and the Enforcement of Directors' Duties (1999) 22 UNSWLJ 417 at 428

36 As demonstrated above, the ultimate regulatory outcome in response to misconduct will not always be deterrence – by way of criminal or civil penalty action and sanctions; it may be incapacitative – by way of administrative licence cancellation or banning order. In many circumstances, a combination of regulatory tools will be required to achieve the appropriate regulatory impact, which may include deterrent and incapacitative responses, but could also include corrective, preservative or compensatory responses: see ASIC's approach to enforcement (INFO 151). [11]

[11] Information Sheet 151 ASIC's Approach to Enforcement (INFO 151)

Case study 1: The Gallop Companies

In September 2019, the Federal Court[12] found in ASIC's favour in proceedings against the Gallop Companies[13] and former director Mr Ming-Chien Wang.

Justice Charlesworth ordered the winding up of two of the companies, a permanent injunction restraining Mr Wang from carrying on a financial services business and an order disqualifying him from managing a corporation for 10 years. Her Honour further ordered that Mr Wang pay a civil penalty of $3 million, which is the highest civil penalty awarded against an individual in an ASIC proceeding to date. ASIC had previously obtained injunctions against the companies and Mr Wang and freezing orders over Australian bank accounts, which in effect shut down the Gallop business.

Justice Charlesworth found that one of the companies had caused or permitted investors' funds to be transferred from its Australian bank account for purposes unrelated to the investments and that a large number of investors had lost all their capital invested. Her Honour also found that Mr Wang 'demonstrates the utmost disregard for Australia's financial services laws'.

The orders sought and obtained by ASIC in the proceedings were deterrent in nature, as reflected in the pecuniary penalty,[14] the injunctions were both protective and compensatory, and the removal of Mr Wang from the financial services industry and from managing a corporation was incapacitative.

Case Study 2: Dover Financial Advisers

Dover Financial Advisers

In November 2019, in civil penalty proceedings taken by ASIC, the Federal Court found Dover Financial Advisers (Dover) engaged in false, misleading or deceptive conduct.[15] The conduct involved the publishing of false, misleading or deceptive statements in a client protection policy between September 2015 and March 2018. The court also found that Mr Terrence McMaster, Dover's sole director was knowingly concerned in the company's conduct. His Honour Justice O'Bryan found that the title of the client protection policy was 'highly misleading and an exercise in Orwellian doublespeak. The document did not protect clients. To the contrary, it purposed to strip clients of rights and consumer protections they enjoyed under the law.'

The client protection policy was provided to 19,402 clients of Dover and purported to be 'designed to ensure that every Dover client get [sic] the

[12] *ASIC v Gallop International Group Pty Ltd* [2019] FCA 1514.
[13] Gallop International Group Pty Ltd (In liquidation) (**GIG**), Gallop Asset Management Pty Ltd (**GAM**), Stumac Pty Ltd (**Stumac**).
[14] *ASIC v Gallop*, see footnote *12*, paragraph 281.
[15] ASIC, *Court finds Dover Financial Advisers Pty Ltd made false, misleading or deceptive statements in Client Protection Policy, and director knowingly concerned*, Media Release (19-321MR) 27 November 2019.

best possible advice and the maximum protection available under the law.' The court found the policy was false, misleading and deceptive.

Penalties against Dover and Mr McMaster will be determined after a penalty hearing on 1 June 2020.

The civil penalty proceeding followed other enforcement action taken against Dover and Mr McMaster by ASIC.

On 28 March 2018, ASIC required Dover to withdraw the client protection policy[16].

On 28 June 2018 ASIC accepted a court enforceable undertaking from Dover and Mr McMaster[17]. Under the terms of the undertaking, Dover was required to cease operating its financial services business by 6 July 2018 and to apply to ASIC to cancel its AFS licence. Mr McMaster was also required to permanently remove himself from the financial services industry. The civil penalty proceedings were then commenced in September 2018.

This approach by ASIC ensured prompt incapacitative action was taken to prevent Dover or Mr McMaster from causing further harm in the financial services industry, but also ensured that appropriate punitive and deterrent action, by way of civil penalty proceedings, commensurate with the seriousness of the misconduct was taken.

Purpose of Criminalisation

37 The ALRC is critical of a lack of a 'principled distinction' between criminal and civil prohibitions in corporations law, stating that criminal offences are intended to respond to the most serious misconduct and that the great majority of existing offences address low-level contraventions that could not properly be said to involve any true criminality.

38 However, the ALRC in the Discussion Paper at paragraph 2.30 also acknowledges the expressive force of criminalisation, which has a broader purpose than the denunciation of particularly egregious conduct. Gregory Gilchrist,[18] cited by the ALRC, refers to criminal offences having a *normative punch* related to their status as a crime. That normative punch has two components: a substantive component reflecting the moral condemnation of the proscribed conduct; and a procedural component, which is the rule-making power of criminalisation - people accept they must act in proscribed way simply by virtue of it being a rule.[19]

39 In ASIC-administered legislation, recourse to criminal action is available to respond to a range of contraventions from extremely serious misconduct to

[16] ASIC, *Civil penalty action commenced against Dover Financial Advisers and director Terry McMaster*, Media Release (18-269MR) 17 September 2018.
[17] ASIC, *Dover Financial Advisers' financial services licence to be cancelled*, Media Release (18-195MR) 29 June 2018.
[18] Gregory M Gilchrist, 'The Expressive Cost of Corporate Immunity' (2012) 64 *Hastings Law Journal* 1 cited in *Corporate Criminal Responsibility*, p. 52, paragraph 2.41: see footnote 1.
[19] Gilchrist, 'The Expressive Cost of Corporate Immunity', p. 48-49: see footnote 18.

objectively less serious contraventions. Criminalisation of these less serious contraventions reflects a legislative intention to harness the expressive force of criminalisation to secure widespread compliance and deter misconduct in relation to particular obligations or prohibitions. Where regulatory interventions lower down the enforcement pyramid have failed in relation to a compliance failure, ASIC has recourse to criminal action. The targeted use of criminal action is effective in reinforcing the power of the rule and further promoting widespread compliance.

40 The ALRC refers to the expressive force of criminal law[20] and states:

> … for this rationale to be reflected in the law, it is necessary for the criminalisation of corporate conduct to be directed at conduct that is sufficiently serious enough to be criminalised. If it is not, there may well be nothing that distinguishes it from liability to a civil penalty.

41 A principled distinction between criminal and civil liability in corporate regulation is embodied in the process of proving to a court such liability should be imposed. The distinction is embodied in the different standards and burdens of proof, in the different privileges that attach to the powers to obtain and use particular evidence, and in other procedural protections available in criminal proceedings but not in civil proceedings.

42 While ASIC recognises the need for a principled distinction between regulatory *responses* to misconduct, a response constrained by a characterisation of a contravention as *criminal* or *civil* in the ALRC's proposed regulatory pyramid is not an appropriate model for effective corporate regulation.

43 ASIC must tailor an enforcement response appropriate to all the circumstances. This includes not only the seriousness of the misconduct, but it also includes consideration of the regulatory environment in which the misconduct occurs and ASIC's statutory obligations, priorities and resources. A tailored response benefits both the regulator and the regulated as a consistent, fair and principled response to misconduct does not equate to an identical response to a contravention regardless of circumstance.

44 ASIC must also consider the wide range of corporate actors in our regulatory environment who commit contraventions in tailoring an appropriate enforcement response. These include natural persons, small businesses, large financial institutions and multi-national corporations, who are motivated by different concerns and whose impact upon and influence within the regulatory environment are vastly different. Therefore, a regulator needs to utilise tools across the enforcement spectrum to respond both to the conduct and the actor.

[20] *Corporate Criminal Responsibility*, p. 48, paragraph 2.43: see footnote 1.

Case study 3: Port Philip Publishing

In 2018, ASIC commenced civil penalty proceedings in the Federal Court against Port Philip Publishing (**PPP**) and its director and CEO, Kristan Sayce, for misleading or deceptive conduct.[21]

The proceedings concerned an article promoting an investment strategy which according to PPP could be adopted by consumers to piggyback on the performance of the Australian Government's Future Fund. The article, which contained purported client testimonials, was published on two of PPP's websites and emailed to at least 120,000 subscribers. The article stated the investment strategy would generate monthly income of between $540 and $6,687. Consumers were able to access the promoted investment strategy by purchasing a guide from PPP for $49. The article induced at least 833 recipients to pay for the Guide.

Justice O'Callaghan of the Federal Court ordered a $600,000 penalty against PPP and $50,000 against Mr Sayce.

In addition to the financial penalties, ASIC sought and obtained corrective advertising orders, injunctions and a disqualification order against Mr Sayce, which prevented Mr Sayce from managing corporations for 12 months.

Case study 4: CommInsure

In November 2019, CommInsure pleaded guilty to 87 criminal charges of offering to sell insurance products in the course of unsolicited telephone calls,[22] conduct known as hawking.[23]

CommInsure provided customer contact details to its agent, a telemarketing firm Aegon Insights[24] who then unlawfully sold life insurance policies known as 'Simple Life' over the phone. CommInsure failed to offer each of the customers the option of having the information required to be given to them in a Product Disclosure Statement read to them over the phone prior to the offer to issue or sell the insurance product.

In 28 November 2019, CommInsure was convicted and fined $700,000[25]. The maximum penalty available for this conduct has significantly increased after the introduction of recent legislative amendments.

This enforcement action followed ASIC's 2018 review of the Sale of Direct Life Insurance which found that outbound telephone sales of life insurance

[21] ASIC, *Online publishing company and former director found liable for misleading and deceptive statements about mimicking the Future Fund*, Media Release (19-235), 30 August 2019.
[22] Contrary to s992A(3) of the *Corporations Act 2001*.
[23] The Colonial Mutual Life Assurance Society Limited trading as CommInsure, a subsidiary of the Commonwealth Bank of Australia (**CBA**).
[24] Aegon Insights Australia Pty Ltd.
[25] ASIC, *CommInsure sentenced for hawking offences*, Media Release (19-324MR) 28 November 2019.

were more commonly associated with poor sales conduct and increased the risk of poor consumer outcomes.

During ASIC's 2018 review, ASIC identified concerns with CommInsure's unfair telephone sales of a range of insurance products, which were also by way of telemarketing calls from Aegon- in particular an accidental death insurance product 'Accident Protection'. This led to CommInsure identifying similar concerns with the sale of other life insurance products by Aegon throughout the period 2010 to 2014. ASIC raised those concerns with CommInsure and as a result has conducted a remediation program in which it is expected over $12 million will be refunded to around 30,000 customers. [26]

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Royal Commission**) also recommended that the hawking of superannuation and insurance products be banned and examined the conduct of Clearview Life Assurance Limited and Freedom Insurance Group Limited as case studies concerning the sale of insurance products[27].

The action taken by ASIC in this matter furthered ASIC's statutory objective of promoting consumer confidence in the financial system and resulted in regulatory outcomes that were punitive, deterrent, corrective and compensatory. The criminal action was also responsive to the current regulatory environment.

45 Some regulatory environments may lend themselves to a more formulaic response to misconduct, but as recognised by the ALRC previously:

> … it is inappropriate to expect one system of regulation to suit all regulatory situations.[28]

46 In ASIC's view the complexity and specialist nature of the industries and issues which ASIC regulates requires a more tailored approach than that which could be obtained with the implementation of Proposal 1.

47 The High Court of Australia (French CJ, Kiefel, Bell, Nettle and Gordon JJ) in *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate*, said:

> … civil penalty provisions are included as part of a statutory regime involving a specialist industry or activity regulator or a department or Minister of State of the Commonwealth ("the regulator") with the statutory function of securing compliance with provisions of the regime that have the statutory purpose of protecting or advancing particular aspects of the public interest. Typically, the legislation provides for a range of enforcement mechanisms, including injunctions, compensation orders, disqualification

[26] ASIC, *ASIC action leads to CommInsure refunds of $12 million for unfair life insurance telephone sales*, Media Release (19-314MR) 19 November 2019.
[27] The Royal Commission into Misconduct in the Banking Superannuation and Financial Services Industry, Final Report, Volume 2: Case Studies, p. 290-317.
[28] Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Federal Jurisdiction* (Discussion Paper No 65) May 2002, p. 40, paragraph 1.33.

> orders and civil penalties, with or, as in the BCII Act, without criminal offences. That necessitates the regulator choosing the enforcement mechanism or mechanisms which the regulator considers to be most conducive to securing compliance with the regulatory regime. In turn, that requires the regulator to balance the competing considerations of compensation, prevention and deterrence. And, finally, it requires the regulator, having made those choices, to pursue the chosen option or options as a civil litigant in civil proceedings.[29]

48 As stated by the Centre for Law Markets and Regulation (**CLMR**) in its submission in response to the Royal Commission Interim Report:

> There is strong research evidence for maintaining a flexible and responsive approach to enforcement, from the base to peak of the regulatory pyramid. That evidence shows turning the pyramid on its head will likely result in an unproductive increase in adversarialism between regulator and regulated. The corporate deterrence research likewise gives no significant support for reversing the pyramid. Non-strategic increase in prosecutions will likely lead to ineffective increases in expense, delay and uncertainty. It would of course raise the numbers of cases prosecuted or enforced: but we think numbers alone are a poor indicator of regulatory effectiveness. Rather, strategic use of the upper levels of the pyramid is crucial to the credibility of the entire approach.[30]

49 The Senate Economics References Committee in the *Final Report: Performance of the Australian Securities and Investments Commission*, endorsed an enforcement pyramid of escalating responses as a foundation for addressing corporate misconduct stating:

> … the enforcement pyramid model of sanctions of escalating severity is a sound foundation for enabling a regulator to address corporate misconduct. The application of this model to Australia's corporate laws has generally proven effective.[31]

50 In the ALRC's Principled Regulation Report after similar discussion and consideration of the principles behind creating criminal and civil penalties, the ALRC concluded:

> Provided that there are clear and consistent guidelines governing decisions about the choice of proceedings, and provided that regulators do act consistently, bearing in mind previous decisions in like cases, then the advantages to be obtained in permitting a choice of proceedings seem clear. Choice is consistent with the enforcement pyramid.[32]

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[29] *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate; Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46 at paragraph 24.
[30] Centre for Law Markets and Regulation, *Submission to Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, 26 October 2018, p. 41.
[31] Senate Economics References Committee, *Performance of the Australian Securities and Investments Commission Final Report*, June 2014, p. 279 cited in *Positions Paper 7*, p. 7.
[32] *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, p. 125, paragraph 3.85: see footnote 7.

Contraventions by Persons include Corporations

51 The ALRC in the Discussion Paper recognises that the vast majority of existing civil and criminal contraventions in Commonwealth legislation do not specifically contemplate a corporate defendant[33] but rather apply to *persons* which via statutory interpretation includes corporations.[34]

52 Therefore, in order to implement Proposals 1–7, all Commonwealth contraventions that can be committed by *any person* (which currently includes corporations and natural persons) would need to be redrafted to 'recalibrate' those contraventions in accordance with the proposed pyramid as they apply to corporations. This could result in perverse outcomes.[35]

53 Further, there is no principled basis upon which to make such a distinction between the liability of corporations and that of individuals for the same contravention. It would be contrary to the principle of expressive consistency referred to by Gilchrist[36] and as cited by the ALRC in the Discussion Paper. A distinction in individual and corporate liability would serve as a:

> … statement that the legal system was pricing corporate crime and differentiating between powerful corporations and mere persons. While the differentiation between corporations and persons may be justifiable philosophically, it deviates too far from the fact that people do blame corporations when they commit crimes.[37]

Proposal 2: Designation as a criminal offence

ALRC Proposal 2

A contravention of a Commonwealth law by a corporation should only be designated as a criminal offence when:

(a) the contravention by the corporation is deserving of denunciation and condemnation by the community;

(b) the imposition of the stigma that attaches to criminal offending is appropriate;

(c) the deterrent characteristics of a civil penalty are insufficient; and

(d) there is a public interest in pursuing the corporation itself for criminal sanctions.

54 As stated above, an effective enforcement pyramid, targeted at regulatory impact and which contains a broad range of tools to enable an escalation of

[33] *Corporate Criminal Responsibility*, p .57, paragraph 3.10 and p. 61, paragraphs 3.18 and 3.19; see footnote 1.
[34] *Corporate Criminal Responsibility*, pp. 25–6, paragraphs 1.15–1.20: see footnote 1.
[35] For example, the same contravention could be pursued criminally if the defendant was a natural person but could only result in a CPN if pursued against a body corporate.
[36] *The Expressive Cost of Corporate Immunity*, p. 64: see footnote 18; cited in *Corporate Criminal Responsibility*, p. 52, paragraph 2.41: see footnote 1.
[37] *The Expressive Cost of Corporate Immunity*, p. 55–6: see footnote 18.

regulatory responses does not reserve criminal action only for the most serious misconduct. Legislation administered by ASIC contains numerous criminal offences which do not always prohibit conduct of the most serious nature, but they do impose obligations necessary for the smooth running of the regulatory system.[38]

Decriminalisation of strict and absolute liability offences

55 The ALRC proposes a significant number of contraventions in ASIC-administered legislation (among others in Commonwealth law) be decriminalised with the only remaining regulatory response to be a CPN.

56 While not specifying which contraventions are proposed to be decriminalised, offences likely to fall into that category are strict and absolute liability offences with penalties below 60 penalty units.[39]

57 In ASIC's view it remains appropriate for these contraventions to attract a criminal penalty. As stated above at paragraph 39, despite the contravening conduct underpinning regulatory offences being objectively less serious than other civil contraventions, a criminal penalty is necessary to incentivise compliance, which in turn ensures the integrity of the entire regulatory regime.

58 Proposal 2 would remove the procedural component of the expressive force of criminalisation, referred to above at paragraph 38, the promotion of compliance through the criminalisation of the rule. Criminal action for these contraventions is predominantly taken only after other methods of securing compliance have failed, but its targeted use is the most efficient and effective use of resources to ensure widescale compliance.

59 The purpose of incentivising compliance through the imposition of criminal penalties for regulatory offences has been recognised by the High Court of Australia in *He Kaw Teh v R* (1985) 157 CLR 523.

60 Chief Justice Barwick and other members of the Court in *He Kaw Teh* referred with approval to the decision of the Judicial Committee in *Lim Chin Aik v The Queen* [1963] AC 160 at 174–5, which considered the imposition

[38] ASIC, *Submission to Senate Standing Committee for the Scrutiny of Bills: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, 2002, paragraph 8.

[39] *Corporate Criminal Responsibility*: see footnote 1. See the proposal to repeal regulatory offences at paragraph 4.18, and offences with no fault element are likely to fall into that category. There is a list of categories of conduct which it is proposed should remain criminalised, at paragraph 4.29, none of which would capture current regulatory offences, such as strict and absolute liability offences. Criticisms are also made of the inconsistent approaches to strict and absolute liability offences currently existing in Commonwealth criminal law at paragraphs 3.20–3.28. The Discussion Paper at Proposal 6 proposes the removal of Chapter 2.2.6 of the *AGD Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* which concerns the drafting of new offences which incorporate strict and absolute liability as fault elements. The AGD Guide recommends 60 penalty units as the maximum penalty that should be available for strict liability offences (10 penalty units for absolute liability offences); 60 penalty units is also the equivalent to 12 months imprisonment in the *Crimes Act 1914* s4B(2) and 12 months imprisonment is the threshold for indictable offences (see s4G *Crimes Act 1914*) at paragraph 3.20. There are also the examples of what would be a criminal offence, a CPP and a CPN and regulatory offences are not captured in the criminal offence category at paragraph 4.42.

of strict or absolute liability in criminal offences. The Judicial Committee stated these offences existed for the purpose:

> … of regulating social or industrial conditions or to protect the revenue, particularly if the penalty is monetary and not too large… [and] the offence promote[s] the object of the legislation by making people govern their behaviour accordingly… Conduct prohibited by legislation which is of a regulatory nature is sometimes said not to be criminal in any real sense, the prohibition being imposed in the public interest rather than as a condemnation of individual behaviour.

61 Regulatory offences in ASIC-administered legislation predominantly concern failures to comply with obligations imposed on persons, corporate or otherwise, who voluntarily enter the regulatory environment, such as corporate office holders, financial advisers and holders of Australian Financial Services licences (**AFS licensees**). These offences are not generally imposed on the community at large. Positive duties are imposed on these corporate actors due to the responsibilities of their position and the regulatory environment in which they are operating. Criminal penalties for failing to comply with these responsibilities are appropriate given the trust placed in these corporate actors by the community and the need to ensure the confidence of that community in the financial system and the markets.

62 The ALRC in its Principled Regulation Report, referred to a paper by the Law Reform Commission of Canada on strict liability offences, which stated:

> … the objective of the law of regulatory offences isn't to prohibit isolated acts of wickedness like murder, rape and robbery: it is to promote higher standards of care in business, trade and industry, higher standards of honesty in commerce and the need to preserve our environment and husband its resources.[40]

63 ASIC acknowledges there may be a small number of offence provisions in ASIC-administered legislation that could be decriminalised, consistent with the limitation Gilchrist, referred to above in paragraph 38, places on the expressive value of criminal liability; that there needs to be sufficient opprobrium for the conduct for criminalisation to be justified. A lack of congruity between society's values and legal prescription can result in a legitimacy cost,[41] that is to say, people are less likely to obey a rule that they do not agree with. However, broadly speaking, ASIC considers the majority of existing regulatory offences are fit for purpose.

64 Regulatory offences are fundamental to the integrity of the sophisticated regulatory environment in which ASIC operates.[42] Compliance with positive obligations is required from those who voluntarily enter that environment.

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[40] *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, p. 67, paragraph 2.18: see footnote 7, citing the Law Reform Commission of Canada, *The meaning of guilt: Strict liability*, working paper 2, 1974, p. 32.
[41] *The Expressive Cost of Corporate Immunity*, p. 50: see footnote 18.
[42] *ASIC's Submission to Senate Standing Committee for the Scrutiny of Bills*, p 264: see footnote 38.

Criminalisation of regulatory offences incentivises widespread compliance, without which public confidence in Australia's financial system and financial markets would be undermined. As stated by ASIC previously:

> Events in recent times in global financial markets have also highlighted the critical importance of market confidence to the stability of financial markets, and the potential for market instability to adversely affect the broader economy. Failure to sufficiently safeguard market confidence can have widespread and serious consequences for both participants in capital markets as well as the economy more broadly.[43]

Illegal Phoenix Activity

65 ASIC's work in tackling illegal phoenix activity demonstrates our use of criminal action where necessary as part of a scaled regulatory response to this type of misconduct and which incentivises widespread compliance. ASIC's intended regulatory impact in response to this misconduct include (but are not limited to): education; surveillance and compliance; disqualification of directors; and enforcement action, including criminal action, where necessary.[44]

66 The removal of criminal action as a regulatory pathway for 'less serious' offences would be detrimental to ASIC's effectiveness in tackling illegal phoenix activity and to our work alongside our domestic and international regulatory counterparts in this area, as part of the Phoenix Taskforce and the Serious Financial Crime Taskforce.

Case Study 5: Darren Blinco

In October 2017 ASIC conducted a phoenix surveillance campaign in relation to Mr Darren Blinco, a director of We Just Grind It Vegetation Management Pty Ltd[45] (**the company**).

As part of the surveillance activities, ASIC served a notice on the company requiring it to produce books about its affairs. After failing to comply with the first notice, ASIC served a second notice on the company, which the company again failed to comply with by the due date.

ASIC and the CDPP then took criminal action against Mr Blinco for intentionally aiding and abetting the company in failing to comply with the

[43] *ASIC's Submission on Positions Paper 7*, p. 32, paragraph 126: see footnote 9
[44] ASIC, *ASIC action on illegal phoenix activity*, ASIC's website.
[45] ASIC, *Loan man charged after ASIC phoenix surveillance* Media Release (19-072MR) 1 April 2019.

> requirement to produce books to ASIC. Mr Blinco was convicted and fined by the Beenleigh Magistrates' Court in June 2019.

67 Since the introduction of the Phoenix Taskforce, the Australian Taxation Office (**ATO**) and ASIC have prosecuted 25 illegal phoenix operators. Since it commenced operation, the Taskforce has seen:

> a reduction in businesses displaying risk factors of non-compliance which may lead to illegal phoenix activity, and a reduction in newly-created entities linked to confirmed phoenix activity. [46]

68 Removing the ability of ASIC to escalate a regulatory response to criminal action in appropriate circumstances, including as part of a multi-agency taskforce to address an issue such as illegal phoenix activity which poses substantial risks to the integrity of the corporate system, would have a detrimental impact on results obtained in this area.

Proposal 3: Designation as CPP or CPN

ALRC Proposal 3

A contravention of a Commonwealth law by a corporation that does not meet the requirements for designation as a criminal offence should be designated either:

(a) as a civil penalty proceeding provision when the contravention involves actual misconduct by the corporation (whether by commission or omission) that must be established in court proceedings; or

(b) as a civil penalty notice provision when the contravention is prima facie evident without court proceedings.

Distinction Between Criminal and Civil Contraventions

69 ASIC agrees in principle that it is appropriate for there to be a principled basis for the distinction between civil and criminal liability.[47] The majority of provisions in ASIC-administered legislation do have such a distinction, as they require proof of a fault element (or a higher level of fault) as a distinguishing factor between criminal and civil liability.

70 However, the distinction for some contraventions rests with procedural differences in proving to a court that criminal or civil liability should be imposed. These include differences in the standards of proof, admissibility of evidence and other procedural safeguards afforded in criminal

[46] *ASIC action on illegal phoenix activity*, see footnote 44
[47] ASIC, *ASIC Submission to Australian Law Reform Commission: Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation Discussion Paper No 65*, 2002, pp. 24–25, Proposal 8-1: ASIC noted s1043A and the market manipulation provisions that do not provide much distinction.

prosecutions that are not available in civil proceedings, as referred to above in paragraph 41.

71 ASIC acknowledges there are a limited number of provisions in ASIC-administered legislation for which there could be greater clarity about the fault element required to be proven in civil proceedings as opposed to criminal proceedings and the physical and fault elements for some criminal offence provisions due to a lack of harmonisation with the Criminal Code. However, that clarity could be achieved through a targeted review of the provisions, rather than attempting to recalibrate every provision to accord with a rigid conduct pyramid.

72 Proposals 2 and 3 if implemented would have the effect of significantly reducing the availability of dual-track regulation to ASIC and other regulators as contraventions which do not meet the threshold for designation as a criminal offence in Proposal 2 could only result in civil action either by way of a CPP or CPN in Proposal 3. It would prevent the escalation of a regulatory response up the enforcement pyramid when necessary.

73 Further, ASIC-administered legislation has in-built safeguards to balance the availability of dual regulatory pathways. These include the stay of civil proceedings after the commencement of criminal proceedings[48] and restrictions on the use that can be made of evidence obtained in civil penalty proceedings.[49]

74 The ALRC states that regulators 'favour' dual-track regulation for 'flexibility'.[50] In ASIC's view that over-simplifies the position. It is not a matter of preference but one of effectiveness.

75 The most appropriate regulatory response is multifaceted and must take into account a broad range of factors, not just those outlined in Proposals 2 and 3. In addition to considering the seriousness of the contravention,[51] the need for denunciation and stigma within the community and deterrence in determining the most appropriate regulatory outcome, other factors include:[52]

(a) ASIC's statutory and regulatory objectives, including promoting the confidence of investors and consumers in the financial system;[53]

[48] *Corporations Act 2001* s 1317N.
[49] *Corporations Act 2001* s 1317Q discussed in *ASIC Enforcement Review Taskforce Positions Paper 7*, p.40, paragraph 12: see footnote 8.
[50] *Corporate Criminal Responsibility* p. 92, paragraph 4.20: see footnote 1.
[51] *ASIC Submission on Positions Paper 7*, p. 9-10, paragraph 16: see footnote 9.
[52] ASIC, Information Sheet 151 *ASIC's Approach to Enforcement*, September 2013; ASIC, *Submission to Interim Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, 2 November 2018; *ASIC Submission to ALRC Discussion Paper Securing Compliance:* see footnote 47.
[53] See *ASIC Act 2001* s1(2).

(b) the regulatory environment, including new and changing technologies; the attitudes and expectations of the regulated population and the broader community; and emerging threats and harms;

(c) the circumstances of the 'contravener',[54] including consideration of whether the contravener is an individual or a corporation and whether the contravener has previously engaged in misconduct, among others;

(d) the optimum use of regulatory resources;

(e) the evidence available;

(f) the timeliness of any regulatory response; and

(g) what type(s) of regulatory outcomes are required in the circumstances: such as compliance, deterrence, punishment, protection, compensation or a combination of these.

Recent Assessment of Dual-Track Regulation by ASIC

76 The ASIC Enforcement Review Taskforce recently considered the appropriateness of dual-track regulation to ASIC and concluded it should continue to be available:[55]

> A broad range of powers, underpinned by penalties that have the capacity to deter misconduct, should enhance ASIC's ability to respond appropriately whether that response be weighted, from a theoretical perspective, toward the 'responsive' end of the regulatory spectrum or conversely, toward the 'enforcement' end.[56]

77 The terms of reference of the Taskforce included assessing the suitability of the existing regulatory tools available to ASIC for the effective performance of our functions. The Taskforce was asked to develop policy options that addressed gaps or deficiencies in those tools to provide for more effective enforcement of the regulatory regime. Among the Taskforce's recommendations to increase the effectiveness of ASIC's enforcement capabilities, were recommendations to increase the availability of dual-track regulation to ASIC.[57]

Case study 6: Astra Resources

In 2014, ASIC commenced civil proceedings against Astra Resources PLC, its directors and a subsidiary. The Federal Court found Astra had unlawfully

[54] Jeffrey Lucy, *Significant Regulatory Issues Facing ASIC and Australian Business*, Presentation to Australia-Israel Chamber of Commerce, 4 August 2004, cited in Ka Wai Choi et al, *Responsive Enforcement Strategy and Corporate Compliance with Disclosure Regulations*, Working Paper, Macquarie University and Australian National University, January 2016, p. 9.
[55] *ASIC Enforcement Review Positions Paper 7* p. 8 , paragraph 12: see footnote: 8 'the Taskforce accepts that it is important that ASIC have a range of options for enforcement to enable it to respond adequately in circumstances of individual cases, including to respond at lower ends of the scale, as by penalty or infringement notices, as well as at the higher end, such as by resort to civil penalty or criminal proceedings.'
[56] *ASIC Enforcement Review Taskforce Positions Paper 7*, p.8, paragraph 13: see footnote 8.
[57] ASIC Enforcement Review Taskforce, *ASIC Enforcement Review Taskforce Report*, December 2017, See in particular recommendations 37, 39, 43 and 44.

> raised more than $6.5 million from 281 Australian investors without a prospectus or similar disclosure document.
>
> The misconduct fell short of proof of a criminal contravention of s727 of the *Corporations Act 2001* (**Corporations Act**) and until the amendments brought in by the Penalties Act came into force in March 2019, a civil penalty was not available under this provision. ASIC therefore sought declarations against the companies and disqualification orders against the directors. Justice White of the Federal Court ordered the directors be disqualified from managing corporations for between 9 and 12 years.

78 The ASIC Enforcement Review Taskforce used this case as an example of a situation in which increasing dual-track regulation to ASIC, by making civil penalties available for a broader range of contraventions, such as that in s727 of the Corporations Act, would increase ASIC's ability to take effective action against misconduct that has serious consequences for investors.

79 As noted by the ALRC in the Discussion Paper,[58] many of the recommendations made by the Taskforce concerning dual-track regulation were implemented by Government in the *Treasury Laws Amendment (Strengthening Corporate and Financial Penalties) Act 2019* (**Penalties Act**) and came into effect on 14 March 2019. Those amendments increased the number of civil penalty provisions with a corresponding offence provision, including s727 of the Corporations Act, [59] and increased the number of contraventions that can be dealt with by way of an IN.

80 For a contravention of s727 of the Corporations Act by a corporation, the Penalties Act introduced a maximum civil pecuniary penalty of at least 50,000 penalty units[60] ($10.5 million). Prior to the Penalties Act, a criminal breach of s727(1) by a corporation attracted a maximum penalty of 1,000 penalty units,[61] ($210,000[62]). It now attracts a maximum fine of at least 45,000 penalty units ($9.45 million). The maximum civil and criminal fines for a contravention of this provision by a corporation can be even higher with the application of a penalty formula which relates to the benefit obtained or detriment avoided, or the annual turnover of the corporation,[63] if that is greater than the stated maximum penalty amount.[64]

81 The Government[65] has also implemented, or has committed to implementing, other recommendations of the Taskforce and the Royal Commission that will

[58] Following the ASIC Enforcement Review Taskforce Report, the number of civil penalty provisions for which there are corresponding criminal offence provisions increased, see *Corporate Criminal Responsibility*, *p.* 70 paragraph 3.38: See footnote 1.
[59] *Corporations Act 2001*, s1317E(3) Column 1.
[60] *Corporations Act 2001*, s1317G.
[61] *Corporations Act 2001*, Item 236 of Schedule 3, prior to 12 March 2019; before the introduction of the Penalties Act for which a breach of s727(1) attracted a maximum fine of 200 penalty units; and *Corporations Act 2001*, s1312 provided that the penalty for a body corporate was 5 times the fine otherwise available.
[62] *Crimes Act 1914*, s4AA: a penalty unit from 1 July 2017 until 1 July 2020 is $210.
[63] For a criminal penalty- *Corporations Act 2001*, Schedule 3 and s1311C post 12 March 2019; and for civil penalty: *Corporations Act 2001*, s1317G(4).
[64] *Corporations Act 2001*, Schedule 3 and s1311C post 12 March 2019.
[65] Australian Government, *Restoring Trust in Australia's Financial System: Financial Services Royal Commission Roadmap*, August 2019.

further increase dual-track regulatory pathways to ASIC.[66] This demonstrates an ongoing recognition by Government that dual-track regulation is appropriate for ASIC.[67] ASIC welcomes consideration by the ALRC before the delivery of its final report, of options for the implementation of the recommendations of the ASIC Enforcement Review Taskforce and the Royal Commission.

International availability of dual-track regulation

82 If Proposals 1 to 3 were implemented and the availability of dual-track regulation to ASIC was reduced or eliminated, the regulation of the securities markets and financial services industry in Australia would risk falling out of step with international counterparts.

United States

83 The United States Securities and Exchange Commission (**SEC**) has the discretion to pursue either civil action or administrative action against those who violate the US securities laws.[68] The SEC also works with law enforcement agencies, such as the United States Department of Justice (**DOJ**), to pursue criminal proceedings when appropriate.[69] The DOJ considers whether civil or administrative penalties are a more appropriate alternative to criminal prosecution, considering both the ability for non-criminal sanctions to deter, punish, and rehabilitate a corporation[70] and the penalties imposed by other federal enforcement authorities conducting joint or parallel civil or administrative proceedings arising from the same underlying misconduct.[71] In the SEC Division of Enforcement's 2019 Annual Report (**SEC Report**), the SEC stated the following in relation to its coordination with criminal law enforcement authorities:

> While the remedies that the SEC is able to obtain are significant, civil sanctions alone can be inadequate to effectively deter or punish some securities law violators. This is especially true with recidivists, microcap fraudsters, insider traders, Ponzi schemers, and others who act with a high degree of scienter. As a result, in such cases, we often refer matters to and investigate in parallel with criminal authorities.[72]

84 The SEC Report cites multiple recent examples of coordinated criminal and civil enforcement action[73] in relation to the same conduct.

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[66] *ASIC Enforcement Taskforce Report*, Recommendation 7: see footnote 57; See *Royal Commission Final Report*, Recommendations 1.15, 3.7, 6.4 and 7.2: footnote 27
[67] *ASIC Submission to ALRC Discussion Paper Securing Compliance*, p. 10*:* see footnote 47.
[68] *See e.g.*, 15 USC Section 78ff – Penalties for Violation of Securities Laws (including fines and imprisonment, or both).
[69] SEC, "How Investigations Work", SEC Website.
[70] DOJ, *Civil or Regulatory Alternatives.*, DOJ Justice Manual, Section 9-28.1200
[71] DOJ, *Coordination of Corporate Resolution Penalties and/or Joint Investigations and Proceedings Arising from the Same Misconduct*. DOJ Justice Manual Section 1-12.100.
[72] SEC Division of Enforcement *2019 Annual Report*,p. 7.
[73] SEC 2019 Annual Report, p. 26-27: see footnote 72.

Case Study 7: SEC and DOJ Action Against Lumber Liquidators

In March 2019, the SEC took action against Lumber Liquidators Holdings Inc, a discount retailer of hardwood flooring, for making fraudulent misstatements to investors in response to media allegations that the company was selling laminate flooring that contained levels of formaldehyde exceeding regulatory standards. Lumber Liquidators fraudulently informed investors in response to those allegations that third-party test results of its flooring products showed compliance with formaldehyde emissions standards, however it knew that its largest Chinese supplier had failed third-party testing.

In settling the SEC action, Lumber Liquidators agreed to pay more than USD $6 million in disgorgement and interest and to fully cooperate with any further investigation or litigation by the SEC.

In a parallel criminal action, Lumber Liquidators entered into a deferred prosecution agreement with the DOJ's Fraud Section and the US Attorney's Office and agreed to pay $33 million in criminal fines and forfeiture. The DOJ agreed to credit the amount paid to the SEC in disgorgement as part of its agreement.

United Kingdom

85 The United Kingdom Financial Conduct Authority (**FCA**) has the power to pursue criminal, civil, and regulatory remedies against those who contravene the laws they administer.[74] The FCA states the following in relation to the use of its enforcement powers:

> The FCA's effective and proportionate use of its enforcement powers plays an important role in the pursuit of its statutory objectives, including its operational objectives of securing an appropriate degree of protection for consumers, protecting and enhancing the integrity of the UK financial system, and promoting effective competition in the interests of consumers... Enforcement is only one of a number of regulatory tools available to the FCA. As a risk based regulator with limited resources, throughout its work the FCA prioritises its resources in the areas which pose the biggest threat to its statutory objectives. This applies as much to the enforcement tool as it does to any other tool available to it.[75]

86 The FCA has the discretion to pursue different types of remedies for the same underlying conduct.[76] Dual-track regulatory options are available to the FCA for a range of contraventions including insider trading[77] and misleading statements in connection with financial services.[78] These can be pursued as criminal offences or they also constitute 'market abuse' for which the FCA can impose disciplinary sanctions, including publishing a statement of public censure, imposing a financial penalty or a suspension, limitation or other

[74] FCA, "Our Enforcement Powers." FCA Website.
[75] FCA, Case Selection and the use of enforcement powers, FCA Handbook, EG 2.1.
[76] FCA, Criminal Prosecutions in Cases of Market Abuse." FCA Handbook, EG 12.3
[77] UK Criminal Justice Act 1933, Part V Insider Dealing, Section 61 – Penalties and Prosecution.
[78] UK Financial Services Act 2012, ss89-92 – Offenses Relating to Financial Services.

restriction on a licence.[79] The FCA Handbook lists several factors that the FCA considers when determining if the use of criminal, civil, regulatory, or a combination of these remedies is an appropriate response to different instances of market abuse.[80] These factors are similar to those cited above at paragraphs 75(a)– 75(g) which ASIC also considers.

Case Study 8: FCA and SFO Action Against Tesco

In 2017, the FCA took action against Tesco Stores Limited (**Tesco**) for market abuse in relation to the publication of a trading update in August 2014 which gave a false or misleading impression about the value of publicly traded Tesco shares and bonds.[81] The FCA used its powers to require Tesco to pay compensation to investors who purchased Tesco shares after the announcement and still held those shares when a corrective statement was published in September 2014. The FCA estimated that the compensation payable under the scheme would be approximately £85 million plus interest.

The compensation scheme was in addition to a fine of £128,992,500 imposed on Tesco pursuant to a deferred prosecution agreement entered into by Tesco and the Serious Fraud Office (**SFO**) for false accounting. The DPA concerned only the potential criminal liability of Tesco Stores Limited and did not address whether liability of any sort attaches to Tesco plc or any employee or agent of Tesco plc or Tesco Stores Limited. The SFO instituted criminal proceedings in relation to other parties concerning these issues. The FCA stated:

'As a result, the FCA does not propose to impose a financial penalty on either Tesco Stores Limited or Tesco plc. In light of the conduct of Tesco plc and Tesco Stores Limited in accepting responsibility for market abuse, in agreeing to the first compensation order under section 384 and, in the case of Tesco Stores Limited, for accepting responsibility for false accounting, the FCA will not impose any additional sanction on them for market abuse.'

New Zealand

87 The New Zealand Financial Markets Authority (**FMA**) has the option to pursue a wide range of civil, criminal and regulatory remedies in response to market misconduct[82] and can chose between civil, criminal, regulatory or a combination of remedies in response to the same contravention.[83]

[79] FCA, *The FCA's use of sanctions*, FCA Handbook, 7.1.1
[80] FCA, *Criminal Prosecutions in Cases of Market Abuse*; *DEPP 6.2 Deciding whether to take action* , FCA Handbook, EG 12.3
[81] FCA, *Tesco to pay redress for market abuse*, Media Release, 28 March 2017.
[82] FMA, *Choosing Our Regulatory Response*, FMA Regulatory Response Guidelines, p 8.
[83] Financial Markets Conduct Act 2013, sections 244 (criminal liability for insider trading); 264 (criminal liability for false or misleading statements); 385 (option to pursue civil remedies).

88 For example, the FMA has the option to pursue criminal, civil, or both, remedies against those who violate insider trading laws and those who make false or misleading statements.[84] Additionally, the FMA's Annual Report 2018–19 (**FMA Report**) highlights the importance the FMA places on the use of a variety of regulatory responses, in order to respond to the unique facts of each case, achieve the most desirable outcome for the market and the affected individuals, and pursue credible deterrence of market misconduct.[85] Again, these are similar to the factors ASIC considers in determining the appropriate regulatory response.

Canada

89 In Canada, the federal government prosecutes criminal contraventions of securities laws, while the provincial governments are responsible for bringing proceedings against individuals for violations of civil securities laws, which differ between provinces.[86] The Canadian Securities Administrators (**CSA**) functions to coordinate responses across the provinces to civil securities contraventions.[87]

90 The Royal Canadian Mounted Police (**RCMP**) have the authority to investigate criminal contraventions of securities laws.[88] The Canadian provinces and RCMP work together to bring civil and criminal charges against those who contravene securities laws.[89] For example, under the Canadian Criminal Code, it is a criminal offence to engage in insider trading,[90] and under the *Ontario Securities Act 1990* it is also a violation of civil law to engage in insider trading.[91]

Criminal action, Criminal Penalties and Why Not Litigate?

91 The ALRC refers to a concern that the concurrent availability of civil and criminal sanctions for breaches of the law disincentivises criminal prosecution, given the higher standard of proof in criminal proceedings and the complex evidence required to prove corporate misconduct.[92]

92 The availability and admissibility of evidence and an assessment of whether that evidence will meet a criminal standard is not a disincentive to prosecute, but is a relevant factor among others, referred to above at paragraph 75, that

[84] Financial Markets Conduct Act 2013, sections 244 (criminal liability for insider trading); 264 (criminal liability for false or misleading statements); 385 (option to pursue civil remedies).
[85] FMA, FMA Annual Report 2018/19, p. 10.
[86] Osler, *Capital Markets Regulatory Framework and Enforcement*, Osler Website.
[87] *Capital Markets Regulatory Framework and Enforcement*: see footnote 86.
[88] RCMP, *Securities Fraud; Corporate Fraud; Investment Fraud*, RCMP Website.
[89] RCMP, *Securities Fraud*: "In connection with its partners, the various provincial and territorial securities commissions… the RCMP conducts investigations related to securities fraud"; CSA, CSA FY2018/19 Enforcement Report, p. 16, referencing quasi-criminal sentences imposed by the provinces and additional criminal sentences imposed under the Canadian Criminal Code).
[90] Criminal Code, s382.1 – Prohibited Insider Trading.
[91] Ontario Securities Act 1990,s134(1) – Liability where material fat or change undisclosed.
[92] *Corporate Criminal Responsibility* p.27: see footnote 1.

ASIC must consider when choosing the appropriate regulatory action to take to misconduct. These considerations are akin to those made by the Commonwealth Director of Public Prosecutions (**CDPP**) when considering whether or not to commence criminal proceedings and what charges are the most appropriate, as set out in the Prosecution Policy of the Commonwealth.[93]

93 As stated by the Full Federal Court in *ASIC v Whitebox Trading Pty Ltd*:

> A mental element being required to be established can be the difference between particular proceedings being viable or not. In criminal proceedings, the inability to prove a necessary state of mind beyond reasonable doubt is not just a significant reason for acquittal, but a significant reason for criminal proceedings not being commenced or maintained in the first place. If a similar requirement to prove criminal fault elements exists for civil penalty proceedings, then it may reasonably be anticipated this will have an important impact on the decision whether to commence criminal or civil penalty proceedings, not least by significantly narrowing the difference between the two types of proceedings. Accordingly, the separate question affects significant public interests because of the constraints that this may place on regulators successfully enforcing, and being seen to enforce, statutory proscriptions, especially by way of civil penalty proceedings.[94]

94 Conversely, if the availability and admissibility of evidence for a particular contravention is sufficient to meet a criminal standard of proof, this will be a relevant factor in considering whether civil penalty proceedings are an appropriate regulatory response to that misconduct.

95 ASIC has acknowledged that for larger financial institutions it should deploy enforcement tools towards the apex of the enforcement pyramid more frequently and has begun implementing its *Why Not Litigate?* enforcement strategy.[95]

96 ASIC is committed to taking criminal action where appropriate, consistent with ASIC's existing requirements that frame our discretion in this area. This includes a 1992 Ministerial Direction issued by the Attorney General: *Serious Corporate Wrongdoing- Direction Relating to Investigation and Enforcement* to ASIC and the CDPP, in which it is stated:

> C. Recognising that the enforcement powers of the ASC extend also to the institution of civil proceedings in respect of corporate wrongdoing, it is the view of the Government that civil proceedings should not, as a general rule, be regarded as an alternative to criminal proceedings, but that each should be seen as complementing the other and that an assessment should be made in every case whether civil proceedings, criminal proceedings, or both, are appropriate in the interests of justice.

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[93] Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*.
[94] *ASIC v Whitebox Trading Pty Ltd* (2017) 122 ACSR 141 at 145
[95] ASIC, *ASIC Royal Commission Update*, September 2019.

> D. The Government considers that in every case in which there is a reasonable prospect that an investigation may disclose evidence of the commission of a serious offence, such assessment should involve the fullest consultation and co-operation between the ASC and the DPP… [96]

97 The Memorandum of Understanding between ASIC and the CDPP gives effect to the above extracts from the Ministerial Direction in stating:

> Civil proceedings will not be used in substitution for criminal proceedings in matters of serious or financial services crime.[97]

98 The MOU also provides that ASIC will consult the CDPP before making an application for a civil penalty order and further states:

> When ASIC believes a criminal offence may have been committed and has gathered sufficient evidence to enable it to support that view, ASIC will refer a brief of evidence to the CDPP in a timely manner…[98]

99 ASIC will pursue criminal action for a contravention if there is a reasonable prospect that an investigation may disclose evidence capable of proving the commission of a criminal offence; and if it is appropriate and in the public interest for ASIC to pursue a criminal action rather than a civil outcome. In general terms, the more serious the contravention, the more likely it will be that the interests of justice will require criminal prosecution and the moral opprobrium that is attached.

100 ASIC has consistently advocated for an increase in penalties for criminal offences in the legislation it administers.[99] The pursuit by ASIC of criminal action against corporations and the implementation of the *Why Not Litigate?* enforcement strategy has been supported by Government's passage of the Penalties Act, following recommendations of the ASIC Enforcement Review Taskforce.

101 The amendments in the Penalties Act significantly increased the maximum penalties available to be imposed against a corporation for a criminal offence in ASIC-administered legislation. Corporations who commit offences for which:

(a) a fine is the maximum penalty, the penalty will now be 10 times the fine amount;

(b) the maximum term of imprisonment that could be imposed on an individual is 10 years or more, the penalty for corporations will now be the greatest of:

(i) 45,000 penalty units;

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[96] Attorney-General, *Serious Corporate Wrongdoing: Direction relating to Investigation and Enforcement*, 30 September 1992, General Notice Gazette No 40, 7 October 1992 p. 2720, see the Preamble.
[97] CDPP and ASIC, Memorandum of Understanding, 1 March 2006, paragraph 2.5
[98] *CDPP and ASIC MOU* paragraphs 4.1 – 5.1: see footnote 97.
[99] ASIC, *ASIC Submission to the Financial System Inquiry*, April 2014, p 45-52; ASIC, *Senate Inquiry into penalties for White Collar Crime: Submission by ASIC*, April 2016, p12; *ASIC Submission on Positions Paper 7*, p. 12- 21: see footnote 9.

(ii) if the court can determine the benefit obtained or the detriment avoided, three times that amount; or

(iii) 10% of the annual turnover of the body corporate[100].

102 An example of the significance of the increase in penalties is illustrated above at paragraph 80, in relation to s727 of the Corporations Act, which prohibits the making an offer of securities that requires disclosure to investors without having lodged a disclosure document with ASIC. Prior to the Penalties Act, the maximum penalty for a criminal breach of s727(1) by a corporation was 1,000 penalty units,[101] ($210,000[102]). It now attracts a maximum fine of 45,000 penalty units ($9.45 million), or higher if the application of the formula relating to the benefit obtained or the annual turnover set out in paragraph 101 is greater than 45,000 penalty units.[103]

103 The increase in maximum penalties for offences committed by corporations brought about by the Penalties Act will significantly increase the likelihood that criminal action will be the most appropriate enforcement action for ASIC to pursue for corporate misconduct (where it is available and otherwise appropriate) as the regulatory impact of that action has markedly increased.

Avoiding Regulatory Gaps

104 As recognised by the ALRC in the Discussion Paper, the availability of concurrent civil and criminal sanctions avoids regulatory gaps.[104] If conduct is only able to be pursued by criminal action and ASIC does not have sufficient admissible evidence to meet the relevant standard of proof, or to disprove a defence in criminal proceedings, then the result may be that no regulatory action is taken. As ASIC has stated previously:

> This does not mean that civil penalties will be used simply to avoid having to establish matters to a criminal standard. However… where sophisticated offenders have ensured insufficient admissible evidence of their wrongdoing to form the basis of a criminal prosecution… the [availability] of civil penalty provisions are crucial.[105]

105 The ALRC in the Discussion Paper proposes a solution for avoiding regulatory gaps if the implementation of the proposals created one, is for regulators to enter into enforceable undertakings or other negotiated settlements with a corporation.[106] However, if no enforcement action is able

[100] *Corporations Act 2001*, s1311C.
[101] *Corporations Act 2001*, Item 236 of Schedule 3, prior to 12 March 2019; before the introduction of the Penalties Act for which a breach of s727(1) attracted a maximum fine of 200 penalty units; and *Corporations Act 2001*, s1312 provided that the penalty for a body corporate was 5 times the fine otherwise available.
[102] *Crimes Act 1914*, s4AA: a penalty unit from 1 July 2017 until 1 July 2020 is $210.
[103] *Corporations Act 2001*, Schedule 3 and s1311C post 12 March 2019.
[104] *Corporate Criminal Responsibility* p. 92, paragraph 4.20: see footnote 1.
[105] *ASIC Submission to ALRC Discussion Paper Securing Compliance*, p. 8: see footnote 47.
[106] *Corporate Criminal Responsibility* p. 99, paragraphs 4.40-4.41: see footnote 1.

to be taken due to a regulatory gap, then it is highly unlikely a regulator will be able to secure a negotiated outcome, especially one with sufficient deterrent impact.

106 Evidence before the Royal Commission demonstrated the protracted nature of negotiated outcomes and the unwillingness of the relevant entities to accept during those negotiations that what they had done was wrong.[107] As stated by Commissioner Hayne in the Interim Report of the Royal Commission:

> Bringing proceedings does not preclude negotiation about how the proceedings may be resolved... Often enough, the prospect of trial is a sharp spur to prompt and realistic discussion of whether and how issues about liability, final relief and compensation for those who have been affected by the conduct could be resolved.[108]

107 However, if a negotiated outcome is the only available regulatory action, there will be no prospect of proceedings to spur that prompt and realistic discussion of liability.

108 Proposals 1–3 if implemented would create a rigid legislative scheme that would limit the enforcement responses available to ASIC and increase the risk that a less than optimal enforcement response is the only available response. It will create the likelihood of the answer to the question *Why Not Litigate?* becoming: *Because we can't*.[109]

Proposal 4: Civil penalty notice provisions

ALRC Proposal 4

When Commonwealth legislation includes a civil penalty notice provision:

(a) the legislation should specify the penalty for contravention payable upon the issuing of a civil penalty notice;

(b) there should be a mechanism for a contravener to make representations to the regulator for withdrawal of the civil penalty notice; and

(c) there should be a mechanism for a contravener to challenge the issuing of the civil penalty notice in court if the civil penalty notice is not withdrawn, with costs to follow the event.

109 Proposal 4 relates to the ALRC's proposed CPN provisions.

[107] *Royal Commission Final Report*, p.435: footnote 27.
[108] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Interim Report*, September 2018, vol 1, p 278.
[109] *Royal Commission Final Report* p.433: footnote 27.

110 As stated above in relation to Proposals 1 to 3, ASIC does not support limiting the availability of INs. ASIC also does not support decriminalising offence provisions to be replaced with a CPN provision.

111 ALRC Proposals 4(a) to (c) share some similarities with existing IN provisions in ASIC-administered legislation; however, they would be significantly less effective in practice because the proposals conceive of INs as a final penalty rather than a settlement of a civil or criminal contravention.

112 INs (or the proposed CPNs) are not accurately described as a civil penalty. As ASIC has stated previously:

> ASIC cannot take action against an offending party for failing to pay an infringement notice. Instead, we can prosecute or commence proceedings against the offending party for the underlying contravention. In this way, infringement notices do not constitute the imposition of a penalty by ASIC as such, but rather a way for a party to avoid criminal or civil proceedings by opting to pay a lower penalty. As such, they are a form of 'settlement' with the regulator.[110]

113 The ALRC has previously recognised INs as a form of administrative device to settle or dispose of a matter that involves a contravention of the law. An IN offers the offending party the chance to discharge or expiate the breach through payments of a specified amount.[111] They have been designed to operate as an alternative to either a criminal or civil penalty, rather than a stand-alone enforcement option.

114 Proposal 4(b) is broadly consistent with how IN regimes under ASIC-administered legislation currently operate. An IN recipient can make representations to ASIC to withdraw an IN and ASIC has set timeframes in which to respond.[112]

115 However, Proposal 4(c) is prefaced on the basis that a CPN or IN is a penalty, rather than an alternative to a criminal or civil penalty. Currently, IN provisions in ASIC-administered legislation are consistent with Parts 6.7 and 6.8 of the *Attorney General Department's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (**AGD Drafting Guide**) and a decision made by ASIC not to withdraw an IN is not a reviewable decision by the Administrative Appeals Tribunal (**AAT**). As stated in the Explanatory Memorandum to the Penalties Act:

> This is because infringement notices are not final or operative determinations of substantive rights and a person may elect to challenge the infringement notice in court. A person who has been issued an infringement notice does not need to pay the penalty and will have the

[110] *ASIC Submission on Positions Paper 7*, p. 50:, paragraph 208: see footnote 9.
[111] *ASIC Submission on Positions Paper 7*, p. 49:, paragraph 207: see footnote 9 citing *Principled Regulation: Federal Civil and Administrative Penalties in Australia* p.78, para 2.67: see footnote 7.
[112] See *Corporations Act 2001* s 1317DAT; *Australian Securities and Investments Commission Act 2001* (Cth) s 12GXF*; National Consumer Credit Protection Act 2009* (Cth) s 288Q*; Insurance Contracts Act 1984* (Cth) s 75ZC.

> ability to challenge the allegation of contravention in any proceedings brought against them.[113]

116 The other critical difference between existing IN regimes in ASIC-administered legislation and ALRC's Proposal 4 lies with Proposal 4(a). Proposal 4(a) provides that a reduced penalty would no longer be available if a CPN recipient chose to pay a CPN amount rather than pursuing the matter in court.[114] This again is prefaced on a CPN being a final penalty, rather than the settlement of criminal or civil enforcement action.

117 This is also contrary to previous recommendations by the ALRC that IN schemes in federal regulatory law should incorporate an amount payable that should not exceed a small proportion (one-fifth) of the maximum penalty which might be imposed if the matter is dealt with by a court.[115] The AGD Drafting Guide in relation to INs was based on these recommendations.[116]

118 Currently, under s1317DAN (2) of the Corporations Act, the maximum IN penalty for a criminal offence is half the maximum penalty a court could impose for the contravention, or for contravention of a CPP provision, the maximum IN penalty is 60 penalty units. Other maximum penalties apply for payment of the IN amount under the different IN regimes,[117] but each offer a reduced maximum to that which would be available if the contravention was pursued in civil or criminal proceedings.

119 A reduced penalty acts as an incentive for the recipient of an IN to pay the IN amount and settle the matter, rather than taking the matter to court.[118] As stated by the ALRC previously:

> The attraction for the person issued with the infringement notice is that it is generally quick, easy and inexpensive to pay the penalty without question. Not paying the penalty and contesting the offence is made less attractive by the prospect of a heavier sanction if a court determines the matter, in addition to the cost and inconvenience of the proceedings themselves.[119]

120 The ALRC states that, under the proposals, rather than a reduced penalty, the incentive for compliance with a CPN provision will be the deterrent cost of challenging the issue of a CPN in court as costs follow the event. The ALRC states the proposed CPN regime will have the effect of removing the vast

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[113] Revised Explanatory Memorandum, Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018 (Cth) 56 [1.166].
[114] See *Corporations Act 2001* s 1317DAP(2): an infringement notice payment amount is half the maximum penalty available that a court could impose
[115] *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, p.34, recommendation 12-8(b): see footnote 7.
[116] Attorney General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 38.
[117] *National Consumer Credit Protection Act 2009* (Cth) s288L(2). See also Revised Explanatory Memorandum, Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018 (Cth) 63, table 1.11, for the maximum penalties under the various ASIC Rules.
[118] *AGD Guide to Framing Commonwealth Offences* p.38 (in relation to fixed or minimum penalties) p.59 (in relation to infringement notice amounts): See footnote 116.
[119] *Securing Compliance: Civil and Administrative Penalties in Federal Jurisdiction*, p. 397, paragraph 12.8: See footnote 28.

majority of CPN contraventions from the court system.[120] ASIC strongly disagrees.

121 While ASIC has previously had a high compliance rate with INs,[121] if Proposal 4 was implemented the compliance rate is likely to drop.[122] It is likely that with no reduced penalty available for payment of a CPN, a contravener would wait and see if ASIC actually commences civil proceedings and then settle the proceedings, rather than pay the CPN amount?

122 Further, if enforcement of a CPN provision was only by way of civil and not criminal action after a failure to pay a CPN amount, this would significantly limit ASIC's ability to take regulatory action as frequently as it currently does, given the potential for adverse costs orders. While the ALRC in the Discussion Paper recognises costs implications will act as a disincentive to contraveners to challenge the issue of CPNs in court without reasonable grounds, it does not mention the significant cost implications to regulators, as previously acknowledged by the ALRC.[123]

123 This would reverse one of the benefits cited by the ASIC Enforcement Review Taskforce of the availability of INs being that they:

> … increase the likelihood that contraventions will be penalised because ASIC is able to take action in relation to a larger number of contraventions than it otherwise would be able to by way of legal proceedings, thereby encouraging voluntary compliance.[124]

124 If ASIC is forced to take less enforcement action for breaches of CPN provisions, the incentive for a CPN recipient to comply with the CPN further decreases as there is an increased likelihood ASIC may be less able to pursue the matter in court due to the cost involved (including associated cost exposure). Reduced enforcement action leads to reduced voluntary compliance, as demonstrated below in the research study into the effectiveness of regulation in the continuous disclosure IN regime.

125 The ASIC Enforcement Review Taskforce recently considered the existing IN regimes in ASIC-administered legislation. After referring to criticism of the regimes by many commentators, including the ALRC, the Taskforce concluded:

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[120] *Corporate Criminal Responsibility*, p. 91, paragraph 4.18: see footnote 1.
[121] *ASIC Submission on Positions Paper 7*, paragraph 14 p. 74: see footnote 9.
[122] *AGD Guide to Framing Commonwealth Offences*, p. 38 (in relation to fixed or minimum penalties) 59 (in relation to infringement notice amounts): See footnote 116
[123] ALRC, *Securing Compliance: Civil and Administrative Penalties in Federal Jurisdiction* p. 396 paragraph 12.4.
[124] *ASIC Enforcement Review Taskforce Positions Paper 7* p. 72, paragraph 11: See footnote 8- citing Michelle Welsh, *Enforcing contraventions of the continuous disclosure provisions: Civil or administrative penalties*, in Company & Securities Law Journal, (2005) volume 25(5), p. 315.

> The Taskforce is, however, mindful of the fact that infringement notices, properly utilised, can have benefits for regulators, the regulated and the public.

126 The Taskforce went on to cite the NSW Law Reform Commission:

> Infringement notices can prevent minor cases reaching court and save time and money both for the offender and the criminal justice system. The avoidance of a conviction results in reduced stigma. The system can be automated, is highly efficient and raises significant revenue. The penalty payable is considerably less than the maximum available were the matter to be dealt with in court.[125]

127 The Taskforce further stated it did not accept the proposition that civil penalty provisions were inherently unsuitable for application to the IN regime.[126]

128 The Government agreed with a Taskforce recommendation to increase the availability of INs to a broader range of provisions and stated this was consistent with recommendations made by the Senate Economics References Committee[127] in *Lifting the fear and suppressing the greed: Penalties for white-collar crime and corporate and financial misconduct in Australia* (**White Collar Crime Report**). As stated above at paragraph 79, the Government has shown its support for ASIC's use of INs through the passage of the Penalties Act which increased the number of civil penalty contraventions which can be dealt with by way of an IN.

129 If this proposal and others which reduce the availability of dual-track regulation are implemented and require ASIC and other regulators to take predominantly civil action, consideration may need to be given to making civil regulatory action a no costs jurisdiction.

Continuous disclosure regime

130 Under Proposals 3 and 4 the category of contraventions for which INs are currently available would be narrowed,[128] so that CPNs would not be available for any contraventions that involve an evaluative judgement.

131 The ALRC raises concerns about the ability of ASIC to use INs for breaches of continuous disclosure provisions (**CD provisions**) and states regulatory action should only be by way of CPP.

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[125] *Principled Regulation: Federal Civil and Administrative Penalties in Australia* p. 427 paragraph 12.9: see footnote 7; *ASIC Enforcement Review Report* p.82: see footnote 57.
[126] *ASIC Enforcement Taskforce Report* p.82 see footnote 57.
[127] Senate Economics References Committee, *Lifting the fear and suppressing the greed': Penalties for white-collar crime and corporate and financial misconduct in Australia Report* ('*White Collar Crime Report*'), March 2017, p. 72, paragraph 5.34, recommendation 3. See also Australian Treasury, *Australian Government Response to the ASIC Enforcement Review Taskforce Report*, 16 April 2018, p. 13, recommendation 44.
[128] *AGD Guide to Framing Commonwealth Offences:* See footnote 116.

132 However, research conducted specifically into ASIC's effectiveness in improving corporate compliance with CD provisions concluded that effectiveness was greatest with a full suite of enforcement actions available. In particular, the most notable improvement in effectiveness was after the introduction of INs.[129]

133 The research conducted by the Australian National University and Macquarie University specifically considered the effectiveness of a responsive enforcement strategy in compliance with the CD provisions throughout the period 1992 to 2006 with the introduction of increasing dual-track regulatory pathways.[130] This covered four distinct periods of regulation of continuous disclosure:

(a) 1992 to 1994 when there was no mandated continuous disclosure regime;

(b) 1994 to 2002 when only criminal sanctions were available;

(c) 2002 to 2004 after the introduction of civil sanctions; and

(d) 2004 to 2006 after the introduction of administrative sanctions.

134 The study found that:

> Between 1994 and 2002 when [CD] was enforced with only criminal sanctions, ASIC's enforcement strategy was not effective in deterring firms from non-compliance because of the high evidentiary burden required for a successful prosecution on continuous disclosure violations. For regulated firms, because the threat of enforcement was minimal, the cost of deviation from compliance with [CD] was low rendering the public enforcement of [CD] ineffective during this period.
>
> The adoption of civil sanctions in 2002 improved the effectiveness of ASIC's enforcement strategy by giving a range of potential punitive penalties. Since 2004 when administrative sanctions were also added, ASIC has completed its responsive enforcement strategy, and is now able to use persuasion and dialogue to engage compliers, administrative sanctions to monitor and deter opportunists, and full enforcement options including civil and criminal penalties to punish contraveners.[131]

135 The study found that with the increase in dual-track regulatory options to support a responsive regulation strategy in the enforcement of the CD provisions, there was improvement in not only the availability and precision of public information and analysts' forecast accuracy,[132] but also in market liquidity by reducing information asymmetry among market participants.[133] The study also found the results were consistent with the theory that in

[129] *Corporate Compliance with Disclosure Regulations*, p. 4: See footnote 54:
[130] *Corporate Compliance with Disclosure Regulations*, p.42: See footnote 54.
[131] *Corporate Compliance with Disclosure Regulations*, p.10: See footnote 54.
[132] *Corporate Compliance with Disclosure Regulations*, p.23: See footnote 54.
[133] *Corporate Compliance with Disclosure Regulations*, p.26: See footnote 54.

responsive regulation, many players will be deterred by the mere existence of a sanction hierarchy.[134]

136 Further the removal of INs for enforcement of CD provisions, does not have widespread industry support. In 2012, the Law Council of Australia conducted a survey[135] about the continuous disclosure IN regime. There were 109 respondents to the survey of which 43.1% were, or previously had been, an officer of an ASX-listed entity. Other respondents included lawyers in private practice and in-house counsel. When asked whether they agreed with the statement 'The continuous disclosure infringement notice regime should be repealed', the majority of survey participants disagreed.

Proposal 5: Escalation across the civil/criminal divide

ALRC Proposal 5

Commonwealth legislation containing civil penalty provisions for corporations should be amended to provide that when a corporation has:

(a) been found previously to have contravened a civil penalty proceeding provision or a civil penalty notice provision, and is found to have contravened the provision again; or

(b) contravened a civil penalty proceeding provision or a civil penalty notice provision in such a way as to demonstrate a flouting of or flagrant disregard for the prohibition;

(c) the contravention constitutes a criminal offence.

137 Proposal 5 recommends the creation of a criminal offence for corporations that contravene a CPP repeatedly (Proposal 5(a)) or in such a way as to demonstrate a flouting of, or flagrant disregard for, the prohibition (Proposal 5(b)). The ALRC states this will enable a regulator to escalate a particular contravention across the civil/ criminal divide.[136]

138 While ASIC supports measures to penalise recidivism and systemic misconduct, ASIC does not support this proposal. In ASIC's view existing dual-track regulatory options are better suited to an escalation of enforcement response, as they enable broader considerations to inform that response. Consideration of whether a corporation has previously contravened the law or has contravened the law in such a way as to demonstrate a flouting or flagrant disregard for the prohibition are two considerations

[134] *Corporate Compliance with Disclosure Regulations*, p. 20: See footnote 54.
[135] Law Council of Australia, *Continuous Disclosure Infringement Notice Survey 2012*, August 2012 (Appendix A to Law Council of Australia, *Disclosure Regulation and Sanctions Submission to the Financial System Inquiry*)
[136] It is not stated how this will work procedurally, i.e. through multiple proceedings, the first being civil and the second or third being criminal or the differences in the standard of proof that may flow: see *Corporate Criminal Responsibility* p. 101, paragraph 4.47: See footnote 1.

among many that currently inform ASIC's response to a particular contravention, as outlined above in paragraph 75.

139 Further, it is unclear how the proposals would work in practice.

140 In relation to Proposal 5(a) which concerns repeated breaches of a CPP provision, after the first contravention by a corporation, there appear to be two options for how this proposal would work in relation to the second contravention. The first option would require initiating two separate sets of proceedings: (1) CPP proceedings to prove the second/repeated CPP contravention and then (2) criminal proceedings to prove there had been two or more breaches of the CPP provisions. Alternatively, the second option is proof of the breach of the CPP provision in relation to the second contravention would be in criminal proceedings.

141 The first option would be costly and time consuming. A second or repeated contravention of a CPP provision could be more efficiently dealt with by a court determining an appropriate penalty for a second contravention of a CPP provision. The second option would create confusion due to a crossover of criminal and civil liability. A regulator would have to prove the second contravention of a CPP provision in criminal proceedings. This would require proof of a civil contravention to a criminal standard, with differences in the admissibility of evidence available in those criminal proceedings to that which would be available if the contravention was pursued by way of a civil penalty proceeding.

142 The example given by the ALRC of an existing provision that escalates sanctions in this way is s74(2) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (***AML-CTF Act**). However, that offence provision does not require proof of the first 'contravention' in court proceedings, but rather the offence is created after a failure to comply with either:

(a) a direction given by AUSTRAC to the relevant person to refrain from engaging in contravening conduct, under s191 of the AML-CTF Act; or

(b) an enforceable undertaking entered into between AUSTRAC and the relevant person under s197 of the AML-CTF Act.

143 This avoids the necessity of a multiplicity of proceedings or a crossover in proof of civil or criminal liability before a court.

144 Proposal 5(b) creates an offence provision for a flagrant breach of a CPP provision. Similar difficulties to those outlined above in relation to the crossover of civil and criminal liability also apply to Proposal 5(b).

145 In ASIC's view contraventions that would be captured by this proposal are more appropriately dealt with by existing dual-track regulatory options, under which the same or similar contraventions can be dealt with either by

way of civil or criminal proceedings. This enables a broader range of factors to be considered alongside the repeated or flagrant nature of the contravention when escalating an enforcement response across the civil/criminal divide. Where there are repeated contraventions by a corporation, or a contravention is flagrant, those are factors favouring an escalation of enforcement response, but that will not always be the case if other factors weigh against it. Nor will that escalated response, always be criminal action, see paragraph 75 above.

146 As stated above in paragraph 69, in the vast majority of cases, contraventions for which both civil or criminal liability attach usually require proof of a fault element (or a higher fault element) when the contravention is pursued by way of criminal proceeding. That fault element is particularised either in the legislation creating the offence or through the application of the Criminal Code.[137] This creates certainty for regulators and defendants as to what is required to be proven to establish the commission of a criminal offence. Although it is not clear how the offence in Proposal 5(b) would be drafted, it appears fault elements that are currently tailored to individual contraventions, would be replaced by a general fault element of 'a flouting of' or a 'flagrant disregard for' the prohibition.

147 The AGD Drafting Guide states that the four standard fault elements in the Criminal Code, being intentionally, knowingly, recklessly or negligently, have been carefully devised and codified and in all but the most exceptional cases Commonwealth criminal offences should use those fault elements. The AGD Drafting Guide states there are significant dangers in using formulations of fault that depart from the fault elements in the Criminal Code and a departure is only justified where it was demonstrably not possible to achieve the Government's objectives through the Code fault elements.[138]

148 In ASIC's view, maintaining dual-track regulation is preferable to the implementation of Proposal 5.

Proposal 6: Amending the AGD Drafting Guide

ALRC Proposal 6

The Attorney-General's Department (Cth) *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* should be amended to reflect the principles embodied in Proposals 1 to 5 and to remove Ch 2.2.6.

[137] Or the legislation provides for strict or absolute liability.
[138] *AGD Guide to Framing Commonwealth Offences*, p.19 paragraph 2.2.3: See footnote 116.

149 As stated above, ASIC does not support Proposals 1 to 5 and therefore does not support Proposal 6 which recommends amending the current AGD Drafting Guide[139] to accord with Proposals 1 to 5.

150 The ALRC also proposes removing the chapter in the AGD Drafting Guide concerned with drafting criminal offences that contain strict or absolute liability, Chapter 2.2.6.

151 While it is not explicitly stated in the Discussion Paper, this suggests not only that the ALRC is proposing no new strict or absolute liability offences be drafted, but also that no new offences should be drafted which contain physical elements for which strict or absolute liability apply.[140]

152 ASIC does not support the proposal that the chapter in the AGD Drafting Guide be removed, nor does it support a proposal under which no new offences be drafted which contain physical elements for which strict or absolute liability apply.

153 A number of criminal offences involving significant misconduct in ASIC-administered legislation contain physical elements for which strict or absolute liability apply. These offences comply with the existing AGD Drafting Guide in that there are legitimate grounds for penalising a person, regardless of fault in relation to particular physical element.

154 An example of this is s588G[141] of the Corporations Act, the director's duty to prevent insolvent trading. Absolute liability applies to the element that the company incurred a debt at a particular time. Strict liability applies to the elements that the person was a director at the time of the offence and that the company was insolvent at the time of incurring the debt or as a result of incurring that debt. If a fault element was required to be proven for those physical elements of that offence, proof of that offence, which is already difficult to establish, would be close to impossible.

155 The AGD Guide was developed after consideration of the Senate Standing Committee Scrutiny of Bill's *Report into the Application of Absolute and Strict Liability Offences in Commonwealth Legislation*,[142] which recognised the merits of those offences and that strict liability may be appropriate where it is necessary to ensure the integrity of regulatory regimes, including those relating to public health, the environment, or financial or corporate regulation.[143]

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[139] *AGD Guide to Framing Commonwealth Offences:* See footnote 116.
[140] There is also a proposal to remove Annexure A to the drafting guide which sets out comparable penalties for categories of conduct, which is not overly controversial as it is likely to be out of date.
[141] Absolute liability applies to the physical element of the offence that the company incurred a debt at a particular time and strict liability applies to the element that at that time the person was a director of the company and the company was insolvent.
[142] *AGD Guide to Framing Commonwealth Offences* paragraph 24: See footnote 116.
[143] Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, 2002, p. 284.

156 Further, ASIC considers strict and absolute liability offences as a critical component in its regulatory toolkit. As stated in ASIC's submission to the ASIC Enforcement Review:

> Strict and absolute liability offences form an important part of the regulatory regime that ASIC administers.
>
> From a deterrence perspective, these offences signal obligations that are straightforward, yet of such importance that ASIC need not prove *mens rea* in order to successfully prosecute breaches. Ordinary offences that require proof of a mental element represent a higher bar in terms of proof for the regulator. Strict and absolute liability offences are only appropriate where there is a legitimate reason for penalising the conduct itself without the mental element.
>
> That is not to say, however, that such offences are of lesser importance than ordinary offences... As recognised in the positions paper, it is expected that individuals in the roles governed by ASIC-administered legislation take active steps to fulfil their obligations.

157 ASIC reiterates the comments made above in response to Proposals 1 and 2 in relation to the expressive force of criminalisation and the recognition that force is appropriate to be applied in a regulatory regime in which actors are voluntary participants and for which compliance is critical for the integrity of that regime.

158 ASIC considers the factors in Chapter 2.2.6 in the AGD Guide appropriately capture the circumstances in which strict or absolute liability should attach to the physical elements of criminal offences and should not be deleted.

Proposal 7: Administrative mechanisms for AGD Drafting Guide

ALRC Proposal 7

The Attorney-General's Department (Cth) should develop administrative mechanisms that require substantial justification for criminal offence provisions that are not consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* as amended in accordance with Proposal 6.

159 ASIC supports Proposal 7 to the extent that it could be implemented without Proposal 6.

160 Under Proposal 7 the ALRC recommends administrative procedures be established to require justification for creating new criminal offences that are inconsistent with the AGD Drafting Guide (as amended in accordance with Proposal 6).

161 In ASIC's recent experience, the explanatory memorandum of Bills which propose amendments to ASIC-administered legislation have referred to and justified deviations from the AGD Drafting Guide: see, for example, the

explanatory memorandum to the Penalties Act.[144] The Senate Standing Committee for the Scrutiny of Bills also regularly comments or seeks clarity from the relevant Minister where a provision deviates from the principles set out in the AGD Drafting Guide.

162 ASIC supports the implementation of administrative mechanisms that would require justification for deviation from the AGD Guide, particularly in relation to the drafting or amendment of criminal offences that do not comply with the Criminal Code: see, in particular, paragraphs 2.2.2 and 2.2.3 of the AGD Drafting Guide.

[144] Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018, Revised Explanatory Memorandum, p. 24, paragraph 1.41.

D Reforming corporate criminal responsibility

Key points

In principle, ASIC supports a single corporate liability attribution model.

ASIC does not support the model proposed by the ALRC.

ASIC considers the corporate culture provisions should be retained in any corporate attribution model.

ASIC does not support the wider availability of the due diligence defence and does not think it is justified by the modest expansion of the category of individuals whose conduct can be attributed to a corporation.

There is insufficient detail about the application of the proposed single model to civil proceedings for ASIC to assess that proposal.

Proposal 8: Single attribution model

ALRC Proposal 8

There should be a single method for attributing criminal (and civil) liability to a corporation for the contravention of Commonwealth laws, pursuant to which:

(a) the conduct and state of mind of persons (individual or corporate) acting on behalf of the corporation is attributable to the corporation; and

(b) a due diligence defence is available to the corporation.

163 In principle, ASIC supports a single model of corporate attribution that applies to all criminal proceedings for Commonwealth offences. ASIC also supports a model that blends the existing attribution methods found in Part 2.5 of the Criminal Code and the 'TPA model' on which s769B of the Corporations Act and s12GH of the *Australian Securities and Investments Commission Act 2001* (**ASIC Act**), among others, are based. ASIC, however, does not support the model as proposed by the ALRC[145] for the reasons set out below.

164 ASIC also supports, in principle, a single corporate attribution model that applies to civil proceedings; however, insufficient detail has been provided in the Discussion Paper of how the proposed model would apply to civil proceedings to enable ASIC to properly assess the application of it in that context.

[145] *Corporate Criminal Responsibility*, p. 28 paragraph 6.7: See footnote 1.

165 The ALRC proposes the attribution model set out below should replace the existing provisions in the Criminal Code:

Proposed redrafted Part 2.5

12.2 Physical elements

Any conduct engaged in by one or more associates of a body corporate is deemed to have been engaged in also by the body corporate, unless the body corporate proves that it exercised due diligence to prevent the conduct.

Note: A defendant bears a legal burden in relation to the defence of exercising due diligence: see section 13.4.

12.3 Fault elements other than negligence

(1) If, in respect of conduct that is engaged in by a body corporate, it is necessary to establish the state of mind, other than negligence, of the body corporate, it is sufficient to show that:

(a) one or more associates of the body corporate who engaged in the conduct had that state of mind; or

(b) the body corporate authorised or permitted the conduct.

Note: Section 12.3(1)(a) does not limit the application of section 11.3 Commission by Proxy or exclude extensions of liability.

166 The relevant provisions of the Criminal Code currently provide:

12.2 Physical elements

If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

12.3 Fault elements other than negligence

(1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.

(2) The means by which such an authorisation or permission may be established include:

(a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

(b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

(c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or

(d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

(3) Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.

(4) Factors relevant to the application of paragraph (2)(c) or (d) include:

(a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and

(b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.

(5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.

Corporate culture provision

167 The ALRC states in a supporting paper to the Discussion Paper, *Corporation Attribution: Principled Simplicity*, that the proposed model preserves the language which precedes the corporate culture provisions in Part 2.5 of the Criminal Code, such that it would remain open to a prosecutor to prove that a corporation authorised or permitted the conduct by reference to a particular corporate culture.

168 ASIC is strongly of the view that the corporate culture provisions that currently exist in s12.2(2)(c) and (d) of the Criminal Code or an amended version of those provisions should be retained so that specific reference is made in the legislation to the ability to prove fault through proof of a poor corporate culture.

169 If the corporate culture provisions are not specifically included in a future attribution model, there would be significant doubt about whether proof of 'authorisation or permission' could be achieved through proof of a poor corporate culture and may potentially close off the ability of the prosecution to prove corporate fault in that way.

170 Chief Justice Spigelman of the Court of Criminal Appeal of NSW in *R v JS*[146] stated the following in relation to statutory interpretation of the Criminal Code:

> The Appellant submitted that the 2001 legislation, which applied the Criminal Code to the relevant Crimes Act provisions did not intend to alter the operation of s 39 from its prior operation at common law. The Appellant relied on express statements by the Minister in the Second Reading Speech and in the Explanatory Memorandum, asserting that no

[146] *R v JS* (2007) 230 FLR 276 paragraphs 141- 146.

> change was intended. Such assertions are rarely useful and often have been rejected in the course of interpretation by the courts.
>
> The task of the courts is to interpret the words used by the Parliament. It is not to divine the intent of the Parliament. (See *State v Zuma* (1995) (4) BCLR 401 at 402; (1995) 2 SA 642; *Matadean v Pointu* [1999] 1 AC 98 at 108; *R v PLV* (2001) 51 NSWLR 736 at [82]; *Pinder v R* [2003] 1 AC 620.) The distinction between interpretation and divination is an important one. The courts must determine what Parliament meant by the words it used. The courts do not determine what Parliament intended to say. (See *R v Bolton ex parte Beane* (1987) 162 CLR 514 at 518; *Byrne & Frew v Australian Airlines Ltd* (1995) 185 CLR 410 at 459; *Wik People v Queensland* (1996) 187 CLR 1 at 168–169; *R v Young* (1999) 46 NSWLR 681 at [5]; *Dossett v TKJ Nominees Pty Ltd* (2003) 218 CLR 1 at [10].) At times that will require the court to refuse to implement an express statement as to what the Parliamentary intention is. (As in *R v Bolton ex parte Beane* supra.)
>
> Statements of the character that the drafter of the legislation did not intend to change the prior operation of the law are rarely, if ever, useful, let alone entitled to significant weight. Such an assertion makes two assumptions. First, that the author knows completely and precisely how the previous provision has been and will be applied. Secondly, that the author has stated the new provision with indisputable comprehensibility. Each assumption reflects a conceit to which drafters of texts are prone when appraising their own work. Each assumption is rarely, let alone generally, applicable.
>
> In a context such as the present, where a comprehensive Code is being grafted onto pre-existing legislation, I find these statements of no use whatsoever for the purpose of interpretation. They should be regarded as aspirational. They may reflect the object of the detailed attention that had been given to every offence and its possible interconnection with the structure of the Code in the process of drafting the 2001 Amendment Act. Whether that aspiration was achieved remains a matter for interpretation.
>
> Fundamental aspects of the law have been altered by the Criminal Code in substantial and indeed critical matters, by the replacement of a body of nuanced case law, which never purported to be comprehensive, with the comparative rigidity of a set of interconnecting verbal formulae which do purport to be comprehensive and which involve the application of a series of cascading provisions, including definitional provisions, expressed in language intended to be capable of only one meaning, which meaning does not necessarily reflect ordinary usage.
>
> Reference to prior case law concerning the element of intent for particular criminal offences is, in my opinion, almost always likely to be a distraction. The changes in the fault requirements implemented by the Criminal Code, compared with the former requirements of mens rea at common law, are of so fundamental a character that, where one is concerned with fault, it is almost certainly futile to seek to determine what the position was at common law.

171 As recognised by the ALRC in the Discussion Paper, the corporate culture provisions in the Criminal Code are a significant departure from the common

law.[147] They have also not been the subject of extensive judicial consideration.[148]

172 The attribution of fault through proof of a corporate culture that authorised or permitted contravening conduct accords with current views of the community and regulators as to the cause of much corporate misconduct exposed recently by the Royal Commission. As Commissioner Hayne stated in the Final Report of the Royal Commission:

> Because primary responsibility for misconduct in the financial services industry lies with the entities concerned and those who manage and control them, effective leadership, good governance and appropriate culture within the entities are fundamentally important.[149]

173 ASIC does, however, agree that in any amended corporate attribution provision in Part 2.5 of the Criminal Code, clarity as to the definition of corporate culture would be beneficial, noting the comments of Chief Justice Blow of the Tasmanian Supreme Court[150] as cited in the Discussion Paper:

> So, one rule amounts to corporate culture. One policy amounts to corporate culture. I say that because the definition begins 'Corporate culture means an attitude, policy, rule, course of conduct or practice.

Associates and the due diligence defence

174 Under the ALRC's proposed corporate attribution model, the due diligence defence would be significantly expanded. ASIC does not support the broadening of the availability of the due diligence defence.

175 The ALRC have not proposed a definition of due diligence, or a provision that sets out how a due diligence defence may be proven, such as the existing s12.5(2) of the Criminal Code which applies to the mistake of fact defence:

> (2) A failure to exercise due diligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:
>
> (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
>
> (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

176 The ALRC states in the Discussion Paper:

> Due diligence is an elastic concept that takes its meaning from the context in which it must be exercised. [151]

177 The ALRC suggests guidelines be developed similar to those in the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019

[147] *Corporate Criminal Responsibility* p. 29, paragraph 1.33, p.115, paragraph 5.53: See footnote 1
[148] *Corporate Criminal Responsibility* p.130, paragraph 6.15, p.118 paragraph 5.67: See footnote 1.
[149] *Royal Commission Final Report*, vol 1, p.47: footnote 27.
[150] *R v Potter & Mures Fishing Pty Ltd*, Transcript of the Supreme Court of Tasmania, Blow CJ, 14 September 2015, p.464-465 as cited in *Corporate Criminal Responsibility* paragraph 5.58: See footnote 1.
[151] *Corporate Criminal Responsibility* paragraph 6.27: See footnote 1.

(**Combatting Corporate Crime Bill**), which under the proposed s70.5B of the Criminal Code are to take the form of ministerial guidelines. The ALRC notes guidance is already provided in legislation that has a due diligence defence and refers to the Criminal Code provision extracted above. It is therefore not clear from the Discussion Paper whether the ALRC are proposing due diligence guidance be included in the Criminal Code or in ministerial guidelines. It is also not clear what form that defence would take.

178 As the ALRC noted in the Discussion Paper, a due diligence defence is not available in some corporate criminal attribution models, such as that found in s769B of the Corporations Act. In the existing attribution provision in the Criminal Code, the defence only applies to attribution of the state of mind of a high managerial agent to a corporation and does not apply to attribution of the state of mind of the board of directors or the corporate culture provisions.

Associates

179 The ALRC states that the broadening of the availability of the defence is necessary to counter-balance the 'extension' of the category of persons whose conduct would be attributed to the corporation under Proposal 8 to 'associates'.

180 The ALRC's proposed definition of 'associates' is:

> any person who performs services for or on behalf of the body corporate, including:
>
> (a) an officer, employee, agent or contractor; or
>
> (b) a subsidiary (within the meaning of the *Corporations Act 2001*) of the body corporate; or
>
> (c) a controlled body (within the meaning of the *Corporations Act 2001*) of the body corporate. [152]

181 This will provide only a modest expansion of the categories of persons captured in many models, including s769B of the Corporations Act, which already enables attribution of conduct by 'a director, employee or agent' to the body corporate.[153]

182 While the proposed definition of 'associates' would remove the requirement that exists in many attribution provisions[154] for the prosecution to prove the relevant individual was acting in the scope of their employment or within the scope of their actual or apparent authority at the time of engaging in the attributable conduct, it replaces it with a requirement to prove the individual was acting 'for or on behalf of the corporation' at the relevant time.[155] It is therefore not a significant expansion of the category of persons whose

[152] *Corporate Criminal Responsibility* p. 131, paragraph 6.16: See footnote 1
[153] We note that officers may be captured by other "classes" within s769B, such as employees.
[154] Including *Corporations Act 2001* s 769; *Australian Securities and Investments Commission Act 2001* (Cth) s 12GH; *Criminal Code Act 1995* (Cth) s 12.2.
[155] Australian Law Reform Commission, *Corporate Attribution - Principled Simplicity*, 27 November 2019.

conduct can already be attributed to the corporation, certainly not enough to justify the much broader applicability of the due diligence defence as proposed.

183 The ALRC's proposed definition of 'associate' is similar to that found in the Combatting Corporate Crime Bill, which is currently before Parliament and which is proposed to apply to foreign bribery offences under the Criminal Code. However, the ALRC's proposed definition for corporate criminal attribution is considerably narrower. The definition of 'associate' in the Combatting Corporate Crime Bill is:

> a person is an associate of another person if the first-mentioned person:
>
> (a) is an officer, employee, agent or contractor of the other person; or
>
> (b) is a subsidiary (within the meaning of the Corporations Act 2001) of the other person; or
>
> (c) is controlled (within the meaning of the Corporations Act 2001) by the other person; or
>
> (d) otherwise performs services for or on behalf of the other person.

184 Therefore, the Combatting Corporate Crime Bill attributes the conduct of any person who performs services for or on behalf of' the corporation as an additional category of persons, rather than a limitation on the other categories of persons, such as officers and employees. Therefore, under the proposed Combatting Corporate Crime Bill offence it is not necessary to prove an employee was performing services for or on behalf of the corporation at the time of engaging in the attributable conduct, whereas it would be under the ALRC's proposed attribution model.

185 Further, the Model Criminal Code Officers Committee (**MCCOC**) in developing the Criminal Code considered whether corporate liability should be limited to those occasions where the individual acts 'on behalf of' a body corporate and rejected this. The MCCOC Report stated this approach had been adopted in the United States and the US courts had adopted interpretations of the expression 'on behalf of' that strained its natural meaning and that making this a requirement of the attribution provision could lead to difficulties.[156]

186 In any single corporate attribution model, ASIC supports the broadening of the categories of persons whose conduct could be attributed to a corporation and that in determining the relevant persons to capture, the focus should be on the substance of the relationship between that person and the corporation[157] rather than their position or title. However, for the reasons outlined above, ASIC does not support the ALRC's proposed category of persons. If an amended corporate attribution model was implemented and

[156] MCCOC, *Model Criminal Code Chapters 1 and 2: General Principles of Criminal Responsibility Report*, December 1992, MCCOC Report, p11.
[157] *Corporate Criminal Responsibility*, paragraph 6.20: See footnote 1.

included an expanded due diligence defence as proposed, in ASIC's view, the broader definition of 'associates' as used in the Combatting Corporate Crime Bill should be adopted to attribute conduct to a corporation.

187 Further, while ASIC considers there is merit in extending the category of 'associates' whose conduct can be attributed to a corporation to subsidiaries and controlled entities, specific consideration will need to be given about how the attribution of the physical and fault elements of offences to the 'parent' corporation will work in those circumstances, given the 'associates' are themselves corporations who act through individuals. This may require specific attribution provisions that apply to these types of corporate associates.[158]

Due diligence defence

188 As stated above, ASIC does not consider that the modest expansion of the categories of persons whose conduct can be attributed to the body corporate contained in Proposal 8 justifies the significant expansion of the availability of the due diligence defence to corporations where it is currently unavailable. These include s769B of the Corporations Act, s12GH of the ASIC Act,[159] and in the Criminal Code beyond its currently limited application to s12.3(2)(b).

189 The ALRC's proposed corporate attribution model[160] would make the due diligence defence available to a corporation for the attribution of the conduct or the physical element of an offence, rather than targeting the availability of the defence to attribution of the fault element in certain circumstances, which is currently the case. Currently, the defence is only available to the attribution of fault to a corporation when fault is proven using the method in s12.3(2)(b) of the Criminal Code, being that a high managerial agent intentionally, knowingly or recklessly engaged in the conduct or authorised or permitted the conduct. The application of the defence in those circumstances is appropriate to prevent a corporation being liable for the actions of a rogue employee.

190 The defence is not currently available to the attribution of liability to a corporation where proof of the fault element of the offence is through the other methods in s12.3(2) of the Criminal Code, including proof that the board of directors impliedly authorised the commission of the offence, or that a corporate culture existed that encouraged non-compliance with the relevant provision. The ALRC's proposed model would expand the

[158] This is less of an issue in the offence proposed by the Combatting Corporate Crime Bill as proof of fault is not required, the attribution is therefore only of the physical element of conduct, which creates less difficulties for attribution of conduct by a corporate actor than attribution of a fault element or state of mind. See discussion below in relation to the Due Diligence defence.
[159] *ASIC Act 2001* (Cth) s 12GH.
[160] *Corporate Criminal Responsibility* paragraph 6.7: See footnote 1.

availability of the defence to limit attribution where proof of fault was via one of those methods.

191 There is no explanation in the Discussion Paper of the basis for expanding the availability of the defence to the attribution of the conduct or the physical element of an offence or how that would interact with the mistake of fact defence in s12.5 of the Criminal Code. That provision applies to strict liability offences and incorporates considerations of due diligence within it.

192 In ASIC's view, the due diligence defence is more appropriately restricted in its application, as it is currently, to attribution of fault to a corporation in limited circumstances. Applying the defence to the attribution of fault is consistent with the justification for the existence of corporate criminal liability as referred to by the ALRC in the Discussion Paper, that there is a blameworthiness or moral culpability on the part of the corporation itself.[161]

193 In the Combatting Corporate Crime Bill, an 'adequate measures' defence applies to attribution of the physical element of the offence proposed to be inserted into s70.5A of the Criminal Code. That offence is attributed to the corporation when committed by an 'associate'; however, proof of the offence does not require proof of fault on the part of corporation. Absolute liability applies to proof of each of the physical elements of the offence. Therefore, the availability of the defence in the proposed s70.5A(5) of the Criminal Code of 'adequate measures designed to prevent the conduct' is appropriately applied to the physical element of the offence in those circumstances as proof of fault is not required. Further, in the Combatting Corporate Crime Bill as discussed above, the conduct of a broader category of 'associates', can be attributed to the corporation in order to prove the commission of the offence, to that proposed under the ALRC model.

194 In the ALRC's proposed model, the legal burden of proving the due diligence defence would be on the defence.[162] This does not change the position in relation to the due diligence defence that currently exists in more limited circumstances in the Criminal Code, for which the legal burden rests with the defence to prove on the balance of probabilities.[163] Therefore, this does not provide any further justification for the expansion of the availability of the defence.

195 As recognised by the ALRC in the Discussion Paper, the limited availability of the defence to date has not caused a flood of corporate prosecutions.[164] Conversely, the widening of its availability will increase the burden on a

[161] *Corporate Criminal Responsibility* paragraph 6.6: See footnote 1.
[162] *Corporate Criminal Responsibility* paragraph 6.25: See footnote 1.
[163] Stephen Odgers, *Principles of Federal Criminal Law*, 2015, paragraph 12.3.300
[164] *Corporate Criminal Responsibility* paragraph 3.56: See footnote 1.

prosecution in proving the commission of offences by corporations, making the prosecution of corporations more difficult. As stated by Brent Fisse:

> It is rare to find a company displaying a criminal policy at or before the time of commission of the external elements of the offences: companies usually have in place general compliance policies proclaiming a stance of full compliance with the law, together with compliance procedures that manifest the taking of reasonable precautions.[165]

196 This makes proof of fault by a corporation extremely difficult, a task which would be made even more difficult by the broader availability of the due diligence defence.

Other issues

197 ASIC agrees that in any amended corporate attribution model, attribution of fault should be expanded to attribute 'state of mind' more broadly rather than specific fault elements as it is currently in the Criminal Code[166] in order to capture fault elements such as dishonesty which are not currently included in the attribution provision.[167]

198 ASIC also considers that in any amended attribution model, the provision should explicitly state that proof of corporate liability is not dependent upon the conviction or finding of guilt of an individual offender, similar to the accessorial liability provision in s11.2(5) of the Criminal Code. Commentators differ significantly on whether this is a current requirement of the model in Part 2.5 of the Criminal Code.[168]

Application of single model to civil proceedings

199 In principle, in relation to attribution of corporate liability in civil proceedings, ASIC agrees that:

(a) there is merit in a single corporate attribution model that applies to all civil proceedings;

(b) provisions relating to the attribution of liability of corporations in criminal proceedings should also apply to liability for conduct that attracts civil penalties;[169] and

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[165] B Fisse, *Howards Criminal Law*, Law Book Company, 1990 pp 607-608 as cited in *Principles of Federal Criminal Law* at paragraph 12.3.340: see footnote 163
[166] *Corporate Criminal Responsibility* paragraph 6.23: See footnote 1.
[167] Ian Leader-Elliott, *Submission to National Criminal Law Reform Committee, Chapter 2 Review*, 23 March 2012, p.13.
[168] J Entwisle, *Corporate liability for the Bribery of foreign public officials: Reassessing Australia's legislative regime in light of the 'banknote scandal' and the UK Bribery Act 2010*, (2012) 27 Australian Journal of Corporate Law 218; I Leader-Elliott for the Commonwealth Attorney-General's Department in association with the Australian Institute of Judicial Administration, *The Commonwealth Criminal Code – A Guide for Practitioners*, March 2002, p319; J Clough and C Mulhern, *The Prosecution of Corporations*, Oxford University Press, Melbourne, 2002, pp 144; E Colvin, *Corporate Personality and Criminal Liability*, Criminal Law Forum, (1995) Volume 6 Issue 1 at 36; *Principles of Federal Criminal Law* paragraph 12.2.100: see footnote 163
[169] *ASIC Submission to ALRC Discussion Paper Securing Compliance*, see footnote 47

(c) the attribution of civil liability to a corporation should not be narrower than criminal liability.[170]

200 However, there is insufficient detail in the Discussion Paper and the ALRC's other supporting material for ASIC to assess how the proposed model of corporate attribution would apply to civil proceedings.

201 A key detail that is not specifically addressed by the ALRC in the Discussion Paper is whether the proposed model would apply to all civil proceedings, or just to civil penalty proceedings.[171]

202 There is also no detail about whether the proposed model would replace existing attribution provisions. If it was to replace existing provisions, there is no analysis of how that would impact the wide range of existing provisions, some of which have a broader application than the attribution of liability to corporations in civil proceedings. For example, s1317QE of the Corporations Act provides that if an element of a civil penalty provision 'is done' by an employee (among others) of the body corporate, that conduct is attributed to the body corporate. The provision does not expressly limit that attribution to a civil penalty proceeding; therefore, that attribution could be used for other purposes, such as an administrative banning hearing.[172]

203 A further key detail that is missing relates to the application of the due diligence defence in civil proceedings. The ALRC states that the due diligence defence should not be available in civil proceedings unless it is currently available.[173] The ALRC then notes that the defences available in existing statutory corporate attribution provisions for civil and criminal liability are not uniform throughout Commonwealth legislation.[174]

204 The ALRC cites the example of the defence in s84 of the *Competition and Consumer Act 2010*. A further example is the defence in s12GI of the ASIC Act, under which a defendant can prove they took 'reasonable precautions and exercised due diligence'. There are also other provisions, which while not strictly defences, may provide relief from liability, such as s1317S (2) of the Corporations Act. Under that provision, the court may relieve a person from liability in civil penalty proceedings if it appears to the court the person has or may have contravened a civil penalty provision, but the person has acted honestly and in all the circumstances should fairly be excused.

205 It is not clear from the Discussion Paper whether the ALRC is proposing that existing defences would be repealed and replaced by a uniform due diligence

[170] *Corporate Criminal Responsibility* paragraph 6.36: See footnote 1.
[171] *Corporate Criminal Responsibility* Paragraph 6.34 refers to "civil proceedings", however the extract from the ALRC's *Principled Regulation Report* at paragraph 7.155 refers to civil penalty proceedings. Also see paragraph 6.37 that refers both civil proceedings and civil penalty proceedings: See footnote 1.
[172] *Corporations Act 2001*, s920A.
[173] *Corporate Criminal Responsibility* paragraph 6.38: See footnote 1.
[174] *Corporate Criminal Responsibility* paragraph 6.39: See footnote 1.

defence. If it is not intended to repeal those provisions, the Discussion Paper does not analyse the potential effect these different defence or relief from liability provisions may have on attribution under the proposed model, or whether their application could lead to significant differences in the application of the model in different legislative contexts.

206 The ALRC also states that the proposed s12.3 of the Criminal Code, which is the attribution of fault provision, would only apply in civil proceedings where a fault element arises from the text of the provision.[175] However, the ALRC does not state whether or not in those circumstances it is intended the due diligence defence would be available.

207 A further key detail that has not been addressed in the Discussion Paper is what legislation the attribution model for civil proceedings would be contained within. The single attribution model for corporate criminal responsibility is proposed to be contained in the Criminal Code. ASIC understands that the ALRC does not propose the civil attribution method would also be contained in the Criminal Code. ASIC considers it would not be appropriate for the civil attribution model to be contained in the Criminal Code as this would enliven similar issues to those that have already been litigated.[176]

208 Currently, under ASIC-administered legislation, there are a number of attribution methods that apply in different circumstances to attribute liability to a corporation in civil proceedings. These include statutory attribution methods, such as s769B of the Corporations Act which applies to proceedings under Chapter 7 of the Corporations Act and s12GH of the ASIC Act which applies to proceedings under Subdivision G of Division 2 of Part 2 of the ASIC Act. There is also the recently enacted s1317QE of the Corporations Act introduced into the Corporations Act by the Penalties Act and equivalent provisions in other ASIC-administered legislation.[177] Even where a statutory model of attribution is available, common law methods of attribution of liability are not excluded.[178]

209 If a single civil corporate attribution model, based on the proposed criminal model in Part 2.5 of the Criminal Code, was introduced into an Act such as the *Regulatory Powers (Standard Provisions) Act 2015*, it could never be truly a single attribution method, given it would then need to be replicated in other federal legislation, such as those Acts outlined in Appendix E to the Discussion Paper. This includes ASIC-administered legislation, but also Acts as diverse as the *Environmental Protection Biodiversity and*

[175] *Corporate Criminal Responsibility* paragraph 6.37: See footnote 1.
[176] *ASIC v Whitebox Trading Pty Ltd* (2017) 251 FCR 448
[177] *National Consumer Credit Protection Act 2009*, s175E; *Insurance Contracts Act 1984*, s75V.
[178] *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530; *TPC v Tubemakers of Australia* (1983) 47 ALR 719, *Corporate Criminal Responsibility* paragraph 5.26: See footnote 1.

Conservation Act 1999 (**EPBC Act**), the *Fair Work Act 2009* and the *Agriculture and Veterinary Chemicals Code Act 1994*.

210 In ASIC-administered legislation, as in many other statutory attribution models, there are particular carve outs which are necessary for the particular legislative context they apply to. For example, s769B (7) of the Corporations Act provides that nothing in s769B or any other law including the common law has the effect that a financial service provided by a person in their capacity as an authorised representative of a financial services licensee is taken to have been provided by that financial services licensee. As stated in the explanatory memorandum to the Bill that introduced s769B,[179] this carve out is necessary as Parts 7.7 and 7.9 of the Corporations Act contain special rules about the liability of others, such as authorised representatives of financial services licensees and other regulated persons.

211 Therefore, even if a single model of civil attribution was legislated in one Act and replicated throughout other federal legislation, the need for carve outs particular to specific legislative and regulatory contexts will still be required.

212 Even if different versions of the same model were enacted, when courts come to interpret those versions, the statutory context in which they appear will necessarily influence their interpretation. This has the potential to exacerbate differences in the provisions removing them even further from the concept of a single model.

213 Further, there is likely to be an even greater divergence between a single attribution model when courts come to apply it to civil proceedings or criminal proceedings. This will necessarily be the case given the different nature of the proceedings and the liability that attaches.

214 As expressly stated in s2.1 of the Criminal Code and as Chief Justice Spigelman of the Court of Criminal Appeal of NSW stated in *R v JS*[180] (referred to above), the Code purports to comprehensively contain all the principles of criminal responsibility that are necessary to determine liability. Therefore, the interpretation by the courts in civil proceedings of provisions based on the single model will have very little, if any, bearing on how the Criminal Code provisions are interpreted in criminal proceedings, creating the likelihood for significant diversion from the concept of a single model.

215 Therefore, while in principle ASIC supports a single model of corporate attribution:

(a) ASIC does not support the model proposed – in particular, the removal of the corporate culture provisions, the significant expansion of the

[179] Financial Services Reform Bill 2001, Explanatory Memorandum, p.48, paragraph 6.120.
[180] *R v JS* (2007) 230 FLR 276, paragraphs 141- 146.

availability of the due diligence defence and only the modest expansion of the category of persons whose conduct could be attributed to the corporation; and

(b) The detail about the application of the proposed single model to civil proceedings has not been sufficiently outlined in the Discussion Paper to enable ASIC to fully assess the ramifications of the proposal to the attribution of civil liability to a corporation.

E Individual liability for corporate conduct

Key points

ASIC supports strengthening individual accountability for corporate crime.

ASIC does not support the mechanisms in Proposals 9 and 10 by which that greater accountability is sought to be achieved.

The crossover of civil and criminal liability for an individual and a corporation in Proposal 9 is likely to be unworkable in practice.

The evidentiary burden on a prosecution to prove the commission of an offence under Proposal 10 will be so high that the offence is likely to have only limited utility.

If Proposals 9 and 10 were implemented, s588G and 769B (5) of the Corporations Act, s12GH of the ASIC Act and s325 of the *National Consumer Credit Protection Act 2009* should not be repealed.

Proposal 9: Individual civil liability for corporate offence

ALRC Proposal 9

The *Corporations Act 2001* (Cth) should be amended to provide that, when a body corporate commits a relevant offence, or engages in conduct the subject of a relevant offence provision, any officer who was in a position to influence the conduct of the body corporate in relation to the contravention is subject to a civil penalty, unless the officer proves that the officer took reasonable measures to prevent the contravention.

216 ASIC supports strengthening liability for corporate misconduct for those individuals who have the capacity to influence the conduct of a corporation and who direct and control aspects of a corporation's business on a daily basis; however, it does not support the mechanisms to achieve this goal as set out in Proposals 9 and 10.

217 ASIC considers the crossover of criminal and civil liability in Proposal 9- individual civil liability resulting from the criminal liability of a corporation, will create difficulties in practice and is also contrary to the 'expressive consistency' principle referred to by the ALRC in the Discussion Paper.[181]

218 Proposal 9 will result in the same underlying conduct, the subject of the contravention, being dealt with differently in relation to the individual and the corporation, with different: standards of proof, admissibility of evidence,

[181] *Corporate Criminal Responsibility* p. 52, paragraphs 2.41- 2.43: See footnote 1.

penalties and time limits for the commencement of proceedings. This has the potential to result in perverse outcomes.

219 As stated by the ALRC, in some cases there may be practical reasons a regulator does not take action against a corporation for a contravention of the law and only takes action against individuals; however, in other circumstances that will not be the case. Under Proposal 9, while it will not be necessary to secure a conviction of a corporation before taking civil action against the individual,[182] the elements of the criminal offence (including its fault elements) will need to be proven against the corporation in any civil action taken against the individual. This could create significant difficulties during an investigation in relation to evidence gathering and in the prosecution in relation to admissibility.

220 For example, evidence that would be admissible in criminal proceedings to prove the corporation committed the offence, such as search warrant material obtained under s3E of the *Crimes Act 1914*, would not be admissible in civil proceedings against an individual to prove the corporation committed the relevant offence or that the relevant individual failed to take reasonable measures to prevent the offence being committed. This difficulty does not currently arise in circumstances when the individual is being charged under the complicity and common purpose provisions in s11.2 of the Criminal Code or as being knowingly concerned under s79 of the Corporations Act.

221 Proposal 9 could also lead to perverse results if proceedings were pursued against both an individual and a corporation for the same conduct – for example, if in the civil proceedings against an individual, a court found the underlying offence had been proven against the corporation to a civil standard for which the individual was liable, but in separate criminal proceedings, the offence was not proven to the criminal standard against the corporation. This could result in an individual being held accountable but the corporation not, which would be contrary to the principle of expressive consistency.

222 Other perverse outcomes could result from Proposal 9 if, in civil proceedings against an individual, proof of the fault element of an offence by the corporation depended on attribution of the state of mind of an individual[183] other than the individual who was the subject of the civil proceedings. For example, where proof of the commission of the offence by the corporation was established by proving a different director, employee, agent[184] (or associate[185]) of the corporation had the state of mind necessary to attribute the commission of the offence to the body corporate; however, it was not

[182] *Corporate Criminal Responsibility* paragraph 7.73: See footnote 1.
[183] As opposed to proving fault using the current or amened Part 2.5 of the Criminal Code, of proof that a body corporate authorised or permitted the conduct.
[184] Using the (existing) attribution method in *Corporations Act 2001*, s769B.
[185] *Criminal Code Act 1995* (Cth) sch 1 s 12.3(1)(a) (as amended).

required to be proven that the individual who is the subject of the civil proceedings possessed any particular state of mind, just that they failed to prevent the contravention.

223 Further, regulators would encounter significant difficulties in relation to selecting the appropriate enforcement action to take, given the prospect of a potential stay of civil proceedings where there are concurrent or proposed criminal proceedings[186] and the applicable time limits[187] for commencing civil or criminal proceedings in relation to particular contraventions.

224 Sections 494 and 495 of the EPBC Act referred to by the ALRC appear to be those closest to what is envisaged by Proposals 9 and 10. Section 494 creates a civil penalty for an individual for breach of a civil penalty provision by a corporation and s495 creates a criminal penalty for an individual for breach of a criminal provision by a corporation. Therefore, in the EPBC Act there is no crossover of civil and criminal liability, unlike in Proposal 9.

Proposal 10: Individual criminal liability for corporate offence

ALRC Proposal 10

The *Corporations Act 2001* (Cth) should be amended to include an offence of engaging intentionally, knowingly, or recklessly in conduct the subject of a civil penalty provision as set out in Proposal 9.

225 As stated above, while ASIC supports the principle of strengthening individual liability for corporate misconduct, ASIC does not consider the mechanism in Proposal 10 would achieve that goal.

226 Currently, s11.2 of the Criminal Code extends criminal responsibility for an offence to a person who aids, abets, counsels or procures another person (the principal offender) to commit the offence.[188] This is commonly referred to as accessorial liability. In order to establish liability for an offence through s11.2 of the Criminal Code, the prosecution must prove that:

(a) the principal offender committed the offence (s11.2(2)(b)), although it is not required that the principal offender was prosecuted or found guilty of the offence before an accused may be found guilty of aiding, abetting, counselling or procuring the commission of the offence;

(b) the conduct of the accused in fact aided, abetted, counselled or procured the commission of the offence by the principal offender (s11.2(2)(a));

(c) the accused intended that his or her conduct would aid, abet, counsel or procure the commission:

[186] *Corporations Act 2001*, s1317N.
[187] Contrast *Corporations Act 2001*, s1317K and *Crimes Act 1914*, s15B.
[188] *Australian Competition and Consumer Commission v Davies* [2015] FCA 1017 at paragraph 28.

(i) of any offence (including its fault elements) of the type committed by the principal offender (s11.2(3)(a)); or

(ii) of an offence, while being reckless about the principal offender committing the offence charged (including its fault elements) (s11.2(3)(b))

227 Under Proposal 10, in order to secure a conviction of an individual, the prosecution would need to prove that:

(a) the principal offender, being the corporation, committed the offence[189] by proving in relation to each physical and fault element of the offence (using the physical element of 'conduct' as an example):

(i) an associate of the corporation engaged in conduct, being the physical element(s) of the offence; and

(ii) an associate of the corporation possessed the relevant state of mind while engaging in the above conduct, being the fault element of the offence;

OR

(iii) that the corporation authorised or permitted the conduct to occur;

(b) the accused (who may or may not be the same 'associate' in above paragraphs 227(a)(i) and (ii)[190]) was in a position to influence the conduct;

(c) the accused failed to take reasonable measures to prevent the conduct; and

(d) the accused did so either recklessly, knowingly or intentionally.

228 Therefore, the evidential burden for proof of an offence under Proposal 10 in some circumstances would be similar to, or even higher than, proof of an offence using the accessorial liability provisions as it requires proof of the additional matters in paragraphs 227(b), (c) and (d).

229 Further, in circumstances where the fault element for the principal offence by the corporation is proven by establishing an associate within the company possessed the relevant state of mind but a different associate (the 'influencer') failed to take reasonable measures to prevent the offence, this is closer to 'stepping stone' liability[191] than 'deemed' liability.

230 Given the high evidentiary burden on a prosecution in proving an offence under Proposal 10, it is likely to have only limited utility in strengthening individual accountability for corporate misconduct.

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[189] See *Corporate Criminal Responsibility* paragraph 7.73: See footnote 1.
[190] While it appears that the intention is for the accused to be a different person to the associate, the provision could also be enlivened by the same person, see: Australian Law Reform Commission, *When Should Officers be Liable for Corporate Crime?* 19 November 2019, Case Study: Freedom Insurance.
[191] As referred to in *Corporate Criminal Responsibility* p. 151, paragraph 7.25: See footnote 1.

231 ASIC welcomes further consideration of mechanisms that could result in strengthened individual accountability.

Interaction of Proposals 9 and 10 with BEAR

232 In a supplementary paper to the Discussion Paper, the ALRC has referred to the interaction of Proposals 9 and 10 with BEAR.[192]

233 The BEAR regime was introduced by the *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Act 2018*, which amended the *Banking Act 1959* and came into force on 20 February 2018.

234 The BEAR regime places obligations on accountable persons[193] who are required to be registered by the relevant ADI with APRA. Those obligations include taking reasonable steps in conducting the responsibilities of their position to prevent matters arising that 'would adversely affect the prudential standing or prudential reputation of the ADI'.[194] The provisions enable APRA to disqualify a person from holding a position as an accountable person for failing to comply with their obligations and imposes civil liability on an ADI for failing to comply with its obligations under the regime. Given the regime has only been in effect for a short period, it is too early to assess its effectiveness.

235 The Royal Commission considered in detail issues of governance and accountability in recommending that the BEAR regime be extended. ASIC notes that in response to the Royal Commission the Government has announced[195] it intends to introduce a similar regime to the BEAR, the Financial Accountability Regime. This will include an accountability regime jointly administered by ASIC and APRA, under which the focus will be on conduct, for which ASIC will be responsible. It has announced that legislation will be consulted on and introduced by the end of 2020. The Government has also announced that it intends to establish an independent review of the implementation of reforms made in response to the Royal Commission to assess the extent to which changes in industry practices have led to improved consumer outcomes and the need for further reform.[196]

236 ASIC supports the Government's proposal for an ASIC-administered accountability regime focused on conduct. ASIC notes that licensees have an existing obligation to address conduct risk as required by their licensing obligations and that detriment can result from a failure to monitor and address conduct as well as prudential risk.

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[192] Australian Law Reform Commission, *The Banking Executive Accountability Regime: an alternative model of individual liability for corporate fault*, 19 November 2019.
[193] *Banking Act 1959* (Cth) ss 37B, 37BA.
[194] *Banking Act 1959* (Cth) s 37CA.
[195] Australian Government, *Restoring Trust in Australia's Financial System: Financial Services Royal Commission Implementation Roadmap*, August 2019, p. 6.
[196] Royal Commission Implementation Roadmap p.7: see footnote 195.

237 There are significant overlapping considerations between Proposals 9 and 10, which are aimed at strengthening individual liability for corporate misconduct, and the accountability regime in BEAR and its proposed extension. These include issues such as: who within a corporation should be held accountable or liable for the corporation's compliance with its obligations, including the obligation not to commit offences; and what steps or measures are reasonable or adequate when imposing that liability or accountability.

238 Under the extended BEAR regime, an "accountable person" nominated by an entity captured by the reforms will be responsible, inter alia, for taking reasonable steps to ensure that the entity complies with its licensing obligations and to prevent matters from arising that would affect the prudential standing or prudential reputation of the entity. Penalties for an individual to fail to meet their obligations as an accountable person under these reforms would be disqualification or a civil penalty of up to 5000 penalty units.

239 Proposals 9 and 10 if implemented would impose liability on an individual within a corporation for failing to take adequate measures to prevent the commission of a criminal offence by the corporation. The class of individuals captured by Proposals 9 and 10 would be broader than under the extended BEAR regime, as they would apply to individuals within corporations that are not captured by BEAR.

240 ASIC welcomes further consideration of these issues, both in the context of the Government's proposal for an APRA and ASIC-administered accountability regime and in considering options for strengthening individual liability for corporate misconduct.

Question A: Category of individuals for deemed liability

ALRC Question A

Should Proposals 9 and 10 apply to 'officers', 'executive officers', or some other category of persons?

241 As stated above, ASIC does not support Proposals 9 and 10 but welcomes further consideration of the issues sought to be addressed by those proposals.

242 ASIC notes the ALRC is seeking to target 'executives in charge of business units who have responsibilities for delivering particular business outcomes, and the capacity to direct and control aspects of a corporation's business on a day-to-day basis'. The terms 'officer' and 'executive officer' may not capture such executives. For example, the definition of officer is cast in

terms of making or participating in the making of decisions that affect the whole, or a substantial part, of the business or corporation.

243 ASIC considers if Proposals 9 and 10 were implemented that any category of persons captured should not exclude directors, even though the proposals are targeted at senior officers. This is consistent with ensuring those with functional authority are captured[197], but also ensuring that it is capable of being adapted to suit corporations of different characters and sizes[198].

Question B: Repeal of Appendix I provisions

ALRC Question B

Are there any provisions, either in Appendix I or any relevant others, that should not be replaced by the provisions set out in Proposals 9 and 10?

244 Appendix I to the Discussion Paper includes s12GH (3) of the ASIC Act, s769B (5) of the Corporations Act and s325 of the *National Consumer Credit Protection Act 2009* (**National Credit Act**), which are described as 'deemed liability' provisions. ASIC does not consider it is appropriate to repeal those provisions if Proposals 9 and 10 were implemented.

245 The ALRC refers to those provisions as 'deemed liability' provisions under which an individual is deemed to have committed the same offence as the corporation by virtue of their position, without necessarily having been involved in the underlying conduct. However, those provisions are more appropriately described as 'attribution' provisions rather than 'deemed liability' provisions.

246 Those provisions provide a method by which the conduct of a person is attributed to another person. While in some circumstances the attribution of that conduct may also be enough to attribute the liability of one person to another, that will not always be the case, as it may be necessary to prove other elements of an offence or a contravention, such as fault elements or other physical elements. Therefore, their substitution with the 'deemed liability' provisions in Proposals 9 and 10 would not be appropriate.

247 ASIC also does not support the repeal of s588G (2) or (3) of the Corporations Act. These are direct liability provision rather than deemed liability provisions, as demonstrated in the recent conviction of Andrew Eric Young.[199]

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[197] *Corporate Criminal Responsibility* paragraph 7.98: See footnote 1.
[198] *Corporate Criminal Responsibility* paragraph 7.87: See footnote 1.
[199] ASIC, *Former Kleenmaid director found guilty of fraud and insolvent trading after a 59-day trial*, Media Release (20-007MR) 10 January 2020; ASIC, *Former Kleenmaid directors ordered to stand trial*, Media Release (14-064MR), 1 April 2014.

248 Contravention of these provisions would not be captured by Proposals 9 or 10. There is no civil penalty provision or criminal offence that can be committed by a corporation of insolvent trading. The obligations in s588G (2) and (3) of the Corporations Act are placed on a director, rather than on the corporation itself. Therefore, it would never be possible to prove the commission of the underlying offence or a contravention upon which to base individual civil liability. Creating an offence or a contravention of insolvent trading by a corporation itself would be futile as the corporation will in all likelihood have entered administration or liquidation or no longer exist by the time a proceeding for a contravention or an offence could be commenced.

F Whistleblower protections

Key points

ASIC does not support Proposal 11.

ASIC does not consider a whistleblower policy to be as relevant as other corporate governance systems and practices in preventing the commission of an offence.

The Whistleblower Amendment Act that recently came into effect significantly amended the compensation scheme for whistleblowers and will be assessed after a period of operation.

A number of people associated with an Australian company or a foreign company registered with ASIC will likely be able to access the existing whistleblower protections in certain circumstances.

Proposal 11: Whistleblower policy and the due diligence defence

ALRC Proposal 11

Guidance should be developed to explain that an effective corporate whistleblower protection policy is a relevant consideration in determining whether a corporation has exercised due diligence to prevent the commission of a relevant offence.

249 ASIC does not support Proposal 11.

250 As stated above in relation to Proposal 8, ASIC does not support the extension of the due diligence defence within an amended corporate criminal attribution provision in Part 2.5 of the Criminal Code.

251 In relation to the existing due diligence defence in Part 2.5 of the Criminal Code, in ASIC's view a whistleblower policy should form part of a broader governance framework within a company. However, such a policy will have less utility in ensuring compliance with legislative obligations, including the prevention of the commission of criminal offences, than other systems and practices targeted to the specific risks of a company's operations. Therefore, a whistleblower policy should not be a prevailing factor relevant to the assessment of a corporation's due diligence. If guidance was developed as proposed in Proposal 11, it could elevate that factor beyond other more relevant factors.

252 ASIC considers that transparent whistleblower policies are essential to good risk management and corporate governance. They help uncover misconduct that may not otherwise be detected. Often, such wrongdoing only comes to

light because of individuals (acting alone or together) who are prepared to disclose it, sometimes at great personal and financial risk.

253 In addition, whistleblower policies help:

(a) provide better protections for individuals who disclose wrongdoing;

(b) improve the whistleblowing culture of entities and increase transparency in how entities handle disclosures of wrongdoing;

(c) encourage more disclosures of wrongdoing; and

(d) deter wrongdoing, promote better compliance with the law and promote a more ethical culture, by increasing awareness that there is a higher likelihood that wrongdoing will be reported.

254 Under s1317AI of the Corporations Act, from 1 January 2020 the following corporate structures must have a whistleblower policy, and make the policy available to their employees and officers:

(a) public companies;[200]

(b) large proprietary companies;[201] and

(c) proprietary companies that are trustees of registrable superannuation entities (within the meaning of the *Superannuation Industry (Supervision) Act 1993*).

255 Section 1317AI (5) sets out at a high level the information that these types of companies must have in their whistleblower policies. This includes information about the protections available to whistleblowers and the actions a company will take after a disclosure.

256 Despite only public and large companies being required to have a whistleblower policy, the whistleblower protection regime in Part 9.4AAA of the Corporations Act applies to *regulated entities*, defined in s1317AAB. Broadly, this definition includes all companies incorporated under the Corporations Act and registered with ASIC, as well as foreign corporations carrying on business in Australia and bodies corporate incorporated under state and territory law that are trading or financial corporations.

257 As such, ASIC considers all regulated entities may benefit from documenting and implementing a strategy for handling any whistleblower disclosures they may receive in line with the legislative requirements. This may form part of the broader governance or compliance measures within the company.

[200] ASIC has provided relief to public companies that are not-for-profit companies limited by guarantee with annual (consolidated) revenue of less than $1 million from the requirement to have a whistleblower policy (unless they are also a trustee of a registrable superannuation entity): See *ASIC Corporations (Whistleblower Policies) Instrument* (2019/1146, 13 November 2019).
[201] See *Corporations Act 2001* s 45A(3); *Corporations Amendment (Proprietary Company Thresholds) Regulations 2019*.

258 ASIC has released Regulatory Guide 270 *Whistleblower policies* (RG 270) to help those companies obliged to have a whistleblower policy to establish a policy that complies with the legal requirements. It also contains our good practice guidance on implementing and maintaining a whistleblower policy. RG 270 may also assist other regulated entities that are not required to have a whistleblower policy but are required to manage whistleblowing in accordance with the Corporations Act.

259 For those companies obliged to have a whistleblower policy, failure to have a policy is a strict liability offence punishable by a fine of $12,600.

260 Currently, Part 9.4AAA of the Corporations Act only proposes the use of a whistleblower policy in defending compensation claims from persons who may have suffered loss, injury or damage from detrimental conduct by a company's employee. Section 1317AE (3) provides that a court, in deciding whether to order a company to pay compensation to a whistleblower (or other person) who has suffered detriment, because an employee of the company caused the detriment to the person, may have regard to

(a) whether the company took reasonable precautions, and exercised due diligence, to avoid the detrimental conduct;

(b) the extent to which the company gave effect to its whistleblower policy (whether or not the company must have a policy under s1317AI); and

(c) any duty that the employer was under to prevent the detrimental conduct, or to take reasonable steps to ensure that the detrimental conduct was not engaged in.

261 As such, the whistleblower policy must be effective if the company seeks to avoid or reduce its liability for compensation to a whistleblower (or other person) who has suffered detriment because of the actions of the company's employee. Broadly, this acts as an incentive for companies to develop systems and processes to support and protect whistleblowers and investigate and address their concerns. We note that, otherwise, Part 9.4AAA does not oblige a company to act on a whistleblower's disclosure, apart from to ensure against breaches of the whistleblower's confidentiality or not to cause detriment to a whistleblower.

262 Nor does Part 9.4AAA of the Corporations Act expressly elevate a whistleblower policy to demonstrate a company's compliance with other Part 9.4AAA obligations (beyond the obligation to have a policy). In this regard, the policy is most directly relevant to the company and its potential whistleblowers, rather than to regulators seeking to demonstrate breaches of criminal laws.

263 Section 12.5(2)[202] of Part 2.5 of the Criminal Code, which is applicable to the mistake of fact defence, sets out the types of evidence which may be used to prove a failure to exercise due diligence in relation to prohibited conduct. It includes evidence of inadequate corporate management, control or supervision of its employees (or the like) or a failure to provide adequate systems for conveying relevant information to relevant persons within the corporation.

264 Having a whistleblower policy in place may not have the same preventative purpose as the compliance and control systems referred in s12.5(2) of the Criminal Code, as in order to have a preventative effect an actual disclosure needs to occur. Similarly, there are issues with equating compliance with a mandatory legal requirement to be due diligence, as this may not, in effect, demonstrate positive acts suggesting due diligence.

265 Further, as the ALRC proposes that consideration of a whistleblower policy as part of a due diligence defence would only apply to those entities that will be required to have a policy in place under s1317AI of the Corporations Act, it is unclear why compliance with that legal obligation should be an additional consideration in a general defence.

266 A better approach may be that companies respond to the risk of potential breaches of criminal law relating to their operations with more targeted compliance systems and processes, and it be those systems and processes (and their implementation) that better demonstrate due diligence.

267 As mentioned above, s1317AE of the Corporations Act, a provision dealing with compensation in Part 9.4AAA for loss, damage or injury suffered as a result of detriment related to a whistleblower disclosure, separates out whether a company has taken reasonable precautions, and exercised due diligence, to avoid detrimental conduct, with the effectiveness and implementation of its whistleblower policy, for a court to determine whether a company should be ordered to pay compensation due to the detrimental acts of its employee.

Question C: Compensation scheme for whistleblowers

ALRC Question C

Should the whistleblower protections contained in the *Corporations Act 2001* (Cth), *Taxation Administration Act 1953* (Cth), *Banking Act 1959* (Cth), and *Insurance Act 1973* (Cth) be amended to provide a compensation scheme for whistleblowers?

[202] While this provision specifically relates to proof of a failure to exercise due diligence in relation to strict liability offences in s 12.5(2) of the Criminal Code Act 1995, Stephen Odgers states it would be reasonable to conclude these circumstances provide some assistance in delineating the scope of due diligence in s 12.3, see *Principles of Federal Criminal Law* paragraph 12.3.310: footnote 163

268 The *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (**Whistleblower Amendment Act**) repeals the whistleblower protection regimes in the *Banking Act 1959* and the *Insurance Act 1973* from 1 July 2019. This is generally apart from the transitional effect for disclosures of information made before 1 July 2019.

269 ASIC notes that the Whistleblower Amendment Act significantly amended the compensation provisions in Part 9.4AAA of the Corporations Act to provide people with easier access to compensation if they suffer loss, injury or harm from detrimental conduct related to whistleblowing. Relevantly:

(a) s1317AD sets out the circumstances when a court can make an order, including a compensation order, to address detrimental conduct;

(b) s1317ADA provides a wide, inclusive definition of detriment; and

(c) s1317AE proposes a list of compensatory and other orders available as a result of detrimental conduct, including compensation, injunction, apology, exemplary damages, reinstatement, or any other order the court thinks appropriate.

270 Section 1317AD(2B) provides that the person bringing the compensation claim has the onus to prove that the other person engaged in (or threatened) detrimental conduct, but once that onus is discharged, the other person bears the onus of proving that the claim is not made out, in effect, that no detriment occurred or that the detriment was not because of a qualifying disclosure.

271 Further, s1317AH protects whistleblowers from costs orders if they are unsuccessful in bringing a claim for compensation, unless the court is satisfied that the proceeding is vexatious, or costs caused by the whistleblower's unreasonable act or omission.

272 Here, Part 9.4AAA creates legal rights for compensation for whistleblowers to pursue through court processes, and to use in potential negotiations with companies. This aligns with the Corporations Act treatment of pursuing other legal rights.

273 It is a policy question for the Government whether other compensation funds or methods should be available for whistleblowers, either provided by the public sector or funded by private companies.

274 ASIC has nothing additional to add to its submission[203] made previously to the 2017 review of tax and corporate whistleblower protections in Australia concerning compensation schemes.

[203] ASIC, *Submission to Australian Government: Treasury Review of Tax and Corporate Whistleblower Protections in Australia*, February 2017.

Review of whistleblower protection regime

275 We note that s1317AK of the Corporations Act requires the relevant Minister to cause a review to be undertaken of the operation of the whistleblower protection regime in Part 9.4AAA of the Corporations Act and in Part IVD of the *Taxation Administration Act 1953*, which contains protections for whistleblowers in relation to tax. The review must be conducted as soon as practicable after the end of five years after 1 July 2019.

276 The Minister must cause a written report about the review to be prepared, and for a copy of the report to be laid before each House of the Parliament within 15 sitting days of that House after the Minister receives the report.

277 The review may be a means to consider the effectiveness of the compensation provisions.

Question D: Whistleblower protections and extraterritoriality

ALRC Question D

Should the whistleblower protections contained in the *Corporations Act 2001* (Cth), *Taxation Administration Act 1953* (Cth), *Banking Act 1959* (Cth), and *Insurance Act 1973* (Cth) be amended to apply extraterritorially?

278 At the outset, we note that the Corporations Act provisions can apply extraterritorially where the necessary jurisdictional nexus to Australia is met, based on the territorial application provisions in s5 of the Corporations Act.

279 With regard to the whistleblower protection regime in Part 9.4AAA of the Corporations Act, ASIC expects that the regime will apply extraterritorially provided the threshold legal tests can be satisfied. Broadly, these legal tests are set out in the following provisions:

(a) Section 1317AA requires an *eligible whistleblower* to report a *disclosable matter* (on reasonable grounds) about a *regulated entity* or a *related body corporate of a regulated entity* to an *eligible recipient* of the regulated entity (or ASIC or APRA).

  (i) Sections 1317AA (4) and (5) provide a broad definition of disclosable matter to mean misconduct or an improper state of affairs or circumstances, or conduct constituting a breach of the law (with certain laws specifically listed), a danger to the public or financial system or a prescribed matter (no regulations have been made to date). Apart from the references to specific Australian laws, the matters do not appear to be confined to conduct occurring within Australia.

  (ii) Misconduct is defined in s9 of the Corporations Act to include fraud, negligence, default, breach of trust and breach of duty.

Improper state of affairs or circumstances is not defined, and we expect it will be interpreted broadly.

(b) Section 1317AAA defines an *eligible whistleblower* as an individual who is or was an employee or officer of, or service or goods provider to, a regulated entity, among others.

(c) Section 1317AAB defines a *regulated entity* as a company or a corporation to which s51(xx) of the Constitution applies, and other named types of financial institutions in Australia. In this context:

(i) a company means an Australian company incorporated under the Corporations Act and registered with ASIC; and

(ii) a constitutional corporation means a foreign corporation – that is, a corporation incorporated outside of Australia under foreign law and operating in Australia, and it must register with ASIC to do so, or a corporation incorporated under state or territory law that is a trading or financial corporation.

(d) Section 1317AAC defines an *eligible recipient* as an officer or senior manager of the regulated entity or a related body corporate to the regulated entity.

280 In effect, we expect that this means that a current or former employee or officer, or service or goods provider to an Australian company or a foreign company registered with ASIC, will likely be able to access the whistleblower protections for a report they may make about the operations of the Australian company or foreign company, including its overseas operations, to the extent that they have reasonable grounds to suspect misconduct, an improper state of affairs or circumstances, or breach of the law.

281 These individuals are also able to make their report to an officer or senior manager of a foreign company if the foreign company is a related body corporate to a regulated entity (i.e. either an Australian company or foreign company registered with ASIC), even where the foreign company is not itself a regulated entity. That is because these people would fall within the definition of an eligible recipient.

282 Further, it is possible that employees or officers of, or service or goods providers to, a foreign body corporate that is related to a regulated entity (but not itself a regulated entity), may also be eligible whistleblowers of a regulated entity to the extent that the foreign body corporate is a service or goods provider to a regulated entity. This would depend on the arrangements within the corporate group.

283 The eligible whistleblower would need to pursue any legal rights or protections through Australian courts, as would ASIC in enforcing the provisions. ASIC's ability to exercise its investigative powers in relation to

extraterritorial contraventions would still be limited. We expect that potential conflicts between Part 9.4AAA and other jurisdictions' whistleblower protection regimes will likely need to be settled with regard to private international law principles.

284 It is a policy question for the Government whether Part 9.4AAA should expressly describe the extraterritorial effect of the regime.

G Deferred prosecution agreements

Key points

A deferred prosecution agreement scheme should be introduced in Australia in the form proposed in the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019.

There has been significant public consultation on whether a scheme should be introduced and on the proposed model.

The effectiveness of the proposed scheme is better assessed after it is implemented and has been in operation for an adequate period.

Question E: The proposed DPA scheme

ALRC Question E

Should a deferred prosecution agreement scheme for corporations be introduced in Australia, as proposed by the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017, or with modifications?

285 A bill for the introduction of a deferred prosecution agreement scheme (**DPA scheme**) in Australia, the Combatting Corporate Crime Bill,[204] referred to above in relation to Proposal 8, is currently before the Senate.[205]

286 Significant consultation on whether a DPA scheme should be introduced into Australia[206] and on the proposed model,[207] which is now contained in the Combatting Corporate Crime Bill, has occurred.

287 ASIC notes that after the close of consultations on the proposed model in March 2018, the Senate Economics References Committee recommended the government introduce a DPA scheme for corporations.[208]

288 ASIC has worked closely with the Attorney-General's Department (**AGD**) and the CDPP since that time in the development of the proposed scheme. The scheme reflects features ASIC considers would be beneficial in any scheme, including those that maximise the potential for self-reporting within prudent boundaries.

[204] Proposed amendments to the *Director of Public Prosecutions Act 1983* (Cth)
[205] Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019
[206] The Senate Legal and Constitutional Affairs Legislation Committee, *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 Report*, April 2018, paragraph 1.11.
[207] Attorney-General's Department, *Improving Enforcement Options for Serious Corporate Crime: A Proposed Model for a Deferred Prosecution Agreement Scheme in Australia, Public Consultation Paper*, March 2017.
[208] Senate Standing Committee on Economics, *Foreign Bribery Report*, March 2018, p. 111, paragraph 5.72, recommendation 11.

289 The AGD proposes reviewing the scheme after two years of operation[209] to assess its effectiveness and, in particular, whether the category of offences to which the DPA scheme applies should be broadened.

290 In ASIC's view, there has been adequate public consultation on whether a DPA scheme should be introduced in Australia and on the proposed model. The effectiveness of the scheme proposed to be introduced by the Combatting Corporate Crime Bill is best assessed after it has been introduced and in operation for a period of time, as foreshadowed by the AGD.

[209] *A Proposed Model for a Deferred Prosecution Agreement Scheme in Australia* p.16: see footnote 207

H Sentencing corporations

Key points

ASIC supports, in principle, the inclusion of a non-exhaustive list of factors for a court to consider when:

- sentencing a corporation (to be included in the Crimes Act 1914); or
- imposing a civil penalty on a corporation (to be included in the Corporations Act).

In ASIC's view, some of the proposed factors should not be included.

ASIC supports increasing the non-monetary penalties available to a court when sentencing a corporation or imposing a civil penalty.

ASIC supports the development of a unified debarment regime.

ASIC supports the ability of a court to consider a victim impact statement made by a representative on behalf of a group of victims.

ASIC does not support the preparation of pre-sentence reports for corporations.

Proposal 12: Same Crime Same Time Report

ALRC Proposal 12

Part IB of the *Crimes Act 1914* (Cth) should be amended to implement the substance of Recommendations 4–1, 5–1, 6–1, and 6–8 of *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC Report 103, April 2006).

291 Proposal 12 recommends implementing Recommendation 4-1 and 5-1 of the ALRC's *Same Crime, Same Time: Sentencing of Federal Offenders*[210] (**Same Crime Same Time Report**), which would include within the Crimes Act 1914 the purposes (4-1) and principles (5-1) of sentencing.

292 ASIC considers the CDPP is best placed to comment on those aspects of Proposal 12.

293 The ALRC also proposes recommendation 6-1 of the Same Crime Same Time Report be implemented. Recommendation 6-1 provides that the *Crimes Act 1914* (**Crimes Act**) should require a court to consider any factor relevant to a purpose or principle of sentencing when known to the court and groups those relevant factors into categories. ASIC notes that the proposed list of categories in Recommendation 6-1 are predominantly those factors

[210] Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders Report*, ALRC Report 103, April 2006.

already listed in s16A (2) of the Crimes Act. ASIC comments on the factors proposed to be included under Proposal 13, some of which are captured by Proposal 13 and others that are captured by this aspect of Proposal 12.

294 The ALRC also proposes Recommendation 6-8 of the Same Crime Same Time Report be implemented, which provides that a court in sentencing should give specific consideration to the fact of and the circumstance of an offender pleading guilty and the degree to which the offender has cooperated or promised to cooperate with authorities regarding the prevention, detection, investigation or proceedings relating to the offence or any other offence.

295 ASIC notes that Recommendation 6-8 as it relates to a plea of guilty, an investigation or proceedings for the offence or any other offence and future cooperation are already considerations listed in s16A(2)(g) and (h) and 16AC of the Crimes Act. ASIC also notes that some state and territory laws require a court to specify any sentence reduction for a guilty plea, even when sentencing Commonwealth offenders.[211]

Proposal 13: Sentencing factors

ALRC Proposal 13

The *Crimes Act 1914* (Cth) should be amended to require the court to consider the following factors when sentencing a corporation, to the extent they are relevant and known to the court:

(a) the type, size, internal culture, and financial circumstances of the corporation;

(b) the existence at the time of the offence of a compliance program within the corporation designed to prevent and detect criminal conduct;

(c) the extent to which the offence or its consequences ought to have been foreseen by the corporation;

(d) the involvement in, or tolerance of, the criminal activity by management;

(e) whether the corporation ceased the unlawful conduct voluntarily and promptly upon its discovery of the offence;

(f) whether the corporation self-reported the unlawful conduct;

(g) any advantage realised by the corporation as a result of the offence;

(h) the extent of any efforts by the corporation to compensate victims and repair harm;

[211] *Sentencing Act 1991* (Vic) s 6AAA; *Sentencing Act 1995* (WA) s 9AA; *Crimes (Sentencing) Act 2005* (ACT), ss 35, 37. See also Commonwealth Director of Public Prosecutions, *Sentencing of Federal Offenders in Australia: A Guide for Practitioners* (2018) p. 20-21, paragraphs 95-101.

(i) any measures that the corporation has taken to reduce the likelihood of its committing a subsequent offence, including:

(i) internal investigations into the causes of the offence;

(ii) internal disciplinary actions; and

(iii) measures to implement or improve a compliance program; and

(iv) the effect of the sentence on third parties.

(j) This list should be non-exhaustive and should supplement rather than replace the general sentencing factors, principles, and purposes as amended in accordance with Proposal 12.

296 In principle, ASIC supports the incorporation of a non-exhaustive list of sentencing factors in Proposal 13 into the Crimes Act to be considered by a court when sentencing a corporation.

297 As stated by the ALRC in the Discussion Paper,[212] currently s16A of the Crimes Act lists a number of factors a court is required to consider if they are relevant and known to the court when sentencing an offender for a Commonwealth offence. A number of those factors are not relevant to a court in sentencing a corporation for an offence, such as the probable effect of any sentence on the person's family or dependants[213] or the physical or mental health of an offender.[214] However, a number of those factors remain relevant to a corporate offender.

298 In particular, ASIC supports:

(a) Proposal 13(a) that courts should take into account the type, size and financial circumstances of a corporation when sentencing;

(b) Proposal 13(g) that courts should consider any advantage realised by the corporation as a result of the offence; and

(c) Proposal 13(j) that courts should consider the effect of a sentence on third parties.

299 In ASIC's view, these considerations intersect with considerations that already exist in s16A(2)(j) to (k) in the Crimes Act when sentencing a corporation.

300 In ASIC-administered legislation, the advantage realised by the corporation, being the benefit gained or the loss avoided in relation to the commission of some offences is a method by which a maximum pecuniary penalty for a contravention can be calculated.[215] Further, the factors outlined in paragraph

[212] *Corporate Criminal Responsibility* p. 207 paragraph 10.28: See footnote 1.
[213] *Crimes Act 1914* (Cth) s 16A(2)(p).
[214] *Crimes Act 1914* (Cth) s 16A(2)(m).
[215] *Corporations Act 2001* s 1311C.

298 have been recognised at common law as matters appropriate to be taken into account in sentencing a corporate offender.[216]

301 In sentencing a corporation for Commonwealth offences, it is particularly important that the effect on third parties be considered to avoid a sentence having unintended consequences to third parties who were not implicated in the offence, such as creditors by reducing company capital and increasing credit risk, or consumers through increased prices.[217]

302 In ASIC's view, many of the factors in Proposal 13 are already captured in s16A (2) of the Crimes Act – in particular:

(a) Proposals 13 (b), (c), (d) and (g) are already captured within s16A(2)(a) – the nature and circumstances of the offence; and

(b) Proposals 13 (h) and (i) are currently captured by s16A(2)(f), being the degree to which the offender has shown contrition for the offence; and

(c) Proposal 13(a) as far as it relates to the internal culture of the corporation is already captured by reference to the character and antecedents of the offender in s16A(2)(m) and the nature and circumstances of the offence as captured by s16A(2)(a).

Cessation of unlawful conduct and self-reporting

303 ASIC does not agree that specific reference should be made in a non-exhaustive list of sentencing factors to:

(a) whether a corporation ceased the unlawful conduct voluntarily and promptly upon discovery of the offence (Proposal 13(e)); and

(b) whether a corporation self-reported the conduct (Proposal 13(f)).

304 If these are relevant considerations for a sentencing court to consider, they will be captured by the existing s16A(2)(a)[218] and 16A(2)(h)[219] of the Crimes Act. However, specific reference to those factors among others risks disproportionately elevating them within the sentencing exercise.

305 In relation to Proposal 13(e) and similarly to comments in paragraphs 321–336 concerning Proposal 14, in ASIC's view, the immediate and voluntary cessation of unlawful conduct upon its discovery is a minimum standard of conduct expected from corporations and individuals alike and is no more than compliance with the law. ASIC does not consider that the conduct of a corporation in merely ceasing to break the law merits significant weight in

[216] *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Limited* (*ACCC v ANZ*) [2016] FCA 1516 at paragraphs 86–89 as applied in *Director Of Public Prosecutions (Cth) v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876 at paragraphs 219-220
[217] Jonathan Clough '*Sentencing the Corporate Offender: The Neglected Dimension of Corporate Criminal Liability',* 2003, *Corporate Misconduct eZine.*
[218] The nature and circumstances of the offending.
[219] The degree to which the corporation has cooperated with law enforcement agencies.

determining an appropriate sentence for a corporation and therefore ought not be included as a specific sentencing factor.

306 As to Proposal 13(f) and whether the corporation self-reported the conduct, while ASIC agrees that it is appropriate for a sentencing court to recognise cooperation with authorities, any act of voluntary self-reporting will be captured by s16A(2)(h) of the Crimes Act.

307 ASIC considers self-reporting should not be specifically included in any list of sentencing factors due to the same concerns outlined below in paragraphs 325–338 in response to Proposal 14.

308 Self-reporting unlawful conduct is a legislative requirement in some instances, such as under s912D of the Corporations Act, which imposes a strict legal obligation on holders of AFS licences to report significant breaches or likely breaches of the financial services laws to ASIC.[220] Breaches required to be reported to ASIC under s912D are, in a literal sense, 'self-reported'; however, the reporting is compelled by law and is not voluntary in nature.[221] ASIC's view is that this type of 'self-reporting', being no more than mere compliance with a legal obligation, should not be treated as voluntary cooperation.

309 The authorities outlined in more detail below make it clear that only voluntary acts of cooperation by the corporation should be treated as a mitigatory consideration in sentencing and no regard should be given to 'cooperation' that consists of conduct required by law.[222]

Detriment sanctioned by law

310 Included in Recommendation 6-1 of the Same Time Same Crime Report as a category of factors for a court to consider in sentencing but which is not specifically included in Proposal 13, is 'factors relating to the detriment sanctioned by law to which the offender has been or will be subject to as a result of the commission of the offence'. Examples of these factors in the report include: the confiscation of property, the imposition of any civil penalty as a result of substantially the same conduct, among others. This is often referred to as extra-curial punishment.

[220] Another example of a mandatory reporting obligation within ASIC's remit is the obligation on registrable superannuation entity licensees to report significant breaches of their RSE licence conditions under the *Superannuation Industry (Supervision) Act* 1993, s29JA.
[221] The Financial Services Royal Commission in its Final Report made a similar observation stating '…although I have no doubt that a co-operative approach is to be encouraged with licensees report breaches, or suspected breaches, it will always be necessary to recognise that making a proper breach report on time is what the law requires': *Royal Commission Final Report*, vol 1, p.489: footnote 27.
[222] *Ungureanu v The Queen* [2012] WASCA 11 at paragraphs 69-72 per Murphy JA; *R v Falconer* [2018] NSWSC 1765

311 Courts have differed in approach as to the weight given to these sanctions in the sentencing exercise.[223] Clarity on this issue would be beneficial for courts, prosecutors and offenders.

312 In ASIC's view, the purpose of sanctions imposed by law that may flow from the commission of the offence are different from the purposes of sentencing and should not be given significant weight in sentencing for the commission of the offence, particularly when the sanction directly relates to the criminal conduct. See, for example, s206B of the Corporations Act, which provides for automatic disqualification from managing corporations of a person if they are convicted of certain offences. These are predominantly protective in nature and courts have previously held they should not be given significant weight in sentencing where the offending consists of an abuse of the position the person held.

313 Further, a sentencing court can and should only be able to take into consideration matters that are known to the court at the time of sentencing; therefore, a court should not be entitled to speculate about the possibility of future sanctions that have not materialised at the time of sentencing, even if they are triggered by a conviction for or finding of guilty of a specified offence.[224]

314 In ASIC's view, clarity could be provided within the legislation that creates the detriment or sanction, as to how it should be treated by a court in sentencing – for example, s320 of the *Proceeds of Crime Act 2002*, under which a sentencing court may have regard to any cooperation of the person in resolving an action under that Act, but it must not have regard to any forfeiture order made to the extent it forfeits proceeds of the offence.

Impact of the offence

315 A factor not listed in Proposal 13 that is included among the 'categories' of factors listed in Recommendation 6-1 of the Same Time Same Crime Report is the impact of the offence. In ASIC's view, there is merit in specifically including this in any list of factors when sentencing corporations.

[223] See *R v Talia* [2009] VSCA 260: the Victorian Court of Appeal distinguished between: "a disqualification resulting from criminal conduct in the course of the employment from which the person is disqualified and criminal conduct remote from that employment but having that consequence… In the latter class of case there might be a considerably stronger argument in favour of the incidental loss of employment being treated as a circumstance of mitigation." Contrast the NSW Supreme Court in *R v Rivkin* [2003] 45 ACSR 366 at paragraph 54: "Finally, there is the possibility that ASIC may take action in relation to the Security Dealer's Licence held by Mr Rivkin. Such action has the potential to result in the revocation of the offender's securities licence or the imposition of a banning order. While it is true that any action in relation to the Security Dealer's Licence might properly be regarded as protective in character, it is clear that an adverse outcome in any such proceedings would be a matter of real practical punishment so far as the offender is concerned. In my view, such matters may properly be taken into account in the sentencing process, notwithstanding that they derive from proceedings essentially protective in nature rather than penal."

[224] Contrast *R v Rivkin* at paragraph 54: see footnote 223

316 'Impact of the offence' encompasses broader considerations to those currently in s16A (2) of the Crimes Act[225] – in particular, s16A(2)(e) any injury, loss, damage caused by the offence. Listed as an example of what could be considered under this factor in Recommendation 6-1 is the impact on the offence on the financial markets.

317 As ASIC has previously stated as part of an ALRC Federal Sentencing Inquiry that led to the Same Crime Same Time Report, corporate crimes are often wrongly perceived to be victimless.[226] In fact, such crimes often have a large number of victims, some of whom may have suffered a little and others who may have suffered a substantial loss. ASIC often prosecutes matters where a vulnerable group is the specific target of offenders, such as retirees, the elderly, those who are socially disadvantaged, or a particular ethnic community.

318 Further to the mechanism proposed by the ALRC in Proposal 20 relating to representative victim impact statements, which ASIC supports, ASIC also considers specifically including among sentencing factors relevant to a corporation 'the impact of an offence' will enable a court to consider the impact of an offence more broadly on market integrity, market confidence and consumer confidence in the financial sector.

Proposal 14: Relevant factors for civil penalty orders

ALRC Proposal 14

The *Corporations Act 2001* (Cth) should be amended to require the court to consider the following factors when imposing a civil penalty on a corporation, to the extent they are relevant and known to the court, in addition to any other matters:

(a) the nature and circumstances of the contravention;

(b) any injury, loss, or damage resulting from the contravention;

(c) any advantage realised by the corporation as a result of the contravention;

(d) the personal circumstances of any victim of the offence;

(e) the type, size, internal culture, and financial circumstances of the corporation;

(f) whether the corporation has previously been found to have engaged in any related or similar conduct;

(g) the existence at the time of the contravention of a compliance program within the corporation designed to prevent and detect the unlawful conduct;

[225] Such as *Crimes Act 1914*, s16A(2)(e) such as any injury, loss or damage resulting from the offence; the personal circumstances of any victims, s16(2)(d); and other matters raised in any victim impact statement s16(2)(ea).
[226] ASIC, *Submission to Australian Law Reform Commission Sentencing of Federal Offenders Discussion Paper No 70*, 2005, p.9.

(h) whether the corporation ceased the unlawful conduct voluntarily and promptly upon its discovery of the contravention;

(i) the extent to which the contravention or its consequences ought to have been foreseen by the corporation;

(j) the involvement in, or tolerance of, the contravening conduct by management;

(k) the degree of cooperation with the authorities, including whether the contravention was self-reported;

(l) whether the corporation admitted liability for the contravention;

(m) the extent of any efforts by the corporation to compensate victims and repair harm;

(n) any measures that the corporation has taken to reduce the likelihood of its committing a subsequent contravention, including:

(i) any internal investigation into the causes of the contravention;

(ii) internal disciplinary actions; and

(iii) measures to implement or improve a compliance program;

(o) the deterrent effect that any order under consideration may have on the corporation or other corporations; and

(p) the effect of the penalty on third parties.

319 In principle, ASIC supports the incorporation of the non-exhaustive list of factors set out in Proposal 14 into the Corporations Act for consideration by a court when imposing civil penalties on a corporation.

320 The majority of the factors set out in Proposal 14 have been recognised at common law as matters appropriate to be taken into account in quantifying civil penalties, and ASIC agrees with the ALRC that their inclusion in the Corporations Act may enhance certainty for litigants, and consistency of sentencing outcomes.

321 ASIC also notes that considerations broadly equivalent to factors (a), (b) and (f) of Proposal 14 are already set out in s1317G (6) of the Corporations Act as matters for the court to take into account in determining the applicable pecuniary penalty.

322 However, with specific reference to the factors as expressed in Proposal 14, ASIC's view is that:

(a) factor (h) should not be included, or, if it is to be included, should apply only as an aggravating factor, and not in mitigation;

(b) factor (k) should:

(i) only apply in mitigation to take account of voluntary acts of cooperation with authorities; and

(ii) also enable consideration of non-cooperation with authorities;

(c) factor (o) should only be included if it is accompanied by express legislative recognition of deterrence as the primary object of civil penalties, in order to ensure that importance of deterrence in the civil penalty context is not otherwise diminished.

Voluntary cessation of conduct

323 Proposal 14 describes factor (h) as 'whether the corporation ceased the unlawful conduct voluntarily and promptly upon its discovery of the contravention'.

324 For the reasons below, ASIC considers that there is insufficient policy or legal basis for the recognition of factor (h) as a mitigating factor. ASIC's view is that factor (h) should not be taken into account in mitigation and should operate only as an aggravating factor.

325 The NSW Law Reform Commission's 2003 Report *Sentencing: Corporate Offenders*[227] stated that '[a]n offender's voluntary action in stopping the unlawful conduct within a reasonable time after its discovery' was a way in which an offender's contrition might be evinced, and that this factor ought be included as one of the sentencing factors set out in s21A of the *Crimes (Sentencing Procedure) Act 1999* (*NSW)*.[228]

326 The Report cited only one authority in support of this sentencing consideration, being *Trade Practices Commission v Malleys Ltd*[229] (***Malleys***) and did not explain why such corporate conduct was demonstrative of contrition, or should otherwise operate as a mitigating factor for sentencing purposes.

327 In *Malleys*, the prompt action of Malleys Ltd to bring to an end a scheme in contravention of the *Trade Practices Act 1974* upon its discovery, was taken into account by the court in the course of determining the pecuniary penalty to be imposed on the corporation.

328 A close reading of *Malleys* indicates that the cessation of the misconduct was treated more as a relevant fact in the context of the overall consideration of the nature and extent of the contravention and the circumstances in which it occurred, rather than as a standalone mitigating factor.

329 *Malleys* also does not clearly stand for the proposition that prompt cessation of misconduct evinces contrition on the part of the corporation. The judgment contained only the uncontentious observation that Malleys' action in this regard was 'consistent with a genuine regret for Malleys' mistake'.

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[227] NSW Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102, 2003
[228] *Sentencing: Corporate Offenders Report* p. 74, paragraph 4.53: see footnote 227.
[229] *Trade Practices Commission v Malleys Ltd* [1979] FCA 70;

330 No explanation as to the policy or legal basis for the inclusion of this factor is contained in the ALRC's Same Crime Same Time Report, or in the Discussion Paper.

331 In ASIC's view, the immediate and voluntary cessation of unlawful conduct upon its discovery is a minimum standard of conduct that is expected from corporations and individuals alike – and is no more than mere compliance with the law. Relevantly, the Royal Commission identified 'obey the law' as the first of six fundamental norms of conduct,[230] and stated that:

> Penalties are prescribed for failure to obey the law because society expects and requires obedience to the law.[231]

332 As a matter of policy, ASIC does not consider that the conduct of a corporation in merely ceasing to break the law is conduct that ought to merit a reduction in the penalties applicable.

333 ASIC also does not consider that such conduct can or should be accepted as demonstrative of contrition on the part of the corporation, although such conduct may, of course, be consistent with contrition.

334 Given the above, ASIC considers that this factor should not apply as a mitigatory consideration that reduces the quantum of civil penalties to be imposed.

335 The converse conduct, where a corporation continues to engage in misconduct even after its discovery, is a circumstance that should be treated as an aggravating factor. In ASIC's view, however, the considerations set out at s1317G(6)(a) and (c) of the Corporations Act, being 'the nature and extent of the contravention' and 'the circumstances in which the contravention took place' (mirrored to a large extent by factor (a) of Proposal 14), already adequately captures and enables appropriate weight to be given to such aggravating conduct.

336 If it is nonetheless considered necessary to introduce factor (h) as a standalone consideration, ASIC's view is that it should apply only as an aggravating factor, such that a higher amount of civil penalties may be considered appropriate to be imposed where a corporation continues to engage in unlawful conduct upon its discovery.

Cooperation with authorities including self-reporting

337 Proposal 14 describes factor (k) as 'the degree of cooperation with the authorities, including whether the contravention was self-reported'.

[230] *Royal Commission Final Report*, vol 1, p.8: footnote 27.
[231] *Royal Commission Interim Report* vol 1, 277: see footnote 108.

338 ASIC agrees that it is appropriate to recognise cooperation with authorities. However, ASIC considers that factor (k) should operate such that only voluntary acts of cooperation with authorities, such as voluntary self-reporting, should be taken into account in mitigation.

339 ASIC's view is that, consistent with the position at criminal law, only voluntary acts of cooperation by a corporation should be treated as a mitigatory consideration, and no regard should be had for these purposes to 'cooperation' that consists of conduct required by law.

340 In the criminal law context and as stated above in relation to Proposal 13, s16A(2)(h) of the Crimes Act provides for the extent of the offender's cooperation with law enforcement agencies to be taken into account by a court when imposing sentence.

341 'Cooperation' for the purposes of s16A(2)(h) has been held to be limited to voluntary conduct.[232] In *Ungureanu v The Queen*,[233] the court found that an offender's participation in, and disclosure of information during, a compulsory examination held by the Australian Crime Commission pursuant to the *Australian Crime Commission Act 2002* did not constitute 'cooperation' within the meaning of s16A(2)(h), as the provision of information could not be regarded as voluntary in nature, and the information provided did not extend beyond what was required under compulsion.

342 In *R v Falconer*,[234] the NSW Supreme Court similarly held that the offender's participation in a compulsory examination held by ASIC pursuant to s19 of the ASIC Act was required by law and could not be regarded as voluntary cooperation.[235]

343 Separately, an offender's voluntary disclosure of involvement in criminal conduct has been held to merit leniency in sentencing.[236]

344 ASIC considers that the same approach should be adopted to cooperation in the civil penalty context, such that only voluntary cooperation, including voluntary self-reporting of misconduct, should merit a discount on the civil penalties imposed.

345 Factor (k) expressly anticipates the scenario of a 'self-reported' contravention. ASIC agrees that self-reporting of misconduct which is wholly voluntary in nature should be considered a mitigating circumstance, where the misconduct may otherwise not have been discovered by the authorities.

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[232] *Ungureanu v The Queen*: see footnote 222
[233] *Ungureanu v The Queen*: see footnote 222
[234] *R v Falconer*: see footnote 222
[235] *R v Falconer*, paragraph 133: see footnote 222
[236] See, *R v Ellis* (1986) NSWLR 603, p.604; *R v CLP* [2008] VSCA 113 at paragraph 22.

346 However, mandatory misconduct reporting obligations exist under various legislative regimes, such as s912D of the Corporations Act as referred to above in response to Proposal 13. A further example is compliance by corporations in response to ASIC's exercise of its compulsory powers, such as requiring the production of books or information to ASIC.[237] Such compliance is a matter of legal obligation, and is not voluntary in nature. It is ASIC's view that this conduct similarly should not be treated as cooperation meriting mitigation of penalty.

Deterrent effect

347 Proposal 14 describes factor (o) as 'the deterrent effect that any order under consideration may have on the corporation or other corporations'. Factor (o) is thus essentially directed to specific and general deterrence.

348 ASIC agrees with the ALRC's observation that civil penalties are primarily directed to deterrence and promoting compliance. The central importance of deterrence in the civil penalty context is well-established at common law. In *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate*,[238] the High Court cited with approval the following passage as to civil penalties from *Trade Practices Commission v CSR Ltd*:

> The principal, and I think probably the only, object of the penalties imposed by s 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravener and by others who might be tempted to contravene the Act.[239]

349 Proposal 14 currently anticipates the inclusion of factor (o) as just one of a lengthy list of factors to be considered in quantifying civil penalties.

350 ASIC is concerned that, in the absence of any express legislative recognition of deterrence as the primary object of civil penalties, the proposed inclusion of factor (o) may materially diminish the significance accorded to deterrence in the determination of civil penalties.

351 ASIC suggests that, if deterrence is to be included in the list of factors, then its primacy as a consideration should be expressly recognised by way of an objects clause or other legislative statement inserted into the Corporations Act.

Other matters

352 ASIC notes that the Proposal 14 amendment to the Corporations Act will not result in all Commonwealth civil penalties being determined by reference to

[237] See, *ASIC Act* ss 30, 33; *Corporations Act.2001* (Cth) s 912C.
[238] *Trade Practices Commission v CSR Ltd* (2015) 258 CLR 482
[239] *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46 at paragraph 55 per French CJ, Kiefel, Bell, Nettle and Gordon JJ.

the list of factors specified. Within ASIC's remit alone, there are various examples of standalone legislation that provides for quantification of pecuniary penalties which would also need modification to ensure uniform coverage, such as the ASIC Act, the National Credit Act and the *Superannuation Industry (Supervision) Act 1993*.

Proposal 15: Non-monetary sentencing options

ALRC Proposal 15

The *Crimes Act 1914* (Cth) should be amended to provide the following sentencing options for corporations that have committed a Commonwealth offence:

(a) orders requiring the corporation to publicise or disclose certain information;

(b) orders requiring the corporation to undertake activities for the benefit of the community;

(c) orders requiring the corporation to take corrective action within the organisation, such as internal disciplinary action or organisational reform;

(d) orders disqualifying the corporation from undertaking specified commercial activities; and

(e) orders dissolving the corporation.

353 ASIC supports the inclusion of non-monetary penalties in the Crimes Act to be available as sentencing options for corporations who commit Commonwealth offences, as set out in Proposal 15.

354 ASIC shares the ALRC's concerns about the limitations on non-monetary penalties for corporations[240] and has previously supported recommendations by the ALRC to expand the range of non-monetary penalties available to courts for misconduct by corporations.[241]

355 The inclusion of these non-monetary sentencing options would enhance consistency in sentencing corporations for Commonwealth offences. For example, currently there is a broad range of specific non-monetary penalties available in relation to some contraventions of the ASIC Act[242] but the availability of non-monetary penalties under the Corporations Act is more limited.[243]

[240] *Corporate Criminal Responsibility* p.213, paragraph 10.53: See footnote 1.
[241] *ASIC Submission to Sentencing of Federal Offenders Issues Paper*, response to question 7-5, see footnote: 226.
[242] *ASIC Act 2001* ss12GLA, 12GLB.
[243] Although see, *Corporations Act 2001*, s1101B which enables a court to make a wide range of orders in circumstances including where there has been a contravention of Chapter 7 of the Corporations Act.

356 These additional sentencing options would enable a court to impose a sentence commensurate to the misconduct and appropriate to the particular corporate defendant, which will have a positive impact in achieving the purposes of sentencing – in particular, specific and general deterrence.

Proposal 16: Non-monetary penalty options for civil penalties

ALRC Proposal 16

The *Corporations Act 2001* (Cth) should be amended to provide the following non-monetary penalty options for corporations that have contravened a Commonwealth civil penalty provision:

(a) orders requiring the corporation to publicise or disclose certain information;

(b) orders requiring the corporation to undertake activities for the benefit of the community;

(c) orders requiring the corporation to take corrective action within the organisation, such as internal disciplinary action or organisational reform; and

(d) orders disqualifying the corporation from undertaking specified commercial activities.

357 ASIC supports the incorporation of the non-monetary penalty options set out in Proposal 16 into the Corporations Act and agrees with the ALRC's view that the inclusion of these options would enhance consistency of sentencing options, and enable flexible, tailored responses to misconduct that appropriately advance the object of deterrence.

358 As stated above, there is a range of non-monetary penalties available in relation to some contraventions of the ASIC Act[244] but they do not apply consistently across all contraventions in the ASIC Act, and the availability of non-monetary penalties under other ASIC-administered legislation, such as the Corporations Act[245] and the National Credit Act, is more limited.

359 Courts have commented on the lack of equivalent provisions to those in the ASIC Act and that, if those provisions had been available, they would have made an appropriate order. For example, Beach J in *ASIC v Make It Mine Finance*[246] was critical of the lack of an equivalent power in the National Credit Act to s12GLA in the ASIC Act. Beach J stated, 'there should be such a specific power' and, if there had been, His Honour would have imposed a compliance program on the company.

[244] *ASIC Act 2001*, ss12GLA, 12GLB.
[245] *Corporations Act 2001*, s1101B.
[246] *Australian Securities and Investments Commission v Make it Mine Finance Pty Ltd (No 2)* [2015] FCA 1255, paragraphs 115-116.

360 ASIC has successfully applied for non-monetary orders in conjunction with financial penalties in a number of civil cases where those options have been available. For example:

(a) *ASIC v GE Capital Finance Australia* [2014] FCA 701 – corrective disclosure (s12GLA(2)(c) and 12GLB (1));

(b) *ASIC v Superannuation Warehouse Australia Pty Ltd* [2015] FCA 1167 – probation order (s12GLA(2)(b)) and corrective advertising (s12GLA(2)(c) and 12GLB (1));

(c) *ASIC v Port Philip Publishing Pty Ltd* [2019] FCA 1483 – corrective disclosure and advertising (s12GLA(2)(c) and (d)); and

(d) *ASIC v Westpac Banking Corporation (No 3)* [2018] FCA 1701 – establishment of internal compliance program (s1101B of the Corporations Act).

361 As with Proposal 14, ASIC notes that corresponding reforms to legislation in addition to the Corporations Act would be required to ensure uniform availability of these non-monetary penalty options for contraventions of other Commonwealth civil penalty provisions.

Proposal 17: Disqualification orders

ALRC Proposal 17

The *Corporations Act 2001* (Cth) should be amended to provide that a court may make an order disqualifying a person from managing corporations for a period that the court considers appropriate, if that person was involved in the management of a corporation that was dissolved in accordance with a sentencing order.

362 ASIC supports the amendment of the Corporations Act to enable a court to make an order disqualifying a person from managing corporations, if that person was involved in the management of a corporation that has been dissolved in accordance with a sentencing order. ASIC agrees that such a mechanism is necessary to prevent the managers of a dissolved corporation from seeking to engage in further misconduct via a replacement corporate vehicle.

363 ASIC suggests that, in addition to providing for a court power of disqualification, the Corporations Act also be amended to empower ASIC to administratively disqualify a person from managing corporations in the same circumstances. Such administrative action will likely result in the same protective and punitive ends being achieved in a shorter timeframe, and with a more efficient use of limited regulator resources, as compared with court proceedings.

364 This proposed administrative power would be broadly analogous with the existing s206F of the Corporations Act, under which ASIC can disqualify a person from managing corporations for up to five years, where that person has been an officer of two or more corporations that have been wound up, and a liquidator has lodged a report about each corporation's inability to pay its debts.

Question F: Review of maximum penalties

ALRC Question F

Are there any Commonwealth offences for which the maximum penalty for corporations requires review?

365 The penalties in legislation administered by ASIC were considered as part of the ASIC Enforcement Review Taskforce, which included a positions paper by the Taskforce on Penalties to which ASIC and a number of other stakeholders made detailed submissions.[247]

366 The Taskforce Report published in December 2017 recommended increases to a significant number of penalties in the legislation, which included an increase in penalties for corporations.[248] The Government's response, published in April 2018, agreed to implement each of the Taskforce's recommendations relating to penalties[249] – in particular, recommendation 33, for maximum pecuniary penalties for criminal offences in the Corporations Act calculated by reference to a formula applicable to individuals with a further multiple of 10 for corporations.

367 As referred to above, the Penalties Act[250] came into effect on 12 March 2019 and incorporated the increase in penalties into the Corporations Act and other legislation administered by ASIC.

Question G: No maximum penalties

ALRC Question G

Should the maximum penalty for certain offences be removed for corporate offenders?

368 The ASIC Enforcement Taskforce Review also considered the removal of maximum penalties for both civil and criminal liability for corporate

[247] *ASIC Submission on Positions Paper 7*, see footnote 9.
[248] *ASIC Enforcement Taskforce Report* ch 7: see footnote 57.
[249] *Government Response to the ASIC Enforcement Taskforce Report* recommendations 32- 45: see footnote 127.
[250] Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018.

misconduct. The Taskforce noted the position in the United Kingdom where there are no maximum limits on amounts that can be imposed in respect of contraventions which are comparable to those found in ASIC-administered legislation. However, the Taskforce concluded:

> … a nominal maximum provides valuable guidance to courts faced with the task of imposing a penalty appropriate to the case before them.[251]

369 The Taskforce recommended that maximum penalties for corporations should be supplemented by amounts limited only be reference to benefit gained or loss avoided as a result of particular contraventions and also by reference to a portion of annual turnover. The Taskforce stated:

> This would ensure that there is flexibility in the regime sufficient to prevent circumstances arising where a fixed maximum expressed in penalty units would not be large enough to deter the offender due to the size of the benefit, for example.[252]

370 In relation to civil penalties, the Taskforce concluded for the same reasons expressed in relation to criminal penalties, that setting a monetary maximum provided clear guidance to the courts, industry and the community.

371 As noted above, the Penalties Act[253] came into effect on 12 March 2019 and incorporated the increase in penalties into the Corporations Act and other legislation administered by ASIC, which included increased criminal penalties for corporations.[254] After the amendments, where the maximum penalty for a criminal or civil contravention is based on the benefit derived or the detriment avoided by the commission of the offence, there is no cap in place. Where the maximum penalty is based on annual turnover for the 12-month period before the contravention, civil penalties have been capped at 2.5 million penalty units,[255] but there is no cap for a criminal penalty.[256] In relation to those maximum penalties for which there is no cap, there are therefore already circumstances in which there is no ceiling to the maximum penalty available to be imposed.

Question H: Court powers to facilitate compensation

ALRC Question H

Do court powers need to be reformed to better facilitate the compensation of victims of criminal conduct and civil penalty proceeding provision contraventions by corporations?

[251] *ASIC Enforcement Review Taskforce Positions Paper 7* p.9, paragraph 17: see footnote 8.
[252] *ASIC Enforcement Review Taskforce Positions Paper 7*: see footnote 8
[253] Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018.
[254] *Corporations Act 2001* s 1311C.
[255] *Corporations Act 2001* s 1317G(4)(c).
[256] See *Corporations Act 2001* s1311C(3).

372 ASIC notes recent legislative amendments or proposed amendments aimed at improving compensation for consumers who have been the victim of misconduct (among others), particularly in the financial services sector, including:

(a) the establishment of the Australian Financial Complaints Authority;[257]

(b) the establishment of a Compensation Scheme of Last Report;[258]

(c) proposed new obligations for licensees to remediate misconduct by financial advisers and mortgage brokers;[259] and

(d) the proposed ASIC Directions Power.[260]

373 ASIC has previously raised concerns about uncompensated consumer losses in a number of Government inquiries and reviews, including the 2014 (Murray) Financial System Inquiry and the Senate Inquiry into the Scrutiny of Financial Advice.[261]

374 ASIC welcomes the further consideration of mechanisms that would enable better facilitation by courts of compensation of victims of misconduct, whether civil or criminal, by corporations.

375 In the context of the civil penalty regime under the Corporations Act, ASIC's view is that it would be desirable for the court's powers to make compensation orders to be expanded, such that compensation orders were consistently available wherever there has been a breach of a civil penalty provision that has resulted in loss or damage.

376 There are currently a number of significant gaps in the coverage afforded by the compensation order provisions under the Corporations Act,[262] as compensation orders are restricted to breaches of specified provisions, breaches of 'corporation/scheme civil penalty provisions', and breaches of 'financial services civil penalty provisions', but not all civil penalty provisions in respect of which loss or damage can result from contravention are captured by these categories.

Proposal 18: Unified debarment regime

ALRC Proposal 18

[257] *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018* (Cth) (**the AFCA Act**). The AFCA Act gained Royal Assent on 5 March 2018.
[258] *Royal Commission Final Report*, vol 1, p.489, recommendation 7.1: footnote 27.
[259] *Royal Commission Final Report*, recommendations 1.6; 2.9: footnote 27
[260] *ASIC Enforcement Taskforce Report* recommendations 46- 50: see footnote 57.
[261] ASIC, *Submission to Australian Government's Financial Systems Inquiry*, April 2014, p.186-187; ASIC, *Submission to Australian Government's Financial Systems Inquiry: Interim Report*, August 2014, p.47-49; ASIC, *Submission to Senate Standing Committee on Economics: Scrutiny of Financial Advice*, December 2014.
[262] Compensation orders and like orders for breaches of civil penalty provisions are available under various *Corporations Act 2001* provisions, including ss 961M, 1317GA, 1317H, 1317HA, 1317HB, 1317HC, and 1317HE.

The Australian Government, together with state and territory governments, should develop a unified debarment regime.

377 ASIC supports Proposal 18 to create a unified debarment regime.

378 There is currently no guidance available for federal agencies on how criminal convictions are to be assessed in relation to Commonwealth procurement decisions under the *Commonwealth Procurement Rules* of April 2019.

379 Some standard form agreements or forms of request for tender in use by Government require disclosure by a proposed supplier of specific information, including that it is not on the Commonwealth's list of entities to which a terrorist asset freezing applies or that it has not had a judicial decision made against it relating to employee entitlements. However, criminal convictions are not generally required in these disclosures.

380 A unified debarment regime that provides certainty to both Commonwealth and state agencies and those they contract with, and which limits the exposure of agencies such as ASIC to material reputational risks, would be welcomed.

Proposal 19: Pre-sentence reports

ALRC Proposal 19

The *Crimes Act 1914* (Cth) should be amended to permit courts to order pre-sentence reports for corporations convicted of Commonwealth offences.

381 ASIC does not support Proposal 19.

382 ASIC recognises the value of pre-sentence reports. However, it considers many of the benefits of those reports to courts in sentencing individual offenders are not relevant to corporate offenders.

383 There are obvious benefits of a pre-sentence report to a court in assessing the appropriate sentencing options for particular categories of individual offenders – for example, if a court is considering whether a community-based order is appropriate for sexual or violent offenders, or whether incarceration is appropriate for an individual with severe health issues. NSW limits the ability to order an 'assessment report' to circumstances such as these.[263]

[263] See *Crimes (Sentencing Procedure) Act 1999* (NSW), ss17C and 17D. The five most common reasons for a court ordering a pre-sentence report were predominantly concerned with the viability of a sentencing option to a particular offender, particularly in the case of offenders who were on the threshold of imprisonment, or who was unrepresented: Judicial Commission of NSW and NSW Probation Service, *Judicial Views About Pre-Sentence Reports*, 1995, p.21.

384 ASIC notes that a pre-sentence report could have some utility in assessing particular sentencing options for corporate offenders, particularly in relation to the impact of a sentence on third parties. However, ASIC notes that criticism of pre-sentence reports also applies to corporate offenders without the corresponding level of benefit and therefore on balance does not support Proposal 19.

385 In particular, ASIC notes the increased delay and cost in sentencing.[264] This will be exacerbated in sentencing corporate offenders, given the likelihood that information relevant to a pre-sentence report would need to be obtained from a much larger group of individuals than those when sentencing an individual.

386 ASIC also notes criticism that pre-sentence reports enable offenders to put mitigating material before the court without the prosecution being able to cross-examine the offender on that material.[265] In some jurisdictions, such as Victoria, there is an ability to cross-examine the author of the report. However, there is no ability for the prosecution to cross-examine the offender or the individuals who provided information to the maker of the report.[266] This is particularly problematic in relation to sentencing corporate offenders again given the large numbers of individuals from whom the relevant information would need to be gathered.

387 One of the reasons cited by the ALRC for obtaining pre-sentence reports is to provide to the court a factual basis for sentencing. However, in ASIC's view, it is the role of the prosecutor and offender's representative in sentencing hearings to put before the court the factual basis of the offending and information about the offender. This has been recognised by the courts.[267]

388 In ASIC's view, the matters outlined in Proposals 13a–13i are not appropriate to be dealt with by way of pre-sentence report and should be matters put in aggravation or mitigation by the prosecutor or an offender's representative. If there was an ability for a court to order a pre-sentence report for corporate offenders, it should be limited to considering Proposal 13j, being the effect of any sentence on third parties and focused on the appropriateness of a particular sentencing option to the particular corporate offender.

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[264] *Corporate Criminal Responsibility* p.228 paragraph 10.130: footnote 1.
[265] *Judicial Views About Pre-Sentence Reports*, p.7: see footnote 263.
[266] *Sentencing Act 1991* (Vic) s 8D.
[267] Judicial College of Victoria, *Victorian Sentencing Manual*, 4th ed, 2019, paragraph 2.2.3.1: in relation to the Role of the Prosecutor and paragraph 2.2.3.2 in relation to the Role of Defence Counsel, in which the following authorities are cited: *R v Tait* (1979) 46 FLR 386, 389; *Matthews v The Queen* (2014) 44 VR 280, 27; *DPP (Vic) v Scott* (2003) 6 VR 217; *R v Halden* (1983) 9 A Crim R 30, 35, 40–41; *R v Bloom* [1976] VR 642, 643–44; *R v Hilary* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Young CJ, McInerney and Jenkinson JJ, 5 August 1977) 4.

Question I: Preparation of pre-sentence reports

ALRC Question I

Who should be authorised to prepare pre-sentence reports for corporations?

389 ASIC does not wish to express a view in relation to Question I.

Proposal 20: Victim impact statements

ALRC Proposal 20

Sections 16AAA and 16AB of the *Crimes Act 1914* (Cth) should be amended to permit courts, when sentencing a corporation for a Commonwealth offence, to consider victim impact statements made by a representative on behalf of a group of victims and/or a corporation that has suffered economic loss as a result of the offence.

390 ASIC supports Proposal 20 to amend the Crimes Act to permit sentencing courts to consider victim impact statements made by a representative of a group of victims or a corporation that has suffered economic loss as a result of the offence.

391 As stated above at paragraphs 315–318 in relation to Proposal 13, ASIC supports increased mechanisms by which a court can consider the broader impact of corporate offending and a mechanism by which this could be achieved is through the implementation of this proposal.

I Illegal phoenix activity

Key points

ASIC does not support Proposal 21(a) and Proposal 22.

ASIC supports Proposal 21(b) if it were implemented in addition to the proposed power in the proposed s588FGAA of the Corporations Act.

ASIC supports Proposal 23.

ASIC considers a licensing (and disqualification) scheme for pre-insolvency advisers would be difficult to effectively enforce.

ASIC supports the introduction of the amendments in the proposed Phoenixing Bill and the Registries Bill.

Proposals 21 and 22: Amendments to the Phoenixing Bill

ALRC Proposal 21

The Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 should be amended to:

(a) provide that only a court may make orders undoing a creditor-defeating disposition by a company, on application by either the liquidator of that company or the Australian Securities and Investments Commission; and

(b) provide the Australian Securities and Investments Commission with the capacity to apply to a court for an order that any benefits obtained by a person from a creditor-defeating disposition be disgorged to the Commonwealth, rather than to the original company, where there has been no loss to the original company or the original company has been set up to facilitate fraud.

ALRC Proposal 22

The Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 should be amended to:

(c) provide the Australian Securities and Investments Commission and the Australian Taxation Office with a power to issue interim restraining notices in respect of assets held by a company where it has a reasonable suspicion that there has been, or will imminently be, a creditor-defeating disposition;

(d) require the Australian Securities and Investments Commission and the Australian Taxation Office to apply to a court within 48 hours for imposition of a continuing restraining order; and

(e) grant liberty to companies or individuals the subject of a restraining notice to apply immediately for a full de novo review before a court.

392 ASIC does not support Proposals 21(a) or Proposal 22. ASIC considers Proposal 21(b) should only be implemented in addition to the amendments proposed in the Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 (**Phoenixing Bill**).

393 Illegal phoenix activity occurs when the controlling minds of a company deliberately avoid paying the debts of a company by shutting it down and transferring its assets to another company. The transfer of assets to the new company occurs without paying true or market value for those assets, leaving debts with the old company. Once the assets have been transferred, the old company is placed in liquidation. When the liquidator is appointed, there are no assets to sell so creditors cannot be paid. Once the assets are transferred to a new company, the controlling minds continue to operate the business. This gives the new business an unfair advantage when competing for work, because it carries less debt and have lower operating costs.[268]

394 Illegal phoenix activity hurts creditors, who fail to receive payments for goods and services and employees, who are left unpaid entitlements and superannuation. It also hurts the broader community because the company avoids paying tax and the Government then must subsidise outstanding employee entitlements.

395 A 2018 report by PricewaterhouseCoopers (**PwC**) commissioned by ASIC, the Australian Taxation Office (**ATO**) and the Fair Work Ombudsman found that illegal phoenix activity annually costs employees between $31 million and $298 million in unpaid entitlements and costs the Government around $1,660 million in unpaid taxes and compliance. The total cost of illegal phoenixing to the Australian economy is estimated to be between $2.9 billion and $5.1 billion annually.[269]

396 The Phoenixing Bill was reintroduced to Parliament on 4 July 2019. It has progressed to a second reading, detailed debate on 27 November 2019 and is now being considered by the Senate.

397 The Phoenixing Bill proposes the introduction of s588FGAA to the Corporations Act, which will enable ASIC to make administrative orders to recover property the subject of creditor-defeating dispositions. A creditor-defeating disposition is a disposition of company property for less than its market value (or the best price reasonably obtainable) that has the effect of preventing, hindering or significantly delaying the property becoming available to meet the demands of creditors in a winding-up.[270]

398 The provisions would enable ASIC to make an order on its own initiative or on the application of a liquidator. When illegal phoenix activity has

[268] ASIC, *Illegal Phoenix Activity*, ASIC Website.
[269] Australian Taxation Office, *The Economic Impact of Potential Illegal Phoenix Activity*, ATO Website, 16 July 2018.
[270] See the proposed *Corporations Act 2001* ss9, 588FDB(1) in the Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019.

occurred, it is commonplace for the liquidated company to have insufficient funds to pay a liquidator the fees associated with investigating the affairs of the company and for taking action to recover assets through court proceedings, such as legal costs (among others). Other common barriers to the recovery of assets in circumstances of illegal phoenixing is the inadequacy (or entire lack) of company records, without which there is often insufficient evidence to bring recovery proceedings in court. There are also circumstances in which the liquidator is complicit in the illegal phoenix activity.

Case Study 9: Recovery of Assets

ASIC provided funding from the Assetless Administration Fund (**AA Fund**) of $85,200 to a liquidator appointed to a group of companies in the telecommunications industry, where illegal phoenix activity had occurred.

The liquidator had no assets to commence proceedings against the director, and ASIC funding assisted the liquidator to pursue recovery action from the director and related entities to whom the director had transferred the business assets for no consideration.

Specifically, ASIC funding enabled the liquidator to obtain:

- freezing orders against the director, prohibiting him from dealing with the assets further; and
- a summary judgment against the director and related entities for $970,000.

Case Study 10: Jason Hammond

In August 2018, ASIC disqualified Mr Jason Hammond from managing corporations for the maximum period available, five years, as a result of his involvement in three failed companies[271].

In making the decision to disqualify Mr Hammond, ASIC relied on reports lodged by liquidators appointed to the failed companies whom had been assisted in preparing those reports through funding from the AA Fund.

ASIC found that Mr Hammond had improperly used his position and had:

- caused assets to be transferred for little or no consideration to the detriment of unsecured creditors;
- failed to prevent some of the companies from trading while possibly insolvent;
- failed to ensure proper financial records were kept; and

[271] ASIC, *ASIC disqualifies former director from managing companies for maximum period for engaging in illegal phoenix activity* Media Release, (18-240MR) 16 August 2018.

- had engaged in illegal phoenix activity by transferring the business of an indebted company to a new company leaving the initial company with no assets to pay creditors.

ASIC found that Mr Hammond continued to behave without regard for the law or for his professional responsibilities as a director and an accountant.

The three companies were LLM Rivits, Dongrove and a company formerly known as Newcastle Bridal House. The total debts owed by the three companies to creditors was almost $1.4 million.

Mr Hammond will remain disqualified until August 2023.

399 The intention of providing ASIC with the power in s588FGAA of the Phoenixing Bill is to create a timely and cost-effective mechanism to protect the interests of legitimate creditors. As stated in the Explanatory Memorandum to the Bill, this will overcome difficulties faced by liquidators where the liquidator has insufficient funds to cover the cost of court action and provide ASIC the opportunity to intervene where a liquidator is not fulfilling their obligations to recover company property.[272]

400 There are significant safeguards in the Phoenixing Bill to protect companies and directors. Firstly, the definition of creditor-defeating disposition is targeted to only capture a specific category of transactions that concern illegal phoenix activity. Secondly, there are safeguards to protect genuine attempts to restructure the business, such as: those which are part of a deed of company arrangement;[273] a restructure that falls under the safe harbour provisions;[274] and those in which there is a good faith purchaser.[275] Thirdly, the making of the order by ASIC can be challenged by applying to the court to have it set aside.[276]

401 Therefore, the Phoenixing Bill ensures the provisions can only be used in limited circumstances for the most egregious illegal phoenix transactions and there are a number of safeguards built into the provisions to protect legitimate transactions and ensure ASIC only makes orders in appropriate circumstances.

402 Proposal 21(a) would defeat the object of the amendments in the Phoenixing Bill to create a timely and cost-effective mechanism to protect the interests of legitimate creditors to overcome the difficulties of a liquidator having insufficient funds to pursue court proceedings or a liquidator who is complicit in the illegal activity.

403 Proposal 22 would not be a sufficient counter-balance to the removal of the proposed power in s588FGAA.

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[272] Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019, Explanatory Memorandum, paragraph 2.52.
[273] See the proposed *Corporations Act 2001* s588FE(6B)(c)(ii) in the Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019.
[274] See *Corporations Act 2001* s588GA as amended by the Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019.
[275] See the proposed *Corporations Act 2001* s588FGAA(4) in the Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019.
[276] See the proposed *Corporations Act 2001* s588FGAE in the Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019.

404 The resourcing and costs associated with the commencement of proceedings in Proposal 22, a necessary step after issuing an interim order, would mean ASIC could take less action against illegal phoenixing than it could under the proposed power in s588FGAA.

405 Further the inadequate or non-existent company records, which is common place in illegal phoenixing activity, and which would be required to substantiate to a court the grounds upon which to grant a continuation of the interim restraining order, would be a further hurdle to ASIC's ability to take timely action to prevent the dissipation of assets.

Case Study 11: Soutsakhorn Chanthabouly – Destruction of Records

Ms Chanthabouly (also known as Nicole Khammenathy) was convicted in June 2019 by a NSW court after pleading guilty to charges of breaching her director duties and destroying company records, conduct related to illegal phoenix activity[277].

Ms Chanthabouly was a shadow director of MK Asbestos Removal Pty Ltd which operated a business of asbestos removal services in NSW. Ms Chanthabouly transferred $22,000 from the company bank account to the account of Express Asbestos Removals Pty Ltd, a company of which she was also a director. Between February and August 2014 Ms Chanthabouly destroyed the books of MK Asbestos Removal, which was placed into liquidation in February 2014 owing over $78,000 to the ATO and close to $20,000 in unpaid premiums for workers compensation insurance.

Ms Chanthabouly was sentenced to a one-year good behaviour bond and ordered to pay $22,000 in reparation. She was also banned from managing corporations for five years from May 2019.

ASIC's investigation commenced after receiving a funded report from the liquidator appointed to MK Asbestos Removal after ASIC provided AA Funding to the liquidator.

406 Any regulatory action that requires the initiation of court proceedings will be less timely than a power to make an administrative order. As noted in the Discussion Paper in reference to Proposal 22, there are concerns that illegal phoenixing occurs too quickly for regulators to act. The proposed s588FGAA attempts to address those concerns better than Proposal 22.

407 In relation to the concern as to the constitutionality of the proposed s588FGAA (4) of the Corporations Act, as noted in the Discussion Paper, similar provisions in the *Bankruptcy Act 1966* have been considered by the Federal Court and found not to confer a judicial power. Any concerns about constitutionality could be addressed through an amendment to s588FGAE (3) to provide the same right of review as the *Bankruptcy Act 1966* rather

[277] ASIC, *NSW company director convicted after engaging in phoenix activity*, Media Release (19-131M), 5 June 2019

than removing the power altogether and defeating the purpose of introducing the proposed provision.

408 ASIC can foresee circumstances in which the capacity to apply for an order of the court as outlined in Proposal 21(b) may be beneficial. However, in ASIC's view, this proposal should be in addition to the power in s588FGAA, rather than as part of other proposals that replace it.

Proposal 23: Director identification number register

ALRC Proposal 23

The *Corporations Act 2001* (Cth) should be amended to establish a 'director identification number' register.

409 ASIC supports Proposal 23.

410 As stated by ASIC Commissioner John Price in October 2019,[278] ASIC strongly supports the introduction of a director identification number (**DIN**) register. A DIN register will enable the traceability of a director's relationships across companies, better tracking of directors of failed companies and prevent the use of fictitious identities. The database will also be able to interface with other government databases, which will assist ASIC and other regulators in detecting, deterring and disrupting illegal phoenix activity.

411 The effective implementation of a DIN scheme requires the modernisation of ASIC's ageing registry platform.

412 The Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019[279] (**Registries Bill**), which proposed the introduction of a DIN scheme alongside a modern Commonwealth government registry, was introduced to Parliament in early 2019 but has lapsed. ASIC understands these reforms are part of the current Government agenda[280] and the Registries Bill should be reintroduced shortly.

413 In addition to the benefits of a DIN scheme referred to above by ASIC Commissioner John Price, the Explanatory Memorandum to the Registries Bill states:

> The new DIN regime will also offer benefits beyond combating phoenixing. For instance, simpler more effective tracking of directors and their corporate history will reduce time and cost for administrators and

[278] ASIC Commissioner John Price, *ASIC Regulatory and Enforcement Update*, Keynote Address at the Australian Institute of Credit Management 2019 National Conference, 17 October 2019.
[279] *Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019*.
[280] Prime Minister of Australia, *New Measures Delivering Deregulation for Australian Business*, Media Release, 20 November 2019.

> liquidators, thereby improving the efficiency of the insolvency process. In addition, the new regime will improve data integrity and security. For example, it would be possible to allow directors to be identified by a number rather than by other more personally identifiable information.[281]

414 ASIC notes the Productivity Commission recommended the introduction of a DIN register in its September 2015 Report.[282]

415 In addition to supporting the introduction of the DIN register, the registry modernisation scheme as proposed in the Registries Bill will combine the Australian Business Register (and 31 ASIC business registers, including business names, company registers, professionals and others) on to a contemporary technology platform administered by the ATO. Currently, the ASIC registry facilitates over 140 million searches, 3 million updates and 900,000 inquiries annually. There are 2.7 million registered companies and 4.4 million current director 'roles' in ASIC's database on a technology platform which is approaching 30 years old.[283] As stated in the Explanatory Memorandum to the Registries Bill:

> The objective of the new regime is to facilitate a modern government registry regime that is flexible, technology neutral and governance neutral, and that facilitates timely and efficient access to information (including, where appropriate, on a real time basis) by regulators and other users of the information. The new Act includes a simplified outline of its contents to assist readers understand the new regime.[284]

416 ASIC reiterates its support for the introduction and passage of the Registries Bill.

Question J: Restructuring and insolvency advisers

ALRC Question J

Should there be an express statutory power to disqualify insolvency and restructuring advisors who are found to have contravened the proposed creditor-defeating disposition provisions?

417 Directors of companies facing financial distress are entitled and are encouraged to obtain advice about the options available to them to deal with the company's financial difficulties. In ASIC's experience, significant harm results from the provision of advice by unregulated pre-insolvency advisers and that advice often facilitates illegal phoenix activity.

418 The Corporations Act provides mechanisms to cancel the registration of a person as a liquidator if they are not a fit and proper person to remain

[281] Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, Explanatory Memorandum at paragraph 2.6.
[282] Productivity Commission, *Business Set-Up, Transfer and Closer Report* (No 75), September 2015, p.28.
[283] *ASIC Regulatory and Enforcement Update*, see footnote 278.
[284] Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, Explanatory Memorandum paragraph 1.12.

registered. This includes where they facilitate illegal phoenix activity. Therefore, existing powers to cancel the registration of a liquidator would enable cancellation of their registration for involvement in creditor-defeating transactions. However, a person whose registration as a liquidator has been cancelled is not automatically prevented from providing pre-insolvency advice.

419 Any power to disqualify insolvency and restructuring advisers would require a separate licensing (and disqualification) regime for pre-insolvency advice.

420 Industry bodies implement standards and codes of conduct for their members who provide restructuring advice and members who fail to comply with those standards can have their membership cancelled. However, this does not automatically preclude a person from providing pre-insolvency advice. Further, pre-insolvency advice can be provided by a wide range of individuals, some with professional qualifications and memberships, such as lawyers, accountants or tax agents and others without such qualifications.

421 Further to this, even regulatory action taken by ASIC against a liquidator does not prevent the same person continuing to provide pre-insolvency advice as a consultant. For example, an ASIC-initiated court inquiry into Andrew Dunner resulted in the cancellation of Mr Dunner's registration as a liquidator for five years. However, he subsequently consulted with notorious pre-insolvency adviser Philip Whiteman, and Whiteman's advisory group Armstrong & Shaw.

422 The Discussion Paper acknowledges the difficulties in implementing a separate licensing and disqualification regime for pre-insolvency advisers. ASIC considers those difficulties will prevent the effective regulation of any such scheme.

423 The number of participants in the pre-insolvency advice market has grown significantly over recent years[285] with these operations increasing in sophistication in how they identify and contact potential 'clients'. Further, many have a significant web-presence for promoting their services while at the same time making it difficult to readily identify the owners and operators of the business. Some of these businesses claim to introduce the 'client' to a qualified adviser or registered liquidator, rather than provide advice themselves. The web-based introductory business model would make implementing a licensing regime on the individuals behind these businesses (as well as the business itself and associated advisers) very difficult.

424 In ASIC's view, implementing the amendments proposed in the Phoenixing Bill and the Registries Bill is likely to be more effective than implementing an additional licensing (and disqualification) regime.

[285] Australian Government, *Combatting Illegal Phoenixing Consultation Paper*, September 2017, p.3.

Question K: Amendments to combat illegal phoenixing

ALRC Question K

Are there any other legislative amendments that should be made to combat illegal phoenix activity?

425 ASIC has worked closely with Government on the development of the Phoenixing Bill and the Registries Bill. ASIC also made a submission to the Senate Economics Legislation Committee in relation to the Phoenixing Bill.

426 ASIC is strongly of the view that the implementation of the amendments proposed in the Bills will greatly assist in combating illegal phoenix activity.

J Transnational business

Key points

ASIC welcomes consideration of additional mechanisms for greater accountability in transnational business.

ASIC considers a review of which geographical jurisdiction provisions apply to particular corporate offences and which corporations are captured by those provisions is merited.

Question K: Due diligence obligations and extraterritorial offences

ALRC Question K

Should the due diligence obligations of Australian corporations in relation to extraterritorial offences be expanded?

427 ASIC shares the concerns of the ALRC in relation to the involvement of Australian corporations in offshore crimes.

428 ASIC welcomes consideration being given by the ALRC to additional mechanisms by which greater accountability for misconduct in transnational business could be achieved.

429 In addition to considering whether the extension of due diligence to incorporate a positive obligation to prevent off-shore crimes is appropriate, ASIC considers there would be merit in a review of the extra-territorial reach of Commonwealth criminal offences, particularly those more likely to be committed by corporations rather than individuals, to ensure that reach is adequate.

430 The Criminal Code provisions in Part 2.7 only apply to offences enacted after 24 May 2001 and only to the extent that a contrary intention does not appear in the legislation creating the offence.[286] Express application of Chapter 2 of the Criminal Code may not be sufficient to apply Part 2.7 of the Criminal Code to an offence if there are other geographical provisions in the relevant legislation.[287] There may be some offences for which an extended geographical jurisdiction, as provided for in s15.1 to 15.4 of the Criminal Code, should apply for which it does not already.

[286] *Criminal Code*, s14.1, *Principles of Federal Criminal Law* paragraph 14.1.100: see footnote 163.
[287] *R v Ahmad* (2012) 31 NTLR 38, cited in *Principles of Federal Criminal Law*, paragraph 14.1.100: see footnote 163.

431 There are also differences in the corporations captured by the existing geographical jurisdiction provisions in different legislation. The extended geographical provisions in the Criminal Code apply to 'body corporates incorporated by or under a law of a Commonwealth, state or territory'.[288] The Corporations Act provision applies to 'all bodies corporate and unincorporated bodies whether formed or carrying on business in Australia or not'.[289] Neither of these provisions are likely to capture offences committed by corporate groups with complex structures, even if part of that structure carries on business in Australia.

432 In addition to assessing the appropriateness of which corporations are captured by the extraterritorial provisions, consideration could also be given to other deeming provisions, such as that in s16.2 of the Criminal Code. That provision deems conduct to have occurred partly in Australia in certain circumstances, such as the sending and receipt of electronic communications. This has the potential to be expanded in a way that could capture misconduct that involves financial or other advantages obtained in Australia resulting from extraterritorial misconduct.

[288] *Criminal Code*, s15.1(1)(c)(ii).
[289] *Corporations Act 2001*, s5(7).

K Other issues

Committal hearings

433 ASIC refers to the ALRC's analysis of the history of committal hearings and the different regimes that currently exist throughout Australia. While not specifically seeking responses by way of a question or proposal in the Discussion Paper, the ALRC:

> Invites views as to whether the requirement for a committal procedure in respect of Commonwealth offences by corporations should be removed in all states and territories.[290]

434 In ASIC's view, criminal procedure should not distinguish between a corporate or individual offender charged with Commonwealth offences, except where it is necessary due to a corporation being a legal entity rather than a natural person.

435 ASIC supports reform of committal procedures in Australia and agrees that the benefits of a committal hearing can be achieved through pre-trial hearings and disclosure, as stated by the ALRC.[291] A reformed committal procedure will have significant benefits in reducing the large costs and lengthy delays currently faced by parties to criminal proceedings, including those with a corporate defendant.

[290] *Corporate Criminal Responsibility* paragraph 1.56: See footnote 1.
[291] *Corporate Criminal Responsibility* paragraph 1.57: See footnote 1.

Key terms

Term	Meaning in this document
AA Fund	Assetless Administration Fund
AAT	Administrative Appeals Tribunal
ADI	An authorised deposit-taking institution—a corporation that is authorised under the *Banking Act 1959*. ADIs include: • banks; • building societies; and • credit unions
administrator	Has the meaning given in s9 of the Corporations Act Note: It therefore includes both deed administrators and voluntary administrators.
adviser	A natural person providing personal advice to retail clients on behalf of an AFS licensee who is either: • an authorised representative of a licensee; or • an employee representative of a licensee Note: This is the person to whom the obligations in Div 2 of Pt 7.7A of the Corporations Act apply: see the definition of 'advice provider' in the 'key terms' in RG 175.
AFCA	Australian Financial Complaints Authority—AFCA is the operator of the AFCA scheme, which is the external dispute resolution scheme for which an authorisation under Pt 7.10A of the Corporations Act is in force
AFCA Act	*The Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018*
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act
AFS licensee financial reporting obligations	The obligations in Subdiv C of Div 6 of Pt 7.8 of the Corporations Act that require AFS licensees to prepare and lodge with ASIC an audited annual profit and loss statement and balance sheet
ALRC	Australian Law Reform Commission
AML/CTF Act	*Anti-Money Laundering and Counter-Terrorism Financing Act 2006*

Term	Meaning in this document
anti-hawking provisions	The provisions set out in Div 8 of Pt 7.8 of the Corporations Act and related regulations
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001*
ASIC Regulatory Portal	The internet channel that allows authenticated regulated entities to interact securely with ASIC, which can be accessed at the portal landing page
ATO	Australian Taxation Office
AUSTRAC	Australian Transaction Reports and Analysis Centre
banning order	A written order by ASIC that prohibits a banned person from providing financial services
body regulated by APRA	Has the meaning given in s3(2) of the *Australian Prudential Regulation Authority Act 1998*
CDPP	Commonwealth Director of Public Prosecutions
CD provisions	Continuous disclosure provisions
CLMR	Centre for Law Markets and Regulation
Combatting Corporate Crime Bill	Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019
continuous disclosure regime (or continuous disclosure obligations)	The continuous disclosure provisions in s674 and 675 of the Corporations Act
corporate culture provisions	The corporate culture provisions are provisions for the attribution of fault to a corporation contained in s12.2(2)(c) and (d) of the *Criminal Code Act 1995*
Corporations Act	*Corporations Act 2001*, including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
CPP provision	Civil Penalty Proceeding provision as defined by the ALRC in *Discussion Paper 87, Corporate Criminal Responsibility*
CPN	Civil Penalty Notice provision as defined by the ALRC in *Discussion Paper 87, Corporate Criminal Responsibility*
CSA	Canadian Securities Administrators

Term	Meaning in this document
Criminal Code	Criminal Code Act 1995
disclosure document	For an offer of securities, this includes a prospectus, a transaction-specific prospectus, a short-form prospectus, a two-part simple corporate bonds prospectus, a profile statement and an offer information statement
DPA Scheme	Deferred Prosecution Agreement Scheme as proposed to be introduced by the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019
DOJ	United States Department of Justice
Discussion Paper	ALRC, *Discussion Paper 87, Corporate Criminal Responsibility*
Dual track regulation	Regulation of conduct through the use of both civil and criminal proceedings as described by the ALRC, in *Discussion Paper 87, Corporate Criminal Responsibility*
EPBC Act	*Environmental Protection Biodiversity and Conservation Act 1999*
external administrator	A voluntary administrator, deed administrator, provisional liquidator or liquidator of a company Note: This is a definition contained in s5-20 of Sch 2 to the Corporations Act.
FCA	United Kingdom Financial Conduct Authority
financial market	Has the meaning given in s767A of the Corporations Act, and includes a facility through which offers to acquire or dispose of financial products are regularly made or accepted
financial product	A facility through which, or through the acquisition of which, a person does one or more of the following: • makes a financial investment (see s763B); • manages financial risk (see s763C); • makes non-cash payments (see s763D) Note: This is a definition contained in s763A of the Corporations Act: see also s763B–765A.
financial report	The documents referred to in s295 and 303 of the Corporations Act—that is, financial statements, notes to the financial statements and the directors' declaration about the statements and notes
financial service	Has the meaning given in Div 4 of Pt 7.1 of the Corporations Act
financial services business	A business of providing financial services Note: This is a definition contained in s761A of the Corporations Act. The meaning of 'carry on a financial services business' is affected by s761C.

Term	Meaning in this document
financial services laws	Has the meaning given in s761A of the Corporations Act
financial services provider	A person who provides a financial service
financial statements	The statements required by accounting standards—that is, the statement of financial position, the statement of comprehensive income, the statement of changes in equity and the statement of cash flows Note: This excludes the directors' declaration and the notes to the financial statements.
FMA	New Zealand Financial Markets Authority
IN	Infringement notice
INFO 196 (for example)	An ASIC information sheet (in this example numbered 196)
infringement notice	An infringement notice issued under reg 7.2A.04 of the Corporations Regulations
Insurance Contracts Act	*Insurance Contracts Act 1984*
investor	In relation to an AFS licensee, includes an existing, potential or prospective client
licensee obligations (AFS)	The obligations of an AFS licensee as set out in s912A and 912B of the Corporations Act and the requirement to be of good fame and character as included in s913B of the Corporations Act
liquidator	An insolvency practitioner appointed under Ch 5 of the Corporations Act to wind up the affairs and distribute the property of a body corporate
market integrity rules	Rules made by ASIC, under s798G of the Corporations Act, for trading on domestic licensed markets
MCCOC	The Model Criminal Code Officers Committee responsible for developing a unified Criminal Code on which the Criminal Code Act 1995 was based.
National Credit Act	*National Consumer Credit Protection Act 2009*
National Credit Code	National Credit Code at Sch 1 to the National Credit Act
PDS	A Product Disclosure Statement—a document that must be given to a retail client for the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act Note: See s761A for the exact definition.

Term	Meaning in this document
Penalties Act	*Treasury Laws Amendment (Strengthening Corporate and Financial Penalties) Act 2019*
Phoenxing Bill	Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019
provide a financial service	A person provides a financial service if they: • provide financial product advice; • deal in a financial product; • make a market for a financial product; • operate a registered scheme; • provide a custodial or depository service; or • provide traditional trustee services Note: This is a definition contained in s766A of the Corporations Act.
RCMP	Royal Canadian Mounted Police
Registries Bill	Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019
registered liquidator	A person registered by ASIC under s20-30 of Sch 2 to the Corporations Act
representative (of an AFS licensee)	Means: • an authorised representative of the licensee; • an employee or director of the licensee; • an employee or director of a related body corporate of the licensee; or • any other person acting on behalf of the licensee Note: This is a definition contained in s910A of the Corporations Act.
Royal Commission	The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry
SEC	Securities and Exchange Commission (US)
SIS Act	*Superannuation Industry (Supervision) Act 1993*
TPA Model	The model of attribution of liability to a corporation under s84 of the *Trade Practices Act 1974* as described by the ALRC in *Discussion Paper 87, Corporate Criminal Responsibility*
whistleblower	A discloser who has made a disclosure that qualifies for protection under the Corporations Act Note: See s1317AA, 1317AAA, 1317AAC and 1317AAD. Also see s14ZZT, 14ZZY and 14ZZV of the *Taxation Administration Act 1953* for a discloser that qualifies for protection under that Act.
Whistleblower Amendment Act	*Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019 (Cth)*