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REPORT

Federal Civil & Administrative Penalties in Australia

REPORT 95
December 2002

Terms of Reference

CIVIL AND ADMINISTRATIVE PENALTIES

1. I, DARYL WILLIAMS, Attorney-General of Australia, HAVING REGARD TO:

(a) the importance of maintaining an effective and efficient criminal justice system;

(b) the need in relation to various economic, financial, business, industrial, environmental, social, law enforcement and other areas of Australian government responsibilities, to achieve effective and efficient regulation and supervision and to counter wrongdoing with a fair, effective and practical system of decision-making and enforcement;

(c) the advantages and disadvantages of a uniform system for imposing monetary penalties by means of administrative and civil penalties (including a system allowing for the prosecution of an offence by a civil procedure);

(d) the balance which ideally should be maintained in deterring and punishing wrongdoing in regulatory and supervisory regimes between the use of the criminal justice system and administrative and civil penalties;

(e) the need for federal administrative and civil penalty systems to be based on clear and consistent principles;

(f) the need, having regard to considerations of fairness, effectiveness and efficiency, for appropriate relations to be established between administrative, civil and criminal offences, processes and penalties, having regard to Chapter 2 of the Commonwealth *Criminal Code* which contains general principles of criminal responsibility which are to apply to all Commonwealth offences:

(g) the recommendations of the Australian Law Reform Commission (ALRC) in its Reports, Nos. 60 (Customs and Excise) and 57 (Multiculturalism and the Law);

(h) Australia's obligations under international law and Australia's commitment to human rights and civil liberties; and

(i) the remarks of the High Court in *Comptroller of Customs v D'Aquino Bros Pty Limited* (30 September 1996) and by the New South Wales Court of Appeal in *Comptroller-General of Customs v D'Aquino Bros Pty Limited* (19 February 1996);

REFER to the ALRC under the *Australian Law Reform Commission Act 1996* the laws of the Commonwealth relating to the imposition of administrative and civil penalties.

2. The ALRC is to report in particular on:

(a) the kinds of areas where provision for administrative penalties and civil penalties is appropriate and what limitations, if any, there should be on making provision for administrative and civil penalties and pursuing those penalties;

(b) how the circumstances and conduct giving rise to administrative and civil penalties should be expressed and, in particular, whether principles relating to criminal liability, including fault elements, corporate criminal responsibility, vicarious responsibility, and strict responsibility, should apply to liability for administrative and civil penalties;

(c) the relationship between administrative and civil penalties and criminal liability in respect of the same conduct, including joint proceedings, double jeopardy, elections, bars to proceedings;

(d) as a matter of general principle, the test to apply in determining whether to issue an infringement notice or other process for the payment of an administrative penalty;

(e) what limitations, if any, should exist on the use of persons other than officers or members of government departments and agencies (eg employees of private contractors) to issue infringement notices or other process for the payment of administrative penalties;

(f) other procedural rules, having regard to possible proceedings in:

(i) a federal court; and

(ii) a State court (including rules as to jurisdiction and venue);

(g) the level of administrative and civil penalties, including:

(i) the principles for setting maximum penalties (having regard to, *inter alia,* relevant scientific and social scientific data and literature,

including data and literature relating to harm caused by environmental, corporate and other forms of crime); and

(ii) the principles for determining penalties in particular cases; and

(h) enforcement of administrative and civil penalties including:

(i) the limitations, if any, which exist or should apply with respect to Commonwealth departments and agencies utilising specialised State and Territory infringement notice enforcement procedures (such as SETONS procedure in Queensland, the PERIN procedure in Victoria and SEINS procedure in New South Wales);

(ii) the limitations, if any, which exist or should apply with respect to the recovery of the costs of investigating contraventions of administrative and civil penalty provisions; and

(iii) the effect of insolvency upon a liability to pay an administrative or civil penalty.

3. The ALRC shall, in performing its functions in relation to this reference, consult with Commonwealth departments and agencies that have responsibilities in relation to the administration or enforcement of laws that currently include, or that may appropriately include, a regime for imposing administrative and civil penalties and, in particular, shall consult with the Attorney-General's Department, the Australian Federal Police, the Director of Public Prosecutions, the Treasury, the Australian Taxation Office, the Australian Competition and Consumer Commission, the Australian Prudential Regulation Authority, the Australian Securities and Investments Commission, the Australian Customs Service, the Human Rights and Equal Opportunity Commission, the Law Council of Australia, the Business Council of Australia and such other governmental and private and community bodies as the ALRC considers appropriate.

4. IN MAKING its report, the ALRC shall have regard to its function in accordance with section 21(1)(d) of the *Australian Law Reform Commission Act 1996* to consider and present proposals for uniformity between laws of the Territories and the States.

5. The ALRC is to report by 1 March 2002.[1]

DATED: 21 January 2000

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1 On 14 February 2002, the Attorney-General extended the reporting date to 30 November 2002.

[signed]

Daryl Williams
Attorney-General

Participants

The Commission

The Division of the Commission constituted under the *Australian Law Reform Commission Act 1996* (Cth) for the purposes of this reference comprises the following:

President
Professor David Weisbrot

Deputy President
Dr Kathryn Cronin (to June 2001)

Members
Ian Davis (full-time Commissioner from 13 June 2000)
Associate Professor Brian Opeskin (full-time Commissioner from 31 July 2000)
Professor Anne Finlay (full-time Commissioner from 12 November 2001)
Justice Ian Coleman (part-time Commissioner)
Hank Spier (part-time Commissioner from September 2000 to November 2002)
Justice John von Doussa (part-time Commissioner)
Justice Mark Weinberg (part-time Commissioner)

Officers
Principal Legal Officer
Michael Barnett (September to November 2001)

Senior Legal Officers
Isabella Cosenza (from April 2002)
Lynne Thompson (from July 2001)

Legal Officers
Kate Connors (from September 2000)
Jonathan Dobinson (from March 2001)
Helen Dakin (to April 2002)
Paula O'Regan (May to December 2001)
Jackie Saisithidej (to June 2001)
Ben Saul (from January to August 2001)
Cathie Warburton (to February 2001)

Project Assistant
Tina O'Brien

Legal interns
Rachel Blackwood
Eleanor Chambers
Inoka Chandrasekara
Yi Chen
Sonia Dimoska
Kristy Dixon
Suseela Durvasula
Leah Friedman
Melissa Goode
Sonia Goumenis
Sarah Henningham
Daniel Joffe
Wendy Karim
Andreas Kirschbaum
Joshua Kulawiec
Veronica Lavulo
Victoria Lee
Michelle McCabe
Beth Midgely
Mohan Nadig
Melanie Ries
Simran Sandhu
Emily Sunman
Wendy Yap

Library
Sue Morris

Advisory Committee

Professor Mark Aronson, Faculty of Law, University of New South Wales
Professor Bob Baxt, Partner, Allens Arthur Robinson
Mr Sitesh Bhojani, Commissioner, Australian Competition & Consumer Commission
Professor John Braithwaite, The Law Program, Research School of Social Sciences, Australian National University
Mr Alan Cameron AM, Former Chairman, Australian Securities & Investments Commission
Mr Simon Daley, Senior Government Solicitor, Australian Government Solicitor
Mr Michael D'Ascenzo, Second Commissioner, Australian Taxation Office
Mr Grahame Delaney, Principal Advisor, Commercial Prosecutions & Policy, Office of the Director of Public Prosecutions (Cth)
Professor David Farrier, Director, Centre for Natural Resources Law and Policy, Faculty of Law, University of Wollongong

Mr Brent Fisse, Partner, Gilbert & Tobin
Dr Geoffrey Flick SC, Barrister, Wentworth Chambers
Professor Arie Freiberg, Head, Department of Criminology, University of Melbourne
Mr Stephen Gageler SC, Barrister, Wentworth Chambers
Mr Duncan Glasgow, Formerly General Counsel, Intech Pty Ltd
The Hon Justice Peter Heerey, Federal Court of Australia
Mr Jeffrey Hilton SC, Barrister, Selborne Chambers
Mr Andrew Hudson, Partner, Herbert Geer & Rundle
Mr Geoffrey Johnson, Barrister, Wardell Chambers
Mr Joe Longo, Special Counsel, Freehills (until June 2002)
Ms Elizabeth Montano, Director, Australian Transaction Reports & Analysis Centre (until December 2001)
Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation, Faculty of Law, University of Melbourne
The Hon Justice Kim Santow OAM, Supreme Court of New South Wales (until February 2002)
Ms Jillian Segal, Committee member of Trade Practices Act Review Inquiry (formerly Deputy Chair, Australian Securities & Investments Commission)
Mr Gary Watts, Partner, Fisher Jeffries
Mr Peter Wood, National Director, Enforcement, Australia Securities & Investments Commission

Abbreviations

AAT	Administrative Appeals Tribunal
ABA	Australian Broadcasting Authority [formerly the ABT]
ABT	Australian Broadcasting Tribunal [now the ABA]
ACA	Australian Communications Authority
ACCC	Australian Competition and Consumer Commission [formerly the TPC]
ACPA	Australian Association for Compliance Professionals of Australia
ACCD	Aged and Community Care Division [of DOHAC]
ACIF	Australian Communications Industry Forum
ACOSS	Australian Council of Social Service
ACS	Australian Customs Service
ADI	Authorised deposit-taking institution
ADJR Act	*Administrative Decisions (Judicial Review) Act 1977* (Cth)
AEC	Australian Electoral Commission
AFMA	Australian Fisheries Management Authority
AFP	Australian Federal Police
AGS	Australian Government Solicitor
ALRC	Australian Law Reform Commission
AMSA	Australian Maritime Safety Authority
AMSA Act	*Australian Maritime Safety Authority Act 1990* (Cth)
ANAO	Australian National Audit Office
ANZFA	Australia New Zealand Food Authority [now Food Standards Australia New Zealand]
APRA	Australian Prudential Regulation Authority
AQIS	Australian Quarantine Inspection Service
ARC	Administrative Review Council
ARO	Authorised Review Officer [in Centrelink]
ASC	Australian Securities Commission
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001* (Cth)
ASX	Australian Stock Exchange Ltd
ATO	Australian Taxation Office
AUSTRAC	Australian Transaction Reports and Analysis Centre
BSLs	Business Service Lines [within the ATO]
CAA	Civil Aviation Authority [now CASA]
CASA	Civil Aviation Safety Authority [formerly CAA]

CBFCA	Customs Brokers & Forwarders Council of Australia Inc
CES	Commonwealth Employment Service [replaced by Job Network]
CLERP	Corporate Law Economic Reform Program
CLERP 9	'CLERP 9: Corporate Disclosure — Strengthening the financial reporting framework' policy document released by Treasury in September 2002
CLERP Act	*Corporate Law Economic Reform Program Act 1999* (Cth)
Constitution	*Commonwealth of Australia Constitution Act 1900* (Imp)
Criminal Code	*Criminal Code Act 1995* (Cth), Schedule
CRU	Customer Relations Unit [within Centrelink]
Dawson Committee	Committee established in May 2002 to undertake a review of the *Trade Practices Act 1974* (Cth)
DEWR	Department of Employment and Workplace Relations
DFaCS	Department of Family and Community Services
DID	Diversified Institutions Division [of APRA]
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs
DOHA	Department of Health and Ageing
DOJ	Department of Justice [in the US]
DP 65	Australian Law Reform Commission Discussion Paper 65, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, published April 2002, Sydney
DPP	Commonwealth Director of Public Prosecutions
DPP Act	*Director of Public Prosecutions Act 1983* (Cth)
ECA	*Export Control Act 1982* (Cth)
EOWA	Equal Opportunity for Women in the Workplace Agency
EOWA Act	*Equal Opportunity for Women in the Workplace Act 1999* (Cth)
EPBC Act	*Environment Protection and Biodiversity Conservation Act 1999* (Cth)
EU	European Union
FaCS	Department of Family and Community Services
FM Act	*Fisheries Management Act 1991* (Cth)
FOI Act	*Freedom of Information Act 1982* (Cth)
FSA	Financial Services Authority [in the UK]
FSRA	*Financial Services Reform Act 2001* (Cth)
FTC	Federal Trade Commission [in the US]
FTRA	*Financial Transactions Reports Act 1988* (Cth)
GIC	General Interest Charge
GM	Genetically modified
GMO	Genetically modified organisms
GST	Goods and Services Tax

GT Act	*Gene Technology Act 2000* (Cth)
HREOC	Human Rights and Equal Opportunity Commission
HREOC Act	*Human Rights and Equal Opportunity Commission Act 1986* (Cth)
ITAA 1936	*Income Tax Assessment Act 1936* (Cth)
ITAA 1997	*Income Tax Assessment Act 1997* (Cth)
ITSA	Insolvency and Trustee Service Australia
JCPAA	Joint Committee of Public Accounts and Audit
MRT	Migration Review Tribunal
NAT	National Adjudicatory Tribunal [of the ASX]
NCA	National Crime Authority
NPP	National Privacy Principle
NRA	National Registration Authority for Agricultural and Veterinary Chemicals
ODM	Original decision maker [in Centrelink]
OECD	Organisation for Economic Co-operation and Development
OFPC	Office of the Federal Privacy Commissioner
OFT	Office of Fair Trading [in the UK]
OGTR	Office of the Gene Technology Regulator
PRS	Problem Resolution Service [of the ATO]
PSA	*Prices Surveillance Act 1983* (Cth)
RIS	Regulatory Impact Statement
RRT	Refugee Review Tribunal
SSA	*Social Security Act 1991* (Cth)
SSAA	*Social Security (Administration) Act 1999* (Cth)
SSAT	Social Security Appeals Tribunal
STCT	Small Taxation Claims Tribunal
TAA	*Taxation Administration Act 1953* (Cth)
TGA	Therapeutic Goods Administration
TIO	Telecommunications Industry Ombudsman
TPA	*Trade Practices Act 1974* (Cth)
TPA Review	Review of the TPA by the Dawson Committee
TPC	Trade Practices Commission [now the ACCC]
UK	United Kingdom
US	United States of America

Glossary

These definitions are not intended to have any legal effect, but to reflect their usage in this Report and the ALRC's understanding of the general meaning.

This term …	**… is used in this Report to refer to … (unless the context requires otherwise)**
Accessorial liability	an individual's indirect liability as an accessory to an offence or contravention for which a body corporate is principally liable.
Accused	any person charged with a criminal offence.
Administrative penalty	a true administrative penalty (*qv*), which arises by operation of legislation when certain triggering events or circumstances are present.
Banning order	a restriction placed on an individual disqualifying him or her from either holding a particular position or engaging in particular activities.
Breach	any infraction of the law, whether criminal or non-criminal.
Civil penalty	any penalty imposed by a court in a non-criminal proceeding.
Concurrent liability	the direct liability of both an individual and a body corporate as principals in respect of the same breach.
Contravention	any non-criminal breach of the law.
Corporation	any body corporate, not just one incorporated under the *Corporations Act*.
Court-imposed penalty	any penalty imposed by a court, including an agreed penalty.
Defendant	any person against whom an action for civil penalties has been brought.
External merits review	the reconsideration of the merits of a decision by a court or other independent tribunal specifically constituted for the purpose of reviewing decisions.

This term …	**… is used in this Report to refer to … (unless the context requires otherwise)**
Financial penalty	a monetary penalty (*qv*).
Fine	any criminal penalty that requires the payment of money to the state or a state agency (but not good behaviour bonds).
Guidelines	any document developed by a regulator for public or internal use that outlines some aspect of the manner in which it operates, and includes documents with a variety of names including 'manuals', 'policy statements', 'charters' and 'practice notes'.
Internal review	the reconsideration of a decision within the same agency by a person other than the original decision maker.
Judicial review	the reconsideration of the legality of a decision by a court.
Managerial liability	an individual's deemed liability as a principal for an offence or contravention by a body corporate because of that individual's role or status in the management of the body corporate.
Monetary penalty	any penalty, whether a criminal fine or a non-criminal pecuniary penalty, that requires the payment of money to the state or a state agency.
Offence	criminal breaches of the law, unless the context clearly requires a more general meaning.
Offender	any person that breaches the law.
Pecuniary penalty	any non-criminal penalty that requires the payment of money to the state or a state agency.
Penalty	any suffering, loss, disability or disadvantage imposed by law as the result of or punishment for an illegal act.
Person	includes both individuals (natural persons) and corporations.
Personal liability	the liability of a natural person for a breach of the law, even if the party principally liable at law is a corporation or another person.

This term …	**… is used in this Report to refer to … (unless the context requires otherwise)**
Private civil action	any court action taken by one person or body corporate against another for private compensation or other remedies.
Prosecutor	any state authority seeking a penalty to be imposed on an alleged offender through a court process, whether that be the DPP or another government agency or regulator.
Quasi-penalty	administrative procedures that result in the imposition of certain restrictions on a person's activities or the withholding of benefits. These might be loosely regarded as penalties but are not penalties as a matter of law. Common examples are licence restrictions and social security 'penalties'.
Regulatory contraventions	non-criminal breaches of regulatory law.
Regulatory Contraventions Statute	the proposed statute in which certain recommended fundamental or default statutory provisions concerning non-criminal regulatory breaches of the law would be enacted.
Sanction	any penalty, but also includes any reward or advantage conferred for compliant behaviour.
True administrative penalties	penalties that arise automatically by operation of legislation when certain triggering events or circumstances are present.

Summary of Recommendations

Statement of Principle

The distinction between criminal and non-criminal (civil) penalty law and procedure is significant and adds to the subtlety of regulatory law. This distinction should be maintained and, where necessary, reinforced. Parliament should exercise caution about extending the criminal law into regulatory areas unless the conduct being proscribed clearly merits the moral and social censure and stigma that attaches to conduct regarded as criminal.

Key Recommendations

Recommendation 6–7. A Regulatory Contraventions Statute of general application should be enacted to cover various aspects of the law and procedure governing non-criminal contraventions of federal law in accordance with the Recommendations in this Report.

Recommendation 6–8. The Regulatory Contraventions Statute is not intended to be a comprehensive code but rather should be expressed:

(a) to contain certain principles of responsibility that apply to any non-criminal breach of any law of the Commonwealth;

(b) to prevail over any inconsistent Commonwealth law to the extent of that inconsistency unless that other law expressly excludes or modifies the operation of the Regulatory Contraventions Statute by express reference to that statute (or the portion of it, the operation of which is to be excluded).

Chapter 3. The Purposes of Penalties

Recommendation 3–1. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, the procedures for the imposition of a civil penalty be in accordance with the usual practice and procedure of the court in civil cases or in accordance with the directions of the court or a judge.

Chapter 4. Fault and the Criminal/Non-Criminal Distinction

Recommendation 4–1. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, contraventions for which a civil penalty may be imposed may contain fault elements as defined under the *Criminal Code* or as specified in a law that creates a particular contravention.

Recommendation 4–2. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, if no fault element is specified, a contravention for which a civil penalty may be imposed does not contain a fault element.

Recommendation 4–3. Where the same physical elements can attract either a civil penalty or criminal liability, any fault elements for the civil contravention should be clearly distinguished from those for the criminal offence.

Chapter 6. The Tools of Regulation

Recommendation 6–1. The *Legislation Handbook* should be amended to make it clear that provisions creating contraventions which impose civil or administrative penalties should only be implemented by primary legislation.

Recommendation 6–2. In addition to any statutory requirements to publish, any guidelines (however named) made as delegated legislation or otherwise made pursuant to a legislative requirement to do so should be made available to the public:

(a) via the website of the regulator responsible for the administration of the guidelines;

(b) on publicly available legislation websites;

(c) in hard copy; and

(d) in any other appropriate medium.

Recommendation 6–3. When regulators develop publicly available guidelines (however named) in the absence of a legislative requirement to do so, these guidelines should:

(a) be drafted in plain English;

(b) include a statement that they are not legally binding and are non-justiciable;

(c) be published in electronic format on the regulator's website and in hard copy;

(d) if appropriate, be published using a systematic method that is accessible to both the regulator's staff and the regulated community; for example, the Practice Note and Policy Statement numbering and presentation system used by ASIC;

(e) clearly indicate they are current and operative guidelines; and

(f) to the extent practicable, be developed in consultation with the regulated community.

Recommendation 6–4. When guidelines for public use have been superseded or withdrawn, the guidelines (however named) should clearly indicate:

(a) that they have been superseded or withdrawn;

(b) the date on which they ceased to have effect; and

(c) if they have been superseded, what they have been replaced with.

Recommendation 6–5. Guidelines (however named) developed by regulators for internal use should, as far as practicable, follow the model proposed in Recommendations 6–2 to 6–4.

Recommendation 6–6. When guidelines (however named) are made, the regulator responsible for the administration of legislation to which the guidelines relate should ensure that training is provided to staff who will make decisions pursuant to those guidelines to ensure that they are familiar with the legislation and the guidelines.

Recommendation 6–7. See Key Recommendations above.

Recommendation 6–8. See Key Recommendations above.

Chapter 7. Corporate Responsibility

Recommendation 7–1. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, if a physical element of a non-criminal contravention 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.

Recommendation 7–2. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary:

(a) If intention, knowledge or recklessness is a fault element in relation to a physical element of a non-criminal contravention, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the non-criminal contravention.

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

(i) 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 non-criminal contravention; or

(ii) 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 non-criminal contravention; or

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

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

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

(d) Factors relevant to the application of paragraph (b)(iii) or (b)(iv) include:

(i) whether authority to commit a non-criminal contravention of the same or a similar character had been given by a high managerial agent of the body corporate; and

(ii) whether the employee, agent or officer of the body corporate who committed the non-criminal contravention believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the non-criminal contravention.

(e) In this provision:

board of directors means the body (by whatever name called) exercising the executive authority of the body corporate.

corporate culture means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place.

high managerial agent means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.

Recommendation 7–3. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary:

(a) If:

(i) negligence is a fault element in relation to a physical element of a non-criminal contravention; and

(ii) no individual employee, agent or officer of the body corporate has that fault element;

that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).

(b) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

(i) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or

(ii) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

Chapter 8. Liability of Corporate Officers

Recommendation 8–1. The Regulatory Contraventions Statute should provide that any provision in legislation that deems an individual to be personally liable for the contravening conduct of a corporation should define the individual who may be liable as an individual (by whatever name called and whether or not the individual is an officer of the corporation) who is concerned in, or takes part in, the management of the corporation and includes an individual:

(a) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or

(b) who has the capacity to affect significantly the corporation's financial standing; or

(c) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the individual in the proper performance of functions attaching to the individual's professional capacity or his or her business relationship with the directors or the corporation).

Recommendation 8–2. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, any legislation that deems an individual to be personally liable for the contravening conduct of a corporation should include a fault element that the individual knew that, or was reckless or negligent as to whether, the contravening conduct would occur.

Recommendation 8–3. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, the pecuniary penalty applicable to any provision that deems an individual to be personally liable for the contravening conduct of a corporation should not be more than one-fifth of the maximum penalty that may be imposed on the corporation for that criminal offence or non-criminal contravention.

Recommendation 8–4. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, any provision in legislation that deems an individual to be personally liable for the contravening conduct of a corporation should include as a threshold test for liability that:

(a) the individual failed to take all reasonable steps to prevent the contravening conduct; and

(b) the individual was in a position to influence the conduct of the body corporate in relation to the contravening conduct.

Chapter 9. Regulators and the DPP

Recommendation 9–1. Regulators who administer legislation under which criminal penalties may be imposed should, together with the DPP, develop and publish a Memorandum of Understanding that addresses the following matters (unless clearly inappropriate in the circumstances):

(a) the investigation and litigation process;

(b) liaison between the regulator and the DPP;

(c) the referral of cases to the DPP;

(d) the referral of cases to other state and federal agencies;

(e) prosecution by the regulator;

(f) parallel and subsequent criminal and non-criminal enforcement arising from the same or substantially the same conduct;

(g) disagreement between the regulator and the DPP in relation to enforcement;

(h) leniency and immunity policies;

(i) enforceable undertakings and settlement negotiations; and

(j) actions to recover penalties or costs and expenses.

Recommendation 9–2. When a regulator and the DPP develop a Memorandum of Understanding in accordance with Recommendation 9–1, the regulator and the DPP

should ensure that training is provided to relevant staff to ensure that they are familiar with it.

Chapter 10. Regulators' Enforcement Policies

Recommendation 10–1. Regulators who administer legislation under which criminal, civil or administrative penalties may be imposed or arise should develop and publish enforcement guidelines setting out their enforcement approach. These guidelines should cover the following matters (unless clearly inappropriate in the circumstances):

(a) the types of action available to the regulator;

(b) the principles behind each of these actions;

(c) the criteria involved in the decision to pursue one or more of these actions; and

(d) the regulator's relationship with other regulators and enforcement agencies.

Recommendation 10–2. Regulators who administer legislation under which criminal, civil or administrative penalties may be imposed or arise should, where necessary to supplement guidelines made pursuant to Recommendation 10–1, develop internal enforcement guidelines to provide guidance to staff who undertake enforcement activities. These internal guidelines must not be inconsistent with guidelines developed and published in accordance with Recommendation 10–1.

Chapter 11. Multiple Proceedings and Multiple Penalties

Recommendation 11–1. When the same physical elements can attract both a civil penalty and criminal liability, the physical and fault elements of both the contravention attracting a civil penalty and the criminal offence should be clearly distinguished in the legislation.

Recommendation 11–2. Legislation that provides for exposure to parallel criminal proceedings and civil penalty proceedings for the same or substantially the same conduct should also provide that:

(a) civil penalty proceedings against a person must be stayed if criminal proceedings are commenced, or have already been commenced, against that person for a criminal offence constituted by conduct that is the same or substantially the same as the conduct alleged to constitute the civil penalty contravention;

(b) no, or no further, civil penalty proceedings may be taken against a person if that person has been convicted of a criminal offence constituted by conduct that is

the same or substantially the same as the conduct alleged to constitute the civil penalty contravention; and

(c) if the person is not convicted of that criminal offence, the civil penalty proceedings may be resumed.

This Recommendation is not intended to restrict the ability of a regulator to seek compensation orders, disqualification orders or preservation orders.

Recommendation 11–3. Legislation that provides for criminal proceedings and civil penalty proceedings for the same or substantially the same conduct should also provide that evidence of information given or documents produced by a person is not admissible in criminal proceedings against the person if the person gave the evidence or produced the documents in civil penalty proceedings.

Recommendation 11–4. Where conduct constitutes a contravention of two or more provisions of legislation that would attract a civil penalty, a person should not be liable for more than one civil penalty in respect of the same or substantially the same conduct.

Recommendation 11–5. Regulators should develop and publish guidelines in accordance with Recommendations 6–2 to 6–4, 9–1 and 10–1 in relation to criminal and civil penalty proceedings for the same or substantially the same conduct that address issues of:

(a) choice of proceedings;

(b) multiple penalties; and

(c) limits on the use of evidence.

Chapter 12. Infringement Notices

Recommendation 12–1. In criminal penalty schemes, an infringement notice scheme should apply only to minor offences of strict or absolute liability.

Recommendation 12–2. In civil penalty schemes, an infringement notice scheme should apply only to minor contraventions in which no proof of a fault element or state of mind is required.

Recommendation 12–3. The payment of the amount specified in an infringement notice should act as a bar to proceedings in respect of the alleged offence or contravention.

Recommendation 12–4. In the absence of any clear, express statutory statement to the contrary, regulators should have the power to withdraw an infringement notice issued in error or to correct an infringement notice issued in error by withdrawing it and issuing a fresh notice.

Recommendation 12–5. Subject to Recommendation 12–6, if a record of the issue of an infringement notice or payment or non-payment of the amount specified in an infringement notice forms part of the formal compliance history maintained by the regulator (or any other person or agency) about the person to whom the infringement notice was issued, this record should:

(a) expressly note that the issue of an infringement notice constitutes no more than an allegation of a breach and that payment does not constitute an admission for any purpose;

(b) be reviewed periodically and stale information expunged (for example, two years after the date of issue of the infringement notice); and

(c) be subject to the *Freedom of Information Act 1982* (Cth) (ie, able to be corrected by the person).

Recommendation 12–6. A regulator may keep a record of the issue of an infringement notice and payment or non-payment of the amount specified in an infringement notice for the purpose of recording, monitoring and reporting on the enforcement activities undertaken by the regulator in compliance with any relevant Commonwealth policies or procedures (for example, the Commonwealth Fraud Investigation Model Procedures or the *Archives Act 1983* (Cth)). Any public reporting (for example, in the regulator's annual report or on its website) should be on an aggregate or anonymous basis.

Recommendation 12–7. No public announcement should be made by a regulator about the issue of an infringement notice to, or the payment or non-payment of the amount specified in an infringement notice by, an identified or identifiable person.

Recommendation 12–8. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, the design and use of infringement notice schemes in federal regulatory law should follow a model scheme that should incorporate the following features:

(a) The options for the regulator should include:

  (i) the commencement of action to seek a criminal or civil penalty;

  (ii) the issue of an infringement notice;

  (iii) a formal caution;

  (iv) an informal warning; and

  (v) no action.

(b) The amount payable under an infringement notice should not exceed a small proportion (say, one-fifth) of the maximum penalty which might be imposed if the matter is dealt with by a court, or a set penalty specified in the legislation or for which a method of calculation is specified in the legislation.

(c) Before an infringement notice may be issued, the regulator must have reasonable grounds to believe that the alleged offence or contravention has been committed.

(d) The payment of an amount by a person under an infringement notice, including payment by instalments, should not be taken for any purpose to be an admission by that person of any liability for the alleged commission of the offence or contravention.

(e) The consequence of failing to pay an amount set out in an infringement notice should be action to seek a penalty for the alleged offence or contravention and not an alternative or substitute penalty such as licence suspension or cancellation.

(f) Guidelines should be developed and published by regulators in accordance with Recommendations 6–2 to 6–4, 9–1 and 10–1 on how they will exercise their discretion to issue, withdraw and correct infringement notices.

(g) Only one notice should be issued for each alleged offence or contravention — if the conduct might amount to several different offences or contraventions, the regulator must choose which offence or contravention upon which it will base the infringement notice.

(h) There should be a 12 month time limit after the occurrence of the alleged offence or contravention within which an infringement notice may be issued.

(i) The nature of the alleged offence or contravention should be set out clearly in the infringement notice (including the section of the legislation creating the offence or contravention).

(j) The rights of the recipient of the infringement notice should be set out clearly in the infringement notice in plain English. These should include, in particular:

  (i) the right to elect to contest liability in court;

  (ii) the right to apply for withdrawal of the notice;

  (iii) the effect of payment; and

  (iv) information about what records (if any) will be kept by the regulator about the issue, payment or non-payment of the amount specified in the infringement notice.

(k) The recipient of the infringement notice should have the right to seek to have the infringement notice withdrawn by presenting material to the issuing authority demonstrating that the factual basis on which the infringement notice was issued was erroneous.

(l) Where the issue of the infringement notice is based on information provided to the regulator by any person, the person to whom the infringement notice is issued should have the right to request a written copy of any information considered relevant by the decision maker in making the decision to issue the infringement notice.

(m) If the amount payable under an infringement notice is more than two penalty units, the recipient of the infringement notice should have the right to request, on the ground of financial hardship, that the time to pay that amount be extended or that the penalty be paid by agreed instalments. Agreement to pay that amount by instalments should not be unreasonably withheld. Agreement to pay that amount by instalments should have the effect of making the unpaid portion of that amount a debt due to the Commonwealth.

(n) Infringement notice schemes may apply to continuing offences or contraventions.

(o) The issue of an infringement notice does not limit the penalty that may be imposed by a court on a person convicted of an offence or found liable for a contravention.

(p) The statements of principle contained in Recommendations 12–3 to 12–7.

Recommendation 12–9. The form of an infringement notice should be specified in delegated legislation and in the guidelines referred to in Recommendation 12–8(f). This form might be based on the *Customs Act 1901* (Cth) Infringement Notice set out in Appendix C to the Customs Act Guidelines for Serving Infringement Notices. At a minimum, an infringement notice should specify:

(a) To whom it is issued (including the name of the individual or corporation and address);

(b) By whom it is issued (including the name and work address of the delegate);

(c) A unique form of identification (such as a notice number);

(d) The date on which it is issued;

(e) The nature of the alleged offence or contravention (including the provision of the legislation that it is alleged has been contravened);

(f) When and where the offence or contravention is alleged to have been committed;

(g) The amount payable under the notice (including its relationship to the maximum fine or penalty a court could impose);

(h) The date by which payment is due;

(i) Where and how payment may be made;

(j) The effect of payment, including a statement that, if payment is made within the period specified in the notice (or any further period that is allowed):

  (i) the person's liability is taken to be discharged;

  (ii) further proceedings cannot be taken against the person for the offence or contravention;

  (iii) the person is not regarded as having been convicted of the offence or found liable for the contravention; and

  (iv) payment does not constitute an admission of liability for any purpose;

(k) The effect of non-payment;

(l) The right to request an extension of time to pay or to pay the amount payable under the notice by instalments (if applicable);

(m) The right to apply for withdrawal of the notice (including to whom an application for withdrawal should be made);

(n) The right to elect to contest liability in court;

(o) Information about what records (if any) will be kept by the regulator about the issue, payment or non-payment of the infringement notice;

(p) The details of any corrections (if any) to any previous infringement notice issued in respect of the same alleged contravention (if any);

(q) Contact details for further information; and

(r) Any other information appropriate in the circumstances.

Recommendation 12–10. The officer within the regulator who considers an application for withdrawal of an infringement notice should be different from the officer who made the decision to issue the infringement notice.

Chapter 13. Customs Prosecutions

Recommendation 13–1. The *Customs Act 1901* (Cth) and the *Excise Act 1901* (Cth) should be amended to:

(a) remove the concept of a Customs or excise prosecution;

(b) classify each relevant offence as either criminal or civil by clear legislative statement and allow the ordinary rules of procedure and evidence for that type of breach to apply; and

(c) specify in relation to each criminal offence whether averments are to be permitted.

Recommendation 13–2. As recommended in the ALRC's report, *Customs and Excise* (ALRC 60, 1992), averments may be disallowed in any proceedings by the court if it is of the view that they would be unfair to the accused.

Recommendation 13–3. The *Customs Act 1901* (Cth) and the *Excise Act 1901* (Cth) should be amended to bring about consistency in the prosecution of minor and more serious breaches so that one class of procedure, either criminal or civil, is used regardless of whether proceedings are brought in a summary or higher court, and irrespective of the jurisdiction within which the proceedings are brought.

Chapter 14. Procedural Fairness

Recommendation 14–1. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, all persons directly adversely affected by a regulator's decision to impose a quasi-penalty must be afforded procedural fairness.

Recommendation 14–2. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, any person in respect of whom a regulator has formed an intention to impose a quasi-penalty should receive adequate prior notice of that intention. This requirement to give prior notice may be excluded by statute in situations where urgent action is needed to prevent imminent harm to any person or property.

Recommendation 14–3. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, any notice of a regulator's intention to impose a quasi-penalty should state the following matters (unless clearly inappropriate in the circumstances):

(a) To whom it is issued;

(b) By whom it is issued (including the name and work address of the delegate);

(c) The date on which it is issued;

(d) The nature of the alleged offence or contravention (including the date and place of occurrence);

(e) The regulator's intention to impose a quasi-penalty;

(f) In the case of a monetary quasi-penalty, the amount of the quasi-penalty intended to be imposed or, where applicable, the amount of the benefit intended to be withheld. In the case of a non-monetary quasi-penalty, the effect of the quasi-penalty intended to be imposed (for example, the withholding of a benefit or a restriction on a licence);

(g) The date on which the quasi-penalty (if imposed) will take effect or the time period which must expire before the quasi-penalty (if imposed) can come into effect, whichever is appropriate;

(h) The right to make submissions before the quasi-penalty is imposed, accompanied by an explanation of the form submissions should take;

(i) The right to seek legal advice in relation to the preparation of any submissions to be made;

(j) The fact that the regulator must consider these submissions prior to making a decision to impose a quasi-penalty;

(k) The time period within which to provide submissions and the effect if no submissions are provided within that period;

(l) The right to receive written notification of the quasi-penalty decision and written reasons for that decision;

(m) The rights of review and appeal, and how to seek such review or appeal;

(n) Contact details for further information; and

(o) Any other information appropriate in the circumstances.

Recommendation 14–4. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, any person in respect of whom a regulator has made a decision to commence proceedings preparatory to the possible imposition of a quasi-penalty, including any form of hearing, should receive adequate notice of that decision.

Recommendation 14–5. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, any notice of a regulator's intention to commence proceedings preparatory to the possible imposi-

tion of a quasi-penalty, including any form of hearing, should state the following matters (unless clearly inappropriate in the circumstances):

(a) To whom it is issued;

(b) By whom it is issued (including the name and work address of the delegate);

(c) The date it is issued;

(d) The nature of the alleged offence or contravention (including the date and place of occurrence);

(e) The regulator's intention to commence proceedings;

(f) If the contravention or offence carries a monetary quasi-penalty, the maximum amount of the quasi-penalty that may be imposed or withheld. If the contravention or offence carries a non-monetary quasi-penalty, the effect of any non-monetary quasi-penalty if imposed;

(g) The date on, or after which, proceedings will be commenced;

(h) The right to present submissions, accompanied by an explanation of the form submissions should take;

(i) The fact that the regulator must consider submissions prior to making a decision to impose a quasi-penalty;

(j) The time period within which to provide submissions and the effect if no submissions are provided within that period;

(k) The right to seek legal advice and to be legally represented;

(l) The right to receive written notification of the quasi-penalty decision and written reasons for that decision;

(m) The rights of review and appeal, and how to seek such review or appeal;

(n) Contact details for further information; and

(o) Any other information appropriate in the circumstances.

Recommendation 14–6. Regulators should ensure that training is provided to staff to ensure that they are familiar with the requirements to give procedural fairness in relation to persons in respect of whom a regulator has formed an intention to impose a quasi-penalty, or in respect of whom the regulator has made a decision to commence proceedings preparatory to the possible imposition of a quasi-penalty.

Recommendation 14–7. Where regulators' decisions to impose a quasi-penalty may adversely affect the interests of third parties, they should consider how procedural fairness could be extended to such third parties.

Chapter 15. Elements of Fairness.

Recommendation 15–1. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, regulators have the power to:

(a) withdraw an administrative penalty applied in error; and

(b) correct an administrative penalty applied in error by withdrawing any notice of that penalty and issuing a fresh notice of the correct penalty irrespective of whether the error goes to the validity of the application of the penalty or whether the correction is in favour of the person on whom the penalty was applied.

Recommendation 15–2. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary:

(a) regulators have the power to withdraw a quasi-penalty imposed in error;

(b) regulators have the power to correct a quasi-penalty imposed in error by withdrawing any notice of that quasi-penalty and issuing a fresh notice of the correct quasi-penalty irrespective of whether the error goes to the validity of the imposition of the quasi-penalty or whether the correction is in favour of the person on whom the quasi-penalty is imposed; and

(c) a person in respect of whom a regulator has formed an intention to correct a quasi-penalty imposed in error, where the correction would directly adversely affect the person on whom the quasi-penalty was previously imposed, should receive adequate prior notice of that intention. The requirement to give prior notice can be excluded by statute in situations where urgent action is needed to prevent imminent harm to any person or property or in the case of minor clerical errors where there is no confusion as to the penalty that has been imposed.

Recommendation 15–3. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, any notice of a regulator's intention to correct a quasi-penalty imposed in error, where the correction would directly adversely affect the person on whom the penalty was previously imposed, should state the following matters (unless clearly inappropriate in the circumstances):

(a) To whom it is issued;

(b) By whom it is issued (including the name and work address of the delegate);

(c) The date on which it is issued;

(d) A description of the quasi-penalty previously imposed and the date on which the quasi-penalty was previously imposed;

(e) The offence or contravention in respect of which the quasi-penalty was previously imposed (including the date and place of occurrence);

(f) A description of the error which gives rise to the intention to correct the quasi-penalty and a statement of the regulator's intention to amend the quasi-penalty because of the error;

(g) A description of the intended correction;

(h) A description of the effect of the intended correction;

(i) The right to make submissions before the quasi-penalty is corrected, accompanied by an explanation of the form submissions should take;

(j) The right to seek legal advice in relation to the preparation of any submissions to be made;

(k) The fact that the regulator must consider these submissions prior to making a decision to correct the quasi-penalty;

(l) The time period within which to provide submissions and the effect if no submissions are provided within that period;

(m) The date on which the corrected quasi-penalty (if imposed) will take effect or the time period which must expire before the corrected penalty (if imposed) can come into effect, whichever is appropriate;

(n) The right to receive written notification of the decision to correct the quasi-penalty and written reasons for that decision;

(o) The rights of review and appeal, and how to seek such review or appeal;

(p) Contact details for further information; and

(q) Any other information appropriate in the circumstances.

Recommendation 15–4. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, where a regulator withdraws an administrative penalty or quasi-penalty imposed in error it must provide written notification to the person on whom the penalty or quasi-penalty was previously imposed which states the following matters (unless clearly inappropriate in the circumstances):

(a) To whom it is issued;

(b) The date the notice is issued and by whom it is issued;

(c) A description of the penalty or quasi-penalty previously imposed and the date the penalty or quasi-penalty was previously imposed;

(d) The offence or contravention in respect of which the penalty or quasi-penalty was previously imposed (including the date and place of occurrence);

(e) The fact that the penalty or quasi-penalty has been withdrawn because of error;

(f) A description of the error or errors which gave rise to the withdrawal;

(g) The date on which the penalty or quasi-penalty was withdrawn, or the date on which the withdrawal will come into effect;

(h) The effect of the withdrawal of the penalty or quasi-penalty, including whether it precludes a later penalty or quasi-penalty in respect of the same conduct;

(i) Contact details for further information; and

(j) Any other information appropriate in the circumstances.

Recommendation 15–5. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, where a regulator corrects an administrative penalty or quasi-penalty imposed in error it must provide written notification to the person on whom the penalty or quasi-penalty was previously imposed which states the following matters (unless clearly inappropriate in the circumstances):

(a) To whom it is issued;

(b) The date the notice is issued and by whom it is issued;

(c) A description of the penalty or quasi-penalty previously imposed and the date on which the penalty or quasi-penalty was previously imposed;

(d) The offence or contravention in respect of which the penalty or quasi-penalty was previously imposed (including the date and place of occurrence);

(e) The fact that the penalty or quasi-penalty has been corrected because of error,

(f) A description of the error which gave rise to the correction;

(g) A description of the correction;

(h) The date on which the penalty or quasi-penalty was corrected; or the date on which the correction will come into effect;

(i) The effect of the correction of the penalty or quasi-penalty;

(j) In the case of a monetary penalty, the time within which payment is required;

(k) Contact details for further information; and

(l) Any other information appropriate in the circumstances.

Recommendation 15–6. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, where a regulator makes a decision to impose a quasi-penalty, it is required to:

(a) provide written notification of the decision in accordance with Recommendation 15–7; and

(b) provide written reasons for the decision upon request, as soon as practicable, and no later than 28 days after the request was made.

Recommendation 15–7. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, written notification of a regulator's decision to impose a quasi-penalty should state the following matters (unless clearly inappropriate in the circumstances):

(a) To whom it is issued;

(b) By whom the decision was made and by whom the notice is issued;

(c) The dates on which the decision was made and the notice is issued;

(d) Details of the alleged offence or contravention;

(e) The regulator's decision to impose the quasi-penalty and a brief description of the grounds upon which the decision was based;

(f) The right to obtain written reasons for the decision upon request;

(g) That a request to obtain written reasons for the decision must be made within 28 days of receipt of the notice;

(h) The amount of any monetary quasi-penalty to be imposed and of any benefit to be withheld, and the effect of any non-monetary quasi-penalty to be imposed;

(i) The date on which the quasi-penalty will take effect or the period that must expire before the quasi-penalty can come into effect;

(j) The rights of review and appeal, and how to seek such review and appeal;

(k) Contact details for further information; and

(l) Any other information appropriate in the circumstances.

Recommendation 15–8. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, where a regulator makes a decision not to remit, or to remit in part only, an administrative penalty, it is required to:

(a) provide written notification of the decision in accordance with Recommendation 15–9; and

(b) provide written reasons for the decision upon request, as soon as practicable, and no later than 28 days after the request was made**.**

Recommendation 15–9. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, written notification of a regulator's decision not to remit, or to remit in part only, an administrative penalty should state the following matters (unless clearly inappropriate in the circumstances):

(a) To whom the notice is issued;

(b) By whom the decision was made and by whom the notice is issued;

(c) The dates on which the decision was made and the notice is issued;

(d) The regulator's decision not to remit the penalty, or to remit it in part only and the extent of the remission;

(e) A brief description of the grounds upon which the decision was based;

(f) The right to receive written reasons for the decision upon request;

(g) That a request to obtain written reasons for the decision must be made within 28 days of receipt of the notice;

(h) The effect of the decision not to remit or to remit in part only;

(i) The date by which any payment must be made;

(j) The rights of review and appeal, and how to seek such review and appeal;

(k) Contact details for further information; and

(l) Any other information appropriate in the circumstances.

Recommendation 15–10. When preparing statements of reasons, regulators should have regard to the *Practical Guidelines for Preparing Statements of Reasons* and the *Commentary on the Practical Guidelines for Preparing Statements of Reasons* (Administrative Review Council, June 2000). Where appropriate, regulators may choose to supplement these Guidelines with customised guidelines addressing any requirements specific to the legislation which they administer.

Recommendation 15–11. Regulators should ensure that training is provided to staff who will be called upon to prepare statements of reasons to ensure that they are familiar with the *Practical Guidelines for Preparing Statements of Reasons* and the *Commentary on the Practical Guidelines for Preparing Statements of Reasons* (Administrative Review Council, June 2000) and any customised guidelines referred to in Recommendation 15–10.

Chapter 16. Fairness in Dealings with Regulators

Recommendation 16–1. Regulators should develop and publish guidelines in accordance with Recommendations 6–2 to 6–4, 9–1 and 10–1 on the basis upon which they will negotiate and agree penalty-related settlements, subject to any relevant statutory criteria, standards or limitations.

Recommendation 16–2. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, where legislation provides a regulator with authority to accept an enforceable undertaking, the terms of an enforceable undertaking must:

(a) bear a clear or direct relationship with the alleged breach;

(b) be proportionate to the breach;

(c) not require the payment of money to the regulator other than in recompense to those affected by the alleged breach or in payment of the regulator's costs (if these are otherwise recoverable at law); and

(d) stipulate a time period within which compliance with undertakings is required and not be otherwise open-ended.

This Recommendation is not intended to prevent an enforceable undertaking requiring a regulated party to perform work or undertake prescribed activities at its expense.

Recommendation 16–3. When legislation provides a regulator with the authority to accept enforceable undertakings, regulators should develop and publish guidelines in accordance with Recommendations 6–2 to 6–4, 9–1 and 10–1 outlining:

(a) the circumstances in which the regulator will accept enforceable undertakings, including:

    (i) whether they will be used as an alternative to criminal proceedings; and

    (ii) the stage of an investigation or civil enforcement proceedings or proceedings to impose a quasi-penalty at which the regulator will accept enforceable undertakings;

(b) examples of acceptable and unacceptable terms in enforceable undertakings;

(c) what will happen if an enforceable undertaking is not complied with;

(d) the circumstances in which a regulator will consider a request to vary or withdraw an enforceable undertaking; and

(e) when and how third party interests will be taken into consideration, having regard to such factors as the standing of third parties to bring an action against the party from whom the regulator is considering accepting an enforceable undertaking, and the ability of third parties to access information acquired under compulsion by the regulator.

Recommendation 16–4. Regulators should develop and publish guidelines in accordance with Recommendations 6–2 to 6–4, 9–1 and 10–1 on the use of publicity prior to, during and following the exercise of penalty powers, including guidelines on the reporting of court and tribunal proceedings, in accordance with the following statements of principle:

(a) These guidelines should cover the circumstances in which a regulator will comment on commenced or proposed investigations, having regard to privacy issues, confidentiality and secrecy obligations, its functions and powers, the law of defamation and the public interest.

(b) Any media release or statement in relation to an investigation should make it clear that the investigation concerns alleged breaches, and that liability or guilt is a matter for the courts.

(c) These guidelines should cover the circumstances in which a regulator will comment on commenced or pending court proceedings having regard to privacy issues, confidentiality and secrecy obligations, the need to avoid prejudicial pretrial publicity, contempt laws, its functions and powers, the law of defamation and the public interest.

(d) Regulators should not provide details of evidence to be used in court proceedings against an alleged offender when providing information to the media.

(e) In general, where it is appropriate for the regulator to comment on court proceedings prior to their resolution, such comment should be restricted to the outcome of particular steps in the court process, and should refer to any statement made by the alleged offender denying the allegations.

(f) Unsuccessful prosecutions, civil penalty actions and other civil enforcement action taken by the regulator should also be the subject of media releases or statements by the regulator where the commencement or progress of the prosecution or the civil penalty action or the civil enforcement action has been the subject of prior publicity, and (so far as practicable) to the same degree as the earlier media releases or statements by the regulator.

(g) Regulators should not inform the media of details relating to the execution of search warrants prior to or during their execution, or relating to the exercise of any of their compulsory powers on any person prior to or during the exercise of such compulsory powers.

(h) These guidelines should cover the circumstances in which a regulator will comment following the execution of search warrants or the exercise of compulsory powers on particular persons, having regard to privacy issues, confidentiality and secrecy obligations, the need to avoid prejudicial pre-trial publicity, contempt laws, the regulator's functions and powers, the law of defamation and the public interest.

(i) No media release or statement should be issued or made in relation to the issue of an infringement notice by a regulator, its payment or non-payment. Any media release or statement, if issued contrary to this Recommendation, should make it clear that:

  (i) the issue of the infringement notice amounts to no more than an allegation by the regulator;

  (ii) payment of the amount specified in the infringement notice does not amount to an admission of any breach of the law or of any liability for any purpose;

  (iii) non-payment of the amount specified in the infringement notice should be treated as a denial of the allegations by the person to whom the notice was issued.

Chapter 17. Leniency and Immunity

Recommendation 17–1. Regulators should develop and publish guidelines describing how discretions will be exercised in relation to leniency, immunity and remission of penalties. These guidelines should be prepared in accordance with Recommendations
6–2 to 6–4, 9–1 and 10–1.

Recommendation 17–2. Regulators who develop guidelines on leniency, immunity or remission of penalties should, where applicable, develop internal guidelines to provide guidance to staff in the exercise of their discretion. These internal guidelines must not be inconsistent with guidelines developed and published in accordance with Recommendation 17-1.

Chapter 18. Privilege against Self-Incrimination

Recommendation 18–1. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, the same protections for individuals afforded by the privilege against self-incrimination in criminal matters apply in relation to actions seeking a civil or administrative penalty.

Recommendation 18–2. Any legislative scheme which seeks to abrogate or modify the privilege against self-incrimination or self-exposure to a non-criminal penalty must do so by express reference to the privilege or privileges that it seeks to abrogate or modify.

Recommendation 18–3. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, no evidence given by any individual that:

(a) would have been subject to the privilege against self-incrimination or privilege against self-exposure to a non-criminal penalty which has been abrogated or modified by statute; and

(b) was the subject of a claim for privilege;

may be used in any criminal proceedings, or civil or administrative penalty proceedings, against that individual, except in proceedings in respect of the falsity of the evidence itself.

Chapter 19. Legal Professional Privilege

Recommendation 19–1. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, legal professional privilege exists in relation to all forms of enquiry by any regulator in or out of court.

Recommendation 19–2. Any legislative scheme which seeks to abrogate or modify legal professional privilege must do so by express reference to that privilege.

Recommendation 19–3. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, no evidence given by any person that:

(a) would have been subject to legal professional privilege which has been abrogated or modified by statute; and

(b) was the subject of a claim for privilege;

may be used in any criminal proceedings, or civil or administrative penalty proceedings, against that person, except in proceedings in respect of the falsity of the evidence itself.

Recommendation 19–4. The Attorney-General should order a review of federal investigative powers with a view to providing greater certainty and consistency between regulators in relation to their ability to compel the disclosure of information and the operation of legal professional privilege.

Chapter 20. Accountability — Appeal and Review

Recommendation 20–1. All penalty schemes should provide avenues of internal review, external merits review and judicial review, unless one or more of these is clearly inappropriate in the circumstances.

Chapter 21. Review of Decisions Imposing Quasi-Penalties

Recommendation 21–1. Legislation under which quasi-penalties may be imposed should provide:

(a) at least one level of internal review of a decision to impose a quasi-penalty, unless internal review is clearly inappropriate;

(b) that internal review of a decision to impose a quasi-penalty should, unless inappropriate in the circumstances, be a mandatory requirement before external merits or judicial review can be sought;

(c) at least one level of external merits review of a decision to impose a quasi-penalty; and

(d) for judicial review of a decision to impose a quasi-penalty.

Chapter 22. Excluding or Limiting Review

Recommendation 22–1. Schedule 2(f) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be amended by substituting the words 'imposition of a penalty' for the words 'recovery of pecuniary penalties'.

Recommendation 22–2. External merits review of a decision to issue an infringement notice in an infringement notice scheme established in accordance with Recommendation 12–8 should not be available.

Recommendation 22–3. A private contractor used by a regulator in relation to any criminal, civil or administrative penalty process should be no less accountable for any penalty-related conduct than if it were a regulator.

Recommendation 22–4. A regulator should not delegate, or purport to delegate, the power to make any decision to impose a quasi-penalty to any private contractor.

Recommendation 22–5. Any private contractor whose contractual obligations towards any regulator involves penalty-related conduct should be explicitly appointed as the agent of the regulator to ensure that review is available as if the penalty-related conduct undertaken by the private contractor had been undertaken by the regulator.

Recommendation 22–6. Regulators should ensure that their contracts with private contractors in relation to any penalty-related conduct:

(a) include the rights of the regulator to require the private contractor to provide the regulator with any information that it reasonably requires to enable it to make any proper relevant penalty-related decision;

(b) include obligations for the private contractor to cooperate with the regulator to the extent necessary to permit an appropriate review of a decision to be undertaken, whether that review is internal review, external merits review or judicial review; and

(c) exclude any performance indicators that involve the number of penalty-related recommendations or other penalty-related conduct, or similar criteria.

Chapter 23. Review of Other Decisions by Regulators

Recommendation 23–1. Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be amended to provide that decisions to initiate civil proceedings for imposition of a penalty for contraventions of a law of the Commonwealth are not decisions to which that Act applies.

Recommendation 23–2. Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be amended to provide that decisions to initiate administrative proceedings for the imposition of a quasi-penalty for contraventions of a law of the Commonwealth are not decisions to which that Act applies.

Recommendation 23–3. At least one level of internal review of a decision not to remit in whole, or in part, an administrative penalty should be available unless internal review is clearly inappropriate.

Recommendation 23–4. At least one level of external merits review of a decision not to remit in whole, or in part, a monetary administrative penalty should be available, unless the amount of penalty payable (after remission, if any) is equal to or less than two penalty units.

Recommendation 23–5. Judicial review of a decision not to remit in whole, or in part, a monetary administrative penalty should be available.

Chapter 26. Setting Monetary Penalties in Legislation

Recommendation 26–1. In setting civil penalties, legislators should have regard to whether the level set will achieve the aim of deterrence, which is the principal purpose of civil penalties.

Recommendation 26–2. In order to promote consistency and fairness in penalty setting, the Attorney-General should develop a table of comparative provisions across all areas of regulation to permit a comparison of similar contravention provisions. Where significant anomalies are revealed that are not explained by their context, legislation should be amended to achieve greater consistency. A table of comparative provisions could give legislative guidance when new penalties are being set.

Recommendation 26–3. When considering the relationship between criminal and civil penalties, the effect of a criminal conviction should be taken into account when considering the relative severity of penalties. This would mean that a penalty for a non-criminal contravention could be larger than the penalty for a parallel criminal offence.

Recommendation 26–4. For the sake of consistency with the *Crimes Act 1914* (Cth), a penalty for a body corporate should be five times that for a natural person for the same contravention, unless there are compelling reasons otherwise. Where a body corporate stands to obtain a much greater financial benefit from a contravention than could be obtained by a natural person, this is a compelling reason to use a larger multiple or another method of assessment. Where there are compelling reasons to depart from the standard, these should be stated in the Explanatory Memorandum.

Recommendation 26–5. Unless there are compelling reasons otherwise, any legislation that does not provide for a differential between the civil penalty for a natural person and that for a body corporate should be amended to do so.

Recommendation 26–6. Where appropriate, the legislation that establishes a civil or administrative penalty scheme should allow a court to link the form or quantum of the penalty to the financial gain as one alternative approach to setting the penalty. Section 80(2B) of the *Commerce Act 1986* (NZ) provides a model for such an approach.

Recommendation 26–7. As a matter of principle, legislation should not specify minimum civil penalties as it would otherwise unduly fetter judicial discretion.

Recommendation 26–8. The Regulatory Contraventions Statute should include a provision similar to s 79B of the *Trade Practices Act 1974* (Cth) which prefers the payment of compensation to payment of a penalty in the event of an offender's inability to pay both.

Chapter 27. Non-Monetary Penalties

Recommendation 27–1. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, a court may impose a non-monetary penalty in addition to, or in substitution for, a monetary penalty for an offence or contravention, including:

(a) orders disqualifying the person from government contracts;

(b) probation orders (as defined in s 86C of the *Trade Practices Act 1974* (Cth));

(c) community service orders (as defined in s 86C of the *Trade Practices Act 1974* (Cth));

(d) information disclosure orders (as defined in s 86C of the *Trade Practices Act 1974* (Cth));

(e) orders to publish an advertisement (as defined in s 86C of the *Trade Practices Act 1974* (Cth));

(f) adverse publicity orders (as defined in s 86D of the *Trade Practices Act 1974* (Cth)).

Recommendation 27–2. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, a court may make an order imposing a penalty that combines a number of different types of penalty.

Recommendation 27–3. Where appropriate, the legislation that establishes a civil penalty scheme should allow a court to make a management disqualification order in respect of an individual in addition, or as an alternative, to a penalty where:

(a) the individual has been convicted of a criminal offence or held by a court to be liable for a non-criminal contravention;

(b) an application for a management disqualification order is made by the DPP or relevant regulator; and

(c) the court is satisfied that the disqualification is justified.

Recommendation 27–4. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, before imposing a penalty for a criminal offence or non-criminal contravention, a court must take into account any enforceable undertaking given by the offender in relation to the conduct alleged to constitute the offence or contravention, in addition to any other matters that the court is required or permitted to take into account.

Chapter 28. Tailored Penalties for Corporations

Recommendation 28–1. As a general matter, legislation that establishes a civil or administrative penalty scheme should not provide for equity fines as a penalty.

Recommendation 28–2. As a general matter, legislation that establishes a civil or administrative penalty scheme should not provide for the dissolution of a corporation as a penalty.

Recommendation 28–3. The additional civil penalty powers referred to in Recommendation 27–1 should be available when a court imposes penalties on a corporation.

Chapter 29. Guidelines for Setting Penalties

Recommendation 29–1. The Regulatory Contraventions Statute should include broad guidance for the courts when setting civil penalties. Unless unsuitable to a particular provision, in determining the amount of a civil penalty, the courts should take account of all relevant factors, including:

(a) the deterrent effect of the penalty;

(b) the nature and extent of the contravention;

(c) any loss or damage suffered, or gain made, as a result of the contravention;

(d) the circumstances in which the contravention took place, including the deliberateness of the conduct and the period over which it extended;

(e) whether professional advice had been obtained in relation to the contravention, prior to the breach;

(f) whether the person has previously been found by a court to have engaged in any related or similar conduct;

(g) the degree of cooperation with the authorities; and

(h) in the case of a natural person, the attitude of the offender.

Where the respondent is a body corporate, the courts should also consider:

(i) at what level in the organisation the contravening conduct occurred;

(j) whether the corporation exercised due diligence; and

(k) whether it has a corporate culture conducive to compliance.

Chapter 30. Penalties in Individual Cases

Recommendation 30–1. Where a monetary penalty may deplete the funds available to pay private compensation claims, courts should consider the use of non-monetary penalties, if that option is available.

Recommendation 30–2. In assessing a monetary penalty for an individual under legislation where there may be related quasi-penalties, such as banning orders, the court should consider the impact of the related order both on the capacity of the person to pay and in the light of the total penalty.

Recommendation 30–3. In assessing a monetary penalty for an individual in circumstances where a corporation which is the alter ego of that individual has been ordered to pay a penalty for a related contravention, the court should consider the impact on that individual of the penalty on the corporation.

Recommendation 30–4. The Regulatory Contraventions Statute should provide that, where a person is found to have committed two or more breaches of the same provision of law, the court may impose one penalty in respect of both or all of those breaches. However, the final penalty order should take account of the totality principle such that the penalty ordered is sufficient to act as a personal and general deterrent but not be so large as to be oppressive. The penalty should not exceed the sum of the maximum penalties that could be imposed if a separate penalty were imposed in respect of each breach.

Recommendation 30–5. Legislation such as s 83 of the *Trade Practices Act 1974* (Cth) should be amended to remove any doubts that formal admissions put to the courts for the purposes of a hearing on an agreed penalty may be used by other parties in private civil proceedings.

Chapter 31. Recovery of Monetary Penalties

Recommendation 31–1. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, where imprisonment is not available as a sentencing option for a criminal offence or non-criminal contravention in the legislation creating the criminal offence or non-criminal contravention, imprisonment in default of payment of a fine or other monetary penalty should not be available, unless failure to pay is held by a court to be contempt of court.

Recommendation 31–2. Legislation under which monetary administrative penalties arise or may be imposed should provide an option for the person penalised to request that the amount be paid in instalments if the amount payable is more than two penalty units.

Chapter 32. Insolvency

Recommendation 32–1. Subject to Recommendation 32–2, the *Bankruptcy Act 1966* (Cth) and the *Corporations Act 2001* (Cth) should be amended to make it clear that the reference to criminal penalties in the *Bankruptcy Act 1966* (Cth), s 82(3) and the *Corporations Act 2001* (Cth), s 553B as 'penalties or fines imposed by a court in respect of an offence against a law' is limited to penalties which are imposed as a sentencing order of a court following a finding as to guilt of the person to be fined and excludes the enforcement by court order of pre-existing statutory liabilities.

Recommendation 32–2. The distinction in corporate insolvency law and personal bankruptcy law between the status of criminal and civil penalties should be removed so that both criminal and civil penalties:

(a) are provable in corporate insolvency proceedings; and

(b) are provable in personal bankruptcy proceedings and discharged upon discharge of the bankrupt with the option available to a regulator creditor to apply to the court prior to the discharge of the bankrupt for an order that outstanding penalties not be discharged.

Recommendation 32–3. The *Bankruptcy Act 1966* (Cth) should be amended to provide that the recoverability of civil pecuniary penalty orders under the *Corporations Act 2001* (Cth) should be determined in accordance with Recommendation 32–2(b).

Chapter 33. Costs of Investigation

Recommendation 33–1. The Regulatory Contraventions Statute should provide that a regulator has no general right to recover the costs of an investigation from the person under investigation unless that right is expressly provided for in the relevant legislation and, where necessary, rules of court. The legislation or rules of court should specify clearly what items are encompassed within a permissible claim for a regulator's costs of investigation. Any such recovery should be:

(a) subject to review, assessment or taxation by a court of the regulator's claim for its costs of investigation; and

(b) limited to cases in which a contravention has been found by a court, a person has been convicted of a criminal offence or an admission of a breach has been sealed by the court (even if the contravention or conviction has not been formally recorded).

Recommendation 33–2. Any costs orders, whether relating to legal, investigative or other costs, should be taken into account when assessing the level of penalty to be imposed.

1. The Inquiry

Contents

Overall scope of Inquiry

1.1 The size of this Report emphasises the scale of the inquiry that these Terms of Reference required the ALRC to undertake. Within every government regulatory scheme is a system of penalties and other sanctions to foster compliance and punish non-compliance. A review of penalty schemes, therefore, looks at the way in which government relates to the communities that it seeks to regulate, which is in many respects the heart of government activity. Although this Inquiry is not directed to review the federal criminal legal system, it would be impossible to consider civil and administrative penalties to any extent without considering how they differ from, and are similar to, criminal sanctions. Indeed, the Terms of Reference stress the importance of this comparison and of maintaining an 'effective and efficient criminal justice system'.[1]

1.2 For some time, the ALRC struggled to identify the issues and problems that the Terms of Reference directed it to consider. Ultimately, the ALRC's task was to consider the many disparate federal regulatory and penalties schemes that had developed over the last three decades or so to identify those areas where the injection of some structure could give them, both collectively and individually, greater clarity, transparency and consistency.

1.3 This is inherently a large and difficult task as it involves the imposition on these diverse schemes of an overriding structure that attempts, within broad limits, to impose some overall system or uniformity when those systems had developed in relative isolation over, in some cases, a considerable period of time. In that time, the older schemes had developed a robust and mature jurisprudence which has shaped regulatory schemes in Australia for the last generation. It would be unacceptable and counterproductive to sweep away that learning and experience in the name of a rigid uniformity.

1.4 In any event, a rigid uniformity would be a hopeless ambition. It was clear from the outset that government regulation, and the penalties schemes used to reinforce it, cannot be generated from a single mould but must be adapted to meet the particular demands and communities which each scheme seeks to regulate. A recurrent theme in

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1 Term of Reference 1(a). See page 9 above.

submissions and consultations is that one size does not fit all, a point readily conceded by the ALRC in this Report and in its Recommendations.

1.5 Ultimately, the ALRC has sought to introduce a greater degree of consistency across the various regulatory schemes in the form of a proposed Regulatory Contraventions Statute of general application. Although intended to provide a consistent basis of certain fundamental provisions relating to regulatory law the demands of a particular regulatory or penalty scheme would entitle parliament to provide for divergence from the default provisions contained in the Regulatory Contraventions Statute. However, as a clear, express statutory statement of that divergence would be required, divergence from the norm becomes a matter of public debate and public statement, and, as a consequence, public justification. The ALRC, by advocating the enactment of a Regulatory Contraventions Statute, does not suggest that its provisions are in any way inviolable. However, if there is to be a divergence, it is in the interest of all parties, regulators and regulated alike, that the divergence be clearly stated and clearly known.

1.6 Many of the Recommendations in this Report involve the development and publication by regulators themselves of a wide variety of informal guidelines. These are intended to give better structure to particular decision-making processes and to identify more clearly, again for the regulator and regulated alike, the criteria on which discretions and decision-making processes will be based. It is not intended that there be a fixed structure for these guidelines, although the overall matters to be covered by them are in some instances spelled out. It is for the regulators themselves to determine what are appropriate, preferably in consultation with the regulated communities, where appropriate and practicable. Nor is it intended to bind regulators except to the extent that the guidelines would identity those criteria which it is important to be taken into account in the decision-making processes covered by this Report.

Consultations and preliminary publications

1.7 As always, the ALRC was committed to consulting publicly and widely with relevant academic, legal, government and public interests bodies. The Terms of Reference directed the ALRC to consult specifically with twelve public agencies, all of whom were contacted. Not all provided detailed submissions or responses to the ALRC, but many of the regulators included in this list made a considerable effort. The ALRC is indebted to their contributions.

1.8 The ALRC is also indebted to the Advisory Committee, the members of which are listed on pages 14 and 15. In accordance with its usual practice, the ALRC gathered representatives of regulators, the regulated community, academics, judges and legal practitioners as a sounding board and a source of ideas for the ALRC's work. The Committee members' contributions were provided freely and willingly and, as always, the ALRC wishes to express its gratitude to the members of the Committee who, over the three years of this Inquiry have consistently been willing to contribute their experience to assist the ALRC.

1.9 The Terms of Reference were issued by the Attorney-General, the Hon Daryl Williams AM QC MP in January 2000 and originally required the ALRC to report by the end of March 2002. By letter dated 14 February 2002, the Attorney-General extended the reporting date to 30 November 2002.

1.10 In order to develop the public awareness necessary to generate the submissions and consultations to assist the ALRC in compiling its Recommendations, a number of preliminary publications were released.

1.11 In June 2001, the ALRC hosted a conference in Sydney entitled *Penalties: Policy, Principles and Practice in Government Regulation.* Once again, the contributions of a broad range of experts assisted the ALRC greatly and provided a significant contribution to the body of work in this area. To coincide with this conference, the ALRC published Background Paper 7, *Review of Civil and Administrative Penalties in Federal Jurisdiction.*

1.12 Discussion Paper 65, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, was published in April 2002. DP 65 called for submissions by the end of August 2002. Both before and after this deadline, the ALRC received a number of very helpful submissions from various regulatory agencies and other groups representing the interests of various regulated communities. A complete list of submissions is found in Appendix A to this Report.

1.13 Copies of the Background Paper and the Discussion Paper can be downloaded from the ALRC's website — www.alrc.gov.au — and copies of the conference papers can be purchased.

Structure of Report

1.14 This Report is divided into six Parts. **Part A** deals largely with the theory of penalties and their role in government regulation. It looks at why penalties are used, how they vary and, most critically for this Inquiry, the distinction between criminal penalties on one hand and civil and administrative penalties on the other. The Report also distinguishes between true administrative penalties and quasi-penalties, infringement notices and other administrative techniques for dealing with criminal and non-criminal contraventions of the law.

1.15 Importantly, and in response to a specific term of reference, the ALRC looks at the role of fault, in particular in distinguishing breaches of the law regarded as criminal and those regarded as regulatory contraventions only. Part A also reviews the federal regulatory scheme, considering in summary the regulators operating within the federal regulatory sphere.

1.16 Finally within Part A, the Report considers the various forms of legislation, regulation and guidelines that might be used, as appropriate, as the tools of regulation

when more or less rigidity or flexibility is required. It is from this discussion that the ALRC developed its Recommendation that a general Regulatory Contraventions Statute be enacted in tandem with a series of informal guidelines intended to outline and guide both regulators and the regulated in relation to the way in which penalty-related discretions and decision-making processes will be exercised.

1.17 **Part B** looks specifically at corporate responsibility, again in response to a specific term of reference. Chapter 7 looks at the responsibility for bodies corporate for breaches committed by their employees and officers. Chapter 8 looks at the converse position: the responsibility of corporate officers and employees for breaches attributed to the body corporate as a whole.

1.18 **Part C** looks at the enforcement responses available to regulators and the Commonwealth DPP as the principal criminal prosecuting authority in Australia. The relationship between these bodies is considered, leading to Recommendations concerning, amongst other matters, the way in which their relationship can be better founded on publicly available guidelines that cover both the regulators' relationships with the DPP and their own internal enforcement policies.

1.19 Consideration is given within Part C to specific enforcement responses, which focuses on the complications that arise when a particular breach of the law gives rise to various criminal and non-criminal penalty options, the use of infringement notice schemes and the particular position of Customs and excise prosecutions, which occupy a peculiar half way position as a hybrid between criminal and civil penalty actions.

1.20 **Part D** looks in particular at procedural protections that should be reinforced or restated, at least as a default provision in the Regulatory Contraventions Statute, to protect regulated parties so that their position under the law is more clearly stated and better understood. Again, the Recommendations permit divergence from a norm but require any such divergence to be clearly and expressly stated in statute.

1.21 This Part considers procedural fairness, elements of fairness, and fairness in dealings with regulators. It looks at leniency and immunity discretions, and the operation of privilege in civil penalty schemes. A number of chapters deal specifically with accountability and the way in which a regulator's decisions should be open to internal review as well as external appeal, either judicial or merits review, looking at the decision itself and not merely the way in which it was made.

1.22 **Part E** considers the way in which the penalties are set, both in the legislation establishing particular penalties schemes and by courts or the law generally in particular cases. The Part considers both the theory of penalty setting in legislation as well as various criteria that should be considered by courts when establishing penalties in particular cases.

1.23 Finally, **Part F** looks at certain aspects of the recovery of monetary penalties and, in particular, the effects of insolvency, the recovery of investigation costs, and the recovery of monetary penalties themselves.

Part A

Penalties in Australian Government Regulation

2. The Nature of Penalties

Contents

Introduction

2.1 One feature of this Inquiry is the confusing, and at times contradictory, terminology used in legislation and literature to describe criminal, civil and administrative penalties and the conduct to which they respond. This chapter seeks to clarify, for the purposes of this Report, what is meant by a 'penalty', the distinctions between different classes of conduct, and the significantly different procedures that arise where an act results in a criminal, civil or administrative penalty process. Specific types of penalties will be discussed at greater length later in this chapter.

2.2 It is important to distinguish between the terminology used to describe the prohibited act itself, the proceedings which are a consequence of that act, and the nature of the penalty ultimately imposed. It is important to note that penalties themselves are not inherently criminal, civil or administrative in nature; rather it is the procedure by which the penalty is imposed which is so categorised, depending on the procedures followed in court or whether a court is involved at all.

2.3 A starting point for considering the differences between penalty types is an understanding of the prohibited acts themselves. The first section of this chapter examines **offending conduct** and examines the differences between a criminal offence and other unlawful acts that do not attract the odium of criminality. Although there are identifiable features common to many criminal offences, such as an intention to act or an element of deception, ultimately the range and variety of actions covered by the criminal law renders it impossible to say that there are certain essential features of a 'criminal offence'. The chapter then looks at non-criminal breaches of the law and discusses the notion of the 'regulatory contravention'. Traditionally, civil law focuses on private redress for wrongs and is not covered with public retribution or public compensation. Modern regulation, however, contains many offences that are prosecuted by the state but do not lead to a criminal sanction.

2.4 The second section of this chapter discusses the nature of a '**penalty**'. An important question for the ALRC in conducting this Inquiry has been how broadly the term 'penalty' should be defined. A penalty is commonly thought of as some form of punishment, covering both civil and criminal law. The difference between a penalty and a 'sanction' is considered, with the distinction made that a sanction can include rewards. Irrespective of the precise definition of 'penalty' and its legal attributes, the ALRC has had to consider some regulatory responses to contraventions that fall outside its Terms of Reference strictly construed.

2.5 The third section begins with a preliminary examination of the differences between **criminal, civil and administrative penalties**. It also notes the origins of civil penalties in Australian federal law. The ALRC has identified three types of processes described as 'administrative penalties': penalties dealt with administratively by infringement notice schemes (not administrative penalties in themselves but rather an administrative device to dispose of a breach giving rise to criminal or civil penalties); sanctions which can be defined as 'quasi-penalties' (which include withholding benefits such as licences and social security payments); and 'true' administrative penalties

(monetary administrative penalties, the amount and application of which are predetermined by legislation).

2.6 The fourth section describes the **procedural consequence**s of identifying a penalty as criminal or non-criminal. It is in these distinctions that much of the confusion and overlap between criminal and non-criminal penalties can be seen. Although the rules of criminal procedure are well established and generally well known, civil and administrative penalty procedures are variable and uncertain.

2.7 Finally, the chapter considers the **types of penalties** used in Australian federal regulation.

Offending conduct

What is a criminal offence?

2.8 The criminal law covers a vast array of activities and offences. These range from murder and assault to offensive language and, in the federal sphere, include Customs infringements and breaches of consumer protection laws.[1] The criminal offences relevant to this Inquiry are concentrated in the various fields of regulation, chiefly the regulation of various areas of commerce which are the subject of federal legislation. Regulatory law concerns the way that governments regulate private sector activity or otherwise intervene in the operation of different areas of society outside traditional criminal law. Therefore, criminal regulatory offences include a number of traditional crimes such as fraud or obtaining benefits by deception, but also breaches that are not so obviously criminal in their nature, such as failing to provide certain types of information or failing to meet a certain licensing standard.

2.9 The main purposes of criminal law are traditionally considered to be deterrence and punishment.[2] Central to the concept of criminality are the notion of individual culpability and the criminal intention for one's actions. Issues related to intention and fault are discussed in chapter 4.

2.10 Traditional criminal offences and non-criminal contraventions can in many respects be distinguished by the inherent nature of the actions themselves. A key characteristic of a crime, as opposed to other forms of prohibited behaviour, is the repugnance attached to the act, which invokes social censure and shame. This is clearly the case in relation to 'traditional' criminal offences such as those involving violence or violation of another's property or person.

2.11 However, in the regulatory sphere, the decision to legislate for a criminal rather than non-criminal penalty may not be based on the inherent immorality of the act itself but rather on assumptions about the deterrence value of the penalty, the differences in pursuing a criminal or non-criminal procedure, or the policy ramifications of a

1 See D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Laws and Process of New South Wales* (2001) The Federation Press, Sydney.

2 Deterrence and punishment are discussed in greater detail in ch 3.

particular choice. Criminal law is not only concerned with the most serious offences. There are, for example, scores of low-level record-keeping and information offences which are treated criminally in many regulatory regimes.[3] Outside the federal sphere, parking offences are criminal.

2.12 There is an enormous amount of debate surrounding decisions to label a prohibited act 'criminal'. As noted by Professor Arie Freiberg:

> Crime is not a behavior, but a process. Law is an institution of social control which defines and deals with wrongful social behavior. The concepts of 'civil law' and 'criminal law' are merely shorthand statements of the complex relationships between the state and its citizens. A recognition of the fact that nothing is inherently criminal or civil challenges the nature of the very categories themselves and focuses attention upon the process of choice, upon the reasons why one act is viewed from one particular standpoint rather than another.[4]

2.13 This debate is not new; HLA Hart's critique also reflects this vexed position:

> If one were to judge from the notions apparently underlying many judicial opinions, and the overt language even of some of them, the solution to the puzzle is simply that a crime is anything which is *called* a crime, and a criminal penalty is simply the penalty provided for doing anything which has been given that name. So vacant a concept is a betrayal of intellectual bankruptcy.[5]

2.14 Nonetheless, law and policy makers, in determining the optimum ways in which compliance with the law can be achieved, have attempted to define what qualities should be present to label an offence as criminal. In the mid-1970s, the Law Reform Commission of Canada split the test of criminality up as follows:

> To determine whether the act should be a real crime within the Criminal Code we should inquire:
>
> - Does the act seriously harm other people?
> - Does it in some way so seriously contravene our fundamental values as to be harmful to society?
> - Are we confident that the enforcement measures necessary for using criminal law against the act will not themselves seriously contravene our fundamental values?
> - Given that we can answer 'yes' to the above three questions, are we satisfied that criminal law can make a significant contribution to dealing with the problem?[6]

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3 A Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225, 243.

4 A Freiberg, 'Commentary on "Blurring the Criminal and Civil Paradigms" by Professor John Coffee Jr' (Paper presented at Penalties; Policy, Principles and Practice in Government Regulation, Sydney, 8 June 2001), 1.

5 H Hart 'The Aims of the Criminal Law' (1958) 23 Law & Contemporary Problems 404 quoted in D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (1996) Federation Press, Sydney, 30.

6 Law Reform Commission of Canada, *Our Criminal Law*, 4 (1976), Information Canada, Ottawa, 33.

What is a non-criminal contravention?

2.15 Traditionally, redress against unlawful behaviour has been split into two types: criminal punishment and private civil remedies.[7] The underlying idea behind the distinction is broadly that the criminal law is designed to punish and the civil law to compensate for harm caused. The criminal law is public, the state enforcing its rules on wrongdoers for the good of all. Civil law has been traditionally the vehicle for private redress, focusing more on compensating victims for damage caused to them personally, and not concerned with public sanctions.[8] In criminal law, wrongful acts are punished because they violate some kind of collective interest, and will apply even if no individual suffered a direct injury.[9] Civil remedies, on the other hand, apply to conduct that has directly harmed an individual's interest.

2.16 Modern regulation law has created many contraventions that are not punishable by a criminal process but are nonetheless dealt with by action taken by a government agency in a court seeking a penalty. The court process, however, is (or closely follows) the procedures used in private civil actions. The most important distinction here is that they are not private remedies; they are invoked by the state. In Australia, these contraventions often relate to corporate or regulatory conduct. The main legislation where civil penalty provisions are found include the *Corporations Act 2001* (Cth)*, Trade Practices Act 1974* (Cth) (TPA)*, Customs Act 1901* (Cth)*,* and the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act).

2.17 In its Discussion Paper on sanctions and administrative law published in the 1980s, the Law Reform Commission of Canada defined 'regulatory offences' as

> characterized both through their attachment as a compliance mechanism to a regulatory scheme of some sort and through a lack of criminal intent for their commission.[10]

2.18 In an earlier paper on strict liability offences the Law Reform Commission of Canada commented:

> Regulatory offences are those which, typically, are committed as much through carelessness as by design. Put it another way, 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.[11]

2.19 Generally speaking, regulatory contraventions lack the violence or violation that characterises traditional crimes. The decision to call some regulatory offences 'criminal' is often one of policy rather than one of principle, or may be based on the

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7 K Mann, 'Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law' (1992) 101(5) *Yale Law Journal* 1795, 1796.

8 Ibid, 1799.

9 Ibid, 1806.

10 Law Reform Commission of Canada, *Sanctions, Compliance Policy and Administrative Law* (1981) Law Reform Commission of Canada, Ottawa, 18.

11 Law Reform Commission of Canada, *The Meaning of Guilt: Strict Liability*, (1974) Law Reform Commission of Canada, Ottawa, 32.

presence of an intention to commit the act or other mental element to distinguish it from a similar non-criminal act that lacks that intent.

2.20 Under the *Corporations Act,* non-criminal offences (some of which are called 'civil penalty provisions' in s 1317E of the Act) relate to a range of duties of company officers, and include contraventions of account-keeping duties and directors' duties. Contravention of duties involved in the management of managed investment schemes are also punishable by civil penalties. More recently, the *Financial Services Reform Act 2001* (Cth) has extended the coverage of civil penalty provisions to market misconduct provisions including insider trading.[12] Breaches of some of these provisions may also constitute criminal offences. Under the TPA, civil penalties are available in respect of restrictive trade practices, anti-competitive conduct in the telecommunications industry and in connection with the telecommunications access regime.

2.21 The ALRC has avoided the term 'civil offence'. An offence can be regarded as either criminal or non-criminal, if that distinction is to be retained, but to call an offence 'civil' is to over-burden that word, which is already used confusingly in this area to denote different styles of procedure and legal action. What may ensue from the commission of a non-criminal act is a hearing by civil court processes, but that is a different concept.

2.22 To reduce confusion, the ALRC has preferred to use terms such as 'non-criminal contraventions' or 'regulatory contraventions' to describe breaches of statutory provisions that are dealt with using civil or administrative procedures, in contrast to terms such as 'criminal offences', used to describe those breaches that attract criminal sanctions and are dealt with using criminal procedures.

2.23 The ALRC prefers to reserve the use of 'offence' to criminal breaches of the law, not least because this is sometimes the only clue in legislation that the breach is to be regarded as criminal. More commonly, however, 'offence' has a broader use and can often be used to describe non-criminal contraventions, or criminal and non-criminal breaches without distinction. The ALRC prefers to use 'contraventions' when describing non-criminal breaches of the law and 'breach' when referring to both criminal and non-criminal breaches of the law or when the distinction is not important.

2.24 In the final analysis, the ALRC is not required by this Inquiry to determine whether any particular offence or contravention should be treated as criminal or non-criminal, but is concerned with three fundamental issues (amongst others):

- Should the distinction between criminal offences and non-criminal contraventions be maintained?
- If so, what are the hallmarks of offences or contraventions that fall or should be placed into each category?

12 G Moodie and I Ramsay, 'The Expansion of Civil Penalties under the Corporations Act' (2002) 30 *Australian Business Law Review* 61.

- What are the procedural consequences of categorising an offence as criminal or non-criminal?

What does 'penalty' mean?

2.25 The term 'penalty' is generally defined as a punishment, commonly in the form of the payment of a sum of money, although caselaw states that the word 'is large enough to mean, is intended to mean, and does mean, any punishment, whether by imprisonment or otherwise'.[13] Traditionally a 'penalty' has been defined as a punishment meted out under the criminal law.[14] Modern legal dictionaries provide a more inclusive definition: it is

> an elastic term with many different shades of meaning; it involves the idea of punishment, corporeal or pecuniary, or civil or criminal, although its meaning is generally confined to pecuniary punishment.[15]

2.26 Caselaw also suggests the term 'penalty' may be used to denote a civil debt or imposition owed to the Crown or the state, as opposed to a 'fine', which denotes a criminal monetary penalty.[16]

2.27 The word 'penalty' itself is closely associated with the word 'punishment' and its meaning. Dictionary definitions of 'punishment' cover all forms of damage and disadvantage without necessarily including an element of retribution.[17] In the legal context, 'punishment' has been defined as:

> The infliction of some pain, suffering, loss, disability, or other disadvantage on a person by another having legal authority to impose punishment. Punishment must be legally authorised, otherwise it is prima facie tortious or itself criminal.[18]

2.28 Three major justifications can be discerned for the legal imposition of 'pain, suffering, loss, disability, or other disadvantage' on a person by an authority:

- compensation for damage caused, or reparation;
- retribution for the contravention of legal requirements; and
- the protection of third parties or society at large.

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13 *R v Smith* (1862) Le & Ca 131, 138 CCR (Blackburn J).

14 A Freiberg, 'Reconceptualizing Sanctions' (1987) 25(2) *Criminology* 223, 224; A Freiberg, 'Reward, Law and Power: Toward a Jurisprudence of the Carrot' (1986) 19 *Australian & New Zealand Journal of Criminology* 91, 94.

15 H Black, *Black's Law Dictionary* (1990) 6th ed, West Publishing Company, St Pauls, 1133.

16 In *Gapes v Commercial Bank of Australia Ltd* (1979) 38 FLR 431, 445 Sweeney J cited the English Court of Appeal in *Brown v Allweather Mechanical Grouting Co Ltd* [1954] 2 QBD 443, 446, where it held that: 'It is true that there is a general rule that if the word "penalty" is used in a section as distinct from the word "fine", the penalty must be sought and recovered as a debt in a civil court, whereas a fine is a penalty imposed by a criminal court'.

17 For example, to cover the damage inflicted by a boxer or other sportsperson on an opponent; or rough use of objects or machinery causing damage: Oxford English Dictionary (2nd ed, online), <http://dictionary.oed.com>, 26 February 2002.

18 D Walker, *The Oxford Companion to Law* (1980) Clarendon Press, Oxford, 1017.

2.29 Claims for compensation in private cases for civil damages are not penalties and not considered in this Inquiry. However, regulatory law now permits orders in penalty actions for reparation for damage caused to third parties.[19] The 'disadvantage' imposed by orders in such cases is directly related to an assessment of the damage caused. The element of reciprocity, and the fact that the orders resolve a dispute between private parties, take civil damages cases outside the kind of imposition that is relevant to regulatory penalties. This Inquiry is concerned with those penalties imposed in accordance with the second and third points above.

2.30 Regulatory penalties are directed at promoting the smooth running of social and economic structures, and are thus broadly separable from crimes and private civil torts, although civil claims for damage and crimes such as fraud are frequently associated with conduct that also attracts a regulatory penalty.

2.31 There are several broad and inclusive definitions of 'penalty'. As an illustration of the breadth of the term in contemporary usage, Freiberg has listed the range of actions which can be characterised as penalties:

> The ostensible range of sanctions appears enormous. It includes imprisonment, attendance center orders, community-based orders, weekend imprisonment, probation orders, care orders, supervision orders, parole, work release, periodic detention, hospital orders, suspended sentences, deferred sentences, bonds, recognizances, discharge, dismissals, work orders, borstals, youth training centers, youth attendance orders, and host of others. On the 'civil' side one can find damages, divestiture orders, restitution and compensation orders, confiscation orders, injunctions, warnings, cease and desist orders, license revocation, suspension or cancellation, and many more.[20]

2.32 The Law Reform Commission of Canada took a pragmatic approach, stating that a sanction is 'what they do to you to make you do what they want you to do'.[21]

2.33 This view of a 'sanction', which can include positive and negative persuasion, appears to be broader than what is meant by 'penalty'. In some respects 'sanction' and 'penalty' may be (and are) used interchangeably, though this is not necessarily so. 'Penalty' carries with it only the connotations of 'negative sanctions', as discussed below.

2.34 Freiberg has developed a useful framework for the study of sanctions or penalties.[22] This framework has three aspects:

- sanction mode — positive or negative;
- sanction form — physical, economic, social, informational, political, privacy and legal; and

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19 For example, see *Trade Practices Act 1974* (Cth), s 82.

20 A Freiberg, 'Reconceptualizing Sanctions' (1987) 25(2) *Criminology* 223, 225.

21 Law Reform Commission of Canada, *Sanctions, Compliance Policy and Administrative Law* (1981) Law Reform Commission of Canada, Ottawa 31.

22 A Freiberg, 'Reconceptualizing Sanctions' (1987) 25(2) *Criminology* 223, 245.

- arena of deployment — public or private.

2.35 Taking the first aspect, sanction mode, it can be noted that the traditional definitions tend to restrict penalties to negative penalties in the form of monetary or other penalties whose aim is to punish. More recent studies of penalties recognise that they can be both negative and positive:

> [S]o deeply has sanction analysis been rooted in the punishment model that little attention has been paid to sanctions in the positive mode.[23]

2.36 If a penalty is an example of the exercise of state power then, just as power can be expressed positively and negatively, so can penalties:

> This more expansive view of law as compliance sought by the state by *either* positive or negative sanctions permits a wide-ranging analysis of the techniques of state power.[24]

2.37 An example of a positive sanction would be a reward or an incentive for certain behaviour.[25] This type of positive sanction encourages compliance by rewarding those who comply rather than punishing those who do not. A related definitional issue is whether or not the failure to receive the reward is a penalty in itself, with the effect that every positive sanction has a mirror negative sanction (or penalty) in its denial or withdrawal.

2.38 This definitional nicety is not without its importance, however. There is some controversy surrounding these definitions. For example, as outlined in chapter 14, there is argument over whether withholding part of a benefit under social security legislation is a penalty or a re-assessment of the person's eligibility for the entitlement. If the withholding of a benefit is not a 'penalty' strictly defined (notwithstanding what it is called), it can be imposed or administered by a non-judicial body and so can fall entirely within the administrative competence of the regulator concerned.

2.39 The ALRC interprets 'penalty' broadly to include the withholding of benefits or entitlements for the purposes of considering the scope of this Inquiry, although there are occasions where the term must be precisely defined, especially when considering administrative penalties. The ALRC's approach to this Inquiry is to develop a broad understanding of regulatory behaviour and it would be counter-productive to narrow its scope because of an artificially restricted definition of key terminology.

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23 Ibid, 229.

24 A Freiberg, 'Reward, Law and Power: Toward a Jurisprudence of the Carrot' (1986) 19 *Australian & New Zealand Journal of Criminology* 91, 94.

25 For example, the Equal Opportunity for Women in the Workplace Agency (EOWA) offers annual awards for compliance with the *Equal Opportunity for Women in the Workplace Act 1999 (Cth)* <www.eowa.gov.au/ empl_choice_women/index.htm>, 25 March 2002.

Categories of penalties

Criminal penalties

2.40 The main criminal penalties used in Australian legislation are fines and imprisonment. Other criminal penalties include forfeiture of property; and criminal conviction may also result in 'follow-on' penalties such as cancellation of licences.[26] The most serious sanctions, like imprisonment, are likely to be reserved for very serious breaches of the law or may be invoked where the court or Parliament seeks to focus on the immorality of the offence.[27]

2.41 In a regulatory context, criminal sanctions may serve as a last-resort punishment after repeated or wilful violations. For example, in environmental or licensing regimes criminal prosecutions can serve as the final rather than the primary sanctioning mode.[28] The function of the criminal offence in this context is to give power to the agency to deal with those who deliberately function outside the established rules.

2.42 Under the model originally put forward by Professors Ian Ayres and John Braithwaite, criminal penalties sit towards the top of the enforcement pyramid as the next level of seriousness to be employed after other sanctions have failed to stop deviant behaviour.[29] This approach is discussed further below at para 2.60.

2.43 However, criminal penalties are not used only in the context of high-level or repeated offences. Criminal fines are by far the most commonly used penalty in regulatory legislation and are applied to both low- and high-level offences.

2.44 Alternatively, criminal penalty schemes which allow community service orders or imprisonment as a sentencing option may be favoured where a defendant would be unlikely to be able to pay a civil pecuniary penalty.[30] This can be seen in Australia where a majority of criminal actions taken by the Commonwealth Director of Public Prosecutions (DPP) involve social security recipients.[31]

Civil penalties

2.45 A 'civil penalty' is one imposed by courts applying civil rather than criminal court processes.

> Civil penalties may be broadly defined as punitive sanctions that are imposed otherwise than through the normal criminal process. These sanctions are often financial in nature, and closely resemble fines and other punishments imposed on criminal of-

26 A Freiberg, '"Civilizing" Crime: Reactions to Illegality in the Modern State', *Thesis*, 1985, 118.
27 Ibid.
28 D Farrier, 'In Search of Real Criminal Law' in T Bonyhady (ed), *Environmental Protection and Legal Change* (1992) Federation Press, Sydney, 79.
29 For example, see I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992) Oxford University Press, New York.
30 A Freiberg, '"Civilizing" Crime: Reactions to Illegality in the Modern State', *Thesis*, 1985, 119.
31 Commonwealth Director of Public Prosecutions, *Annual Report 2000–2001*, Commonwealth Director of Public Prosecutions, 18–19; Commonwealth Director of Public Prosecutions, *Annual Report 2001–2002* (2002), Commonwealth of Australia, table 8.

> fenders … the process by which these penalties are imposed is decidedly non-criminal.[32]

2.46 The term 'civil offence' is a misnomer as 'civil' refers to the process of determining culpability and assessing the penalty but does not relate to the breach of the law itself. As will be seen, some regulatory schemes allow the prosecuting authority the choice of pursuing either, or both, criminal and civil processes.[33]

2.47 Civil penalty provisions have been described as a hybrid between the criminal and the civil law.[34] They are clearly founded on the notion of preventing or punishing public harm. The contravention itself may be similar to a criminal offence (for example, breaches of a director's duties or publishing misleading material) and may involve the same or similar conduct, and the purpose of imposing a penalty may be to punish the offender, but the procedure by which the offender is sanctioned is based on civil court processes.

2.48 Dr Kenneth Mann has called these penalties 'punitive civil sanctions'.[35] These penalties differ from traditional private civil remedies in that they do not necessarily bear any close relationship to the actual damage caused (that is, they are non-compensatory).[36]

2.49 Civil penalties may be more severe than criminal penalties in many cases. For example, there are substantial civil pecuniary penalties available under the TPA[37] and the *Corporations Act*.[38]

2.50 There are no federal non-criminal regulatory contraventions that include a prison sentence as part of the penalty.[39] The ALRC is strongly of the view that, not only is there is no place for imprisonment for non-criminal contraventions, there is no place for imprisonment for non-payment of a civil penalty unless failure to pay is held by a court to be contempt of court. If imprisonment is possible, the offence should be criminal with the defendant having all the procedural protections of criminal offences.

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32 M Gillooly and N Wallace-Bruce, 'Civil Penalties in Australian Legislation' (1994) 13(2) *University of Tasmania Law Review* 269, 269–270.

33 See ch 11.

34 See, for example, K Mann, 'Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law' (1992) 101(5) *Yale Law Journal* 1795, 1799.

35 Ibid, 1798.

36 Ibid, 1815.

37 For example, in *Australian Competition & Consumer Commission v Roche Vitamins Australia Pty Ltd* (2001) ATPR ¶41–809 total civil penalties of $26 million plus costs were awarded.

38 For example, Mr Jonathan Broster, a former executive manager of the Satellite Group Limited, recently agreed to penalties of $200,000 (the maximum that can be imposed under the *Corporations Act* on directors) plus costs of $50,000: <www.asic.gov.au/asic/ASIC_PUB.NSF/>, 7 March 2002.

39 Until 1957, s 258 of the *Customs Act 1901* (Cth) allowed a court to imprison a person liable to pay a pecuniary penalty pending payment of the penalty or the giving of a security and, until 1982, s 242 of the *Customs Act* permitted a court to imprison a person previously convicted of a similar offence.

Statement of Principle

> Imprisonment should not be part of any civil penalty, either directly as a possible sentence or indirectly for non-payment unless failure to pay is held by a court to be contempt of court.

2.51 Civil penalties are not exclusively monetary and may also include injunctions, banning orders, licence revocations and orders for reparation and compensation.

2.52 It must be acknowledged that, although criminal procedures in court are closely defined and relatively standardised, civil court procedures differ much more from court to court and from case to case as each court retains certain discretions to vary its procedure to meet the individual demands of justice in each case and the proper administration of its business generally.[40]

Origins of civil penalties in Australian legislation

2.53 Civil penalties have been available under the Customs prosecution procedures in the *Customs Act* since its enactment in 1901, although there has been considerable controversy over their proper characterisation. The basis for the adoption of civil penalties in Customs legislation has been their characterisation as a debt to the Crown. Customs prosecutions are discussed in detail in chapter 13.

2.54 Civil monetary penalties have been available under Part IV of the TPA since its inception in 1974. The reasoning behind the introduction of a civil penalty regime for Part IV was to avoid criminalisation of the types of commercial activity it governed. The then Attorney-General, Lionel Murphy, noted of the proposed civil penalties:

> There is a clear distinction between the trade practices provisions and the consumer protection provisions in the Bill. For the most part, consumer protection provisions deal with conduct which amounts to a criminal offence. This is in cases where there are false representations or conduct which is obviously of some fraudulent type and which is of a kind ordinarily covered by the criminal law. In the trade practices area, the conduct is more commercial conduct dealing with competitors, driving them out of business and so forth. An endeavour has been made to treat this area in the civil sense. … We think it is important not to import into the trade practices area the notion of criminality as such.[41]

2.55 The absence of criminality is not intended to remove the deterrent impact of the penalties. French J noted in *TPC v CSR Ltd* that the object of the civil penalties in the Act was to put a sufficiently high price on contraventions to deter potential

40 See, for example, the Water Wheel litigation discussed at para 2.95–2.97 below.
41 Commonwealth of Australia, *Parliamentary Debates*, Senate, 15 August 1974, 984–5.

breaches.[42] The deterrent aspect was emphasised when the penalties in Part IV were significantly increased to a maximum of $10 million in 1993.

2.56 In its report, *Compliance with the Trade Practices Act 1974*, the ALRC questioned the distinction between the use of civil penalties in Part IV (restrictive trade practices) and criminal penalties in Part V (consumer protection).[43] The ALRC argued that there was no rational reason why one type of commercial conduct was treated differently from another and recommended that Part V allow for civil penalties as well as criminal.[44] It did not recommend that criminal liability be extended to Part IV[45] although in mid-2002 the ACCC called for criminal penalties for certain hard-core restrictive trade practices.[46]

2.57 The civil penalty provisions in Part 9.4B of the *Corporations Law* (now the *Corporations Act)* came into operation on 1 February 1993. The *Corporate Law Economic Reform Program Act 1999* (Cth) consolidated and streamlined Part 9.4B with s 1317E setting out the civil penalty provisions under the *Corporations Act*. Part 9.4B provides for both civil and criminal consequences resulting from a breach of the civil penalty provisions. [47]

2.58 The adoption of these civil penalty provisions was based on the recommendations of the Senate Standing Committee on Legal and Constitutional Affairs (the Cooney Committee) in its report *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors.*[48] The Committee heard evidence that the (then) criminal penalties for breaches of directors' duties, which often involved gaol terms, gave the appearance of being too draconian. Courts were reluctant to impose gaol terms, and the modest fines that were imposed in their place gave the appearance that the law was weak.[49] The reforms proposed by the Cooney Committee included that:

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42 *Trade Practices Commission v CSR Ltd* (1991) 13 ATPR ¶41–076, 52, 152. See discussion in M Gillooly and N Wallace-Bruce, 'Civil Penalties in Australian Legislation' (1994) 13(2) *University of Tasmania Law Review* 269.

43 Criminal penalties are now in Part VC of the *Trade Practices Act*.

44 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), Australian Law Reform Commission, Sydney, para 9.11.

45 Ibid, para 9.27.

46 This issue forms part of the review of the *Trade Practices Act* being undertaken by the Dawson Committee: Australian Competition & Consumer Commission, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P1.pdf, www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P2.pdf, www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P3.pdf>, 13 August 2002.

47 Further civil penalty provisions were added to the *Corporations Act* in 2001 by the *Financial Services Reform Act 2001* (Cth) which extended the civil penalty regime to continuous disclosure and various market misconduct offences such as insider trading.

48 Senate Standing Committee on Legal and Constitutional Affairs, *Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (1989), AGPS, Canberra.

49 Ibid, 188.

- a range of penalties be available to the regulator to best address the individual circumstances of the case;[50]

- criminal liability should only apply where conduct is genuinely criminal in nature;[51] and

- civil penalties be provided for breaches by directors where no criminality was involved and, in appropriate circumstances, people suffering loss as a result of a breach be able to claim damages in the proceeding to recover the loss.[52]

2.59 The Cooney Committee was, however, keen to stress the need to retain criminal penalties to punish behaviour that was genuinely criminal in nature.[53]

2.60 The aim of introducing civil penalties into the *Corporations Law* was to provide punishment for contraventions which fell short of a criminal offence, thus allowing the regulator a greater range of options moving up the regulatory pyramid.[54] Other reasons for imposing civil rather than criminal penalties included balancing the desire to protect the public with the need to not unduly burden honest company directors and deter people from wishing to undertake that role.[55] The use of civil penalties in the *Corporations Law* emerged in response to the considerable work on regulatory enforcement undertaken in the 1980s and 1990s by theorists such as Ayres and Braithwaite.[56] Under the 'enforcement pyramid' model[57] Ayres and Braithwaite advocated what they describe as a 'tit for tat' approach, by which breaches of increasing seriousness are dealt with by sanctions of increasing severity, with the ultimate sanctions (such as imprisonment or loss of a licence to carry on business) held in reserve as a threat. Braithwaite has described the operation of the pyramid 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

50 Ibid, 194. See also M Gething, 'Do We Really Need Criminal and Civil Penalties for Contraventions of Directors Duties?' (1996) 24 *Australian Business Law Review* 375, 379.

51 Senate Standing Committee on Legal and Constitutional Affairs, *Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (1989), AGPS, Canberra, 190.

52 Ibid, 190–191.

53 Ibid, 190.

54 G Gilligan, H Bird and I Ramsay, *Regulating Directors' Duties — How Effective are the Civil Penalty Sanctions in the Australian Corporations Law?* (1999), Centre for Corporate Law and Securities Regulation, Melbourne, 8.

55 M Gillooly and N Wallace-Bruce, 'Civil Penalties in Australian Legislation' (1994) 13(2) *University of Tasmania Law Review* 269, 287.

56 I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992) Oxford University Press, New York.

57 The model was first put forward by Braithwaite in J Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (1985) State University of New York Press, Albany, NY, and was further discussed in B Fisse and J Braithwaite, *Corporations, Crime and Accountability* (1993) Cambridge University Press, Cambridge and in C Dellit and B Fisse, 'Civil and Criminal Liability Under Australian Securities Regulation; The Possibility of Strategic Enforcement' in G Walker and B Fisse (eds), *Securities Regulation in Australia and New Zealand* (1994) Oxford University Press, Oxford, 570.

> 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.[58]

2.61 Civil monetary penalties play a key role in the pyramid as they may be sufficiently serious to act as a deterrent (if imposed at a high enough level) but do not carry the stigma of a criminal conviction. As under the TPA, civil sanctions are attractive for contraventions of the *Corporations Law* where the moralising aspects of criminal penalties are considered inappropriate (for example, in relation to the on-going debate about corporate and directors' liability)[59] or where there is a continuing relationship between the regulator and the regulated.

> The greater flexibility and range of civil sanctions makes them the preferred mode of social control where persuasion, negotiation and voluntary compliance are viewed as the techniques most likely to achieve the desired results. Whilst the criminal sanction is said to be suitable for the control of isolated or instantaneous conduct, the civil sanction is said to be better in cases where continuous surveillance is desired.[60]

2.62 A further suggested reason for the introduction of the civil penalties regime in the *Corporations Law* was to increase the likelihood of punishing corporate offenders given the lower standard of proof and the fewer procedural protections available to the defendant in a civil action compared with an accused in a criminal prosecution.[61] This view was also put in evidence to the Cooney Committee, although the then Australian Securities Commission refuted such claims.[62]

Categories of civil penalty processes

2.63 The ALRC has identified three categories of civil penalty processes:

- civil penalties which sit alongside criminal penalties in legislation as additional or alternative enforcement options, often when the necessary fault element to prove a criminal offence (usually intention or knowledge) is not present, such as under the EPBC Act[63] and Part 9.4B of the *Corporations Act*;[64]
- separate civil penalty schemes which sit alone as the penalty for certain contraventions, such as Part IV of the *Trade Practices Act*; and

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58 Quoted in F Haines, *Corporate Regulation; Beyond Punish or Persuade* (1997) Clarendon Press, Oxford, 218.

59 A Freiberg, '"Civilizing" Crime: Reactions to Illegality in the Modern State', *Thesis*, 1985, 119.

60 Ibid, 120.

61 H Bird, 'The Problematic Nature of Civil Penalties in the Corporations Law' (1996) 14 *Company and Securities Law Journal* 405, 412. Bird cites submissions noted in Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), Australian Law Reform Commission, Sydney, where the ALRC proposed to extend civil penalties to Part V of the TPA: para 9.5.

62 M Gething, 'Do We Really Need Criminal and Civil Penalties for Contraventions of Directors Duties?' (1996) 24 *Australian Business Law Review* 375, 386.

63 For example, under s 23 and 24A both civil and criminal penalties are prescribed for certain specified contraventions. The civil sanctions impose standards of strict liability whereas the criminal sanctions require a mental element (set out in accordance with Chapter 2 of the Commonwealth *Criminal Code*) as a necessary component of the offence.

64 Multiple proceedings are discussed in ch 11.

- those which have a quasi-criminal status but use civil procedures, such as Customs prosecutions, and involve features of both criminal prosecutions and civil penalty proceedings.[65]

Administrative penalties

2.64 'Administrative penalties' in Australian federal law are broadly understood as being sanctions imposed by the regulator, or by the regulator's enforcement of legislation, without intervention by a court or tribunal. The term is, however, widely used, or misused, to include processes that are themselves not penalties or administrative.

2.65 The Law Reform Commission of Canada initially defined administrative sanctions as 'a means of implementing compliance with agency policy'.[66] However, it acknowledged that this definition may be too broad because actions such as 'investigation, public inquiry, release of true but damaging information or even the imposition of a reporting requirement' may help implement compliance with agency policy but could not be described as sanctions.[67]

2.66 The working definition of 'administrative penalty' finally adopted by the Law Reform Commission of Canada contains three elements: administrative action authorised by law; taken to achieve client [sic] compliance with policy; and perceived by the client [sic] as significantly affecting his interests.[68]

2.67 The ALRC has identified three broad categories of regulatory activity that are, sometimes wrongly, described as 'administrative penalties' in Australian federal regulation. The first category of activity, though wrongly described as administrative penalties, is the handling of a varied range of offences by infringement notices (or penalty notices). Infringement notices are not administrative penalties in themselves: they are an administrative device to dispose of a matter that involves a criminal or non-criminal breach. When such a breach is committed, the relevant agency may prosecute or take civil penalty proceedings, or may issue an infringement notice offering the offending party the chance to discharge or expiate the breach through payment of a specified amount. The use and efficacy of infringement notice schemes in Australia is considered in chapter 12.

2.68 The second category is the application by regulators of 'quasi-penalties' or 'pseudo-penalties' by which they may vary, qualify or revoke the distribution of benefits or licences to which the regulated party would otherwise be entitled. The principal areas of operation of these regulatory techniques are licensing regimes and social security. There is debate about whether the withholding or variation of benefits is in fact a 'penalty' or merely an issue of entitlement to a benefit or right (and this is taken up further in chapter 14). If the agency has any discretion about the nature of the penalty to

65 Custom prosecutions are discussed in ch 13.
66 Law Reform Commission of Canada, *Sanctions, Compliance Policy and Administrative Law* (1981) Law Reform Commission of Canada, Ottawa, 10.
67 Ibid, 13.
68 Ibid, 31.

be imposed, such as in considering the terms of a qualification on a licence, Chapter III of the Australian Constitution requires it not to be a penalty in a strict sense. Therefore, in one sense these actions must be defined other than as 'penalties' to allow them to be constitutionally valid.

2.69 The ALRC accepts that these types of action cannot be categorised as true administrative penalties. However, as the thrust of the Inquiry is to consider the application of all forms of sanctioning in federal government regulation, it would be counterproductive to exclude quasi-penalties from consideration. At the very least, these quasi-penalties are useful as a point of contrast. The scope and use of true administrative penalties, which are clearly within the ALRC's Terms of Reference, cannot be fully understood without considering them.

2.70 The third category of administrative penalties — true administrative penalties — are automatic, non-discretionary monetary administrative penalties, generally found at present in tax and communications legislation. In these cases the legislation determines when a breach has occurred as well as the nature, imposition and the amount (or method of calculation) of the penalties to be imposed. The regulator has no power before the penalty is imposed to determine the level of penalty other than in accordance with the legislation, nor to determine whether there are extenuating circumstances that might warrant a variation in its imposition. It is under an obligation to document and formalise the imposition of the penalty for which the law provides, and has no other active role in the determination or assessment of the penalty as the law has already predetermined it. The agency does, however, have a limited discretion whether to impose the penalty for the breach at all, to withdraw the penalty if the facts on which the breach is based are incorrect, and can in many cases remit some or all of the penalties after they have been imposed. Such penalties are imposed by legislation where tax, levies or penalties are underpaid, paid late, or not paid; where required information is not provided; or where incorrect information is provided to the regulator. Remission of penalties is discussed in chapter 17.

Procedural consequences

2.71 The most important features of the distinction between criminal offences and non-criminal contraventions, for both the regulators and regulated communities, are the differences in the procedures by which they are enforced.

Characteristics of criminal procedure

> The argument advanced is that what has been traditionally labelled 'criminal law' has long since lost its coherence and distinctiveness. Some have reached the barren conclusion that the only thing that distinguishes criminal offences is the procedure by which the legal system handles them.[69]

69 D Farrier, 'In Search of Real Criminal Law' in T Bonyhady (ed), *Environmental Protection and Legal Change* (1992) Federation Press, Sydney, 79, 79, quoting G Williams, *Textbook on Criminal Law* (1978) Stevens & Sons, London, 27.

2.72 A majority of the unique identifiers of crimes are procedural,[70] which is supported by the definition of a 'crime' from Glanville Williams:

> A crime (or offence) is a legal wrong that can be followed by criminal proceedings which may result in punishment.[71]

2.73 The characterisation of an act as a criminal offence conventionally:

- places a high burden of proof (beyond reasonable doubt) on the prosecutor;
- requires the presence of mental elements such as intent;
- gives the accused certain procedural protections in the face of investigation and prosecution, such as the right to remain silent, and the rights not to specify its defence, discover documents or answer interrogatories before trial;
- imposes greater ethical obligations of candour, fairness and disclosure on the prosecutor;
- confers a privilege against self-incrimination and a protection against double jeopardy upon the accused;
- extends the range and severity of sentencing powers, including imprisonment;
- requires a judge to impose the penalties and, in many cases, a jury to determine guilt.[72]

2.74 In most cases, convicted persons will have a criminal record, which must be disclosed for some purposes and may be publicly accessible. Exceptions include some minor and first offences. A conviction or criminal record makes the person ineligible to hold certain positions, may result in their being denied permission to travel to certain countries, and may deprive them of certain civil rights (eg, the right to vote if imprisoned).

2.75 The European Court of Human Rights has used the following criteria in determining whether or not proceedings should be labelled as criminal or civil. They are likely to be regarded as criminal if the proceedings are (a) brought by a civil authority and either (b) have a requirement to show some kind of culpability (wilful or neglectful) or (c) have the potential for severe consequences such as imprisonment.[73] The emphasis is on the true nature of the proceedings rather than their form.

2.76 However, this distinction cannot be said to apply consistently in Australian civil penalty proceedings brought by a public authority. As well, some criminal penal-

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70 M Bagaric, 'The "Civil-isation" of the Criminal Law' (2001) 25(4) *Criminal Law Journal* 184, 191.

71 G Williams, *Textbook on Criminal Law* (1978) Stevens & Sons, London, 14.

72 See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1. In that case McHugh J noted that an administrative penalty (mandatory detention while processing a claim to a protection visa) would be constitutional under Chapter III if the penalty were no greater than was necessary to achieve a legitimate non-punitive object: 70–71.

73 A Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225, 230.

ties in the regulatory sphere specifically do not require a mental element and involve strict or absolute liability. Furthermore, recent examples of civil penalty judgments, such as the multi-million dollar penalties awarded under the civil penalty provisions of the TPA, may be far more onerous than criminal fines awarded for other types of corporate misconduct,[74] though this is not always understood by the general community.

Characteristics of civil procedure

2.77 Much of the debate regarding the appropriateness of civil penalties centres on their procedural aspects. Some procedural aspects of bringing a civil penalty action are the same as for a criminal prosecution: for example, an agent of the state commences the court action, be it the DPP, the regulator itself or an authorised ministerial delegate applying to the court for a civil penalty order. Whereas most criminal prosecutions are undertaken by the DPP, civil penalty proceedings are brought by a range of government agencies and regulators. Many such agencies also have broad investigative powers.

2.78 The most important distinction is that civil penalty proceedings are characterised by a variable standard of proof at or above the balance of probabilities accompanied by a loss of other procedural protections of an accused, such as the privilege against self-incrimination.

2.79 The available civil penalties are usually monetary. In some areas, there is also an option for the offender to give undertakings, pay damages to third parties, or publish notices regarding the contravention, or to be ordered to do these things. Since the purpose of civil penalties includes some element of punishment, only a judge can impose a civil penalty, as with criminal penalties.

2.80 Specific examples of procedural differences in civil proceedings include:

- *pleadings*: formal written statements of claim and defence filed by the parties to the dispute, with the aim of defining the issues at hand for both the parties and the court;
- *discovery*: which requires parties to disclose relevant non-privileged documents to each other;
- *interrogatories:* written questions administered by one party on another seeking admissions of factual matters in dispute; and
- *removal of privilege:* the privilege against self-incrimination (or self-exposure to a penalty) may be lost in proceedings for civil penalties.

2.81 This greater procedural flexibility and the lower burden of proof attract many legislators towards civil penalties. The standard of proof placed on the prosecuting

74 For example, in *Australian Competition & Consumer Commission v Roche Vitamins Australia Pty Ltd* (2001) ATPR ¶41–809 civil penalties totalling $26 million were imposed on a number of respondents, one receiving a penalty of $15 million.

regulator is derived from the civil standard — the balance of probabilities — but can rise depending on the seriousness of the offence.

> [R]easonable satisfaction [in relation to the standard of proof] is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.[75]

2.82 The degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the fact to be proved.[76] This approach has been enshrined in legislation in s 140 of the *Evidence Act 1995* (Cth), which states:

> 140(1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
>
> (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
>
> (a) the nature of the cause of action or defence; and
>
> (b) the nature of the subject-matter of the proceeding; and
>
> (c) the gravity of the matters alleged.

2.83 With the increasing severity of civil penalties in areas such as trade practices and corporations law, the appropriateness of having lesser protections available for the regulated has been questioned.

> The conclusive presumption, in effect, that all criminal sanctions require greater procedural protections than any civil sanction, may be seen as an outmoded relic of the pre-Revolutionary period, when all criminal penalties were harshly severe and the civil process rarely imposed crushing liability. Today, by contrast, many relatively trivial transgressions of the legislative will have been criminalized and incur only minor penalties. Simultaneously, there has been a staggering expansion of civil liability, not merely through the creation of new private causes of action but through the manifold increase in even the relative size of civil damage judgments and the creation of powerful engines of administrative regulation.[77]

2.84 Many pieces of legislation containing civil penalty provisions are relatively silent on procedure. The *Corporations Act* simply states that civil penalty applications be dealt with according to the civil rules of procedure.[78] The *Customs Act* contains a unique set of procedures discussed in chapter 13.

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75 *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362 (Dixon J).

76 *Rejfek v McElroy* (1965) 112 CLR 517, 521.

77 E Dudley, 'Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts' (1993) 79 *Virginia Law Review* 1025, 1064.

78 *Corporations Act 2001* (Cth), s 1317L, or see *Trade Practices Act 1974* (Cth), s 77.

2.85 Courts have to some extent adapted civil procedures in civil penalty cases to take into account procedural concerns. In *Refrigerated Express Lines (Australasia) Pty Ltd v Australian Meat and Livestock Corporation*[79] Deane J noted

> the well established principle that a defendant in proceedings solely for the recovery of a pecuniary penalty should not be ordered to disclose information or produce documents which may assist in establishing liability to a penalty.[80]

2.86 However, these judicial comments, based on established principles of procedural fairness, have been piecemeal and vary among the courts in which proceedings are held.[81] These procedural issues are considered in chapter 14 and in considering options for reform in Part D of this Report.

Characteristics of administrative penalty procedure

2.87 As discussed above, the principal feature of true administrative penalties is that they are enforced and documented mechanically by the regulator in circumstances where they are imposed automatically, and to recover amounts which are predetermined by statute.

2.88 Because breaches of law handled as true administrative penalties are not prosecuted within the court system, under the Constitution they must be a purely mechanical application of the law. In that sense they are ideally suited to minor, high-volume breaches, such as minor Customs and fisheries infringements, involving strict or absolute liability and, therefore, no or little forensic enquiry.

2.89 There are a few common elements to procedures concerning true administrative penalties. In the case of financial administrative penalties such as those imposed under taxation legislation, there is allowance for some element of discretion by the regulator after the penalty has been imposed, such as provisions for remission of all or part of a penalty and provisions allowing the regulator to exempt a person from a particular requirement, and provisions requiring the regulator to interpret legal or factual points in determining whether the penalty applies.

2.90 Most true administrative penalties and quasi-penalties carry a right of review (both merits and judicial review). These avenues can include a merits review tribunal such as the Social Security Appeals Tribunal or Administrative Appeals Tribunal, Federal Court appeals under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth), judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), judicial review under the *Judiciary Act 1903* (Cth) and High Court review pursuant to s 75 of the *Constitution* (see chapter 20).

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79 *Refrigerated Express Lines v Australian Meat and Livestock Corporation* (1979) 42 FLR 204.

80 Ibid.

81 J Longo, 'Civil Penalties under the Corporations Act — Reflections of a Gamekeeper turned Poacher' (Paper presented at Corporation Law Workshop, 27–29 July 2001). For example, in the on-going Water Wheel litigation the defendants have not been required to provide a fully pleaded defence: D Elias, *ASIC Told to Detail Elliott Case*, The Age Melbourne, <www.theage.com.au/business/2000/12/16/FFXL1UVERGC.html>, 16 December 2000 (see para 2.95).

Confusion and overlap

2.91 The traditional dichotomy between criminal and non-criminal procedures and penalties no longer accurately describes the modern position, if it ever did. The functions and purposes of civil, administrative and criminal penalties overlap in several respects. Even some procedural aspects, such as the different standards of proof for civil and criminal sanctions, are not always clearly distinguishable. As Gail Heriot noted, 'the distinction between the two was probably never as clear in the law as it seemed in the public mind'.[82]

> The history of middle-ground jurisprudence demonstrates the inadequacy of the bipolar paradigms for governing actual sanctioning policy. While the legal community has always recognised that many sanctions do not fit into either paradigm, it has never developed a systematic jurisprudence to explain the substantive and procedural position of punitive civil sanctions within the field of sanctioning.[83]

2.92 It is not always clear what category a penalty fits into; consequently, the appropriate protections and procedures are not clear. Civil pecuniary penalties are often, on their face, little different from a criminal fine.[84] As such, civil penalties have been viewed as

> merely a blind to conceal a lower standard of proof, albeit floating upward with the gravity of the offence. The argument is that a civil penalty is an oxymoron — it is really criminal. But this is to commit the fallacy of the undistributed middle — to assume something is either criminal or civil, with nothing in between.[85]

2.93 Mann has recognised the resulting problem that procedural protections become dependent on almost arbitrary categories rather than on the severity of the penalty, calling for 'the resurrection and extension of a middle ground that connects procedural rights with the severity of the sanctions'.[86] This clearly dismisses any assumption that the purpose of a penalty is connected with its category as criminal, civil or administrative, a development that has been applauded by Freiberg.[87]

2.94 An example of the confusion and overlap between criminal and civil procedures is found in the area of Customs and excise legislation.[88] Even where the civil and criminal penalties are clearly distinguished and articulated in legislation, there is con-

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82 G Heriot 'An Essay on the Civil-Criminal Distinction with Special Reference to Punitive Damages' (1996) 7(1*) Journal of Contemporary Legal Issues* 43, 44–45.

83 K Mann, 'Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law' (1992) 101(5) *Yale Law Journal* 1795, 1871.

84 M Gillooly and N Wallace-Bruce, 'Civil Penalties in Australian Legislation' (1994) 13(2) *University of Tasmania Law Review* 269, 270.

85 G Santow, 'Corporations Law in a Federal System' (Paper presented at Conference on the Future of Corporation Regulation, Sydney, 3 November 2000).

86 K Mann, 'Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law' (1992) 101(5) *Yale Law Journal* 1795, 1872.

87 A Freiberg, 'Commentary on "Blurring the Criminal and Civil Paradigms" by Professor John Coffee Jr' (Paper presented at Penalties; Policy, Principles and Practice in Government Regulation, Sydney, 8 June 2001).

88 See discussion in ch 13.

cern with the way regulators and the courts apply or determine civil penalties. In a 1999 study, certain ASIC officers commented that

> they would like the courts to express a clearer view on how they regard civil penalties and they felt that some judges placed almost a criminal standard of proof with regard to civil penalty provisions, even though the statutory test is the balance of probabilities.[89]

2.95 The rules of civil procedure in proceedings may be modified (either by legislation or the courts) with the aim of protecting the defendant where a civil penalty is sought.[90] An example of this is the proceedings by ASIC against the directors of Water Wheel Holdings Ltd.[91] ASIC commenced civil action in the Supreme Court of Victoria against directors of Water Wheel Holdings Ltd and its subsidiary, Water Wheel Mills Holdings Pty Limited, alleging that the directors allowed the companies to incur further debts after the companies became insolvent, contrary to the *Corporations Law*. ASIC sought orders from the court that the directors personally pay compensation for the benefit of the companies' unsecured creditors; that the directors be prohibited from managing any corporation for such period as the court thinks fit; and for the imposition of monetary penalties of up to $4 million on each of the directors.

2.96 David Knott, ASIC chairman, stated that:

> It is important to emphasise that these are not criminal proceedings. The breaches of law alleged by ASIC are sufficiently serious to seek orders against the defendants for both compensation and civil penalties.[92]

2.97 The directors disputed the claim. The matter went before the Supreme Court of Victoria for directions on 15 December 2000, when Mandie J accepted the directors' argument that ASIC was using the civil courts to bring a quasi-criminal matter. His Honour rejected an application from ASIC that would have required the directors to file an early defence. Instead, he ordered ASIC to file its case against the directors.[93] This case had not been concluded at the time of writing this Report.

Types of penalties

Criminal penalties

2.98 The principal criminal penalties in the regulatory sphere are imprisonment, fines and community service orders. A form of community service order may also be used as a civil penalty, and is discussed at para 2.120.

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89 G Gilligan, H Bird and I Ramsay, *Regulating Directors' Duties — How Effective are the Civil Penalty Sanctions in the Australian Corporations Law?* (1999), Centre for Corporate Law and Securities Regulation, Melbourne.

90 M Gillooly and N Wallace-Bruce, 'Civil Penalties in Australian Legislation' (1994) 13(2) *University of Tasmania Law Review* 269, 270.

91 *ASIC v Plymin* (No. 7748 of 2000, VSC).

92 'ASIC Sues Elliott over Water Wheel Conduct', *The Australian Financial Review*, 27 November 2000.

93 D Elias, *ASIC Told to Detail Elliott Case*, The Age Melbourne, <www.theage.com.au/business/2000/12/16/FFXL1UVERGC.html>, 16 December 2000.

Imprisonment

2.99 The ALRC has identified about 800 (out of some 2400) penalty provisions with imprisonment as a sentencing option. Of those, 279 allow imprisonment only, the remainder allowing a choice between imprisonment and a fine. Under s 4B(2) of the *Crimes Act 1914* (Cth), courts may substitute a monetary penalty for any offence punishable by a term of imprisonment unless a contrary intention is expressed in the legislation.

2.100 The types of offences for which imprisonment only is indicated are largely offences that include an element of contempt (either in a court context or in the course of a regulator's investigations or hearings) or providing false or misleading information.

2.101 In its report, ALRC 44 *Sentencing*, the ALRC noted that imprisonment remained an important part of the system of punishment for offences against federal laws.[94] However, the ALRC stressed the importance of reserving imprisonment for only the most serious offences, with the primary value of imprisonment arising from its perception as the ultimate sanction.[95] The ALRC argued that for certain types of offences, imprisonment should be removed as a sentencing option.

> The Commission suggests that, of federal offences, social security offences, and taxation offences, especially where no systematic fraud is involved, and some Customs and quarantine offences should be reviewed first for this purpose. These would be cases where non-custodial sanctions, including the fine and community service orders, would be more appropriate than a prison term. Where systematic fraud is involved, fines may well be the appropriate sanction, if set at an appropriately high level.[96]

2.102 In 1998, the Senate Scrutiny of Bills Committee considered the appropriateness of imprisonment as a punishment for certain offences under the Productivity Commission Bill 1996. These largely related to the failure to provide information at a hearing, providing misleading information and disrupting or hindering the work of the Productivity Commission.[97] The Committee agreed with the ALRC's approach that imprisonment should be retained only for those offences or circumstances that Parliament considered to be sufficiently serious. For example, in relation to the types of offences that are common in federal regulatory legislation — such as failing to provide information — the Senate Committee argued that imprisonment would be an inappropriate sentencing option where the agency was focused on information collection, policy matters or research, but may be appropriate where an individual knowingly makes misleading statements for financial gain or prejudices a quasi-criminal investigation.[98]

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94 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), AGPS, Canberra, para 40.
95 Ibid, para 52.
96 Ibid, para 59.
97 Parliament of Australia Senate Scrutiny of Bills Committee, *Scrutiny of Bills Eighth Report of 1998: The Appropriate Basis for Penalty Provisions in Legislation Comparable to the Productivity Commission Bill 1996* (1998), Parliament of Australia.
98 Ibid, para 4.9.

Fines

2.103 There is considerable overlap and confusion in the terminology used to describe monetary penalties. For the purposes of this Report, the ALRC uses the term 'fine' to denote a criminal monetary penalty, 'pecuniary penalty' to denote a civil monetary penalty, and 'monetary penalty' when referring to both types.

2.104 Fines are overwhelmingly the most common criminal sanction used in federal legislation. Of the 2400 penalty provisions mapped by the ALRC, 923 involved a fine alone as the penalty and 640 involved a fine with, or as an alternative to, some other kind of sanction such as imprisonment, compensation orders to pay a third party or forfeiture of a licence.

2.105 Fines are considered by legislators to be both an appropriate deterrent and a flexible sentencing option, allowing multi-million dollar penalties for white collar crime but much smaller penalties for minor infractions.[99]

2.106 Many of the problems associated with the use of fines are the same as for a non-criminal monetary penalty. These are discussed below.

Civil penalties

Pecuniary penalties

2.107 Civil pecuniary penalties are more closely aligned with criminal fines than with private law civil damages.[100] Civil damages aim to compensate individuals for harm caused. Civil pecuniary penalties, on the other hand, are punitive[101] — even if their chief aim is said to be deterrence — and are payable whether or not any harm was actually caused by the unlawful action.[102] Whilst civil pecuniary penalties are thought not to entail the moral sanction of a criminal conviction, they do not serve as merely the tax or price of an illegal act.[103]

2.108 Civil pecuniary penalties are most extensively found in more recent legislation such as the *Corporations Act*, the TPA and the EPBC Act, although they have also been present in the *Customs Act* since its enactment in 1901.

2.109 The similarity between a fine and a pecuniary penalty may mean that the particularly 'criminal' or moral element of the criminal fine is lost.

2.110 The ALRC has found substantial differences in the levels of fines and pecuniary penalties for similar contraventions. This is discussed in more detail in chapter 26.

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99 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), AGPS, Canberra, para 108.

100 K Yeung, *The Public Enforcement of Australian Competition Law* (2001), Australian Competition and Consumer Commission, Canberra, 67.

101 As discussed earlier at para 2.45.

102 K Yeung, *The Public Enforcement of Australian Competition Law* (2001), Australian Competition and Consumer Commission, Canberra, 67.

103 Ibid, 67.

Corporations and monetary penalties

2.111 In its report, ALRC 68 *Compliance with the Trade Practices Act,* the ALRC argued that imposing monetary penalties (either criminal or civil) on corporations had a number of limitations. These included that:

- large monetary penalties do not necessarily result in corporate offenders taking internal disciplinary action against responsible officers and that, as a consequence, internal controls are often not revised to prevent further contraventions;
- the burden of large monetary penalties may be borne by shareholders, workers or consumers rather than the responsible officers of the offending corporation;
- monetary penalties may convey the impression that offences are purchasable commodities or a cost of doing business;
- a large monetary penalty may force a corporation into liquidation. The court could be faced with the choice between putting the company into liquidation or imposing a penalty that does not reflect the gravity of the offence; and
- monetary penalties are prone to evasion through the use of incorporated subsidiaries and other avoidance techniques such as asset stripping.[104]

2.112 While monetary penalties can be flexible, they can be criticised for a perceived lack of equity and deterrence value and for not responding to the nature of the offender. A monetary penalty of $10,000 may affect an individual but hardly register with a large corporation. Conversely, very large penalties may impact on the behaviour of big business but be meaningless for smaller players. For example, DP 65 noted that some members of the small business sector like provisions that have large monetary penalties because they believe that if they get caught they will get 'a slap on the wrist' as they cannot afford a $10 million penalty.[105] However, it is also important to note that courts rarely impose maximum penalties, nor is it expected that they would. Indeed, it is part of the sentencing process for the court to take into account the ability of the party to pay (see chapter 30).

2.113 A number of alternative penalties to fines were suggested in ALRC 68, including community service orders (discussed at para 2.120) and publicity orders (see para 2.138). Many of that Report's recommendations were adopted by the Government in the *Trade Practices Amendment Act (No. 1) 2001* (Cth), including allowing courts to impose non-monetary penalties such as community service orders, probation orders and adverse publicity orders for both criminal and non-criminal contraventions of the TPA in the areas of restrictive trade practices, unconscionable conduct, industry codes, consumer protection and price exploitation.

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104 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), Australian Law Reform Commission, Sydney, para 10.3.

105 Australian Compliance Professionals Association, *Consultation*, Brisbane, 15 February 2001.

Injunctions

2.114 The ALRC found 53 provisions concerning injunctive relief in its review of federal legislation, primarily relating to marketplace regulation, particularly in the *Corporations Act*, TPA and the *Workplace Relations Act 1996* (Cth).

2.115 Injunctions are not in themselves penalties but are used in support of actions seeking penalties. In consultations, ASIC officers have commented on the usefulness of injunctions in acting quickly against offenders.

> The foundation of the ASIC approach is to try and protect investors, so the first step is always to act to protect, then start thinking about civil or criminal penalties.[106]

2.116 The ACCC says that it is the public interest nature of a regulator's work that leads courts towards a willingness to grant injunctions.[107]

2.117 In *ICI Australia Operations Pty Ltd v TPC*, the Federal Court concluded that the granting of an injunction in addition to pecuniary penalties was appropriate.

> Injunctions are traditionally employed to restrain repetition of conduct. A statutory provision that enables an injunction to be granted to prevent the commission of conduct that has never been done before and is not likely to be done again is a statutory enlargement of traditional equitable principles. But this is because traditional doctrine surrounding the grant of injunctive relief was developed primarily for the protection of private proprietary rights. Public interest injunctions are different. Parts IV and V of the [Trade Practices] Act involve matters of high public policy. Parts IV and V relate to practices and conduct that legislatures throughout the world in different forms, and to different degrees, have decided are contrary to the public interest … These are legislative enactments of matters vital to the presence of free competition and enterprise and a just society. This does not mean that the traditional equitable doctrines are irrelevant. For example, it must be relevant to consider questions of repetition of conduct or whether it has ever occurred before or whether imminent substantial damage is likely, but the absence of these elements is not fatal to the granting of an injunction under s. 80.[108]

Compensation to third parties

2.118 The option of compensation orders for third parties is available where the offence includes some element of unlawful profit-making at another's expense or causes loss or damage to another. Fifty such provisions were identified by the ALRC in its legislation-mapping exercise.[109]

2.119 As an example, s 87 of the TPA grants the court wide powers to make compensation orders to a person who has suffered, or who is likely to suffer, loss or dam-

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106 Australian Securities & Investments Commission, *Consultation*, Sydney, 23 May 2001.

107 S Bhojani, 'Principles of Fairness and Accountability' (Paper presented at Penalties; Policy, Principles & Practice in Government Regulation, 8 June 2001), 31.

108 *ICI Australia Operations Pty Ltd v TPC* (1992) ATPR ¶41–185, 40,524–40,525.

109 For example, these types of orders can be made under the *Trade Practices Act, Corporations Act, Superannuation Industry (Supervision) Act 1993* (Cth), *Telecommunications Act 1997* (Cth) and the *Workplace Relations Act*.

age by conduct of another person that was engaged in contravention of Parts IV (other than s 45D and 45E), IVA, IVB, V or VC. Applications for third party compensation may come either from the party suffering damage or the ACCC on its behalf.

Community service orders

2.120 Community service orders have been promoted as an alternative penalty option, not only for individuals but also for corporate offenders.[110] Particularly in the case of environmental damage, community service orders are seen as a practical way to rectify damage. For example, polluters could be ordered to clean up after substance spills, or give money and time to environmental organisations. Orders of this kind have been popular in the United States for some time.[111]

2.121 Community service orders are now a sentencing option under Parts IV and VC of the TPA.[112] This was largely in response to the recommendations of the ALRC in its report, ALRC 68 *Compliance with the Trade Practices Act*.[113]

2.122 The ALRC discussed the issue of community service orders for corporate offenders in Discussion Paper 30, *Sentencing: Penalties*.[114] In that Discussion Paper the ALRC noted that these orders have the advantages of:

- enabling the sentencing court to order the performance of a socially useful program adapted to the expertise of the offender;
- assisting in stigmatising corporate offences as anti-social;
- stimulating internal discipline within a company in relation to that type of offence; and
- reducing the likelihood of the costs of a fine being simply passed on to consumers. In this case, whilst there might be costs associated with performing the project, there would still be some benefit to the community arising from whatever work is performed under the order.[115]

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110 See discussion in ch 17, 27 and 28.

111 R Mulheron, 'Criminal Enforcement of Environmental Law; Limitations and 'Flat Earth Thinking' Sanctions' (1996) *Queensland Law Society Journal* 427.

112 *Trade Practices Act*, s 86C as amended by *Trade Practices Amendment Act (No 1) 2001* (Cth). The Explanatory Memorandum to the Bill noted that 'These proposed amendments would enable a Court to make an order directing a contravening party to inform the public of their unlawful conduct, correct the harm that they have inflicted upon the community as a result of their contravention, or engage in activities that are aimed at altering the internal business operations of the contravening party. Orders of this nature would be regarded as putting in place mechanisms to foster an environment of legislative compliance by changing incorrect business practices and correcting the misallocation of resources brought about by and evident in the breach': Explanatory Memorandum, Trade Practices Amendment Bill (No 1) 2001, Part 3.

113 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), Australian Law Reform Commission, Sydney.

114 Australian Law Reform Commission, *Sentencing: Penalties — Discussion Paper*, DP 30 (1987), Australian Law Reform Commission, Sydney.

115 Ibid, para 302.

2.123 The disadvantages of using community service orders were thought to be:

- the inability to guarantee institutional change through the sanction;
- the danger of courts preferring certain types of projects and not necessarily relating the project to the offence in question; and
- the risk of corporate cheating on projects without adequate supervision.[116]

Administrative penalties

Monetary penalties and charges

2.124 Monetary penalties are currently imposed administratively in a number of ways. Typically, they are imposed as a charge or interest. An example of the use of charges or interest is under the *Taxation Administration Act 1953* (Cth) (TAA), where the main penalties are:

- *General Interest Charge* (GIC), which is generally payable if a person has failed to pay an amount to the Commissioner on time. The operative provisions of the GIC, including the formula for its calculation, are found in the TAA, s 8AAC. The Commissioner may remit all or part of the GIC in particular circumstances; for example, where the person did not cause the delay in payment or where it would be fair and reasonable to remit the charge (TAA, s 8AAG).
- *Penalty additional taxes*, which are most commonly payable when a person has incorrectly assessed the amount of tax payable so that there is a tax shortfall. These are in addition to the payment of the correct amount of tax.
- *Specific penalties*, applicable to breaches such as the failure to notify and submitting late reconciliation statements.
- *General penalties*, which relate to indirect tax, withholding tax and PAYG tax and which deal with acts or omissions such as failing to make electronic payments, registration requirements, failure to provide information, making a false statement, and failure to withhold the required amount.

2.125 The amount of each of these penalties is determined by a formula set out in the legislation. For example, in relation to the penalty for a failure to notify, the penalty is worked out at the rate of 8% per annum of the amount affected.[117]

2.126 Most administrative penalties are imposed for failure to meet the following requirements:

- not paying a liability when it is due and payable;

116 Ibid, para 303. Community service orders are further considered in ch 27 and 28
117 *Taxation Administration Act 1953* (Cth), s 8AAK.

- not lodging a document on time;
- making a statement to the Commissioner which causes a shortfall in the amount that is properly payable; and
- failing to comply with miscellaneous obligations such as keeping proper records.

2.127 Under the *Taxation Administration Act,* a penalty is determined using concepts of a base penalty amount that may then be varied upwards or downwards in fixed percentages according to various listed criteria. The scheme takes account of factors such as whether the taxpayer or their agent has intentionally disregarded the law, has been reckless or has failed to take reasonable care. It allows for reductions for factors such as voluntary disclosure. Where a penalty relates to failing to lodge documents, for example, the penalty is varied according to the time period involved.

2.128 While the penalty amounts are determined according to a formula in the legislation, there is an important discretion retained by the Commissioner. The Commissioner may choose to remit a penalty, either in relation to a particular taxpayer, or generally. This was done, for example, in relation to the implementation period of the new tax system in 2000–01.[118] Remission of penalties is discussed further in chapter 17.

Infringement notices

2.129 Infringement notice schemes are not true administrative penalties. They are administrative methods for dealing with certain breaches of the law.[119] On their face, they seem to be a significant departure from the traditional separation of powers doctrine that only a court may impose a penalty. Their use is often justified on the grounds that they are a low cost, efficient way for regulators to deal with minor offences, and are a simple way for wrongdoers to discharge their obligation without appearing before a court.

2.130 Infringement notice schemes are typically used for low-level offences and where a high volume of uncontested contraventions is likely. Infringement notice schemes are constitutionally valid where they do not involve a regulator assessing a penalty after a hearing of any description, but merely applying the law that determines the breach, together with a statement of the amount that the notice invites the alleged offender to pay.

2.131 Infringement notices have long been used by the States and Territories to punish offences such as traffic and parking violations, but are becoming increasingly a part of the federal regulatory framework. Under an infringement notice scheme, a non-judicial officer is empowered to give a notice to a suspected offender, alleging the of-

118 Australian Taxation Office, *Practice Statement 2002/8*, <http://law.ato.gov.au/atolaw/view.htm?dbwidetocone=%2203:PSR:2002:%2300008%…>, 16 September 2002.

119 See chapter 12.

fence and providing that the offender may pay a prescribed penalty to avoid prosecution.

2.132 Over 15 federal regulatory schemes have provision for infringement notices.[120] Examples in legislation looked at by the ALRC are found in the *Radiocommunications Act 1992* (Cth), the *Fisheries Management Act 1991* (Cth), the *Migration Act 1958* (Cth), the EPBC Act, the *Customs Act* and the *Corporations Act.*

2.133 DP 65 suggested that most infringement notice schemes walk the line between deterrence and fairness. If the set penalty is too low, it may place undue pressure on the alleged offender to pay irrespective of guilt. If it is too high, there is no incentive not to take a chance in court. Offences are generally of strict or absolute liability and with a clear physical element.

2.134 Infringement notice schemes are discussed in detail in chapter 12.

Negotiated penalties

2.135 Regulators with enforcement powers to recommend or initiate penalty proceedings can use a variety of concessionary arrangements to improve compliance, including negotiating a penalty with the offending party.

2.136 Australian courts have shown a willingness to accept negotiated penalty submissions in civil proceedings for pecuniary penalties although not without some reservation.[121] Generally, the procedure is that the regulator and the party agree on a penalty based on prior caselaw and the factors relevant to penalty setting, which is then submitted with the facts of the case to the court for decision (in effect, approval).[122] In *NW Frozen Foods v ACCC* the Federal Court approved this process, stating:

> When corporations acknowledge contraventions, very lengthy and complex litigation is frequently avoided, freeing the courts to deal with other maters, and investigation officers of the Australian Competition and Consumer Commission to turn to other areas of the economy that await their attention. At the same time, a negotiated resolution in the instant case may be expected to include measures designed to promote, for the future, vigorous competition in the particular market concerned. The court will not

120 These include the *Air Navigation (Fuel Spillage) Regulations 1999* (Cth); *Air Navigation Regulations 1947* (Cth)*; Airports (Building Control) Regulations 1996* (Cth)*; Airports (Control of On-Airport Activities) Regulations 1997* (Cth)*; Airports (Environment Protection) Regulations 1997* (Cth)*; Civil Aviation Regulations 1988* (Cth)*; Corporations Regulations 2001* (Cth)*; Customs Act 1901* (Cth); *Defence Force Discipline Act 1982* (Cth); *Education Services for Overseas Students Regulations 2001* (Cth); *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth); *Excise Act 1901* (Cth); *Financial Sector (Collection of Data) Act 2001* (Cth); *Fisheries Management Regulations 1992* (Cth)*; Interstate Road Transport Regulations 1986* (Cth); *Migration Regulations 1994* (Cth); *Quarantine Regulations 2000* (Cth); *Radiocommunications Regulations 1993* (Cth); *Road Transport Reform (Dangerous Goods) Act 1995* (Cth); *Road Transport Reform (Heavy Vehicles Registration) Act 1997* (Cth); *Road Transport Reform (Dangerous Goods) Regulations 1997* (Cth); *Sydney Airport Demand Management Act 1997* (Cth); *Tradex Scheme Act 1999* (Cth).

121 S Bhojani, 'Reforming Court Processes' (1998) 17 *ACCC Journal* 1, 4.

122 Ibid.

> depart from an agreed figure merely because it might otherwise have been disposed to select some other figure, or except in a clear case.[123]

2.137 There is some controversy over the fairness, transparency and accountability of negotiated penalties. See discussion at chapter 16.

Publicity

2.138 Publicity can be a penalty. The Law Reform Commission of Canada identified publicity as a 'soft sanction', meaning that it operates as a penalty but may not involve the law in its application. For example, it may simply be part of a regulator's interaction with its regulated community (warnings and information) or may be a result of another penalty action, such as the publicity that accompanies a trial.[124]

2.139 In Australia, publicity can be a formally legislated sanction and can also operate at a more informal level.[125]

Publicity as a penalty in its own right

2.140 Publicity has been used as a punishment in criminal proceedings and as a civil penalty.[126] Examples of the operation of publicity in practice include orders that the offender is required to send copies of the court's decision to a company's shareholders,[127] to advertise publicly that it has breached a certain provision and offer apologies,[128] and where regulatory authorities publish the names of offenders under particular legislation.

2.141 The ACCC and ASIC have powers to use publicity against those who commit anti-competitive practices and in relation to consumer protection and corporate governance. Formal adverse publicity orders may be made under s 86D of the *Trade Practices Act* and s 12GLB of the *Australian Securities & Investment Commission Act 2001* (Cth).[129] An order requires an offender to disclose or publish such information related to the offence committed as the court directs. In July 2001, a major retailer, Target, was ordered to publish corrective advertising 'explaining how earlier ads breached the *Trade Practices Act'*.[130]

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123 *NW Frozen Foods v Australian Competition & Consumer Commission* (1996) 71 FCR 285, 291. This case was an appeal from the trial judge's decision to impose a higher penalty than that submitted by the parties, reported as *Australian Competition and Consumer Commission v NW Frozen Foods Pty Ltd* (1996) 141 ALR 640. See discussion in ch 16.

124 Law Reform Commission of Canada, *Sanctions, Compliance Policy and Administrative Law* (1981) Law Reform Commission of Canada, Ottawa, 73.

125 The formal penalty of an adverse publicity order is considered in ch 27 and 28.

126 B Fisse and J Braithwaite, *The Impact of Publicity on Corporate Offenders*, (1983) State University of New York Press, Albany, 285.

127 Known as a 'disclosure order'; see discussion in ch 27 and 28.

128 Corrective advertising is discussed in ch 27 and 28.

129 This penalty was introduced in September 2001 by the *Financial Services Reform (Consequential Provisions) Act 2001* (Cth).

130 'At Last, Truth in Advertising', *The Sydney Morning Herald*, 9 July 2001, 31.

2.142 Another formal use of publicity is a regulator's ability to name non-compliant entities in reports tabled in Parliament.[131]

Informal publicity and publicity arising from another penalty

2.143 Informal publicity can operate simply through the negative perceptions of a company that has, for example, misled consumers or damaged the environment. In their study of the negative effects of publicity on companies, Brent Fisse and Braithwaite concluded that informal publicity, whilst damaging, can be selective or brief and therefore formal publicity orders play a more important role in ensuring that the sanction is felt by the corporation.[132]

2.144 Media releases are commonly used by the ACCC to detail actions against those alleged to have breached the *Trade Practices Act* and where penalties have been imposed by the courts. Details of enforceable undertakings are also published both in press releases and on the ACCC website.[133] ASIC also publicises undertakings in media releases and on its own website.

2.145 The use of informal publicity is controversial. Informal publicity and the use of the media is discussed in detail in chapter 16.

Other administrative regulation

Quasi-penalties

2.146 Quasi-penalties have been defined by the ALRC as those administrative actions that require the exercise of discretion that goes beyond a mechanistic application of the relevant legislation, such as licensing decisions or social security breach penalties. They do not involve the imposition of a punishment (although their impact might well be felt to be punitive by the recipient). As such they are not true administrative penalties. They are discussed for the sake of completeness and because they are important in federal regulation.

Restricting rights and banning orders

2.147 Banning orders are a common enforcement tool used under the *Corporations Act*.[134] For example, in 2001–02, 21 people were banned either by the courts or administratively from being company directors,[135] ASIC banned 35 people from giving investment advice. Of these, 17 were banned for life.[136]

131 *Equal Opportunity for Women in the Workplace Act 1999* (Cth), s 19.
132 B Fisse and J Braithwaite, *The Impact of Publicity on Corporate Offenders*, (1983) State University of New York Press, Albany, 283–284.
133 A Fels, 'A Service and a Deterrent', *BRW*, 15–21 November 2001, 30.
134 See discussion in ch 27.
135 Australian Securities & Investments Commission, *Annual Report 2001–2002*, Australian Securities & Investments Commission, 29.
136 Ibid, 31.

2.148 In *ASC v Kippe*,[137] the Federal Court held that the purpose of a banning order under the *Corporations Law* was protective and not a penalty or punishment. As a consequence, the proceedings were treated as civil proceedings and the privilege against self-incrimination did not apply. Their categorisation was the subject of further judicial comment in *ASIC v Papotto.*[138] In *Papotto,* ASIC sought an order under s 230(1)(c) of the *Corporations Law*, disqualifying the defendant from managing any company following his conviction for failing to act honestly in undertaking duties as a company officer. Anderson J held:

> The purpose of the order sought by ASIC is protective not punitive. The interests to be protected include those of the public who may unwittingly deal with companies run by people who are not suitable to be involved in the management of companies and the public interest generally in the transparency and accountability of companies and the suitability of directors to hold office.[139]

Withholding licences

2.149 The most powerful administrative penalties in licensing regimes are cancellation, suspension or variation of a licence and they are at the top of the enforcement pyramid.[140] There is no legal right to the renewal or non-revocation of a licence. However, the value of licences is now recognised to be such that there is a reasonable expectation of their renewal, or a right to hearing before revocation.[141]

2.150 Professor Peter Grabosky and Braithwaite have noted that regulators relatively rarely take action to remove or suspend licences.[142] The reason for this is acknowledged to be the severe consequences that can result from such action, including consequences for third parties, however, there is less reason why suspensions for short periods of time are not considered more often.[143]

2.151 There is enormous variation in the range of licensing sanctions available to regulators. In addition to the suspension of a licence or intervention by the regulator, less severe sanctions could include a system of demerit points,[144] giving the licence holder an opportunity to improve its performance and avert a more serious sanction.

2.152 Similar issues arise with licences as with banning orders.

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137 *Australian Securities Commission v Kippe* (1996) 67 FCR 499.

138 *Australian Securities and Investments Commission v Salvatore Papotto* (2000) 35 ACSR 107.

139 Ibid, 122.

140 Across federal legislation, undertaking licensed activities without obtaining a licence almost invariably leads to criminal sanctions. The amount of the fine varies considerably between licensing regimes, with a maximum fine of $2.2 million in broadcasting and telecommunications and as little as $2,000 and $10,000 in health insurance and navigation respectively. Breaches of licence conditions may also result in fines.

141 *FAI Insurances v Winneke* (1982) ALJR 388 noted in A Freiberg, 'Reward, Law and Power: Toward a Jurisprudence of the Carrot' (1986) 19 *Australian & New Zealand Journal of Criminology* 91, 99.

142 P Grabosky and J Braithwaite, *Of Manners Gentle; Enforcement Strategies of Australian Business Regulatory Agencies* (1986) Oxford University Press, Melbourne, 187.

143 Ibid, 187.

144 See, for example, the reforms of the Civil Aviation Safety Authority announced in November 2002: The Hon John Anderson MP, *Media Release A140/2002: CASA Reform,* <www.ministers.dotars.gov.au/ja/releases/2002/november/A140_2002.htm>, 18 November 2002.

> A perennial but crucial issue is whether the withholding of a reward can be considered to be a negative sanction. The posited case is where a pattern of reward comes to be regarded as a right, despite a contrary intention in the grantor. Can a withdrawal of the benefit in these circumstances be regarded as a deprivation?[145]

2.153 As with banning orders, cancelling a licence is often regarded by regulators as protective not a punishment.[146]

Withholding financial benefits

2.154 The clearest examples of withholding a benefit that can be analogous to a penalty occur under social security legislation. Almost all penalties under social security legislation are administrative in nature and take the form of a decision by an officer of the Department of Family and Community Services that a 'payment reduction period' or a 'non-payment period' applies. There are two types of administrative penalties under social security legislation: administrative breach penalties and activity test breach penalties.

2.155 An *administrative breach penalty* is imposed when a person fails to satisfy administrative requirements; for example, failing to attend a Centrelink office as required, failing to reply to correspondence, or failing to notify of changes in their circumstances.[147]

2.156 An *activity test breach penalty* is imposed when a person receiving payment fails to satisfy activity test requirements without a reasonable excuse. The activity test aims to ensure that an unemployed person is actively looking for work, and willing to accept offers of suitable employment or undertake activities intended to improve his or her employment prospects. It may also require a person to participate in specific programs (such as 'Work for the Dole'), education or both. The legislation creates a system of cumulative penalties for repeated contraventions of the activity test, with penalties increasing for subsequent contraventions. Breach histories are retained for two years. Administrative penalties do not, however, accumulate.[148]

2.157 Common types of administrative penalties imposed include reduction or cancellation of benefits. Departmental officers have the power to require an applicant to attend the department,[149] undergo a medical examination,[150] and provide information[151] such as their tax file number or that of their partner.[152]

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145 A Freiberg, 'Reward, Law and Power: Toward a Jurisprudence of the Carrot' (1986) 19 *Australian & New Zealand Journal of Criminology* 91, 92.

146 Advisory Committee meeting, 17 November 2000.

147 Australian Council of Social Service and National Welfare Rights Network, *Doling out Punishment; The Rise and Rise of Social Security Penalties* (2000), ACOSS, Sydney.

148 Ibid.

149 *Social Security (Administration) Act 1999* (Cth), s 63.

150 Ibid, s 64.

151 Ibid, s 92–95.

152 Under s 75 of the *Social Security (Administration) Act 1999*, the person has the right to refuse, but will have his or her payment reduced or cancelled.

2.158 It has also been argued that what occurs in the case of activity test and administrative requirements is that the person's failure to comply affects their eligibility and therefore they are no longer entitled to the full benefit rather than being 'penalised'. However, a former Minister for Family and Community Services, Senator Jocelyn Newman, used the term 'penalties' when referring to breaches of social security requirements[153] and that term is used throughout the legislation.

Enforceable undertakings

2.159 Enforceable undertakings are a relatively recent enforcement response used by the ACCC and ASIC. They are a mechanism unique to Australia, although similar types of agreements exist elsewhere.[154] An enforceable undertaking is a promise enforceable in court. A breach of the undertaking is not contempt of court but, once the court has ordered the person to comply, a breach of that order is contempt.[155]

2.160 Enforceable undertakings became available to ASIC in July 1998. By early 2001, ASIC had accepted 127 enforceable undertakings, compared with 68 undertakings accepted by April 2000 (out of approximately 300 investigations).[156] ASIC reported that it secured 30 enforceable undertakings in 2001–02.[157]

2.161 ASIC's Practice Note 69 states that enforceable undertakings will not be used solely to secure payment of a pecuniary civil penalty, in relation to compliance with an ASIC instrument, or where the matter has been referred to the Companies Auditors and Liquidators Disciplinary Board or the Corporations and Securities Panel (now known as the Takeovers Panel).[158] It may also not accept undertakings at an early stage of investigations because enough may not then be known about the circumstances and facts of the case to make a proper decision.[159]

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153 Minister for Family and Community Services, *Press Release; Breaches Not to be Taken Lightly*, Department of Family and Community Services, <www.facs.gov.au/internet/newman.nsf>, 16 November 2000.

154 The Antitrust Division of the US Department of Justice has employed a concept similar to enforceable undertakings since the 1930s, called 'consent decrees'. A consent decree is an agreement between the Department of Justice and a defendant in a pending antitrust action whereby the defendant accepts specific limitations on its conduct in return for the termination of the government action. These consent decrees differ from Australian enforceable undertakings in one respect: they provide for an avenue of review, thus addressing the concerns raised above in relation to the accountability, transparency and fairness of the process. In this regard, from the early use of consent decrees the courts have had a formal role in reviewing the agreement before approval is given: J Savin, 'Tunney Act 96: Two Decades of Judicial Misapplication' (1997) 46 *Emory Law Journal* 363. The Enterprise Act 2002 (UK) has introduced a similar power for the Office of Fair Trading in respect of suspected breaches of the Competition Act 1998 (UK).

155 See, for example, *ASIC Act*, s 93A, 93AA.

156 ASIC 'Enforceable Undertakings: Acting Faster in the Market' (Paper presented at Seminar, Sydney, 11 April 2000).

157 Australian Securities & Investments Commission, *Annual Report 2001–2002*, Australian Securities & Investments Commission, 33.

158 Australian Securities & Investments Commission, *Practice Note 69: Enforceable Undertakings*, Australian Securities & Investments Commission, <www.cpd.com.au/asic/pn/>, 20 December 2001.

159 ASIC 'Enforceable Undertakings: Acting Faster in the Market' (Paper presented at Seminar, Sydney, 11 April 2000).

2.162 Undertakings under s 87B of the TPA were introduced as an enforcement tool in 1993. Approximately 400 enforceable undertakings had been accepted by the ACCC to June 2000.[160] In 2000–01, the ACCC accepted 66 enforceable undertakings or variations to existing undertakings under s 87B[161] and 38 undertakings in 2001–02.[162] Dr Karen Yeung's research for the ACCC shows that such undertakings have been used instead of court proceedings, to supplement them (usually encompassing assurances by the offender to undertake a comprehensive compliance program), and also as a settlement of court proceedings.[163]

2.163 It appears generally accepted, at least by regulators, that enforceable undertakings are working well, with other regulatory agencies such as CASA keen to adopt them to increase the range of regulatory responses available.[164]

2.164 However, some writers have voiced concerns about the accountability of enforceable undertakings. These concerns are discussed further in chapter 16.

Cease and desist orders

2.165 Cease and desist orders are interim orders imposed by a regulator to restrain conduct alleged to be in breach of the law. Cease and desist orders are not a feature of federal regulation. However, the ACCC in its submission to the Dawson Committee proposed the introduction of cease and desist orders along the lines of those contained in the New Zealand *Commerce Act 1986*.[165]

2.166 The ACCC said such orders would be used where 'urgent action was required in the public interest' to restrain corporations from 'engaging in specified anti-competitive conduct'.[166] Under the ACCC's proposals cease and desist orders would operate for up to 90 days during which time the ACCC would fully investigate the alleged breach with a view to issuing proceedings for a contravention.[167] Any breach

160 Australian Competition & Consumer Commission, *Consultation*, Canberra, 5 June 2000.

161 Australian Competition & Consumer Commission, *Electronic Public Registers: Section 87B Undertakings Register*, <www.accc.gov.au>, 21 January 2002.

162 Australian Competition & Consumer Commission, *ACCC Annual Report 2001–2002*, <www.accc.gov.au/fs-pubs.htm>, 11 November 2002, 2.

163 K Yeung, *The Public Enforcement of Australian Competition Law* (2001), Australian Competition and Consumer Commission, Canberra, 19–20. The use of enforceable undertakings in conjunction with court-ordered penalties is discussed in ch 27.

164 M Toller, 'Scandalously Competent' (Paper presented at National Press Club Speech, 21 February 2001). The Aviation Legislation Amendment Bill (No 1) 2001 (Cth) proposed a new section 31A in the *Civil Aviation Act 1988* (Cth) to give CASA the power to accept undertakings in relation to enforcement of civil aviation safety legislation. The proposal was modelled on s 87B undertakings of the *Trade Practices Act*. The Bill lapsed. However, it was announced in November 2002 that CASA's new enforcement sanctions to come into effect in July 2003 will include enforceable undertakings: Civil Aviation Safety Authority, *Media Release: Reforms to CASA Improve Safety and Scrutiny*, <www.casa.gov.au/hotopics/media_rel/02-11-19.htm>, 19 November 2002.

165 Australian Competition & Consumer Commission, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P1.pdf, www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P2.pdf, www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P3.pdf>, 13 August 2002, 95.

166 Ibid, 95.

167 Ibid, 97.

would be subject to judicially imposed penalties and orders.[168] The Regulator's proposals include limiting the power of a court to stay the operation of an order to 'exceptional circumstances'.[169]

2.167 Were cease and desist orders to be introduced into federal regulation, they would be quasi-administrative penalties in that, while they would not be a penalty in themselves, they would have that effect.

2.168 It is outside the ALRC's Terms of Reference for this Inquiry to comment specifically on the merits of the ACCC's proposals.

Customs and excise prosecutions

2.169 The ALRC's Terms of Reference specifically ask it to look at the issue of Customs prosecutions, as commented on in *Comptroller of Customs v D'Aquino Bros Pty Limited*.[170] The prosecution of offences under Customs and excise legislation in Australia, and in particular the confusion regarding the use of criminal and civil procedures, has been the subject of considerable comment, including a 1992 report by the ALRC.[171]

2.170 Customs and excise prosecutions take a unique form in Australian legislation, primarily due to their historical origins in English law and are an interesting example of the very different nature of criminal and civil penalty procedures and the problems that can arise when the distinction is blurred.

2.171 Customs prosecutions are regulated by Part XIV of the *Customs Act*.[172] The *Customs Act* also contains ordinary criminal offences but different terminology is used to distinguish the two. Section 244 of the *Customs Act* provides that 'proceedings by Customs for the recovery of penalties' shall be referred to as 'Customs prosecutions'.[173] Customs and excise prosecutions for non-indictable offences that are not punishable by imprisonment are also regulated by special procedures in Part XIV.[174] Where a pecuniary sanction is called a 'fine' in the legislation, the prosecution will be by criminal proceedings; if the sanction is expressed as being for the recovery of a penalty, it will be a 'Customs prosecution' or 'Excise prosecution'.

2.172 Section 247 of the *Customs Act* provides that Customs prosecutions in a superior or intermediate court may be conducted in accordance with the usual practice and

168 Ibid, 95.
169 Ibid, 98.
170 *Comptroller-General of Customs v D'Aquino Bros Pty Ltd* (1996) 135 ALR 649; *Comptroller-General of Customs v D'Aquino Bros Pty Ltd* [1997] 17 Leg Rep C8A.
171 Australian Law Reform Commission, *Customs and Excise*, ALRC 60 (1992), Australian Law Reform Commission, Sydney.
172 See also *Excise Act*, Part XI. For example, two specific procedures apply to Customs prosecutions. Discovery is available against the prosecution but may not be obtained from the defendant. As well, the prosecution is allowed to make averments. Averments are not permitted if the offence is punishable by imprisonment. See discussion in ch 13.
173 See also *Excise Act,* s 133. As the provisions of the *Excise Act* and *Customs Act* are similar, references to Customs prosecutions will include excise prosecutions.
174 *Excise Act*, Part XI.

procedure of the court in civil cases or in line with a court or judge's direction. However, s 248 provides that 'the provisions of the law relating to summary proceedings in force in the State or Territory where the proceedings are instituted shall apply to all Customs prosecutions before a Court of summary jurisdiction in a State or Territory'. Therefore, Customs prosecutions for lesser amounts that are heard in courts of summary jurisdiction are treated in the same way as ordinary criminal prosecutions with greater protections than may be available to defendants exposed to higher penalties in superior courts.

2.173 Where the amount of the penalty sought in a Customs or excise prosecution exceeds the jurisdiction of the lower courts, it will be heard in the higher courts. The standard of proof in the lower courts is the criminal standard, beyond reasonable doubt; in the higher courts, it has been held to be the civil standard. Appeals from a hearing in a superior court are governed by the rules of civil procedure in relation to appeals. However, under s 248 of the *Customs Act*, appeals from a summary court shall be heard 'in the manner provided by the law of the State or Territory where such conviction or order is made for appeals from convictions or orders of dismissal'.

2.174 Customs and excise prosecutions are discussed in detail in chapter 13.

3. The Purposes of Penalties

Contents

Introduction

3.1 The Terms of Reference for this Inquiry direct the ALRC to report, *inter alia*, on

> the kinds of areas where provision for administrative penalties and civil penalties is appropriate and what limitations, if any, there should be on making provision for administrative and civil penalties and pursuing those penalties.

3.2 Regulatory theory has much to say about what are appropriate means to achieve regulatory compliance. It cautions against the over-use of criminal penalties and looks to gradations of offences matched by a range of sanctions. The question of what is appropriate for a given offence raises issues for legislators and for regulators.

3.3 Federal regulation reaches across a broad spectrum of activity, much, but not all, impacting on economic activity. Some of the issues about the appropriate penalties for regulatory contraventions arise because of their sphere of operation: in particular, whether the criminal law is too heavy an instrument to be wielded in this area and,

conversely, whether all the safeguards developed to protect the individual from the weight of the state are necessary when the accused is a corporation.

3.4 Penalties seek to punish undesirable behaviour and thereby to promote desired behaviour. The form and level of penalty applied will depend on its purpose as well as on the area of activity, the type of wrongdoer and the nature of the wrongdoing. Several purposes, not all of which may be consistent, can often be discerned in any one penalty[1] but the deterrence of wrongdoing is ultimately an aim of all penalty regimes.

3.5 Particular penalties have more narrowly defined aims which affect the form they take and the levels at which they are set. These aims can be categorised as:

- retribution ('just deserts' for having committed the contravention);
- social condemnation (expressed through the stigma of a criminal record or severe penalty such as imprisonment);
- specific deterrence (deterrence of the person sanctioned from repeating the contravention);
- general deterrence (deterrence of others from engaging in the prohibited behaviour);
- protection of third parties or the public at large; and
- payment of reparation or compensation.

3.6 More than one of these aims is usually present in any particular penalty. The protective aim applies particularly to some administrative quasi-penalties such as banning orders, licence conditions or revocations. The aim of social condemnation, or stigma, traditionally applies to criminal penalties, and remains one important criterion for distinguishing between criminal and non-criminal penalties. The remaining aims apply both to civil and criminal regulatory penalties but retribution plays a less important role in civil penalties than in criminal ones.

Punishment

3.7 Punishment is the imposition of a form of loss or disadvantage to the extent that it is not directed at protection or compensation. There are two aspects to the purpose of punishment: retribution for the wrong done (which need not be categorised as criminal) and, in the case of criminal penalties, the social stigma attached.

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1 Chief Justice Spigelman has noted that the 'requirements of deterrence, rehabilitation, denunciation, punishment and restorative justice — do not generally point in the same direction. Specifically, the requirements of justice, in the sense of just deserts, and of mercy, often conflict. Yet we live in a society which values both justice and mercy': The Hon Chief Justice J Spigelman, *Sentencing Guidelines Judgments*, NSW Supreme Court, <www.agd.nsw.gov.au/sc/sc.nsf/pages/CJ_240699>, 12 December 2001.

3.8 Retributive penalties are imposed as a result of a court's finding that the person has contravened the law. Retributive penalties are most commonly imposed for crimes. However, some civil regulatory penalties are also retributive, at least to some extent.

3.9 The major formal distinction between civil and criminal regulatory penalties is that only criminal penalties can take the form of imprisonment. (See the Statement of Principle in chapter 2 at para 2.50.) Where a criminal regulatory penalty is monetary, the differences can be difficult to discern. Each is imposed in retribution for a contravention of legislation and with the aim of deterring further such conduct. Arguably, however, punishment plays a far less important role in determining the civil penalty although it is an aspect of deterrence.

3.10 Issues such as 'fault' play a far more significant role in criminal law. The procedural, social and other consequences flowing from a penalty categorised as civil may be very different from those of a penalty categorised as criminal, as noted in chapter 2.

3.11 The imposition of a monetary penalty (whether for a criminal or non-criminal contravention) does not necessarily convey social condemnation, but imprisonment does. One of the issues in the regulatory area is how to punish corporations effectively for criminal contraventions. A corporation cannot be imprisoned and many of the ramifications of a criminal conviction do not impact on a body corporate, there are concerns that the criminal law may lose its force on corporate offenders. Corporate responsibility and corporate penalties are addressed in this Report in chapters 7 and 28.

3.12 The difficulty of punishing corporations and the growth in regulatory offences has led some commentators to conclude that the distinction between these categories and the retention of a function of overt moral condemnation have outlived their usefulness and validity in Australian regulation.[2]

3.13 The imposition of a retributive penalty necessitates certain procedural protections to minimise the chance of a person being unfairly subjected to punishment. These include the requirement that only a judge may determine the person's guilt or liability, and can include the protections associated with criminal procedure such as the right to silence, the requirement of proof beyond reasonable doubt and the rule against double jeopardy.[3] It does not necessarily follow, however, that the imposition of non-retributive penalties does not also require procedural protections.

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2 A Freiberg, '"Civilizing" Crime: Reactions to Illegality in the Modern State', *Thesis*, 1985; A Freiberg, 'Commentary on "Blurring the Criminal and Civil Paradigms" by Professor John Coffee Jr' (Paper presented at Penalties; Policy, Principles and Practice in Government Regulation, Sydney, 8 June 2001); M Bagaric, 'The "Civil-isation" of the Criminal Law' (2001) 25(4) *Criminal Law Journal* 184.

3 Double jeopardy and double punishment are discussed in ch 11.

Constitutional issues associated with punishment

3.14 Under Chapter III of the Constitution, only a judicial officer may impose a retributive penalty for federal offences.[4] This is especially the case where the penalty includes imprisonment,[5] but it also applies to monetary and other penalties seen to be retributive in character. The basis for this principle is the doctrine of the separation of powers.[6]

3.15 A person other than a judge has power to impose adverse consequences on a person where the adverse consequences do not result from a judgment as to that person's guilt or liability. For the most part, administrative penalties come into this category. The most common of these situations involve quasi-penalties under licensing regimes, or true administrative penalties imposed under legislation where the only matter to be ascertained is a straightforward factual question and where the penalty arises by automatic operation of law.

Protection of the public

3.16 Regulation normally has as at least one of its purposes an aim of protecting particular individuals, the public, or a public good such as a free and fair market or a clean environment. Accordingly, some forms of penalty are designed to minimise the risk of harm being done by limiting a person's capacity to undertake activities that may cause harm. Many non-retributive penalties do not involve general restrictions of liberty but prevent a person from doing specific activities through the removal or restriction of a licence, or banning them from engaging in certain activities in the future. The justification for the action is normally to protect the public. Where the regulator aims to protect public safety (eg, the Civil Aviation Safety Authority) or to protect the market from fraudulent or incompetent operators (eg, the Australian Securities & Investments Commission), it may need to act quickly to prevent or mitigate damage.

3.17 Sanctions such as withdrawing or imposing conditions on a licence may be regarded as punitive by the person whose activity is curtailed, but they are formally regarded as measures to protect the public and, for that reason, as having no punitive purpose.[7] One issue, therefore, is whether such administrative actions can be properly characterised as 'penalties'. While licence restrictions and banning orders are noted here, their protective purpose means they are not regarded as true penalties and many

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4 Section 71 vests the judicial power of the Commonwealth in the High Court, and such other courts that Parliament creates or are invested with federal jurisdiction. See discussion in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 66–67.

5 In *Kable v Director of Public Prosecutions* (1996) 189 CLR 51, the High Court disallowed legislation passed by the NSW Parliament which provided for the continued imprisonment of a man who had completed his sentence for murder in order to protect people in the community. The decision to keep him in prison was effectively made by the Minister and members of the Executive and was to continue as long as the prisoner was seen to pose a potential threat regardless of his actions.

6 Although the NSW Constitution does not impose a formal separation of powers, the High Court in *Kable* held that the NSW Parliament and judicial system are bound by an implied requirement of the Australian Constitution that state courts, exercising federal jurisdiction, will observe the principle.

7 For example, see *Australian Securities Commission v Kippe* (1996) 67 FCR 499.

of the issues surrounding the imposition of penalties are not relevant to licence restrictions and banning orders. See discussion in chapter 2.

Withdrawal of benefits

3.18 Regulation not only controls behaviour through the use of traditional notions of 'penalty' or 'punishment' but also through what might be termed 'allocation sanctions' whereby access to resources or benefits are allocated or withdrawn by the state in response to desired or prohibited behaviour.[8]

3.19 The imposition of a form of disadvantage on a person by withdrawing benefits may not be considered a punishment by the person imposing the disadvantage. As noted above, banning orders and many licensing sanctions are characterised as measures to protect the public rather than as punishment.[9] It is sometimes argued that the suspension or reduction of social security benefits as a result of breaches of entitlement conditions is a matter of eligibility rather than punishment. However, the normal perception of a suspension of benefits in these circumstances is that it is a form of punishment for non-compliance,[10] clearly distinct from non-eligibility for benefits as a result, for example, of increased income.

3.20 Licensing regimes and the granting of other benefits are commonly used by regulators as a compliance technique to ensure an on-going relationship and monitoring between themselves and the regulated.

> Inducements offering some reward in exchange for compliance always offer the possibility of being transformed into negative sanctions; the withholding of a reward represents a punishment and represents a definite form of coercion.[11]

3.21 The importance of the distinction for this Inquiry is that the predominance of a purpose other than punishment may justify the alteration of some of the procedural protections that apply to the imposition of a penalty. The characterisation of a decision imposing a disadvantage affects the perceptions of the parties involved and the public, the procedures followed, and thus the rights of the parties. A court order to pay damages in a civil suit could be regarded as the imposition of a disadvantage on the defendant but (except where punitive damages are concerned) the reason for the imposition is to compensate the plaintiff for the damage suffered rather than to punish the defendant, and hence this is not a penalty.

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8 A Freiberg, 'Reward, Law and Power: Toward a Jurisprudence of the Carrot' (1986) 19 *Australian & New Zealand Journal of Criminology* 91, 91.

9 This was the case in *Australian Securities Commission v Kippe* (1996) 67 FCR 499.

10 For example, see Australian Council of Social Service, *Breaching the Safety Net: The Harsh Impact of Social Security Penalties*, ACOSS Info 305 (2001), Australian Council of Social Service.

11 A Giddens quoted in A Freiberg, 'Reward, Law and Power: Toward a Jurisprudence of the Carrot' (1986) 19 *Australian & New Zealand Journal of Criminology* 91, 92.

Approaches to imposing penalties

3.22 The purpose ascribed to a penalty in particular circumstances will influence the kind of penalty imposed and the level at which it is set. For example, misconduct by a company director may give rise to criminal sanctions (punishment), a civil penalty (deterrence), orders to compensate shareholders or others for the damage caused (reparation), publicity by the regulator (deterrence), a requirement that the company introduce a compliance program (education, prevention of future wrongdoing), and a banning order (protection of the public). Any, or all, of these sanctions may apply to a given course of conduct, and the regulator or the court may decide which of the available sanctions (or which combination of them) is the best tool for the regulatory purpose of reducing misconduct.[12]

Just deserts

3.23 There are a number of recognised approaches to setting penalties for contraventions of the law. The traditional approach, often described as 'just deserts', seeks to determine a penalty that reflects the seriousness of the contravention relative to other contraventions. Under this approach, in order to determine the equivalences and relative seriousness of different conduct, it is necessary to develop a form of hierarchy of seriousness of contravention and severity of penalties.[13]

Pricing

3.24 The approach favoured by economic analysts is the 'pricing' of undesirable behaviour. One of the major models for this approach is the deterrence model, which imposes a cost (penalty) at a point where misbehaviour occurs or reaches a specified level. The other approach, described as a taxation model, attaches a price to the conduct at any level, increasing in severity with the seriousness or continuance of the repetition.[14] Both models involve considerable practical problems regarding the level of damage at which the cost should be imposed, and the amount of the cost that must be imposed to achieve the aims of the sanction.[15]

3.25 Penalty theory, and its effect on the choice of and level of penalty, is discussed in more detail in chapter 25.

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12 Combining penalties is discussed in ch 27.

13 See A Freiberg and R Fox, 'Sentencing Structures and Sanction Hierarchies' (1986) 10 *Criminal Law Journal* 216; A Freiberg, *Sentencing Review Discussion Paper*, Attorney-General (Victoria), <www.justice.vic.gov.au>, 23 January 2002.

14 See A Ogus, 'Corrective Taxes and Financial Impositions as Regulatory Instruments' (1998) 61 *Modern Law Review* 767; A Ogus, 'Corrective Taxation as a Regulatory Instrument' in C McCrudden (ed), *Regulation and Deregulation; Policy and Practice in the Utilities and Financial Services Industries* (1999) Clarendon Press, Oxford, 15.

15 This is discussed in A Ogus, 'Corrective Taxes and Financial Impositions as Regulatory Instruments' (1998) 61 *Modern Law Review* 767; A Ogus, 'Corrective Taxation as a Regulatory Instrument' in C McCrudden (ed), *Regulation and Deregulation; Policy and Practice in the Utilities and Financial Services Industries* (1999) Clarendon Press, Oxford, 15. See also ch 30 which discusses factors relevant in determining penalties in particular cases.

Why regulate?

3.26 The wide reach of regulation in modern society is well recognised. Robert Baldwin and Martin Cave suggest that:

> Regulation is often thought of as an activity that restricts behaviour and prevents the occurrence of certain undesirable activities (a 'red light' concept) but the influence of regulation may also be *enabling* or *facilitative* ('green light') as, for example, where the airwaves are regulated so as to allow broadcasting operations to be conducted in an ordered fashion rather than left to the potential chaos of uncontrolled market.[16]

3.27 Several commentators have pointed out that wide-ranging regulation of activity is not new, and in fact the state 'has exercised regulatory functions over the economy for hundreds of years'.[17] Baldwin, Colin Scott and Christopher Hood have noted that:

> Market regulation by local officials is no new phenomenon. It was considered to be a basic function of the state … in eighteenth-century 'police science'. Even before that, markets were subject to detailed common law rules in medieval England to ensure produce was only sold on market-day at the appointed place, and that middlemen did not buy and resell in the market for profit. Additionally, statutory schemes were developed to prevent the dilution of staples such as bread and beer with cheaper impurities, and universal standards to be enforced locally were developed for regulating weights and measures. Today analogous functions are exercised through legislative standard setting for consumer protection …[18]

Market failure

3.28 Contemporary regulatory theorists are largely in agreement as to the general purpose of governments involving themselves in the regulation of business and other activities; the need for such intervention is regarded as arising where there is a form of 'market failure', or a failure of the unfettered market to deliver socially beneficial results. Sources of market failure were summarised by Baldwin and Cave as covering these matters:

- monopolies;
- windfall profits;
- externalities (where costs are borne by persons who do not benefit from the activity — eg, where environmental damage is caused);

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16 R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) Oxford University Press, Oxford, 2.

17 R Baldwin, C Scott and C Hood (eds), *A Reader on Regulation* (1998) Oxford University Press, Oxford, 5.

18 Ibid, 5.

- information inadequacies resulting in consumers being unable to make a reasoned choice;
- a need for continuity and availability of service (eg, communication needs in remote areas);
- anti-competitive behaviour;
- public goods that benefit all but may not be paid for by all (eg, defence, security and health services);
- unequal bargaining power;
- scarcity of resources;
- social policy (eg, assistance to injured persons, and requirements to wear seatbelts);
- rationalisation and co-ordination (to reduce the individual costs to small producers of transporting and selling products); and
- planning to protect the interests of future generations (eg, by protecting the environment).[19]

3.29 Federal regulators have a role in most of these. Monopolies (or near monopolies) such as broadcasting, the use of the telecommunications and radiocommunications spectrum are regulated by the Australian Broadcasting Authority (ABA) and the Australian Communications Authority (ACA), who must ensure continuity and availability of service across the country. The ACCC identifies and works against anti-competitive behaviour, and also works to counter information inadequacies. ASIC is also substantially concerned with ensuring the market is adequately informed. A number of agencies, including APRA and the Department of Health and Ageing (DOHA), address inequalities of bargaining power by imposing and monitoring standards for businesses offering essential services to people who do not have the capacity to investigate their viability (eg, insurance companies) or who are particularly vulnerable (eg, residents of nursing homes). The Australian Fisheries Management Authority (AFMA) and associated state bodies regulate fishing in order to preserve limited natural resources. Many other examples can be identified, and many regulators address several forms of market failure. The range of regulators and their subject areas are discussed in chapter 5.

3.30 If the fundamental aim of regulation is understood to be reversing one or more of these sources of market failure, the tools used by regulators should be aimed not primarily at imposing retribution on offenders since the purpose of the rules is not to prohibit actions but to maximise benefit or convenience to society. There will, how-

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19 R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) Oxford University Press, Oxford, 1–17. See also S Breyer 'Typical Justifications for Regulation' in R Baldwin, C Scott and C Hood (eds), *A Reader on Regulation* (1998) Oxford University Press, Oxford, 59.

ever, be cases in which legal wrongs such as dishonesty, fraud, tortious acts, or damage to third parties or future generations or to items of national or international heritage occur and punishment is justified. This will often mark the demarcation point between a civil penalty regime and a criminal offence.

Regulation unrelated to market failure

3.31 There are regulators whose activities do not seem to fit easily into the categories of market failure. Border control regulation, such as immigration control, is not directly related to market concerns; nor is revenue protection by the ATO and the Australian Customs Service (ACS), or distribution of social security benefits. The distinct purposes of these areas of regulation often require different approaches to regulation and the imposition of penalties.

The enforcement pyramid

3.32 Professors Ian Ayres and John Braithwaite have developed an influential model to describe an ideal regulatory approach. This is the 'enforcement pyramid' by which regulators use coercive sanctions only when less interventionist measures have failed to produce compliance.[20] The less interventionist measures cover a wide range of options some of which cannot be categorised as penalties. The pyramid model was part of Ayres and Braithwaite's construction of 'responsive regulation',[21] which they described as follows:

> We suggest that regulation be responsive to industry structure in that different structures will be conducive to different degrees and forms of regulation. Government should also be attuned to the differing motivations of regulated actors. Efficacious regulation should speak to the diverse objectives of regulated firms, industry associations, and individuals within them. Regulations themselves can affect structure (e.g. the number of firms in the industry) and can affect motivations of the regulated.
>
> We also conceive that regulation should respond to industry conduct, to how effectively industry is making private regulation work. The very behaviour of an industry or the firms therein should channel the regulatory strategy to greater or lesser degrees of government intervention.[22]

3.33 Under the 'enforcement pyramid' model, breaches of increasing seriousness are dealt with by sanctions of increasing severity, with the ultimate sanctions (such as

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20 The model was first put forward by Braithwaite in J Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (1985) State University of New York Press, Albany, NY and was further discussed in B Fisse and J Braithwaite, *Corporations, Crime and Accountability* (1993) Cambridge University Press, Cambridge and in C Dellit and B Fisse, 'Civil and Criminal Liability Under Australian Securities Regulation; The Possibility of Strategic Enforcement' in G Walker and B Fisse (eds), *Securities Regulation in Australia and New Zealand* (1994) Oxford University Press, Oxford, 570. See also ch 2.

21 I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992) Oxford University Press, New York.

22 Ibid, 4.

imprisonment or loss of a licence to undertake an activity) held in reserve as a threat. As noted in DP 65,[23] Braithwaite has described the operation of the pyramid 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.[[24]] 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 ensures; if this fails the plant is shut down or a licence to operative 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.[25]

3.34 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. Using John Scholz's application of game theory to the arena of regulation,[26] 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.[27]

3.35 However, once persuasion has failed, the issue of the use of penalties arises. This raises questions as to whether the penalties chosen both by legislators and by the regulator, if there is a choice, should be criminal or civil.

The criminal/civil distinction

Choice in legislation

3.36 Regulatory theorists warn against the over-use of the criminal law in the regulatory area. One writer suggests there has been an exponential growth in the number of criminal offences such that the 'criminal law is devoid of any justificatory principle' and the notion of criminality is now debased.[28]

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23 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, para 2.58.

24 For an example of persuasion used industry-wide see, 'Call for defect reports', CASA *Media Release*, Friday 26 July 2002, <www.casa.gov.au/hotopics/media_rel/02-07-02.htm> in which CASA said 'CASA is reassuring people in the aviation industry that defect reports will not be used for prosecution or enforcement action unless there has been wilful negligence'.

25 Quoted in F Haines, *Corporate Regulation; Beyond Punish or Persuade* (1997) Clarendon Press, Oxford, 218.

26 J Scholz (1984) 'Deterrence, Cooperation and the Ecology of Regulatory Enforcement' 18 *Law and Society Review* 179–224; 'Voluntary Compliance and Regulatory Theory' 6 *Law and Policy* 385–404, discussed in I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992) Oxford University Press, New York, 21.

27 Ibid, 25.

28 M Bagaric, 'The "Civil-isation" of the Criminal Law' (2001) 25(4) *Criminal Law Journal* 184, 184–185.

3.37 Those who argue against criminalising regulatory contraventions cite the following arguments:

- if too many contraventions are called 'criminal', the special nature of the criminal law as being reserved for behaviour deserving of moral opprobrium is lost;
- it may account in part for 'regulatory capture' — regulators reluctant to use the full force of the criminal law;[29] and
- the use of criminal procedure adds to the cost and complexity of enforcement.[30]

3.38 However, given that some regulatory breaches are serious, either because of their analogy with the general criminal law or because of the damage they cause, there is often an understandable desire by government to invoke the criminal law.

3.39 Some theorists characterise offences according to whether moral condemnation ought to attach: hence the notion of *mala in se*, conduct that is wrongful in itself, and *mala prohibita*, conduct to which society chooses to attach sanctions. The former attracts moral condemnation; the latter does not, or not to the same extent. Some theorists put some regulatory offences in the former category. They draw a distinction between regulatory offences concerned with matters such as environmental protection, occupational health and safety and public health and safety with those regulatory laws concerned principally with economic interests.[31]

3.40 The question whether to use criminal or civil penalties in economic regulation has been at issue in a number of jurisdictions in recent years. In particular, as countries have reviewed their company law,[32] especially in relation to market manipulation and

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29 R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) Oxford University Press, Oxford, 36. Ayres and Braithwaite say that regulatory agencies have 'maximum capacity to lever cooperation when they can escalate deterrence in a way that is responsive to … the moral and political acceptability of the response': I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992) Oxford University Press, New York, 36.

30 R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) Oxford University Press, Oxford, 38. Professor Dimity Kingsford-Smith says that 'it is well known that heavy reliance on criminal sanctions doesn't work well. … The defects include cost, complexity, slowness and even the abandonment of actions after failure to meet the high standard of proof': *The Age* (Melbourne), 19 August 2002, 2.

31 K Yeung, 'Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective' (1999) 23(2) *Melbourne University Law Review* 440, 458–459. Yeung notes in particular the work of theorists such as Richardson, Ogus and Burrows, who argue that blame can attach where the commission of an offence amounts to failure to take reasonable care. She also cites Kadish, who suggests that the stigma of moral reprehensibility is not usually associated with laws regulating economic behaviour.

32 In Australia, the *Corporate Law Reform Act 1992* (Cth) introduced civil penalty provisions. Madgwick J in *ASC v Forem-Freeway Enterprises Pty Ltd* (1998-1999) 30 ASCR 339, 349 described the reforms as 'something of a compromise' involving 'acceptance of a Senate Committee's recommendations to reserve criminal liability for conduct considered to be "criminal in nature" … and to provide a range of other *civil* remedies in other cases'. In the United States, the *Sarbanes-Oxley Act of 2002* introduced tougher criminal provisions for corporate misconduct.

corporate governance, and their competition law,[33] issues have arisen about when to use criminal proceedings. The debate in Australia about whether price fixing by major cartels ought to be criminalised is an example of the issue.[34] Those who liken it to theft or fraud find it easier to argue for criminalisation. Those who regard it more as a breach of a law regulating the economy are more likely to argue against treating it as a criminal offence.

3.41 The Law Commission of Canada's test for criminality is useful:

> To determine whether the act should be a real crime within the Criminal Code we should inquire:
>
> - Does the act seriously harm other people?
> - Does it in some way so seriously contravene our fundamental values as to be harmful to society?
> - Are we confident that the enforcement measures necessary for using criminal law against the act will not themselves seriously contravene our fundamental values?
> - Given that we can answer 'yes' to the above three questions, are we satisfied that criminal law can make a significant contribution to dealing with the problem?[35]

3.42 But 'serious harm' and a 'serious contravention of fundamental values' are not value-free concepts. For example, as the community has placed more importance on the environment, so serious pollution breaches have been treated more seriously and there is little public debate calling for the decriminalisation of such offences. However, differing values and perceptions of harm accounts, to some extent, for the debate over whether there should be criminal penalties for some breaches of Part IV of the *Trade Practices Act 1974* (Cth). Different conclusions might be reached depending on a person's approach to competition issues or economic regulation generally.

3.43 Ultimately it is the role of the legislature to determine which contraventions it regards as deserving of the epithet 'criminal'. There are public policy and political dimensions to the choice. As DP 65 said, the jurisprudential basis for the criminal/civil distinction is not always easy to discern in the regulatory area. The primary distinction between the regimes is not the types of conduct but rather the 'prosecutorial procedure,

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33 The Australian Competition & Consumer Commission in its submission to the Dawson Committee argued for the introduction of criminal penalties for 'hard-core' price fixing: Australian Competition & Consumer Commission, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P1.pdf, www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P2.pdf, www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P3.pdf>, 13 August 2002, ch 2.

34 This is one of the key debates of the Dawson Committee. Louise Castle and Simon Writer suggest the ACCC's proposals for criminalising hard core cartels 'says much about the lack of a general community consensus as to whether cartel conduct is regarded as truly criminal': L Castle and S Writer, 'More Than a Little Wary: Applying the Criminal Law to Competition Regulation in Australia' (2002) 10(1) *Competition and Consumer Law Journal* 1, 8.

35 Law Reform Commission of Canada, *Our Criminal Law*, 4 (1976), Information Canada, Ottawa, 33.

proof and punishment'.[36] Any basis for the lesser protections for the defendant and enhanced capacity to prove a contravention by the regulator in civil proceedings, is the lack of the 'criminal' label where the contravention is proved.

3.44 Differences in investigatory and enforcement strategies between criminal and civil proceedings have important ramifications for regulators in terms of staffing and budgets and potentially in the choice or success of proceedings.[37] In civil proceedings regulators generally have the advantage of the lower evidentiary standard (discussed below) together with procedures that facilitate evidence gathering, including compellability of witnesses. In some areas of economic regulation, such as cartels, insider trading and market manipulation, this is particularly important because evidence may be difficult to obtain and proof to the criminal standard is notoriously difficult. These difficulties have even led some commentators to suggest that there should be a reversal in the onus of proof for matters such as insider trading.[38] The choice whether to pursue criminal or civil penalties might therefore be determined on the pragmatic grounds of increasing the prospects of success of the regulator.

Clear divide or spectrum of offences?

3.45 Historically, regulation followed what has been described as the 'command and control' style model[39] where penal sanctions (along with sanctions such as loss of a licence or orders to close) were the final tool of the regulator and there was little use of civil penalties. In federal regulation, civil penalties have existed since the passage of the *Customs Act 1901* (Cth) and the *Excise Act 1901* (Cth), but the rapid expansion in their use was a feature of the latter decades of the 20th century. Their potential to be a highly significantly regulatory tool was highlighted with the passage of the *Trade Practices Act* in 1974.[40]

3.46 Civil penalties provide a means for the state to enforce breaches of laws without going as far as declaring all law-breakers 'criminals'. But the development of the hybrid civil penalty — falling somewhere between criminal penalties and civil actions

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36 I Leader-Elliott, *Submission CAP 11*, 30 August 2002.

37 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, para 17.5.

38 See, for example, R Tomasic and B Pentony, 'The Prosecution of Insider Trading: Obstacles to Enforcement' (1989) 22 *Australian & New Zealand Journal of Criminology* 65. One of the issues for the Dawson Committee is whether there ought to be a reversal of the onus of proof in actions for breaches of s 46 of the TPA.

39 A Ogus, *Regulation; Legal Form and Economic Theory* (1994) Clarendon Press, Oxford, 79. Baldwin and Cave describe 'command and control' regulation 'as the exercise of influence by imposing standards backed by criminal sanctions': R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) Oxford University Press, Oxford, 35.

40 Ogus notes that Britain has made little use of civil penalties whereas they are widely used in US federal regulation. In Germany, regulatory offences (Ordnungswidrigkeiten) are procedurally different from criminal ones (Straflichkeiten): A Ogus, *Regulation; Legal Form and Economic Theory* (1994) Clarendon Press, Oxford, 80.

for damages — has not been without its critics. At one end of the spectrum is the argument that a very clear divide between the two should be re-established and rigidly maintained, with criminal sanctions serving the purpose of expressing social condemnation and non-criminal sanctions having a more utilitarian function of discouraging, or placing a cost on, undesirable behaviour and rewarding desirable behaviour.[41] At the other end is the argument that the terms 'civil' and 'criminal' serve no useful function for penalties and should no longer be used.[42] Instead, a scale of procedural protections should be adopted according to the severity of the penalty so that the most serious penalties would attract the strongest procedural protections.

3.47 The 'spectrum' approach has its difficulties in those areas of regulation where there are parallels with the criminal law, such as fraudulent or dishonest dealing with monies or where significant loss or damage is caused through reckless behaviour. If it is understood why Parliament has chosen to make a particular breach a criminal offence and that this is not done lightly, maintaining a strict divide ensures that the power inherent in a 'criminal' finding is not lost.

3.48 The most important difference between criminal and civil proceedings is that successful criminal proceedings result in a criminal conviction with the attendant consequences. These consequences are more serious for individuals than for corporations, not only because a corporation cannot be imprisoned, but also because of the ramifications for an individual of a criminal conviction in matters such as holding public office or corporate directorships. Additionally, the stigma of a criminal conviction falls more heavily on an individual.

Procedural distinctions

3.49 The law recognises only two types of judicial proceedings: criminal and civil. In a criminal proceeding, unless the offence provides otherwise, the prosecutor must prove the physical and fault elements of an offence, *actus reus* and *mens rea.* The criminal proceeding is marked by the higher evidentiary standard, beyond reasonable doubt.[43] The standard of proof for a civil proceeding is on the balance of probabilities[44]

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41 J Coffee, 'Paradigms Lost; The Blurring of the Criminal and Civil Law Models — And What Can Be Done about It?' (1992) 101 *Yale Law Journal* 1875. Tony Greenwood described civil penalties for breaches by corporate officers as 'a noxious hybrid': 'Corporate Officers – Bounden Duty and Service … and Reasonable Lively Sacrifice', (1992) 6 *Butterworths Corporate Law Bulletin* 61, 65.

42 For example, A Freiberg, 'Civilising Crime: Parallel Proceedings and the Civil Remedies Function of the Commonwealth Director of Public Prosecutions' (1988) 21 *Australian and New Zealand Journal of Criminology* 129 and A Freiberg, 'Commentary on "Blurring the Criminal and Civil Paradigms" by Professor John Coffee Jr' (Paper presented at Penalties; Policy, Principles and Practice in Government Regulation, Sydney, 8 June 2001).

43 *Evidence Act 1995* (Cth); *Uniform Evidence Act 1995* (Cth), s 141.

44 *Evidence Act 1995* (Cth), s 140. In its submission to the Dawson Committee, Caltex suggested that, given the size of the pecuniary penalties for breaches of Part IV of the *Trade Practices Act*, consideration should be given to proof beyond reasonable doubt: Caltex Australia Ltd, *Submission to the Review of the Trade Practices Act 1974*, <http://tpareview.treasury.gov.au/content/subs/065_submission_caltex.pdf>, 11 July 2002, 4.

although for serious matters the court may require proof to the higher *Briginshaw* standard of 'reasonable satisfaction'.[45] As Dixon J said in that case:

> When, in a civil proceeding, a question arises whether a crime has been committed, the standard of persuasion is, according to the better opinion, the same as upon other civil issues … But consistently with this opinion, weight is given to the presumption of innocence and exactness of proof is required.[46]

3.50 The serious implications of criminality suggest an approach that requires both a presumption of innocence and a high degree of satisfaction by the court. The ALRC said of the *Briginshaw* standard in ALRC 60 in the context of Customs and excise prosecutions:

> It may be that in many cases there is unlikely to be any practical difference between the application of this standard and the criminal standard because the courts have often held that in customs prosecutions the standard of proof should be almost as strict as that of the criminal standard.[47]

3.51 But, just as the *Briginshaw* standard can have important implications for the regulator in the evidence needed to prove a matter, so respondents in civil penalty proceedings can be given greater procedural protections than might ordinarily occur in a private civil action. The rules of civil procedure can be modified where a particularly serious civil penalty is a possibility. Mandie J in the Victorian Supreme Court in the *Water Wheel* case ordered ASIC to file its case against the directors and treated the matter as criminal proceedings to the extent that he did not grant ASIC's application that the directors file an early defence.[48]

3.52 This case highlights the dilemma when considering the application of civil procedure. Although criminal procedure is well known, clearly structured and strongly adhered to in order to protect the accused, civil procedure varies more from court to court and from case to case. This gives the courts the proper ability to tailor their procedures to meet the demands of justice in each case. The corollary to this desirable flexibility is a lack of consistency in the way different cases may be viewed by different courts and judges. This capacity of the courts to modify the procedures followed blurs the distinction between criminal and civil proceedings.

3.53 The criminal/civil distinction is blurred further when criminal offences are made offences of strict or absolute liability. Unless made an element of a specific contravention, prosecutors in civil penalty proceedings are not required to prove fault,

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45 *Briginshaw v Briginshaw* (1938) 60 CLR 336.

46 Ibid, 362–363.

47 Australian Law Reform Commission, *Customs and Excise Volume II*, ALRC 60 (1992), ALRC, Sydney, para 14.11.

48 *ASIC v Plymin* (No. 7748 of 2000, VSC). The directors are facing monetary penalties of up to $4 million each.

mens rea.[49] But there is also considerable use of strict or absolute liability criminal offences in the regulatory area.

3.54 Their use can be particularly important in offences by corporations. For individuals, strict and absolute liability offences where imprisonment or other serious consequence may follow do raise concerns. To date, however, there has been an assumption that strict and absolute liability are usually reserved for minor offences.[50] Because they usually do not require proof of fault but do not result in a criminal conviction, civil penalty provisions may be seen as occupying a 'middle ground'[51] between criminal proceedings and private civil actions.

3.55 Because of the uncertainties that can arise in relation to the procedure to be adopted in relation to contraventions leading to a civil penalty, Proposal 17–4 in DP 65 suggested that:

> Legislation providing for penalties for non-criminal regulatory contraventions should clearly and expressly state the nature of the procedures that are to apply.[52]

3.56 DP 65 then asked what was the best way to achieve procedural protections for respondents and whether legislation should be specific about when heightened procedures should apply or whether it was sufficient to leave this to the courts on a case-by-case basis.[53]

Consultations and submissions

3.57 Most submissions favoured the proposal. Environment Australia suggested that the proposal would address the inconsistencies that may occur 'between serious (punishment + deterrence) and less serious (deterrence) civil penalty proceedings'. It suggested further that a code could set out default procedures with the ability for departure from these standards in specific legislation. Environment Australia also said that individual legislation should be specific if heightened procedural protections are to apply.[54]

3.58 ASIC supported the proposal on the basis the basis of its experience conducting civil penalty proceedings under the *Corporations Act 2001* (Cth). ASIC suggested that there is 'a degree of uncertainty about the procedural rules that will apply, despite the reference in section 1317L to the application of civil rules and procedure.'[55]

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49 Intent is discussed further in ch 4.

50 I Leader-Elliott, 'Elements of Liability in the Commonwealth Criminal Code' (2002) 26(1) *Criminal Law Journal* 28, 37.

51 Ministry of Economic Development, *Reform of Securities Trading Law: Volume Three: Penalties, Remedies and the Application of Securities Trading Law*, <www.med.govt.nz/buslt/bus_pol/bus_law/securities/penalties/index.html>, 12 August 2002, para 282.

52 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Proposal 17–4.

53 Ibid, Question 17–2.

54 Environment Australia, *Submission CAP 26*, 24 October 2002.

55 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.

3.59 ASIC also stated that

> the real issue may be whether the Courts provide greater procedural protections for defendants than the legislature contemplated, and the uncertainty that arises when Courts consider these questions on a case-by-case basis. If increased procedural protections are to apply to hearings to impose civil or administrative penalties, there should be some clear reference to the protections in the relevant legislation. This would provide certainty about the procedures to be followed in any action, although care would need to be taken to ensure that the legislative provisions did not impose a protective regime that was so prescriptive and detailed as to be unworkable.[56]

3.60 Dr Karen Yeung considered that:

> This proposal is unclear. The nature of the penalty is an important factor in identifying the nature of a contravention. Hence if a civil penalty is imposed, then it makes no sense to impose criminal proceedings. Likewise if a criminal penalty is imposed, then procedural fairness dictates that criminal proceedings must apply. The difficulty arises when the contravention is expressed to be civil, but the sanction is clearly punitive in nature. In such cases, procedural fairness demands that the procedural safeguards associated with the imposition of the penalty should be correspondingly strengthened.[57]

3.61 Question 17–2 in DP 65 asked:

> What is the best way to achieve appropriate procedural protections for respondents facing civil or administrative penalties? Should legislation be specific when heightened procedural protections must apply? Is it sufficient to leave this to the courts in exercising their discretion on a case-by-case basis?[58]

3.62 Yeung said in relation to Question 17–2 that

> a benefit of leaving the matter to the courts would be to allow flexibility in determining the appropriate degree of procedural protection afforded in each type of contravention. My fear is that legislatures increasingly seek to erode the degree of procedural protections which principles of procedural fairness demand.[59]

3.63 The ATO took the view that an express statement in legislation about the standard of proof and procedures to apply would 'provide greater certainty'.[60]

Conclusion

3.64 There can be little argument that any legislation that provides for either criminal or civil penalties should clearly indicate which categories the penalties fall into. It may not be sufficient to leave cryptic or Delphic references to 'fine' or 'penalty' or the

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56 Ibid.
57 K Yeung, *Submission CAP 20*, 9 October 2002.
58 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Question 17–2.
59 K Yeung, *Submission CAP 20*, 9 October 2002.
60 Australian Taxation Office, *Submission CAP 16*, 17 September 2002.

mere use of terms such as 'offence' to do this. If it is accepted that this categorisation depends on the procedures that are to apply, it may well be that the legislation ought to specify this rather than seek to describe the offence itself. The difficulty comes from whether it is appropriate for legislation to seek to prescribe when heightened protections, such as the *Briginshaw* standard and other procedural protections are to apply to cases that would otherwise be dealt with using civil court procedures.

3.65 The theory surrounding Environment Australia's suggestion of a differentiation between penalties that merely seek to deter (pricing the breach) and those which include an element of punishment, is a sound one in principle. However, in practice such a distinction may not always be easy to draw.

3.66 Further, prescribing heightened protections may go too far in inhibiting the ability of regulators to achieve good regulation. In particular, when the choice has been made to seek a civil penalty rather than to take criminal proceedings (where both are available) on the basis of a greater chance of proving the contravention, providing the respondent with heightened protections would seem to defeat part of the rationale at least for providing parallel or sequential proceedings. The offender may avoid a criminal conviction, in return for the civil penalty (which may or may not be lower or less onerous). It is difficult to argue that there ought to be heightened protections in such cases.

3.67 However, despite the reservations expressed by some regulators about the role of the courts in giving greater protections *ad hoc*, this is an important safeguard. While the courts ought to draw a distinction between civil and criminal procedure and not give respondents in civil penalty proceedings all the protections that they would have in a criminal case, they do need to have the flexibility to ensure there is procedural fairness.

3.68 Accordingly, the ALRC is not recommending that the proposed Regulatory Contraventions Statute prescribe the procedure to be adopted in a particular case beyond a statement that the procedures for the imposition of a civil penalty should, unless stated otherwise in specific legislation, be those in accordance with the usual practice and procedure of the court in civil cases or in accordance with the directions of the court or a judge.

Recommendation

Recommendation 3–1. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, the procedures for the imposition of a civil penalty be in accordance with the usual practice and procedure of the court in civil cases or in accordance with the directions of the court or a judge.

Factors influencing the legislative approach

3.69 The choice for legislators to make a breach criminal or civil may be the choice between the greater prospect of a successful action against the greater impact of a criminal finding. Balanced against the civil law's easier evidentiary standard and procedures that facilitate evidence gathering, is the greater deterrent effect of a criminal conviction. There is little doubt that, for individuals, a criminal conviction is far more serious than the imposition of a civil penalty at the same level. There is the stigma of a conviction, amplified if there has been imprisonment, coupled with ramifications such as difficulties in obtaining visas, in holding public office and corporate directorships. Prison brings particular problems for the convicted — loss of liberty, separation from family and friends, potential loss of income, and exposure to a dangerous environment. If the aim of penalties is deterrence, then, given effective enforcement, criminal penalties are more likely to deter than civil ones, but they may be more difficult to obtain, either because of the greater procedural protections for the defendant or because of the claimed reluctance of juries to convict for white-collar crime.

3.70 Other issues arise with corporations because a corporation cannot be imprisoned; nor do the same consequences flow to the corporation from a criminal conviction. It is not clear either whether there is any significant distinction drawn in the minds of the public between corporations paying a civil pecuniary penalty, or a fine for a criminal conviction. The media, for example, frequently use the expression 'fine' for a civil penalty under Part IV of the TPA.[61] However, as DP 65 noted, there remains considerable support for retaining criminal penalties for corporations.[62]

3.71 DP 65 noted the comments of Brent Fisse that

> the claim that it is impossible to punish corporations effectively depends on the false assumption that monetary sanctions are the only means of punishment possible and neglects the emergence of corporate probation and the potential of other non-monetary types of corporate sanction.[63]

3.72 US academic, Stephen Calkins suggests that corporations do draw a very considerable distinction between a civil fine and a criminal penalty:

> Another response is to doubt that, as some have suggested, a civil fine has the same deterrent effect as a criminal fine. The stock-market studies of this issue are inconclusive. My discussions with officers and lawyers for a series of substantial companies, however, are decidedly one-sided: Criminal is different. As one CEO told me, if his

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61 '[C]artel … Fined Almost $15 Million': M Wade, *The Sydney Morning Herald*, 4–5 May 2002, 1; 'ACCC's Fine Deals Not Enough: Judge', L Wood, *The Age Business* (Melbourne), 16 May 2002, 1.

62 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, para 17.87–17.91.

63 B Fisse, 'Who Carries the Corporate Can? Allocation of Responsibility for Offences or Breaches of Civil Penalty Provisions' (Paper presented at Penalties; Policy, Principles and Practice in Government Regulation, Sydney, 8 June 2001), footnote omitted.

> company pays a moderate civil fine, it is five minutes at a regular board of director's meeting; were that same fine a felony, there is a special board meeting. One CEO worried about customers that would rather not purchase from a tainted source; an inside counsel worried about recruiting new employees; another inside counsel worried about the effect on existing employees. The persons with whom I talked disagreed so strongly with the suggestion that criminal and civil fines are equivalent that I am loath to assume that they are, absent some clear supporting evidence.[64]

3.73 Given the very significant impact of a criminal conviction, at least on an individual, those seeking to enhance deterrence argue for criminal rather than civil penalties. As noted above, this has been raised recently in relation to some breaches of Part IV of the TPA and is one of the issues being examined by the Dawson Committee. Without commenting specifically on the TPA, the ALRC notes there are several possible approaches to regulatory breaches by corporations: criminal proceedings against implicated corporate executives, but civil proceedings against the company; criminal proceedings against both; civil proceedings only but with high penalty levels, especially against the corporation; or criminal proceedings only against the corporation.[65]

3.74 In the United Kingdom, the *Enterprise Act 2002* (UK) provides for criminal penalties for individuals involved in certain anti-competitive activities, but 'only' civil penalties for corporations.

3.75 Where the corporations power[66] under the Constitution is a principal head of power on which a federal statute rests, then making a corporation liable for a civil penalty, while making the company's officers criminally liable using an accessorial principle, would seem to have its difficulties. The ALRC does not recommend this type of approach in Australian federal regulation.

3.76 As DP 65 noted,[67] Fisse argues that any strategy to proceed against individuals within a company *instead* of the corporation itself suffers from several weaknesses:

- it does not take account of corporate responsibility;
- the difficulties of investigation and enforcement are largely responsible for the development of corporate criminal liability; and
- retributive theories of punishment apply to corporations as much as to individuals.[68]

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64 S Calkins, 'Corporate and the Antitrust Agencies Bi-Modal Penalties' (1997) 60 *Law and Contemporary Problems* 127, 145. Corporate penalties are discussed in more detail in ch 28.

65 The liability of corporate officers for corporate breaches of the law is discussed in ch 8.

66 *Commonwealth of Australia Constitution Act 1900* (Imp), s 51(xx).

67 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, para 17.89.

68 B Fisse, 'Who Carries the Corporate Can? Allocation of Responsibility for Offences or Breaches of Civil Penalty Provisions' (Paper presented at Penalties; Policy, Principles and Practice in Government Regulation, Sydney, 8 June 2001).

3.77 In its submission to the Dawson Committee, the Productivity Commission set out a number of arguments for and against criminal sanctions for conduct such as price fixing. The Productivity Commission identified as arguments in favour of criminal penalties that they:

- may have a stronger deterrent effect on individuals than could be achieved by monetary penalties;
- will be effective in relation to firms that would otherwise have nothing to lose, such as financially distressed firms; and
- may overcome the problem of the corporation paying an individual's penalty.[69]

3.78 Arguments against the use of criminal penalties, especially imprisonment, identified by the Productivity Committee include:

- that imprisonment 'represents a deadweight cost to society'; and
- the cost of regulatory and judicial error.[70]

3.79 This latter point is said by the Productivity Commission to be the 'most important drawback'. It cites the work of Block and Sidak, suggesting that regulatory and judicial error 'is the major concern with harsh penalties in a regime where the regulator and courts have imperfect information [about horizontal behaviour]'.[71] The Productivity Commission suggested that the problem could be overcome by:

- requiring a high standard of proof, as in other criminal cases; and
- confining criminal penalties to behaviour 'where there is little ambiguity about its adverse effects on competition and economic efficiency (such as explicit price fixing in cartels)'.[72]

3.80 Arguably much conduct considered in this Inquiry is not suitable for a criminal penalty, either because of its minor nature or because it lacks an inherent level of 'criminality', and this helps explain the growth in the use of civil penalties. Some breaches of directors' duties under the *Corporations Act*, for example, do not deserve to be called 'criminal' and, while such breaches may evidence lack of suitability to manage a corporation, they may not involve dishonesty. As discussed elsewhere,[73] the *Corporations Act* allows the regulator a choice of proceedings depending on culpabil-

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69 Productivity Commission, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/125_Submission_ProdComm.pdf>, 25 July 2002, 42.
70 Ibid, 42–43.
71 Ibid, 43.
72 Ibid, 43.
73 See, in particular, ch 11.

ity so that, in principle, where fraud is present and can be proven, the choice will be criminal proceedings. Where the issue is really one of incompetence or lack of due attention, proceedings that seek to compensate victims, encourage compliance by others and protect third parties from further breaches are probably both more suitable and have a greater utility.

Multiple proceedings

3.81 Much of the legislation under review in this Inquiry allows criminal and civil proceedings to be undertaken simultaneously or sequentially in respect of the same or similar conduct giving the prosecuting authorities a choice of proceedings depending on factors such as degree of culpability and the availability of evidence.[74]

3.82 The Chairman of the Australian Securities and Investment Commission (ASIC), David Knott, says that ASIC has 'successfully combined a range of administrative, civil and criminal actions to bring accountability to offenders'.[75] He noted the gaoling of 69 white-collar criminals in the past three years.[76] The New Zealand Ministry of Commerce suggests a 'dual regime gives some flexibility' and cites Vivien Goldwasser:

> The argument for a cogent structure of cumulative sanctions incorporating civil remedies as the base, criminal sanctions at the apex and civil penalties filling the middle ground is compelling.[77]

3.83 This approach is consistent with the 'pyramid approach' to regulatory enforcement.

3.84 However, there are risks with legislation permitting a choice of proceedings: similar conduct may attract civil penalties in one case and criminal in another not because of degrees of culpability but because of differences in the availability of evidence or other procedural matters. It might be argued that it is better for a regulator to at least get civil penalties than no conviction at all, but fairness would suggest that like behaviour ought to attract like enforcement responses and like penalties. Further, if the choice was made to seek a civil penalty because of procedural advantages in circum-

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74 See discussion of multiple proceedings in ch 11.

75 D Knott, 'Corporate Governance — Principles, Promotion and Practice' (Paper presented at Monash Governance Research Unit Inaugural Lecture, July 2002), 7. Although ASIC appeared to make little use of civil penalties when they were first introduced, there has been a significant rise in their use since the changes to the *Corporations Act* that commenced with the passage of the *Corporate Law Economic Reform Program Act 1999* (Cth) (CLERP) (effective from 13 March 2000): G Moodie and I Ramsay, 'The Expansion of Civil Penalties under the Corporations Act' (2002) 30 *Australian Business Law Review* 61 and A Hepworth, 'ASIC's Use of Civil Penalties Rises', *The Australian Financial Review*, 21 January 2002, 5.

76 In 2001–02, 19 people were gaoled for corporate offences in Australia: Australian Securities & Investments Commission, *Annual Report 2001–2002*, Australian Securities & Investments Commission, 3.

77 Ministry of Economic Development, *Reform of Securities Trading Law: Volume Three: Penalties, Remedies and the Application of Securities Trading Law*, <www.med.govt.nz/buslt/bus_pol/bus_law/securities/penalties/index.html>, 12 August 2002, para 165 citing V Goldwasser, 'CLERP 6 — Implications and Ramifications for the Regulation of Australian Financial Markets' (1999) 17(4) *Company and Securities Law Journal* 206, 210.

stances where there had been apparent criminal behaviour, what then is the role of criminal offences?

3.85 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.

Developments in other jurisdictions

United Kingdom

3.86 The United Kingdom has been reviewing aspects of its company law. The Final Report of the UK Company Law Review was issued in June 2001.[78] One of the issues raised in an earlier report, *Completing the Structure,*[79] was whether there should be greater reliance on civil rights and remedies over criminal sanctions.[80] However, the Final Report agreed with the conclusions of the Law Commission of England and Wales that there should be no systematic decriminalisation for reasons of proportionality and efficiency.

3.87 The Report's suggested bases for criminality is:

- offences of dishonesty;
- intermediate offences; and
- regulatory offences.[81]

3.88 The first basis requires little comment. The Report suggested that intermediate offences had a role in 'underpinning and supplementing directors' duties'.[82] It proposed redefining existing intermediate offences in the *Companies Act 1985* (UK) to create two distinct offences: one focused on the physical element alone (failure to comply with a regulatory requirement) and the other including a fault element, acting with dishonest intent, attracting a higher penalty.[83] The rationale for the former was said to be to encourage disclosure and provide an incentive for transparency of direc-

78 Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Final Report* (2001), UK Department of Trade and Industry, London.
79 Company Law Review Steering Group, *Modern Company Law for a Competitive Economy; Completing the Structure* (2000), UK Department of Trade and Industry, London, para 13.27.
80 The United Kingdom places far less emphasis on civil penalties than does the United States.
81 Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Final Report* (2001), UK Department of Trade and Industry, London, para 15.5.
82 Ibid, para 15.10.
83 Ibid, para 15.10.

tors' dealings.[84] The Report instanced failure to keep proper accounting records as an example of the new offence of dishonesty, to catch each 'deliberate, dishonestly motivated breach'.[85]

3.89 The Report recommended the continued availability of criminal and civil sanctions for breaches such as the giving of financial assistance for the purchase of shares.[86] Similarly, the Report recommended the continuation of the use of minor criminal offences for regulatory enforcement, concluding that they were justified by cost-effectiveness and had the effect of 'concentrating the minds of the regulated community'.[87] It rejected submissions arguing for reliance on administrative penalties for failures such as late filing, backed by disqualification for directors for serious breaches. Instead, the Report suggested that high levels of compliance were best achieved by

> a regime of technical criminal offences for procedural and regulatory requirements, enforced by the authorities operating in the public interest to secure compliance largely by administrative means (such as drawing attention to breaches and inviting compliance, and where appropriate levying administrative penalties), with relatively rare resort to formal enforcement through the courts.[88]

3.90 The Report concluded that the existing use of administrative penalties contributed to achieving and maintaining high levels of compliance and were consistent with judgments of the European Court of Human Rights. The Report considered a range of other possible sanctions:

- extending late filing penalties and use of similar penalties for other breaches of regulatory requirements;
- suspension of tax concessions;
- extension of powers to disqualify directors;
- suspension of limited liability (in the sense of making directors, as opposed to the shareholders, personally liable should the company's assets become exhausted) while the company is in default; and
- striking the company off the register for persistent non-compliance.[89]

3.91 The Report rejected all on the basis that 'there were sufficient doubts about the proportionality and/or efficiency of each'.[90]

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84 Ibid, para 15.11.
85 Ibid, para 15.12.
86 The Report noted, that some consultees had argued for decriminalisation of this breach: Ibid, para 15.18. However, the Steering Group said that it was 'not convinced that an approach based on civil penalties and the *Financial Services and Markets Act 2000* (UK) would work. Although the criminal penalty is unlikely to be frequently used we consider that it has a helpful deterrent effect.'
87 Ibid, para 15.19.
88 Ibid, para 15.30.
89 Ibid, para 15.21.
90 Ibid, para 15.21.

3.92 But the power to disqualify directors for breaches of competition law has been included in the *Enterprise Act 2002* (UK),[91] along with new criminal provisions. The Act gives the regulator the power to apply to the court for an order to disqualify from management of a company, directors who have been involved in certain breaches of competition law.[92] Additionally, the Act provides for the criminal prosecution of individuals who dishonestly engage in certain cartel agreements. The criminal offences will operate alongside the existing civil regime of the *Competition Act 1998* (UK). The maximum penalty for the offence is five years' gaol and/or fines. The Act gives effect to the recommendation in the Report that penalties for corporations remain civil only and at their previous level, but that individuals be subject to criminal sanctions, including imprisonment on the basis that 'it may only be the fear of a custodial sentence for a criminal offence which may serve as a sufficient deterrent against them engaging in such activity.'[93]

New Zealand

3.93 New Zealand too is undertaking a review of aspects of its company law as 'part of a broad programme of reforms aimed at strengthening the regulatory framework to enhance performance of, and confidence in, the New Zealand securities markets'.[94] One of the issues under consideration is whether New Zealand should introduce criminal penalties for insider trading, continuous disclosure and market manipulation offences and, if so, whether they should replace or be added to civil penalties.[95] At the time of writing, this report was not yet available.

3.94 A comprehensive review of competition law has been completed in New Zealand, resulting in the inclusion of criminal penalties for cartel offences in the *Commerce Act 1986* (NZ).

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91 The Act inserts five new sections into the *Company Directors Disqualification Act 1986* (UK) and provides for disqualification of up to 15 years.

92 Management disqualification orders are discussed further in ch 27.

93 Office of Fair Trading (UK), *Proposed Criminalisation of Cartels in the UK* (2001), Office of Fair Trading (UK), para 6.2.

94 The Ministry for Economic Development published three volumes: Ministry of Economic Development, *Reform of Securities Trading Law: Volume One: Insider Trading: Fundamental Review*, <www.med.govt.nz/buslt/bus_pol/bus_law/securities/insider/index.html>, 12 August 2002; Ministry of Economic Development, *Reform of Securities Trading Law: Volume Two: Market Manipulation Law*, <www.med.govt.nz/buslt/bus_pol/bus_law/securities/market/index.html>, 12 August 2002; and Ministry of Economic Development, *Reform of Securities Trading Law: Volume Three: Penalties, Remedies and the Application of Securities Trading Law*, <www.med.govt.nz/buslt/bus_pol/bus_law/securities/penalties/index.html>, 12 August 2002, inviting submissions by 31 August 2002.

95 Ministry of Economic Development, *Reform of Securities Trading Law: Volume Three: Penalties, Remedies and the Application of Securities Trading Law*, <www.med.govt.nz/buslt/bus_pol/bus_law/securities/penalties/index.html>, 12 August 2002, para 4.

United States of America

3.95 A spate of corporate scandals and high profile corporate collapses led to the passage of the *Sarbanes-Oxley Act of 2002*. One of the measures brought about by that law is increased criminal penalties for securities fraud, including imprisonment for up to 10 years. However, the enforcement of securities law remains a dual system. As the then Chairman of the Securities and Exchange Commission, Harvey Pitt, noted recently:

> By creating a dually enforceable system of laws, the drafters of the securities statutes understood that not all securities violations warrant the same degree of punishment. When criminal sanctions are warranted, coordination between the civil and criminal agencies gives life and meaning to that scheme. Imposition of jail time ensures a violator will be out of the securities or accounting fraud business in a way that an administrative or court order may not and exceeds the deterrent effect that the SEC can achieve on its own. … one of the most important new tools we have received under Sarbanes-Oxley is the FAIR Fund provision of Section 308. The provision sponsored by Chairman Oxley and Congressman Baker allows us to add civil penalties to disgorgement funds and see these civil fines go to investors. In this way we are making good on our principle goal of taking care of innocent investors and trying to make them whole when they have been defrauded.[96]

Consultations and submissions

3.96 Proposal 17–5 in DP 65 said:

> Parliament should exercise caution about extending the criminal law into regulatory areas unless the conduct being proscribed is clearly deserving of the moral censure and stigma that attaches to conduct deemed criminal.[97]

3.97 DP 65 also suggested that 'there is no compelling reason to do away with the criminal/civil distinction and develop a continuum of offences'.[98]

3.98 In its submission, the ABA said in relation to the *Broadcasting Services Act 1992* (Cth) that:

> The moral culpability of many of the offences under the Act is relatively low, so that criminal sanctions are not clearly appropriate. The absence of clear moral culpability tends to reduce willingness to enforce criminal penalty provisions.[99]

3.99 The ABA also suggested that it should have available a more flexible range of penalties to improve compliance with the Act and that very severe penalties can be ineffective because 'suspension or cancellation will usually be a disproportionate penalty

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96 Harvey L Pitt, 'Speech by SEC Chairman: Remarks before the US Department of Justice Corporate Fraud Conference, 26 September 2002' <www.sec.gov/news/speech/spch585.htm>, 23 October 2002.

97 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney.

98 Ibid, para 17.92.

99 Australian Broadcasting Authority, *Submission CAP 23*, 14 October 2002.

in relation to the relevant breach and, moreover, is unlikely to be in the public interest'.[100]

3.100 The ABA said in relation to the criminal/civil distinction under its legislative regime:

> In the ABA's view, conduct that undermines the licensing scheme under the Act should be regarded primarily as a civil wrong. Criminal sanctions are an inflexible and ineffective tool for achieving compliance with the licensing scheme. Further, the subjective nature of the matters to be considered in determining what category that a particular broadcasting service falls into is more appropriately addressed by the courts in the exercise of their civil jurisdiction.[101]

3.101 The Victorian Bar said there was an 'implicit assumption in chapter 17 of DP 65 that the criminal/non-criminal distinction provides a sound basis for dispensing with standard criminal procedure, and the introduction of novel procedures and penalty schemes'.[102] It expressed concern, however, that 'the attempt to distinguish between criminal and non-criminal conduct masks an intent to dispense with the standard criminal law rules and procedures in order to obtain quick and easy convictions and penalties'. The submission took issue with the justification frequently given for civil and administrative penalties that the traditional criminal law often leads to difficulties in obtaining a conviction and that it is time-consuming and expensive, especially for corporate offenders. The Victorian Bar said that 'the experience of members of this Bar dealing with actual criminal prosecutions of corporate prosecutions of corporate defendants in a variety of areas refute these claims'.[103]

3.102 The Victorian Bar suggested that:

> Because of the changes in corporate culture, most corporations will be more concerned to avoid the stigma of conviction than they will be about the level of the fine. This is driven in part by a genuine commitment to occupational health and safety, and in part to concern about corporate good name, and concern about the prejudicial effect of a conviction when tendering for future business.[104]

Conclusion

3.103 As DP 65 noted, most commentators support a criminal/civil distinction.[105] While many caution against the over-use[106] of criminal sanctions, most commentators

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100 Ibid.
101 Ibid.
102 The Victorian Bar Association, *Submission CAP 22*, 14 October 2002.
103 In particular, the Victorian Bar instanced occupational health and safety convictions: The Victorian Bar Association, *Submission CAP 22*, 14 October 2002.
104 Ibid.
105 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, para 17.92.

support them for the most serious of offences. DP 65 suggested that that there was no compelling reason to do away with the criminal/civil distinction and develop a continuum of offences. The ALRC maintains this position and recommends that the clear distinction between criminal offences and non-criminal contraventions be maintained. However, a combination of *Briginshaw* and the capacity of the courts to modify civil procedures does lead to some blurring of the distinction at least in terms of procedural protections. On balance, the ALRC has no issue with that as flexibility should be preserved in the interests of justice.

3.104 However, there are cogent arguments in favour of retaining the criminal law for those regulatory offences where the action of a person has caused, or is capable of causing, significant harm to others and, in relation to individuals, where there is dishonesty or fraud. The parallels are with the general criminal law. Additionally, there is a role for criminal prosecutions where individuals have been implicated in corporate criminal behaviour.

3.105 Offences should also be identified as criminal where a prison sentence may be imposed as part of the punishment, or where a prison sentence may follow a failure to pay a monetary penalty. This is consistent with the Principle stated in chapter 2 at para 2.50.

3.106 While the ALRC suggests that Parliament should exercise caution about extending the criminal law into regulatory areas unless the conduct being proscribed is clearly deserving of the moral censure and stigma that attaches to conduct deemed criminal, this does not require that there be no criminal regulatory offences if the consequences of a breach are sufficiently serious. The use of criminal law in these circumstances is to indicate society's concern about, condemnation of, and punishment for, that behaviour. Examples of serious regulatory offences for which the criminal law may well be appropriate include intentionally dumping toxic waste where it will cause harm, or knowingly selling dangerous goods.[107]

3.107 As well as signalling society's moral condemnation of a crime, there are other reasons for the use of criminal proceedings in relation to serious offences. One of the features of criminal law is the capacity to use extradition proceedings where the offence is, among other things, sufficiently serious. There are ramifications for this in areas such as the *Corporations Act*, and any suggestion that breaches of directors' duties should be confined to civil proceedings would close off the use of extradition[108] and limit information exchange between law enforcement agencies.

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106 'Over-use' can mean overly prescribed by Parliament or overly resorted to by prosecutors. Green notes most critics suggest that they are overly prescribed but often under-used because of regulatory capture: S Green, 'Why It's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses' (1997) 46 *Emory Law Journal* 1533, 1545–6.

107 These examples are taken from S Green, 'Why It's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses' (1997) 46 *Emory Law Journal* 1533, 1565.

108 There have been several attempts to use the extradition powers in this area such as the long-running campaigns to extradite the late Christopher Skase from Majorca and Tony Oates from Poland.

3.108 While supporting the retention of a general criminal/civil distinction, the ALRC is not saying that the present categorisation or range of available penalties within each of the statutes considered in this Inquiry is necessarily satisfactory. The submission from the ABA, noted above, suggests there may be a need for a review of the penalties available in relation to the regulatory regime for broadcasting, for example.

3.109 If the criminal/civil distinction is to be maintained, and if there is not to be an over-use of the criminal law, it follows that some of the civil penalties will be for relatively serious contraventions. Principles should be developed for use by legislators faced with a choice of making a particular act criminal or non-criminal and for regulators and prosecutors when faced with a choice of proceedings.

Statement of principle

3.110 The distinction between criminal and non-criminal (civil) penalty law and procedure is significant and adds to the flexibility of regulatory law. This distinction should be maintained and, where necessary, reinforced. Parliament should exercise caution about extending the criminal law into regulatory areas unless the conduct being proscribed clearly merits the moral and social censure and stigma that attaches to conduct regarded as criminal.

Assessing effective regulation[109]

3.111 In any system of regulation one must eventually ask whether it is successful. This raises questions whether the legislation is appropriate, whether regulators are adopting the most effective enforcement polices and, when matters do come to court, whether the courts are making the most appropriate orders and setting the most appropriate penalties. In assessing the effectiveness of any regulatory regime, a perennial problem is that the elements that can be measured are not necessarily those that reveal the most about the functioning of the system. Accordingly, this section focuses on the elements that have been held to contribute to effective and principled regulation, rather than on seeking to identify indicators and objective standards by which to calculate effectiveness.

3.112 There are two major components of regulatory efficiency: the framework of regulation established by legislators, and the way in which the regulator implements the rules and exercises its discretion.

Criteria for regulation regimes

3.113 A Director of the US Securities and Exchange Commission, Michael Mann, described two aspects of any effective regulatory regime:

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109 A more detailed discussion of this area may be found in ch 4 of DP 65.

- the legal structure or the rules, which must be easily understandable; and
- the implementation of the rules, which must be done in a predictable and consistent manner. [110]

3.114 Baldwin and Cave identified five criteria by which 'good' regulation may be judged:[111]

- Is the action or regime supported by legislative authority?
- Is there an appropriate scheme of accountability?
- Are the procedures fair, accessible and open?
- Is the regulator acting with sufficient expertise?
- Is the action or regime efficient?[112]

3.115 In recent years, both Australia[113] and the United Kingdom[114] have undertaken formal reviews and implemented government-wide policies aimed at improving the quality of regulation making and enforcement.

Australia

3.116 In Australia, the Office of Regulation Review is responsible for promoting the effectiveness and efficiency of regulation. In particular, it is required to focus on regulation that affects business or restricts competition.

> The ORR is to ensure that particular effects on small businesses of proposed new and amended legislation and regulations are made explicit, and that full consideration is given to the Government's objective of minimising the paperwork and regulatory burden on small business.[115]

3.117 The role of the Office of Regulation Review was clarified in 1997 following the recommendations of the Small Business Deregulation Task Force.[116] One of those recommendations included publication of a guide to regulatory practice. In 1998 the Office of Regulation Review published *A Guide to Regulation*, setting out best practice

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110 M Mann, 'What Constitutes a Successful Securities Regulatory Regime?' (1993) 3(2) *Australian Journal of Corporate Law* 178.

111 R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) Oxford University Press, Oxford, 77.

112 Assessments of efficiency are made by the Australian National Audit Office and others.

113 Small Business Deregulation Task Force, *Time for Business* (1996), Department of Employment, Workplace Relations and Small Business.

114 Better Regulation Task Force (UK), *Principles of Good Regulation*, <www.cabinet-office.gov.uk/regulation/TaskForce/>, 21 December 2001; Better Regulation Task Force (UK), *Enforcement* (1999), Her Majesty's Stationery Office, London.

115 Office of Regulation Review, *Charter for the Office of Regulation Review*, Office of Regulation Review, <www.pc.gov.au/orr/>, 11 December 2001.

116 Small Business Deregulation Task Force, *Time for Business* (1996), Department of Employment, Workplace Relations and Small Business.

processes for regulation, including the need for, and content of, Regulatory Impact Statements.[117]

3.118 The Guide promotes the use of Regulatory Impact Statements as a way of ensuring that the dual goals of 'effectiveness' and 'efficiency' in regulation are achieved.

> While some regulation is necessary and beneficial, there are some cases where it may not be so or where it could be better designed. Regulation should not only be effective, but should also be the most efficient means for achieving relevant policy objectives. In this context, there is a public perception that rule makers too often concern themselves with the issue of effectiveness, ignoring efficiency issues (that is, existing regulation may be effective, but it may not necessarily be the 'best' means for achieving the particular policy goal).[118]

3.119 Compliance with the requirement to prepare Regulatory Impact Statements (RISs) has been made compulsory if the regulation affects business or restricts competition, in the wake of the Productivity Commission's 2001 review of progress in implementation of RISs.[119]

3.120 In addition to establishing the Office of Regulation Review as the regulation watchdog, the 'Government's 1998 small business election policy, *A Small Business Agenda for the New Millennium*, included a commitment that departments and agencies would publish annual regulatory plans'.[120] This is monitored by the Office of Regulation Review, which reports regularly to government on progress in this area.[121]

United Kingdom

3.121 In the United Kingdom, the role of the Regulatory Impact Unit of the Cabinet Office is similar to the role of the Office of Regulation Review. Its work involves:

- promoting good regulation;
- supporting the Better Regulation Task Force;
- removing unnecessary regulation; and

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117 Office of Regulation Review, *Guide to Regulation — Second Edition: December 1998*, Productivity Commission, <www.pc.gov.au/orr/reguide2/>, 16 October 2001.

118 Ibid, B1.

119 Productivity Commission, *Regulation and its Review 2000–01* (2001), Productivity Commission.

120 Ibid, 45.

121 The ORR also monitors compliance with the Council of Australian Governments, *Principles and Guidelines for national Standard setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies*, (1997), Department of Prime Minister and Cabinet, Canberra.

- 'improving the assessment, drawing up and enforcement of regulation, taking particular account of the needs of small businesses'.[122]

3.122 The Better Regulation Task Force has established the following *Principles of Good Regulation*, against which it will assess existing and proposed regulation:

- Transparency — including a clear statement of the purpose of regulation and the penalties for non-compliance, with guidance for those affected in plain English;
- Accountability — including clear accountability of regulators and enforcers to government and the community and a well publicised, accessible, fair and efficient appeals process;
- Proportionality — including proportionality between enforcement action and risk, and between penalties and harm done;
- Consistency — including consistency of enforcement action within and across regulators, and consistency with EU and other international laws;
- Targeting — including the use of a 'goal-based approach … with enforcers and those being regulated given flexibility in deciding how best to achieve clear, unambiguous targets'.[123]

3.123 The *Regulatory Reform Act 2001* (UK), which commenced operation on 10 April 2001, allows Ministers to use regulatory reform orders to amend primary legislation without the need for passage of new legislation through Parliament, although proposals will be subject to scrutiny by two parliamentary committees. The Act also allows Ministers to develop codes of good enforcement practice.

Indicators of regulatory success

3.124 Modern regulation occurs against a backdrop of 'outcomes-focused' government, with results shown (or styled) to justify funding dollars. Successful regulation encompasses compliance by the target population with regulatory rules and the achievement of the regulatory objective, whether this be clean water, safe airways, or a competitive marketplace. But the proper measure of these outcomes is elusive.

> Enforcement programs, often culturally isolated within regulatory agencies, feel most acutely the limitations on outcomes they can claim as their own. Pressed to describe their performance in terms of outcomes rather than outputs, they are obliged to focus on deterrent effect of their enforcement actions. But deterrence is notoriously difficult to isolate and measure, so the enforcement function, in describing enforcement-

122 Cabinet Office (UK), *Role of the Regulatory Impact Unit*, <www.cabinet-office.gov.uk/regulation/>, 21 December 2001.

123 Better Regulation Task Force (UK), *Principles of Good Regulation*, <www.cabinet-office.gov.uk/regulation/TaskForce/>, 21 December 2001, 8–9.

> specific outcomes, is limited to the micro level and local behavioral changes that result directly from individual enforcement actions.[124]

3.125 In general, agencies seek to demonstrate their effectiveness by reference to the activities taken by the agency and the effect of the regulatory activity. Measures of success, as indicated in annual reports, can be broadly categorised by reference to:

- process and procedures — numbers of complaints, inspections, investigations, or complaints followed up;
- penalties or remediation — numbers of court actions, levels of penalties and other imposed outcomes;
- cooperative and consensual regulatory techniques — education campaigns, the numbers and scope of undertakings, and co-regulatory partnerships.

3.126 There is some contention about this approach and how effectively it captures the success or otherwise of a regulatory regime in meeting its broader goals.

Measuring outcomes

3.127 For some agencies, such as the ATO, whose primary aim is collection of revenue, measuring enforcement success is a relatively straightforward task. For others, enforcement success is less easy to quantify. The ACCC has noted:

> By communicating the results of our compliance activities to the community we also help to prevent conduct that may breach the law. When we publicise our enforcement action, and liaise with and inform businesses about the Act and other relevant legislation, we make them aware of their obligations when selling goods and services.[125]

3.128 Education and deterrence do not easily translate into statistics and, therefore, the measurement of enforcement success in these respects is difficult.

3.129 Traditional measures of enforcement success — including number of proceedings commenced, quantum of penalties imposed, and litigation success rates — give some indication of the outcomes of conventional enforcement, but are not particularly helpful in identifying whether regulation is achieving its objectives. Market regulators such as ASIC and the ACCC do go to court and obtain awards of fines, penalties and costs, but the penalties imposed in this way are not necessarily a sign of the success of the regulator.

3.130 Professor Malcolm Sparrow used the example of the border-policing role of Customs authorities to illustrate how too much emphasis on enforcement rates will dis-

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124 M Sparrow, *The Regulatory Craft* (2000) Brookings Institution Press, Washington DC, 283.

125 Australian Competition & Consumer Commission, *Corporate Plan and Priorities 2001-02* (2001), ACCC Publishing Unit, Canberra, 8.

tort measures of success. If a Customs project measured its success in terms of the numbers of arrests or seizures, then true success (which would be actually deterring people from trafficking goods through that port) would look like a failure because seizure rates would be down, and a failure (lots of illegal traffic through the port) would look like a success because an increased number of offenders were caught.[126]

Risk control

3.131 The increasingly sophisticated possibilities for commercial activity and regulatory surveillance provided by technological developments have raised new issues for regulators. Regulators cannot attempt to act on every contravention of the legislation, given the extent and complexity of the legislation in place.

> For regulators, continuing in a traditional, enforcement-centred mode — given the constraints of shrinking budgets, declining public tolerance for the use of regulatory authority, and clogged judicial systems — is now simply infeasible.[127]

3.132 Sparrow identified problem-solving as a core element of regulatory reform[128] and a possible solution to the regulatory dilemma of how to allow regulators the latitude to solve problems in a responsive, flexible way that is tailored to the circumstances of the persons regulated.[129] This approach involves identification of the patterns or risks of non-compliance, an emphasis on risk assessment in allocating resources, and developing an organisational culture that allows the regulator to develop creative, 'tailor-made' solutions to identified problems to procure compliance, while recognising the need to retain enforcement as the ultimate threat.[130] The practice of implementing this approach leads to a number of questions:

> Who will be authorised to select regulatory styles? At what level? Would these choices require legislative approval, or could they be made at operational level?[131]

3.133 Sparrow called on regulators to search for the measurement of impacts within small, specific, well-defined problem areas as indicators of success, including the following:

- Effects/impacts/outcomes: eg, environmental results, health effects, or declines in injury rates;
- Behavioural outcomes: compliance rates or other outcomes (eg, adoption of best practice, other risk reduction activities, 'beyond compliance' activities, or voluntary actions);

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126 M Sparrow, *The Regulatory Craft* (2000) Brookings Institution Press, Washington DC, 151.
127 Ibid, 20.
128 Ibid, 100. Three core elements of regulatory reform are identified: a focus on real results (ie, not just productivity measures), a problem-solving approach, and investment in collaborative partnerships.
129 Ibid.
130 This approach is consistent with the 'enforcement pyramid' model developed by Ayres and Braithwaite, discussed earlier in this chapter and elsewhere in this Report.
131 M Sparrow, *The Regulatory Craft* (2000) Brookings Institution Press, Washington DC, 39.

- Agency activities/outcomes: eg, enforcement actions, inspections (number, nature, findings); education and outreach; collaborative partnerships; administration of voluntary programs; or other compliance-generating or behaviour-change-inducing activities;

- Resource efficiency: the use of agency resources; regulated enterprises' resources; and state authority resources.[132]

3.134 In its recently expanded consumer protection role in financial services, ASIC has adopted a risk control approach similar to that advocated by Sparrow.

> It is clear to us that only dealing with individual transactions, after the event as they come through the regulator's door as a complaint, is not necessarily the best way to achieve our consumer protection regulatory outcomes. We have had to focus on how best to achieve broad results across our new jurisdiction, on identifying high risk areas, on trying to deal with conflict before it results in serious investor harm, and working with a variety of other groups and other organisations to get maximum leverage and impact for our efforts.[133]

3.135 ASIC has identified the following features of a risk control approach in the financial services area:

- identifying important areas of regulatory risk through research projects, consumer surveys, analysis of market trends and products;

- understanding the needs of vulnerable consumers through research; and

- using other risk identification techniques such as liaising with stakeholders, surveillance of the marketplace and assessing risks based on complaints received.[134]

3.136 The ATO has shown a commitment to this type of risk control for some time. In the early 1990s a key part of the move to self-assessment was the use of risk management to identify and correct non-compliance.[135] The ATO found that, as different taxpayers had different needs and motivation, to achieve compliance at a minimum cost (in other words, to manage risk), groups needed to be dealt with on a segmented basis by reference to seven broad areas of risk:

- failure to enter the system;

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132 Ibid, 119.

133 S Tregillis, 'Effective Regulation' (Paper presented at 25th IOSCO Annual Conference, Sydney, 18 May 2000).

134 Australian Securities & Investments Commission, *Submission to the Senate Select Committee on Superannuation and Financial Services* , 18–19.

135 T Boucher, 'Risk Management on a Market Segmented Basis' in M Sparrow, *The Regulatory Craft* (2000) Brookings Institution Press, Washington DC, 231.

- dropping out of the system;
- deliberate underpayment of tax;
- inadvertent under- or over-payment of tax;
- use of tax planning arrangements;
- failure to pay tax; and
- failure to withhold tax.[136]

3.137 These broad areas were marked as having high, medium or low levels of risk. For those classified as medium to high risk, the risk was quantified according to whether it was one-off or continuing, the amount of revenue it involved, and prioritised on the basis of severity. Strategies were developed to reduce or eliminate the risk including law reform, education initiatives, system changes, attitude and behavioural changes, and enforcement action.[137]

3.138 This risk assessment work continues at the ATO. The Centre for Tax System Integrity, a research joint venture between the Australian National University and the ATO, has targeted risk-leveraging experiments as one of their three areas of research. This work includes research on methods to encourage lodgement of correct tax returns and testing of different letters reminding business to lodge their activity statements.[138]

3.139 It could be argued that considerations of equity require a risk management approach, which explicitly recognises that only a minority of wrongdoers will be identified, to minimise the social stigma attached to contraventions and acknowledge the aim of keeping the machinery running smoothly rather than punishing wrongdoers.

3.140 The ability of agencies to undertake this approach may be limited by the scope of the regulatory activities they are commissioned to undertake. ASIC itself commented on this point:

> [M]any regulators such as ASIC cover a wide range of responsibilities and it is a challenge to identify, set and implement systemic 'problem solving responses' across all those activities. We need to think and manage in terms of a complex portfolio of regulatory initiatives and projects across our organisation. This is very demanding of management reporting, information and analysis systems and especially senior management decision-making processes.[139]

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136 This approach is discussed in ibid, 221.
137 M Sparrow, *The Regulatory Craft* (2000) Brookings Institution Press, Washington DC.
138 Centre for Tax System Integrity 'Risk Leveraging Experiments': Project 3 <http://ctsi.anu.edu.au/project3.html>, 7 November 2002.
139 S Tregillis, 'Effective Regulation' (Paper presented at 25th IOSCO Annual Conference, Sydney, 18 May 2000).

4. Fault and the Criminal/Non-Criminal Distinction

Contents

Introduction

4.1 The Terms of Reference require the ALRC to consider whether principles relating to criminal liability (including fault elements, corporate criminal responsibility,[1] vicarious responsibility and strict responsibility) should apply to liability for non-criminal contraventions. This chapter considers the role of fault in contraventions leading to civil or administrative penalties and defences to contraventions.

4.2 As noted in the previous chapter, because civil penalties appear to occupy a middle ground between criminal penalties and private civil action, issues arise as to whether some or all of the principles that apply to criminal offences should apply to civil penalties. In particular, because criminal law has traditionally looked not only for a guilty act, but also a guilty mind, questions arise as to how much, if at all, these principles ought to apply to civil penalty provisions.

4.3 Administrative penalties present other issues. Because they must arise automatically by operation of the law, they are generally suited to contraventions where the

1 Corporate responsibility is discussed in ch 7.

penalty can be reduced to a formula based on the failure to comply properly with a legislative requirement. They are therefore suited to breaches such as late payment, underpayment or non-payment of taxes, fees or charges, and to late or non-lodgment of documents. Variations in the amount of an administrative penalty based on criteria such as whether a person was reckless or whether they made voluntary disclosures, can be accommodated by reducing the relevant factors to a formula. However, true administrative penalties are not matters for discretion by the regulator. There can be no hearing to determine the level of the penalty, for example. A qualification to this is that the relevant officer, for example the Commissioner in the case of administrative penalties imposed by the ATO, may elect to remit the penalty in whole or in part.[2]

Fault

4.4 Criminal offences are generally categorised in one of three ways:

- *Mens rea* offences: where the prosecution must prove fault elements (the mental element) as well as the physical element (*actus reus*);
- Strict liability offences: where the prosecution is not required to prove any fault elements but where there is a defence of reasonable mistake available and any other statutory defence such as a due diligence defence; and
- Absolute liability offences: where proof of fault not is required and the defence of reasonable mistake is not available.

4.5 Under some legislation, the inclusion of fault or other mental element distinguishes a criminal from a non-criminal contravention. Criminal offences generally have the traditional requirement of proof of intention or knowledge on the part of the offender (the 'criminal mind' or *mens rea*). Regulatory law creates many offences, both criminal and non-criminal, which do not require proof of a fault element, but also many that do.

4.6 On 15 December 2001, the position in relation to the fault elements articulated in federal criminal offence provisions changed. The *Criminal Code Act 1995* (Cth), which contains general principles of criminal responsibility under laws of the Commonwealth, now applies to all criminal offences against the law of the Commonwealth. Commonwealth legislation creating an offence must now be read alongside the *Criminal Code* to fully understand a person's legal rights and obligations.[3] This is significantly different from the previous situation where all the elements of an offence were generally found within the relevant Act itself or in the common law.

4.7 In its analysis of legislation the ALRC found that many regulatory offences do not explicitly refer to a fault element as part of the offence. The ALRC's analysis has

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2 See, for example, *Income Tax Assessment Act 1936* (Cth), s 221N.

3 J Longo, 'CLERP 6 and Markets Regulation; The Market Misconduct Provisions' (Paper presented at Financial Markets and The Internet, Sydney, 31 May 2001), 2.

also shown that there are some criminal offences that are classified as strict liability offences, which implies the lack of any requirement for a mental element, particularly in relation to breaches of provisions such as record keeping requirements. There are a smaller number of absolute liability criminal offences.[4]

The conventional criminal law position on fault

4.8 The requirement of a mental element is considered a hallmark of our criminal justice system.[5] It is an overarching principle of criminal law that doing a forbidden act should not of itself render a person guilty of a crime; it must also be shown that the person had a guilty mind.[6]

4.9 Criminal offences, whether in statute or common law, are considered to be made up of physical and mental elements, also described as the prohibited act (*actus reus*) and the criminal mental element (*mens rea*). In the *Criminal Code*, these elements are called 'physical elements' and 'fault elements'.

4.10 The physical elements of an offence can include an act, omission or state of affairs.[7] A 'state of affairs' can include, for example, the possession of stolen goods.

4.11 The fault element is the accused's state of mind in relation to an offence that must be proved for guilt to attach. As the state of mind is inextricably linked to the act itself, the mental element means different things in relation to different crimes.[8] Different fault elements are required for different types of offences, generally based on intention, knowledge,[9] recklessness, or awareness of a particular circumstance or an act's consequence or result.[10]

4.12 *Intent* is the most commonly understood mental element. A person's intention may be to undertake an act (such as the intention to have sexual intercourse) or an intention to bring about a consequence (the intention to cause death).[11] Intention goes not only to the desire of the conduct or its consequences but also involves knowledge of the circumstances that surround the conduct where they are relevant to the offence.[12]

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4 These are particularly related to offences such as undertaking an activity without a licence, for example, s 133 and 134 of the *Broadcasting Services Act 1992* (Cth).

5 P Fairall, 'He Kaw Teh in the High Court; Drug-Trafficker's Charter?' (1986) 10 *Criminal Law Journal* 139, 140.

6 D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Laws and Process of New South Wales* (2001) The Federation Press, Sydney, 344.

7 R Bromwich, *Overview of the Commonwealth Criminal Code* (2001) The College of Law, 5.

8 P Fairall, 'He Kaw Teh in the High Court; Drug-Trafficker's Charter?' (1986) 10 *Criminal Law Journal* 139, 139.

9 'Intention' includes 'knowledge': G Williams, *Textbook on Criminal Law* (1978) Stevens & Sons, London, 50.

10 P Fairall, 'He Kaw Teh in the High Court; Drug-Trafficker's Charter?' (1986) 10 *Criminal Law Journal* 139, 139.

11 D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Laws and Process of New South Wales* (2001) The Federation Press, Sydney, 376.

12 G Williams, *Textbook on Criminal Law* (1978) Stevens & Sons, London, 52.

> Intention means a volitional movement (or omission), knowledge of the relevant circumstances and a desire that any relevant consequence shall follow. An act can be said to be intentional, but not as to a circumstance that is not known or a consequence that is not desired.[13]

4.13 A person is *reckless* where he or she is indifferent whether a substantial and foreseeable risk will eventuate. Many offences arise where the offender does something 'knowingly or recklessly'.[14] These include offences where a person may be guilty either by knowing a statement to be false or by knowing the possibility that the statement may be false and being reckless in the use of that statement.[15]

4.14 *Negligence*, in line with tortious negligence, concerns what a reasonable person would have been aware of at the time of the relevant act or omission rather than what the accused was actually aware of. For most offences, the presence or otherwise of the requisite state of mind of the accused is generally judged on his or her *actual* state of mind; that is, a subjective test. However, in the case of a negligence offence the accused is judged by a hypothetical standard based on the state of mind of a reasonable person confronted with the same set of circumstances, an objective test.[16]

Commonwealth *Criminal Code*

4.15 The *Criminal Code* applies to all offences that are included either in the Code itself or in other Commonwealth legislation or common law. Its purpose is 'to codify the general principles of criminal responsibility under the laws of the Commonwealth'.[17] The Code is aimed at ensuring that the same principles of criminal responsibility will apply to all Commonwealth offences. It contains all the general principles of criminal responsibility that apply to any offence, irrespective of how the offence is created.[18] However, it is subject to significant exemptions and, although it is a statute of general application, it is not really a code.

4.16 As well as general principles, some specific offences are contained in the *Criminal Code* itself, which are partly new and partly transferred from the *Crimes Act 1994* (Cth). It also contains a range of offences of common application (such as fraud against the Commonwealth) that have been collected from a number of Commonwealth Acts.[19]

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13 Ibid, 67.
14 Ibid, 68.
15 Ibid, 68.
16 D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Laws and Process of New South Wales* (2001) The Federation Press, Sydney, 375.
17 Section 2.1.
18 Ibid.
19 R Bromwich, *Overview of the Commonwealth Criminal Code* (2001) The College of Law, 3. Chapter 7 of the Code deals with theft, fraud, forgery and interference with the operations of the Commonwealth. It replaces some *Crimes Act* offences and the common offences that pertained to the operation of Commonwealth agencies that were previously found in individual Acts. These include a range of offences pertaining to making false statements and obtaining benefits under the *Social Security Act 1991* (Cth).

4.17 Part 2.5 of the *Criminal Code* extends the criminal liability of corporations in a number of key areas. It applies the Code to bodies corporate 'in the same way as it applies to individuals' and attributes the physical elements of an offence to the body corporate if it 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.[20] Corporate criminal responsibility is discussed in chapter 7.

4.18 In some more recent Australian legislation, the existence of a mental element results in a prohibited act being labelled as a criminal offence as opposed to non-criminal. Under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), civil and criminal liability may arise from the same act. For example, where 'recklessness' is proven in relation to the killing or injuring of threatened species, Part 13 of the Act provides for a penalty of imprisonment not exceeding two years or a fine not exceeding 1000 penalty units[21] (or both).[22] Where recklessness is not established, the offence is classed as a 'civil penalty provision' and the penalty is reduced to a fine not exceeding 500 penalty units.[23] The *Criminal Code* is identified in the Act as determining whether a person has criminal responsibility.

Fault under the Criminal Code

4.19 Section 3.1(1) of the *Criminal Code* divides an offence into 'physical elements' and 'fault elements'. Criminal penalties are largely distinguished by the requirement for a fault element (except where an offence is one of absolute or strict liability, which is discussed at para 4.32). Much of the Code is based on principles similar to the common law described above. However, there are some significant differences.

4.20 Section 4.1(1) of the Code provides that an offence may consist of one or more of the following physical elements:

- conduct;[24]
- a circumstance in which conduct occurs; or
- a result of conduct.

4.21 The Code then sets out the fault elements. Section 5.1(1) provides that a fault element for a particular physical element may be intention, knowledge, recklessness or negligence. The Code expressly provides in s 5.1(2) that the denotation of these fault

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20 Sections 12.2 and 12.1.

21 'Penalty units' rather than specific amounts are used in many pieces of legislation to allow pecuniary penalties to be increased with inflation without the need to amend many separate pieces of legislation. The value of the penalty unit is contained in one piece of legislation only and can thus be easily amended. Under s 4AA of the *Crimes Act 1914* (Cth), a penalty unit is currently defined as $110.

22 *Environmental Protection and Biodiversity Conservation Act 1999* (Cth), s 196.

23 Ibid, s 196A.

24 'Conduct' means an act, omission to perform an act, or a state of affairs, s 4.1(2).

elements does not prevent a law that creates a particular offence from specifying other fault elements for that offence or any physical element of it.

4.22 Under the *Criminal Code*, a person is defined as intending to act if he or she means to engage in the act.[25] A person intends to bring about a result (or consequence) if he or she means to bring it about or is aware that it will occur in the ordinary course of events.[26] Therefore, for example, a person setting a bomb under a building does not need to have intended to kill every person in that building to be guilty of their murders but must have been aware that deaths were almost certainly going to occur to be found to have intended those deaths.[27]

4.23 The Code defines a person as being reckless if he or she is aware of a substantial risk that the consequence will occur and it is unjustifiable to take that risk having regard to the circumstances known to them.[28]

4.24 Section 5.5 of the Code defines a person as negligent in relation to the physical elements of the offence when his or her conduct involves:

> (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and
>
> (b) such a high risk that the physical element exists or will exist;
>
> that the conduct merits criminal punishment for the offence.

4.25 An important feature is that different fault elements may apply to different physical elements in the same offence. Intention can apply to any fault element, but knowledge and recklessness can only be fault elements in relation to a circumstance or result.[29]

4.26 Over the last several years a considerable amount of work has been undertaken to examine all the laws of the Commonwealth to ensure they are compliant with the *Criminal Code*.[30] A large part of this work has been to ensure that, where an offence is intended to be one of strict liability, this is made clear.[31] If provisions are not harmonised to have their meaning clarified, the task of proving an offence, with the potential for multiple fault elements to attach to the different physical elements making up an offence, could prove difficult.

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25 Section 5.2(1).
26 Section 5.2(3).
27 D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Laws and Process of New South Wales* (2001) The Federation Press, Sydney, 376.
28 Section 5.4(1).
29 R Bromwich, *Overview of the Commonwealth Criminal Code* (2001) The College of Law, 7. See s 5.3, 5.4 of the *Criminal Code*.
30 J Longo, 'CLERP 6 and Markets Regulation; The Market Misconduct Provisions' (Paper presented at Financial Markets and The Internet, Sydney, 31 May 2001), 6.
31 For example, the application of the *Criminal Code* by insertion of Part VC into the *Trade Practices Act 1974* (Cth) by the *Treasury Legislation Amendment (Application of Criminal Code) Act (No 1) 2001* (Cth).

Default fault elements under the Criminal Code

4.27 Under the Code, offences in federal legislation which do not appear to contain any fault element will attract the appropriate 'default fault element'. Where the relevant legislation does not specify any fault element for an offence, nor states expressly that it is 'an offence of strict liability', the Code will imply the relevant fault elements.

4.28 Where the legislation creating an offence does not specify a fault element for a physical element that consists only of conduct, intention is deemed to be the fault element for that physical element (s 5.6(1)). Where the legislation does not specify a fault element for a physical element that consists of circumstances or a result, recklessness is the deemed fault element for that physical element (s 5.6(2)).

4.29 Where the legislation provides that an offence is one of strict liability, there are no fault elements for any of the physical elements of that offence but the defence of mistake of fact is available under s 9.2 (s 6.1). This distinguishes strict liability offences from those of absolute liability, for which under s 6.2 no such defence is available (see para 4.44).

4.30 The Explanatory Memorandum to the *Criminal Code* makes it clear that the fundamental nature of the principles of criminal responsibility means that Parliament should not override them lightly.

> It is possible that subsequent legislation will vary the 'general principles' of Chapter 2 in relation to specific offences. In the interests of the integrity of the scheme, variation should not occur without clear justification for it, and there are some principles that, because of the basic nature of the principles, it is difficult to imagine should be varied at all. Other principles might be susceptible to variation more readily, in particular, those dealing with the liability of corporations [proposed Part 2.5].[32]

4.31 It is worth noting that the operation of the principles relating to corporate criminal responsibility in Part 2.5 has been excluded from many major Acts. Part 2.5 was intended to operate as a default definition of corporate criminal liability; where a piece of legislation had its own test, that would remain.[33] Part 2.5, therefore, does not apply to portions of the *Corporations Act 2001* (Cth) or the *Trade Practices Act 1974* (Cth) (TPA), where a definition of criminal responsibility exists. The integrity of the *Criminal Code* scheme, or any similar scheme for non-criminal contraventions, is compromised if it is routinely or widely excluded from the operation of regulatory regimes so that its operation becomes patchy.

Strict and absolute liability

4.32 Despite its status as a foundation principle of criminal law, the requirement of a mental element for criminal offences has not been consistently applied in the creation

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32 Explanatory Memorandum to the Criminal Code Bill 1994 (Cth), 7.
33 Ibid, 45.

of offences in regulatory legislation.[34] In the legislation looked at by the ALRC, there are many regulatory offences, both criminal and non-criminal, which impose strict or absolute liability. The emphasis in strict and absolute liability offences is on the manifestation of the conduct, the physical element, and there is an assumption they are usually reserved for minor offences.[35]

4.33 In Australia (and also in the United Kingdom and Canada) the removal of the common law requirement for a mental element in 'public welfare' legislation has been justified on the basis of protecting the community by enforcing a high standard of care. Without strict liability, this standard of care has the potential to be undermined by the difficulty for the prosecution in proving a guilty mind in these types of cases.[36] In the United States, the federal government has argued that the presumption of *mens rea* has less force in an assessment of regulatory offences than in the case of traditional crimes, such as crimes of violence or theft. However, there is less of a tendency there than in Australia to legislate for crimes of strict liability. For example, US environmental legislation does not contain offences imposing criminal liability without a particular state of mind.[37]

Strict liability

4.34 Where an offence is one of strict or absolute liability, the prosecuting authority bringing the action is only required to show that the alleged act took place, removing the need to prove any *mens rea*.[38] Strict liability differs from absolute liability in that the defence of honest and reasonable mistake of fact is allowed in answer to a charge of strict liability but not in one of absolute liability.[39] The 'reasonable excuse' defence originated in the High Court's decision in *Proudman v Dayman,*[40] which established that:

> As a general rule, an honest and reasonable belief in a state of facts which, if they had existed, would make the defendant's act innocent, affords an excuse for doing what would otherwise be an offence.[41]

4.35 In determining whether an offence is one of strict liability courts have traditionally looked at the words of the statute creating the offence, the subject matter of the offence, and whether the enforcement of the law would be best served by imposing

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34 D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Laws and Process of New South Wales* (2001) The Federation Press, Sydney, 357.

35 I Leader-Elliott, 'Elements of Liability in the Commonwealth Criminal Code' (2002) 26(1) *Criminal Law Journal* 28, 37.

36 P Clifford and S Ivey, 'Problems with Defending Crimes Against the Environment' (Paper presented at Environmental Crime, Canberra, 1–3 September 1995), 3.

37 Ibid, 3.

38 D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Laws and Process of New South Wales* (2001) The Federation Press, Sydney, 357.

39 *Criminal Code*, s 6.2.

40 *Proudman v Dayman* (1941) 67 CLR 536.

41 Ibid, 540 (Dixon J).

strict liability.[42] The decision in *He Kaw Teh v R* made the position of the High Court clear: courts are unlikely to impose strict or absolute liability unless there is an express indication in the legislation.[43] Where the legislation does not make the requirement of a fault element clear, the High Court has held that there is no presumption that one is not required. Further, the initial presumption should be that a mental element is required.[44] Brennan J said:

> It is implied as an element of the offence that, at the time when the person who commits the actus reus does the physical act involved, he either –
>
> (a) knows the circumstances which make the doing of that act an offence; or
>
> (b) does not believe honestly and on reasonable grounds that the circumstances which are attendant on the doing of that act are such as to make the doing of that act innocent'.[45]

4.36 Street CJ, commenting on *He Kaw Teh* in *Wampfler v R,* said, in relation to *mens rea*, that statutory criminal offences fall into three categories:

> 1. Those in which there is an original obligation on the prosecution to prove *mens rea*.
>
> 2. Those in which *mens rea* will be presumed to be present unless and until material is advanced by the defence of the existence of honest and reasonable belief that the conduct in question is not criminal in which case the prosecution must undertake the burden of negating such belief beyond reasonable doubt (strict liability).
>
> 3. Those in which *mens rea* plays no part and guilt is established by proof of the objective ingredients of the offence (absolute liability). [46]

4.37 While strict liability criminal offences are relatively common in the regulatory area, absolute liability offences are less common. The Attorney-General's Department has guidelines for the use of each.[47] Under the guidelines, strict liability offences should not include imprisonment as part of the penalty and the maximum penalty should be no more than 60 penalty units for an individual or 300 penalty units for a corporation. The guidelines note that strict liability has been applied in the following cases:

- to regulatory offences, particularly those which relate to the environment or public health;

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42 P Fairall, 'He Kaw Teh in the High Court; Drug-Trafficker's Charter?' (1986) 10 *Criminal Law Journal* 139, 140.
43 *He Kaw Teh v R* (1985) 157 CLR 523.
44 Ibid.
45 Ibid, 582.
46 *Wampfler v R* (1987) 11 NSWLR 541, 546.
47 Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002), AGPS, 259

- where it is difficult for the prosecution to prove a fault element because a matter is peculiarly within the knowledge of the defendant;
- to overcome the 'knowledge of the law' problem, where an element of the offence expressly incorporates a reference to a legislative provision.[48]

4.38 The guidelines state that absolute liability should apply only to:

- elements of offences relating only to jurisdiction;
- offences not punishable by imprisonment or more than 10 penalty units;
- where inadvertent errors including those based on a mistake of effect ought to be punished.[49]

4.39 The Senate Standing Committee for the Scrutiny of Bills in its report, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, endorsed and supplemented the Attorney-General's Department guidelines.[50] The Senate Committee report stated a number of basic principles that it said 'should constitute the starting point for Commonwealth policy on strict and absolute liability'.[51] Among these were that:

- fault liability is one of the most fundamental protections of criminal law; …
- strict liability should be introduced only after careful consideration on a case-by-case basis of all available options; it would not be proper to base strict liability on mere administrative convenience or on a rigid formula; …
- the *Criminal Code* should continue to provide that the presumption that fault must be proven for each element of an offence may be rebutted only by express legislative provision under section 6.1 for strict liability and section 6.2 for absolute liability;
- the general defence of mistake of fact with its lower evidentiary burden is a substantial safeguard for those affected by strict liability; the *Criminal Code* should continue to provide for this defence;
- the *Criminal Code* should continue to expressly provide that strict or absolute liability does not make any other defence unavailable ...[52]

4.40 The Senate Committee report suggested that

> strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime such as, for instance, those relating to public health, the environ-

48 Ibid, 259.
49 Ibid, 259–260.
50 Ibid, 283–285.
51 Ibid, 283.
52 Ibid, 283–284.

> ment, or financial or corporate regulation; as with other criteria, however, this should be applied subject to other relevant principles.[53]

Difficulties with strict liability offences: Customs Act amendments

4.41 There has been some controversy regarding recent amendments to the penalty provisions of the *Customs Act 1901* (Cth) contained in the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* (Cth). The *International Trade Modernisation Act* was passed by both Houses in June 2001; some of the offences under the Act commenced on 1 July 2002. Others will be introduced progressively.

4.42 The amendments relate to a range of Customs cargo reporting and commercial activities. A key feature of the reforms is the adoption of strict liability for a number of offences, some new and some already in the *Customs Act.* The new strict liability offences include offences for entering incorrect data in Customs entries notwithstanding that the Customs agent accurately passed on information from a third party and had no means of checking it.

4.43 The Customs Brokers and Forwarders Council of Australia argues that strict liability in a commercial setting like this is inappropriate as it will impose liability without a test for reasonableness and does not allow for inadvertent, careless or third party mistakes.[54] The Government has argued that a strict liability regime has not been adopted lightly.

> However, the mischief intended to be addressed in the legislation is (for the most part) either late or inaccurate reporting of information to Customs. If this information is received either late or inaccurately, Customs cannot perform its community service obligations of analyzing information about cargo so as to ensure that prohibited drugs are kept out of the country, or that the correct amount of duties and taxes is paid as a result of the importation or exportation of goods. *The intention of the communicator is therefore irrelevant. The critical outcome is the quality of the information.* [emphasis added][55]

Following the passing of the Bill in the Senate (where strict liability was removed from a number of the offences), the issue of the application of absolute and strict liability offences in Commonwealth legislation was generally referred to the Senate Standing Committee for the Scrutiny of Bills. The Committee reported in June 2002; its report is discussed at para 4.39–4.40.

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53 Ibid, 284.

54 Customs Brokers Council of Australia, *Consultation*, Brisbane, 16 February 2001. The Law Council of Australia has also argued that, given the detailed and complex nature of Customs legislation, 'strict liability is a very blunt instrument which is inappropriate for an industry with so many detailed working parts which must all work together to ensure that that the industry process works': Law Council of Australia, Customs and International Transactions Committee, *Preliminary Submission to the Standing Committee for the Scrutiny of Bills Inquiry into the Application of Absolute and Strict Liability Offences in Commonwealth Legislation*,<www.hgr.com.au/knowledgekiosk/pdfs/cus_pub_mar201.pdf>, 8 April 2002.

55 Explanatory Memorandum, Customs Legislation Amendment and Repeal (International Trade Modernisation Bill) 2000, 10. See also ch 12.

Absolute liability

4.44 Generally speaking, the law is reluctant to punish severely without the need to prove awareness on the part of the accused. As a result, absolute liability contraventions are often thought to carry only small penalties.[56] This has been borne out in the ALRC's analysis of Commonwealth legislation. However, a common trend was for absolute liability provisions to relate to licensing conditions, with the 'penalty' generally being revocation of the licence. A policy justification for this approach might be that a licence condition is a 'known requirement' and therefore the offender can be considered to have been aware of his or her obligations prior to committing the breach. Nonetheless, the revocation of a licence is not necessarily a small matter and closely resembles a penalty even if it is not penalty as strictly defined.

4.45 As noted above, strict liability offences do allow for the *Proudman v Dayman*[57] defence of reasonable mistake of fact. This is reflected in the *Criminal Code*.[58] Absolute liability offences do not permit this defence[59] although reasonable mistake may go to mitigation and other defences found in the Code are available including intervening event, duress and sudden or extraordinary emergency.

4.46 In *Proudman v Dayman*, Dixon J discussed an increasing tendency of government towards the use of absolute liability provisions in legislation, especially in relation to low-level offences dealing with 'social and industrial regulation'.[60] In line with the reasoning in *He Kaw Teh*,[61] courts have been increasingly reluctant to support this trend. In *Hawthorn (Department of Health) v Morcam Pty Ltd*, Hunt CJ at CL, in finding that the offence in question (selling adulterated food) was one of strict, not absolute, liability, stated:

> I do not understand how the sale of adulterated food is going to be prevented simply by imposing an absolute liability … An absolute liability will not assist in preventing the sale of adulterated food where the seller honestly believes upon reasonable grounds that it is unadulterated. All the imposition of such a liability will do is to obtain convictions for conduct which is manifestly not criminal in nature by any recognised standards of justice.[62]

4.47 The ALRC is not required to consider whether particular offences are appropriate for strict or absolute liability. However, it may be desirable to set out parameters

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56 D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Laws and Process of New South Wales* (2001) The Federation Press, Sydney, 459.

57 *Proudman v Dayman* (1941) 67 CLR 536.

58 *Criminal Code* , s 6.1.

59 See also ibid, s 6.2. However, s 606(5) of the *Corporations Act*, which deals with the prohibition on certain acquisitions of relevant interests in voting shares, permits a defence of 'inadvertence or mistake' although s 606(4A) indicates that an offence based on s 606(1), (2) or (4) is an absolute liability offence.

60 D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Laws and Process of New South Wales* (2001) The Federation Press, Sydney, 452. See *Proudman v Dayman* (1941) 67 CLR 536, 540–41.

61 *He Kaw Teh v The Queen* (1985) 157 CLR 523.

62 *Hawthorn (Department of Health) v Morcam Pty Ltd* (1992) 29 NSWLR 120, 133 (NSW Criminal Court of Appeal).

to be included in legislation that establishes offences of these types. Nevertheless, the reasons advanced for limiting the use of absolute liability in the criminal law are relevant for contraventions leading to a civil penalty. That is, their use should be limited to minor or relatively minor contraventions.

4.48 As discussed below, the ALRC recommends that fault not be an element of a contravention leading to a civil penalty unless the relevant statute provides otherwise. This would mean that, as many non-criminal contraventions would be strict or absolute liability contraventions, the Attorney-General's Department guidelines as to the maximum size of penalty discussed above[63] would be inapplicable in relation to the non-criminal contraventions. The trade-off for the fact there might be sizeable civil penalties without a need to prove fault is the lack of a criminal conviction. Given the serious ramifications of a criminal conviction, this is not insignificant.[64]

Choice of proceedings

4.49 In the case of parallel or sequential proceedings, fault is frequently the distinguishing feature between the offence and the non-criminal contravention. For example, the difference between s 181 and 184 of the *Corporations Act* is the fault element. They share the same physical elements. Each requires that a director act in good faith and in the best interests of the company or for a proper purpose (the physical elements), but s 184 provides that it is a criminal offence if the director has acted recklessly or has been intentionally dishonest. Recklessness becomes the threshold for criminal liability.[65]

4.50 Similarly, s 674(2) and 675(2) of the *Corporations Act* set out continuing disclosure obligations for different types of disclosing entities. Both subsections are civil penalty provisions pursuant to s 1317E of the *Corporations Act*, but they are drafted to allow also for criminal proceedings. Intent, as defined in Chapter 2 of the *Criminal Code*, is the point of differentiation (along with differing standards of proof). Section 1311, the general penalty provision of the *Corporations Act*, cross-refers to Chapter 2 of the *Criminal Code*, which states the general principles of criminal responsibility. If fault can be proved beyond reasonable doubt, the DPP may well decide to bring an action to seek a criminal conviction and a criminal penalty. Where the regulator brings the proceedings for a civil penalty, there is no need to prove fault.[66]

4.51 Some market misconduct provisions in Chapter 7 of the *Corporations Act*[67] specify a mental element to distinguish a contravention from the same behaviour that

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63 See para 4.37.

64 See discussion in ch 3.

65 Leader-Elliott suggests the *Criminal Code* generally 'has a strong commitment … to the principle that recklessness marks the threshold of criminal liability': I Leader-Elliott, 'Elements of Liability in the Commonwealth Criminal Code' (2002) 26(1) *Criminal Law Journal* 28, 39.

66 This discussion deals with the difference in the elements of the offence/contravention. Issues surrounding the choice of proceedings are not as straightforward as this discussion might suggest. Choice of proceedings is discussed in detail in ch 11.

67 For example, *Corporations Act 2001* (Cth), s 1041E, 1041F and 1043A.

does not breach the legislation. The sections cited are offences pursuant to the *Criminal Code*[68] and also civil penalty provisions. For example, s 1043A, which deals with insider trading, provides that a person who possesses inside information (physical element) which they know, or ought to know, is inside information (mental element), commits an offence or is liable to a civil penalty if they, *inter alia*, deal with a relevant financial product. On its face there is little to distinguish the criminal offence from the civil contravention, although, of course, different standards of proof are required.[69]

4.52 In the *Superannuation Industry (Supervision) Act 1993* (Cth), fault is the basis of the choice between civil or criminal proceedings.

Fault as an element of a contravention

4.53 Fault can be an integral part of a statutory offence provision and can be expressed in various ways:

- Section 494(1) of the EPBC Act provides for civil penalties for executive officers of corporate bodies that contravene a civil penalty provision when it can be shown, *inter alia*, that 'an executive officer of the body knew that, or was reckless or negligent as to whether, the contravention would occur'.
- Under the *Sydney Airport Demand Management Act 1997* (Cth), the operator of an aircraft is liable for a civil penalty for an 'off-slot movement' only if this is done 'knowingly or recklessly'.[70]
- Section 46 of the TPA provides that a 'corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of' various anti-competitive activities.

Role of fault

4.54 These examples illustrate several different roles for fault in civil penalties. In some legislation it is the point of differentiation between criminal and civil proceedings. In other statutes, it is the key to whether there has been a contravention leading to a civil penalty or no contravention at all. Fault may also be the key to accessorial liability or to liability where a person is deemed personally liable for the contravention of another, in particular, a body corporate.[71]

4.55 Unless otherwise indicated, reckless conduct is regarded as criminal. Negligence is somewhat more problematic. Although negligence is a fault element under the

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68 It is not always apparent from the wording of the legislation what is the difference between the civil penalty provision and the offence. Section 1043A is an example in point. Lack of clarity in drafting where choice of proceeding is possible is discussed in ch 11.

69 *Corporations Act 2001* (Cth), s 1332 provides that for proceedings, other than those for an offence, where the court needs to be satisfied of a matter, it is sufficient if it is satisfied on balance of probabilities.

70 *Sydney Airport Demand Management Act 1997* (Cth), s 13.

71 See further discussion in ch 8.

Criminal Code, if a fault element is not specified, recklessness is the fault element for a physical element involving a circumstance or a result.[72] Unless otherwise stated therefore, recklessness is the threshold for criminal liability. Ian Leader-Elliott has suggested that, in formulating the Code, 'liability for negligence was accepted, at best, as an expedient compromise of fundamental principle'.[73] There are regulatory offences where negligent conduct might be a relevant fault element — those involving public safety or the protection of the environment, for example. But whether negligent conduct in any particular area ought to lead to criminal liability, a civil penalty, or no penalty, is a policy issue for the legislature.

4.56 Leader-Elliott argued in his submission to this Inquiry that the definition of 'negligence' in the *Criminal Code* 'approaches incoherence' and suggested that it would be unsuitable for use for non-criminal regulatory contraventions. He also suggested that the concept itself might serve no purpose for defining such breaches in any statement of general principles.[74] As will be discussed later in this chapter, Leader-Elliott proposes the use of a due diligence defence as an alternative to the prosecutor being required to prove negligence.

Consultations and submissions

4.57 Proposal 17–2 of DP 65 suggested that 'where parallel or sequential proceedings are possible, there should be no role for fault as an element of the non-criminal contravention'. Proposal 17–6 of DP 65 said that 'fault should not be an ingredient of a non-criminal regulatory contravention'.

4.58 In his submission, Leader-Elliott suggested that fault elements play two quite distinct roles in the definition of criminal offences. When liability is imposed for causing harm, degrees of seriousness may be distinguished by specifying different fault elements. Seriousness itself can be a measure of harm or of culpability based on whether the harm was caused intentionally, recklessly or negligently. Leader-Elliott agreed with the suggestion in DP 65 that there be no role for gradations of this kind in the framing of regulatory offences.[75]

4.59 However, he suggested that fault also plays a role in determining the limits of criminal responsibility in the 'form of a prohibition of conduct [X] when done with intent to [Y]'. He suggested that

> they are very common and many are comparatively minor offences. In practice, they constitute by far the largest group of offences which require proof of intention, and intention alone, as a prerequisite for guilt. Unlike the familiar offences against the person, where recklessness will almost always substitute for intention, the requirement of intention is an essential element in the definition of these offences. There is a surpris-

72 *Criminal Code* , s 5.6

73 I Leader-Elliott, 'Elements of Liability in the Commonwealth Criminal Code' (2002) 26(1) *Criminal Law Journal* 28, 37.

74 I Leader-Elliott, *Submission CAP 11*, 30 August 2002.

75 Ibid.

> ing relationship between requirements of ulterior intention and the defence of 'reasonable excuse' which appears in a variety of contexts in federal criminal law.[76]

4.60 The Attorney-General's Department agreed with the thrust of Proposal 17–2, noting that:

> The co-existence of one of the fault elements set out in the Criminal Code, in particular intention, knowledge or recklessness, with the physical elements giving rise to a civil penalty will, in certain circumstances, justify invoking the criminal law. For example, intentional conduct leading to the death of an animal is more likely to be seen by the community as criminal than conduct inadvertently leading to the death of that animal. Whilst such conduct is to be discouraged in both instances, invoking the powers of the criminal law may be more appropriate in the first instance. In this context we also support Proposal 17–2.[77]

4.61 ASIC, in its submission, noted that it was generally in agreement with Proposal 17–2 that 'where parallel or sequential proceedings are possible for the same conduct, the non-criminal contravention should be made up of the physical element only' but it noted provisions in the *Corporations Act* that insert fault elements into contraventions which give rise to civil penalties. ASIC instanced some of the market misconduct provisions in Chapter 7 of the Act[78] and noted that a mental element distinguishes a contravention from the same behaviour that does not constitute a breach. ASIC suggested that the general rule must be subject to necessary exceptions.

4.62 Environment Australia considered the proposal 'sound' and consistent with the current approach under the EPBC Act. It noted, however, that where conduct constitutes the physical element for both a criminal offence and a mirror civil contravention, for example s 142 and 142A, the decision whether to take criminal or civil proceedings would not be solely on the basis of whether the fault element could be made out.[79]

4.63 Dr Karen Yeung indicated strong opposition to both proposals. She suggested it 'would be wholly unacceptable to eliminate fault from non-criminal contraventions'. She instanced intentional littering from unintentional littering but suggested this was an example where even an intentional act may lack such moral impropriety as to justify criminal sanctions.[80]

4.64 The Australian Broadcasting Authority identified problems with the elements of some of the criminal offences in its legislation.

> It is difficult to assess the effectiveness of the penalties regime under the *Broadcasting Services Act.* At least in part, this is because of difficulties involved in proving the elements of some of the offences under the Act, particularly the offences concerning providing a broadcasting service without a licence. The categories of broadcasting services are defined in the Act by vague elements such as whether the programs pro-

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76 Ibid.
77 Attorney-General's Department, *Submission CAP 14*, 9 September 2002.
78 For example, *Corporations Act 2001* (Cth), s 1041E, 1041F and 1043A.
79 Environment Australia, *Submission CAP 26*, 24 October 2002.
80 K Yeung, *Submission CAP 20*, 9 October 2002.

> vided by the service 'appear to be intended to appeal to the general public' or whether the service 'provides programs of limited appeal'. The vagueness of such definitions makes it difficult for the ABA to collect reliable evidence in cases where broadcasters are pushing the boundaries of a particular category. If it is difficult to envisage reliable evidence of the physical elements of the offence, it is harder to do so in relation to intention.[81]

4.65 It is outside the Terms of Reference for this Inquiry to comment on the appropriateness or wording of particular offences or legislative schemes. The problem highlighted by the ABA raises issues about the use of the criminal law in the regulatory area, an issue that was discussed in the previous chapter.

Conclusion

4.66 Whilst the need to prove fault or *mens rea* is the most important distinction in those legislative regimes where choice of proceedings is an issue, as the examples listed above illustrate, fault elements do properly have a role in some contraventions leading to civil penalties. Sometimes they are the key to whether there has been a contravention. Section 494 of the EPBC Act*,* is an example of a contravention where intention is an essential element of the contravention. The fault elements — knowledge, recklessness or negligence — in this example are not being used as the point of demarcation between criminal or civil penalties; rather they are the determinant of whether someone may or may not be liable in a personal capacity for the contravention of another party, a corporate offender.[82] This is an appropriate use of fault in a civil penalty provision. Fault here is the key to liability *per se*, not to the type of proceedings or type of penalty.[83] The onus also falls on the regulator to prove that the corporate officer against whom proceedings are being taken bears some responsibility for the contravention. An alternative approach would be to deem the corporate officer liable, and allow for specified defences. This is discussed in chapter 8.

4.67 There is a role for fault where it defines a contravention in terms of the purpose of achieving some contravening objective. Section 46 of the TPA is an example of a contravention where intention in the form of a purpose test is essential to the contravention. It is not sufficient for the regulator to prove that a corporation with a substantial degree of market power took advantage of that power; the impugned purpose must also be demonstrated.

4.68 As was conceded in DP 65, legislation permitting a choice of proceedings using fault as the basis of the choice, such as s 674(2) and 675(2) of the *Corporations Act*, is not without difficulties.[84] Giving regulators the choice of parallel or sequential

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81 Australian Broadcasting Authority, *Submission CAP 23*, 14 October 2002.

82 Section 496 provides criteria for determining whether the officer had taken reasonable steps.

83 Under s 494 if the company has contravened a provision of Part 3 that is a civil penalty provision or section 142, with the appropriate fault, the officer may be liable. Under s 495 an executive officer may be criminally liable for a criminal offence by the company in relation to the provision of false or misleading information under s 489, 490, 491.

84 In its submission to the ALRC in relation to its 1994 report, ALRC 68, *Compliance with the Trade Practices Act 1974*, the DPP criticised the then Pt 9.4B of the *Corporations Law,* claiming its effect had been

criminal and non-criminal proceedings for the same physical element calls for the development of clear principles governing the choice. It also calls for the legislation to be drafted in such a way that the elements (physical and fault) of each offence are clearly stated. This is perhaps most important for provisions such as s 674 and 675 of the *Corporations Act* and for those such as the market misconduct provisions in Chapter 7 of the *Corporations Act*, described above, where there is a mental element for both the civil penalty contravention and the criminal offence.

4.69 Choice of proceedings also calls for transparency in the application of discretions. The availability of this choice can lead to uncertainty both for regulators and the regulated, and it has the potential to lead to inconsistency in the regulator's approach to commencing proceedings. Care must be taken that the reasons that a criminal prosecution is commenced against one offender while another faces 'only' civil penalty proceedings are transparent and consistent.[85] Difficulties in proving the mental elements of the offence to the criminal standard may well be the reason for the decision to take proceedings for a civil penalty in one case, while in another, it may be that the breach lacked the requisite fault. It can be difficult to discern the purpose of the civil penalty: is it supplementing the criminal penalty or providing an alternative to it?[86]

4.70 The issue is more complex where there is choice of proceedings for conduct that is rarely inadvertent, although there may be differing levels of knowledge and honesty. Given that price fixing,[87] for example, is almost always a deliberate act, if choice of proceedings is available under the TPA, the legislation should be drafted to distinguish clearly the mental elements of the criminal offence from the mental elements of the civil contravention. In addition, clear guidelines about the choice of proceedings should be available. While difficulties with proof to the criminal standard may provide a reason for choosing to seek a civil penalty, and hence apparently similar cases may be treated differently, care would be needed to ensure consistency of approach. Issues about choice of proceedings are discussed in detail in chapter 11.

Recommendations

Recommendation 4–1. The Regulatory Contraventions statute should provide that, in the absence of any clear, express statutory statement to the contrary, contraventions for which a civil penalty may be imposed may contain fault ele-

'to render some criminal prosecutions virtually impossible due to confusion surrounding the fault element'. Bird too criticised Pt 9.4B on the basis, in part, that 'neither Pt 9.4B nor s 232(2) particularises the mental elements required for contravention *per se*, for either a civil, civil penalty or criminal proceeding': H Bird, 'The Problematic Nature of Civil Penalties in the Corporations Law' (1996) 14 *Company and Securities Law Journal* 405, 415. Yeung indicated in her submission 'complete agreement with the caution expressed in that paragraph': K Yeung, *Submission CAP 20*, 9 October 2002

85 See further discussion in ch10 and 11.

86 F Zimring, 'The Multiple Middlegrounds Between Civil and Criminal Law' (1992) 101 *Yale Law Journal* 1901, 1905.

87 *Trade Practices Act 1974* (Cth), s 45.

ments as defined under the *Criminal Code* or as specified in a law that creates a particular contravention.

Recommendation 4–2. The Regulatory Contraventions statute should provide that, in the absence of any clear, express statutory statement to the contrary, if no fault element is specified, a contravention for which a civil penalty may be imposed does not contain a fault element.

Recommendation 4–3. Where the same physical elements can attract either a civil penalty or criminal liability, any fault elements for the civil contravention, should be clearly distinguished from those for the criminal offence.

Infringement notices and fault

4.71 As discussed in chapter 2, infringement notice schemes are typically used for low-level offences and where a high volume of uncontested contraventions is likely. Infringement notice schemes are discussed in detail in chapter 12 of this Report.

4.72 The Senate Standing Committee for the Scrutiny of Bills' report on strict and absolute liability noted the Attorney-General's Department guidelines that infringement notices are acceptable 'where the physical elements of an offence are clear cut'.[88]

4.73 As discussed in chapter 12, the ALRC agrees with the Attorney-General's Department guidelines that infringement notices are acceptable for:

- relatively minor offences;
- offences with a high volume of contraventions;
- where a penalty must be imposed immediately to be effective;
- where only strict or absolute liability offences are involved.

4.74 The Senate report also said that

> strict liability offences should be designed to avoid the likelihood that those affected, particularly by the issue of an infringement notice, will pay the lower penalty simply because it is easy and convenient to do so, rather than spend the money and time to pursue what might be a legitimate defence; any agency which encouraged this tendency would be acting improperly;[89]

4.75 This approach is consistent with the ALRC's approach discussed fully in chapter 12.

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88 Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002), AGPS, 260.

89 Ibid, 288

Defences and civil penalty contraventions

4.76 As discussed above, under the *Criminal Code*, strict liability offences permit the *Proudman v Dayman*[90] defence of reasonable mistake of fact.[91] Absolute liability offences do not permit this defence[92] although reasonable mistake may go to mitigation. However, absolute liability offences still do have available other defences under the Code.[93] These defences include involuntariness,[94] act of a stranger[95] and duress.[96]

4.77 While the position has been codified for criminal offences, there is less clarity with non-criminal contraventions because there is no equivalent code or general statute. Most non-criminal contraventions act like strict or even absolute liability criminal offences.

4.78 The Report by the Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, stated that:

> - the general defence of mistake of fact with its lower evidentiary burden is a substantial safeguard for those affected by strict liability;
>
> - the *Criminal Code* should continue to expressly provide that strict or absolute liability does not make any other defence unavailable …[97]

4.79 Some legislation spells out specific defences for contraventions leading to a civil penalty. For example, s 85(6) of the TPA[98] provides a defence in circumstances where a person has acted 'honestly and reasonably'. Similarly, s 1317S of the *Corporations Act* provides for the court to relieve a person wholly or partly for liability in relation to a contravention for a civil penalty provision if the person 'has acted honestly and having regard to all the circumstances of the case … the person ought fairly to be excused for the contravention'.

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90 *Proudman v Dayman* (1941) 67 CLR 536.

91 *Criminal Code* , s 6.1

92 See also ibid, s 6.2. However, s 606(5) of the *Corporations Act 2001* (Cth), which deals with the prohibition on certain acquisitions of relevant interests in voting shares, permits a defence of 'inadvertence or mistake' although s 606(4A) indicates that an offence based on s 606(1), (2) or (4) is an absolute liability offence.

93 *Criminal Code,* s 6.2(3).

94 Ibid, s 4.2.

95 Ibid, s 10.1.

96 Ibid, s10.2.

97 Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002), AGPS, 283–284.

98 *Trade Practices Act 1974* (Cth), s 86(6) '[w]here, in any proceedings under this Part against a person other than a body corporate, it appears to the Court that the person has or may have engaged in conduct in contravention of a provision of Part IV or in conduct referred to in paragraph 76(1)(b), (c), (d), (e) or (f) but that the person acted honestly and reasonably and, having regard to all the circumstances of the case, ought fairly to be excused, the Court may relieve the person either wholly or partly from liability to any penalty or damages on such terms as the Court thinks fit'.

4.80 Proposal 18–2 of DP 65 recommended that general defences should be available for non-criminal regulatory contraventions that consist of a physical element only. In particular, it suggested a defence of 'reasonable mistake' should be available unless specifically excluded by clear, express statutory statement.

Consultations and submissions

4.81 Leader-Elliott supported a defence of 'reasonable mistake' and suggested that it be amalgamated with 'intervening event' into a 'due diligence' defence, discussed below. Leader-Elliott also suggested that a number of other general defences found in the *Criminal Code* would be relevant, including those in s 9.3 and 9.4 (mistake or ignorance of statute or subordinate law); s 10.2 (duress); s 10.3 (extraordinary emergency) and s 10.5 (lawful authority).[99]

4.82 Environment Australia suggested there was a need for further consultation with regulators about the defences that should generally be available. While it had little difficulty with a defence such as duress, it said the defence of 'reasonable mistake' is 'more problematic where no mental element is required'.[100]

4.83 Question 17–1 in DP 65 asked whether, if there was a need for clarification of the defences available for contraventions, a regulatory code was the best way to achieve this. Environment Australia considered that the use of a code was the best way to achieve consistency, provided there was also the ability for departure in specific legislation.[101]

A 'due diligence' defence

4.84 One of the issues for the ALRC in this area was whether to propose a general due diligence defence or to include due diligence as one of the factors to be considered when assessing a penalty.

4.85 As noted above, Leader-Elliott suggested that a Regulatory Contraventions Statute[102] should provide for a defence of 'due diligence' unless specifically excluded.[103] He suggested that this be a defence in place of 'mistake of fact' and 'intervening conduct or event', defences that are found in the *Criminal Code.*

4.86 Under his proposal, the evidentiary burden of a due diligence defence would need to be established by the defendant. Lack of due diligence would be the threshold of liability, rather than recklessness, which is the threshold under the *Criminal Code*, with the corollary that there would be no strict liability contraventions unless the due

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99 I Leader-Elliott, *Submission CAP 11*, 30 August 2002.
100 Environment Australia, *Submission CAP 26*, 24 October 2002.
101 Ibid.
102 Leader-Elliott prefers the name 'Violations Code': I Leader-Elliott, *Submission CAP 11*, 30 August 2002.
103 Ibid.

diligence defence was specifically excluded. Inability to establish the defence would establish the presumptive liability.

4.87 The effect of having a due diligence defence would mean that for absolute liability contraventions, the defences available would be more limited than under the *Criminal Code*, since intervening event would not be available.

4.88 There was support too for a due diligence defence by some members of the Advisory Committee to this reference.[104]

Conclusion

4.89 The ALRC believes there is merit in a Regulatory Contraventions Statute adopting, as far as relevant, mirror provisions to the *Criminal Code* at least until there has been more time to assess the operation of the Code. Therefore the ALRC is not recommending, at this time, the inclusion of a 'due diligence' defence into any general statute, although it may be appropriate in specific legislation[105] and the ALRC does not argue against such inclusion. Indeed the ALRC suggests such a defence will be appropriate in relation to complex regulatory schemes. It may also be appropriate in relation to some civil penalty provisions where liability is attributed from an individual to a corporation. See discussion in chapter 7.

4.90 The Senate Standing Committee Report on Absolute and Strict Liability suggested that

> strict liability should not be implemented for legislative or administrative schemes which are so complex and detailed that breaches are virtually guaranteed regardless of the skill, care and diligence of those affected; any such scheme would be deficient from the viewpoint of sound public administration.[106]

4.91 If the ALRC's recommendations on fault, discussed above, are followed, proof of the physical element alone would generally be sufficient to establish liability for a civil penalty, except for those contraventions where a fault element was stated. This could lead to liability where there is a complex and detailed legislative scheme even if skill, care and diligence was exercised. In such regimes, fairness would dictate that there be available a due diligence defence.

4.92 The ALRC believes there will be some contraventions, however, where it would not necessarily be appropriate to have a due diligence defence. Such contraventions are likely to be those where significant harm has been caused to others. In particular, if the relevant legislation also provides for the payment of compensation as a

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104 Advisory Committee members, *Advisory Committee meeting*, 17 October 2002.
105 An example if a due diligence defence is found, for example, in *Customs Act 1901* (Cth), s 33(4).
106 Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002), AGPS, 286.

result of a breach, then it will be important to be able to establish the breach.[107] Some of the offences under the EPBC Act, for example, are criminal offences if the relevant fault elements are established, but civil penalty provisions for the same physical elements, without a fault element. Arguably, it is appropriate that Parliament chooses to make a person liable for a serious breach of the law that causes damage to the environment whether or not they exercised due diligence. However, a court should take into account any exercise of due diligence when it assesses the penalty. This is discussed further in chapters 7, 29 and 30.

4.93 This conclusion on the non-availability of a due diligence defence in the Regulatory Contraventions Statute means that the general statute would differ from the approach in the *Criminal Code* where, under s 12.3(3), there is a defence of due diligence in relation to attributing to a body corporate intention, knowledge or recklessness in relation to a physical element. This is discussed in more detail in chapter 7.

4.94 The ALRC notes Environment Australia's reservations about 'reasonable mistake'. Consistently with the criminal law's approach to strict liability, this defence ought to be available, where appropriate, for civil contraventions. However, the ALRC does not assert that it will always be appropriate, merely that when it is not to be available, it should be expressly excluded, by stating for example, that 'this is an absolute liability contravention'.

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107 As discussed in ch 2, the ALRC's database exercise identified some 50 provisions where the option of compensation orders for third parties is available in those circumstances where the offence includes some element of unlawful profit-making at another's expense or causes loss or damage to another.

5. Overview of Federal Regulators

Contents

Introduction

5.1 Australian federal regulation provides for civil and administrative penalties in areas as diverse as taxation, social security, trade practices, the provision of financial services, corporations law, the regulation of food technology, insurance, broadcasting, Customs, immigration, and the licensing of nursing homes, airlines, navigation, and fishing. The regulatory entities in federal jurisdiction include large and small or single activity agencies as well as government departments.

5.2 Regulators vary widely in their functions and activities depending upon their statutory powers and the nature of the industry or community being regulated. Many agencies have multiple discretionary functions, such as adjudicating issues between parties; rule making, standard setting and policy formation; and exercising expert, professional or technical judgments.[1] The roles and functions of federal regulatory bodies are often closely aligned and overlap. Frequently memorandums of understanding exist between agencies which delineate lines of responsibility and methods of cooperation between the bodies.

5.3 This chapter provides an overview of the main areas of regulation and the main regulators at federal level in Australia. The principal regulators derive their powers from explicit government legislation — often referred to as 'black letter law'. As discussed in chapter 4 of DP 65, there is a vast array of other regulatory arrangements that involve lesser degrees of government intervention.[2]

5.4 Some regulators function largely autonomously, managing the full regulatory process from compliance activities through investigation of suspected contraventions to conducting court or administrative proceedings seeking penalties for contraventions. Other regulators are less self-contained, making use of private contractors (see discussion in chapter 22) to perform some regulatory functions or the DPP to prosecute offences (see chapter 9). Many federal regulators also have responsibilities to administer, or cooperate in the enforcement of, international regulation.

5.5 Important factors dictating an agency's approach to enforcement are its workload and resources. Crucial factors in individual cases are the strength of the evidence of a contravention and the likelihood of enforcement success.[3] Important considerations may also be the public interest, political and policy concerns; the influence of

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1 R Baldwin and K Hawkins, 'Discretionary Justice: Davis Reconsidered' (1984) *Public Law* 570, 590.

2 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, ch 4.

3 Measured, for example, as the likely prospect of criminal conviction or a civil or administrative penalty being imposed or, more broadly, as the likelihood of preventing on-going breaches or securing future compliance.

personalities, cultural and institutional attitudes; the conservatism of the courts or the lack of precedent. Often a combination of factors will be decisive — for example, a disproportion between effort, time, money and results will discourage enforcement.[4] Regulators operating in a field of regulation that attracts a high level of public interest may be subject to a greater degree of political and public pressure in their enforcement decisions.[5]

5.6 Regulators such as the ACCC, ASIC and APRA regulate a wide range of individuals and entities that are engaged in diverse fields of marketplace activity. Other regulators supervise particular industries or activities and have a narrower compass of regulatory functions. Regulators such as CASA, the ABA and the Aged and Community Care Division (ACCD) of the Department of Health & Ageing (DOHA) function as single-industry regulators, essentially regulating by way of licensing regimes. Some regulators are responsible for a single activity across a wide range of industries. The Australian Transaction Reports and Analysis Centre (AUSTRAC) is an example of a single-activity regulator. The following summary of the main areas of federal regulation and the principal federal penalty schemes illustrates this diversity.[6] This summary is of necessity somewhat selective and is not intended to be entirely comprehensive.

Marketplace

5.7 The Australian marketplace underwent considerable change in the 1990s as the result of recommendations of the Financial System Inquiry (Wallis Inquiry)[7] and the Corporate Law Economic Reform Program (CLERP). The Wallis Inquiry recommended a new regulatory structure based along functional lines rather than institutional lines.[8] This resulted in the establishment of ASIC (from the former Australian Securities Commission) as the market integrity regulator, and the establishment of APRA with the single responsibility of prudential regulation of deposit-taking institutions. The ACCC continued to administer laws to prevent anti-competitive behaviour. In addition to these main regulators, other regulators such as the Australian Stock Exchange Limited (ASX) and AUSTRAC have discrete and complementary functions within the broad areas of marketplace regulation.

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4 R Tomasic and B Pentony, 'The Prosecution of Insider Trading: Obstacles to Enforcement' (1989) 22 *Australian & New Zealand Journal of Criminology* 65, 73.

5 A Ashworth, *The Criminal Process — An Evaluative Study* (2nd ed, 1998) Oxford University Press, 145. See also ch 10 in this Report.

6 The enforcement approach taken by many of these regulators in relation to penalties is described in greater detail in ch 10 of this Report.

7 Treasury, *Financial System Inquiry Final Report: March 1997* (1997), Commonwealth of Australia, Canberra.

8 J Carmichael, *The Australian Model of Integrated Regulation*, <www.apra.gov.au/speeches/iosco.htm>, 4 September 2001, 8.

Competition and consumer protection: Australian Competition and Consumer Commission (ACCC)

5.8 The ACCC is the federal regulatory agency concerned with competition and consumer protection.[9] The ACCC's objectives are to prevent anti-competitive conduct; provide appropriate safeguards for consumers in their dealings with producers and sellers; promote competitive pricing; improve competition and efficiency in markets; foster adherence to fair trading practices in well informed markets; restrain price rises in markets where competition is not effective; and foster a fair and competitive operating environment for small business.[10]

5.9 The ACCC is responsible for securing compliance with the *Trade Practices Act 1974* (Cth) (TPA) and complementary state and territory legislation 'by means of persuasion, education and litigation'.[11] The objective of the TPA is to enhance the welfare of Australians through the promotion of competition and fair trading and by providing for consumer protection. Those parts of the TPA administered by the ACCC, cover anti-competitive and unfair market practices, mergers or acquisitions of companies, and product safety and liability. At present, the competition provisions contained in Part IV of the TPA are under review. The Dawson Committee, established in May 2002 to undertake a review of the TPA, was due to report by November 2002.[12]

5.10 The scope and nature of the ACCC's functions and powers vary significantly under the various parts of the TPA. For example, while civil pecuniary penalties are used to enforce compliance with prohibitions on restrictive trade practices (Part IV), the consumer protection provisions of Part VC are the subject of criminal sanctions. Enforceable undertakings are available to encourage compliance. The penalty regime is backed up by the creation of a wide range of private rights of action, such as actions for damages under s 82. Accordingly, the ACCC has published a range of guidelines and other material which summarises the law and the ACCC's practices in particular areas.[13]

5.11 The ACCC also administers the *Prices Surveillance Act 1983* (Cth) (PSA) and other legislation. The PSA enables the ACCC to examine the prices of selected goods and services so as to promote competitive pricing and restrain price rises in less competitive markets. Other legislation gives the ACCC responsibilities in areas such as

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9 State fair trading laws substantially mirror the TPA and are administered by state agencies such as the NSW Department of Fair Trading and Consumer and Business Affairs Victoria.

10 Australian Competition & Consumer Commission, *ACCC Annual Report 2001–2002*, <www.accc.gov.au/fs-pubs.htm>, 11 November 2002, 10.

11 Australian Competition & Consumer Commission, *Making Markets Work — Directions and Priorities* (1999), ACCC Publishing Unit, Canberra, 4.

12 See http://tpareview.treasury.gov.au/content/home.asp. At the time of writing the Dawson Committee had been granted a two month extension and is due to report in January 2003: The Hon Peter Costello MP (Treasurer of the Commonwealth of Australia), *Media Release: Report of the Review of the Trade Practices Act*, <www.treasurer.gov.au/tsr/content/pressreleases/2002/067.asp>, 12 November 2002.

13 For example, Australian Competition & Consumer Commission, *Collection and Use of Information* (2000), ACCC Publishing Unit, Canberra, 2.

broadcasting services, telecommunications, trade marks, and access to essential services such as airport services and natural gas pipeline systems.[14]

5.12 The ACCC has stated that its priorities for 2002–2003 include the following:

- To pursue hard core collusive activities such as price fixing, market sharing and primary boycotts;
- To pursue misleading and deceptive behaviour, especially blatant breaches of the law and conduct which results in significant consumer detriment;
- To examine mergers that increase consolidation in already concentrated industries; and
- To introduce greater transparency and better inform consumers through price monitoring in areas of particular concern such as fuel and insurance.[15]

5.13 The ACCC uses various strategies to ensure that individuals and businesses comply with the laws that it administers, including taking court action, education, administrative settlements, promotion of self-regulation, compliance programs and granting immunity from the law when anti-competitive behaviour is found to deliver public benefits.[16]

5.14 Much of the ACCC's work is non-discretionary, such as responses to significant apparent contraventions of the law and major mergers, applications for authorisation, referrals from other regulators and access undertakings.[17] Where it does have discretion, it is necessarily selective in the matters it chooses to pursue given the large number of complaints it receives.[18] When deciding which matters to pursue, the ACCC takes into account a number of factors including whether the matter involves blatant disregard of the law, significant public detriment, a history of previous contraventions, the likely educative or deterrent effect of action, and whether the matter involves new market issues or a need to test the reach of the TPA.[19]

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14 Australian Competition & Consumer Commission, *ACCC Annual Report 2001–2002*, <www.accc.gov.au/fs-pubs.htm>, 11 November 2002, 12.

15 Australian Competition & Consumer Commission, *Corporate Plan and Priorities 2002/03*, ACCC, <www.accc.gov.au/fs-pubs.htm>, 22 November 2002, 11.

16 Ibid, 6. The ACCC also has a special focus on the conduct of the small business sector and has stated that it is particularly interested in pursuing allegations of unconscionable conduct affecting this sector: Australian Competition & Consumer Commission, *Corporate Plan and Priorities 2002/03*, ACCC, <www.accc.gov.au/fs-pubs.htm>, 22 November 2002, 4.

17 Australian Competition & Consumer Commission, *Making Markets Work — Directions and Priorities* (1999), ACCC Publishing Unit, Canberra, 32.

18 During 2001–02, the ACCC received a total of 57,120 inquiries and complaints, 297 of which were GST-related. During that period the ACCC pursued 3600 non GST-related matters: Australian Competition & Consumer Commission, *ACCC Annual Report 2001–2002*, <www.accc.gov.au/fs-pubs.htm>, 11 November 2002, 186.

19 Australian Competition & Consumer Commission, *ACCC Working in New South Wales, 1999–2000 Report* (2000), ACCC Publishing Unit, Canberra, 2.

5.15 The majority of the ACCC's investigations arise from complaints made by consumers, businesses and associations.[20] The ACCC obtains information through voluntary production and through the use of coercive powers. It has powers to require information, documents and evidence.[21] While the ACCC prefers to receive information voluntarily, it may use its coercive powers in certain situations, such as when voluntary disclosure with conditions attached could constrain the ACCC.[22]

5.16 The ACCC makes extensive use of publicity in respect of its enforcement and other roles, believing that given the public interest nature of its work it is important that accurate and reliable information be made available to the media.[23] The use of publicity is discussed further in chapter 16.

5.17 The TPA provides for administrative, criminal and civil penalties. Remedies that may be sought by the ACCC in the event of a contravention of the TPA include injunctions, declarations, pecuniary penalties for contravention of Part IV, fines for contraventions of Part VC, community service and probation orders, corrective advertising and compensation and refund orders.

Market conduct in the financial sector: Australian Securities and Investments Commission (ASIC)

5.18 ASIC is an independent Commonwealth government body that regulates the financial system including the securities and futures industries.[24] It has prime responsibility for consumer protection in the financial system. It regulates advising, selling and disclosure in relation to financial products and services, and aims to protect markets and consumers from manipulation, deception and unfair practices. Since 2002, ASIC has been responsible for consumer protection in the area of credit.[25] ASIC enforces the rights of investors and consumers who deal with the market, warns them of risks and takes action to improve standards of behaviour across the financial sector.[26]

5.19 The *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) sets out the objectives of ASIC which include maintaining, facilitating and improving the performance of the financial system; promoting the confident and informed participation of investors and consumers in the financial system; receiving and processing information and, where necessary, disseminating information as quickly as possible

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20 Ibid, 1.
21 *Trade Practices Act 1974* (Cth), s 155.
22 Australian Competition & Consumer Commission *Collection and Use of Information* (2000), ACCC Publishing Unit, Canberra, 6.
23 S Bhojani, 'Principles of Fairness and Accountability' (Paper presented at Penalties; Policy, Principles & Practice in Government Regulation, 8 June 2001), 6. *Trade Practices Act 1974* (Cth), s 28 supports the ACCC's practice of issuing press releases in respect of its enforcement activities.
24 P Lipton and A Herzberg, *Understanding Company Law* (10th ed, 2001) Law Book Co, Sydney, 16.
25 Australian Securities & Investments Commission, *Annual Report 2001–2002*, Australian Securities & Investments Commission, 2 and 12.
26 Ibid, 12.

to the public; and enforcing and giving effect to the laws that confer functions and powers on it.[27]

5.20 ASIC administers the *Corporations Act 2001* (Cth). The *Corporations Act* and related legislation came into effect on 15 July 2001. The *Corporations Act* replaced the old *Corporations Law* scheme, in which the High Court had identified a number of constitutional problems.[28] The new legislation essentially re-enacted the old state-based scheme as one federal Act.

5.21 The *Corporations Act* covers a wide range of matters including companies' regulation, securities regulation, winding up, takeovers, futures and managed investments, and provides for administrative, civil and criminal penalties and remedies.

5.22 Organisations and people regulated by ASIC include superannuation funds, life and general insurance companies, banks, credit unions, building societies, friendly societies, investment advisers, insurance agents and brokers, the Australian Stock Exchange Ltd (ASX) and Sydney Futures Exchange, managed investments, companies, company auditors and liquidators.[29]

5.23 The ASIC Act gives ASIC a wide range of investigative and information-gathering powers where it has reason to suspect that a contravention of laws it administers may have been committed. ASIC has powers to undertake formal investigations, conduct oral examinations, obtain records, hold hearings and conduct examinations. Public complaints and auditors' reports about alleged misconduct made to ASIC are crucial sources of information about possible contraventions of the law.[30] Additionally, ASIC may obtain information from other agencies such as the ASX, the Futures Exchange, ATO, AUSTRAC and other bodies including the National Crime Authority (NCA), federal and state police forces, crime commissions and the Australian Bureau of Criminal Intelligence.[31]

5.24 As described in its own material, ASIC undertakes its enforcement responsibilities by use of civil and administrative remedies and instigation of criminal proceedings. It seeks to use the right regulatory tool to achieve the best outcome. Education and consumer alerts are considered to be more effective in some instances to prevent contraventions of regulation than civil or criminal proceedings.[32] ASIC's priority is to protect the interests of consumers and investors as quickly and as effectively as possi-

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27 *Australian Securities and Investments Commission Act 2001* (Cth), s 1(2). See discussion of legislative statements of objectives in ch 10.

28 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511

29 Australian Securities & Investments Commission, *Annual Report 2001–2002*, Australian Securities & Investments Commission, 13.

30 In the period 2001-2002 ASIC received a total of 7,827 public complaints, 2.0% of which were investigated, and 2,942 complaints through statutory reports from external administrators and auditors, 0.3% of which were investigated: ibid, 59.

31 See Butterworths, *Australian Corporations Law* (Looseleaf) Butterworths vol 3, para 15.1.0025 for details of the legislative bases for exchanges of information.

32 J Segal, 'ASIC Issues: An Update on the Last 12 Months' (Paper presented at Insurance Council of Australia, 10 August 2000), 6.

ble. To achieve this end ASIC makes increasing use of its administrative remedies, such as enforceable undertakings, licensing powers and banning orders in place of civil action where the same outcome can be achieved more quickly.[33] However, ASIC says that it will take 'strong and decisive action to enforce the law' when necessary.[34]

5.25 ASIC has power to seek a wide range of civil remedies designed to either prevent or contain damage to corporate or individual assets caused by suspected wrongdoing (preservative actions), assist in the return of assets or to obtain damages (recovery actions), remedy contraventions and otherwise protect the public from further detriment (remedial and protective actions). Further expansion of the civil penalty regime to market misconduct and continuous disclosure matters has occurred under the *Financial Services Reform Act 2001* (Cth).[35] Contraventions of the market misconduct and continuous disclosure provisions are subject to both civil penalties and criminal consequences. The availability of civil penalties for breaches of continuous disclosure requirements is of particular importance because of the need for timely outcomes to rectify harm caused to the market and its participants by the withholding of price-sensitive information.[36]

5.26 Despite the availability of civil penalties, in the past these have not been frequently pursued by ASIC. A study by the Centre for Corporate Law and Securities Regulation observed that ASIC had commenced only 14 civil penalty applications relating to 10 case situations between 1993 and 1999.[37] A more recent study has shown that between September 1998 and December 2001, ASIC took civil penalty action against 30 people in 12 case situations.[38] Consultations with ASIC officers have indicated that civil penalties are not always suitable as ASIC is often dealing with a company in liquidation and directors who may be bankrupt.[39] See discussion in chapter 32 at para 32.76 concerning the difficulties in obtaining meaningful penalties where both the corporation and the directors are insolvent.

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33 Ibid, 6.

34 Ibid, 6.

35 Commenced 11 March 2002: Minister for Financial Services & Regulation, *Press Release; FSR Bill Start Date*, Department of Financial Services and Regulation, <www.minfsr.treasury.gov.au/content/pressreleases/2001/068.asp>, 21 September 2001.

36 J Segal, 'Comments on Paper by D Valentine "Regulating in a High-Tech Marketplace — The Import for Remedies"' (Paper presented at Penalties; Policy, Principles & Practice in Government Regulation, Sydney, 2. An infringement notice scheme for breaches of continuous disclosure obligations was announced as part of the CLERP 9 proposals: Treasury, *CLERP 9: Corporate Disclosure — Strengthening the financial reporting framework*, <www.treasury.gov.au/contentitem.asp?pageId=&ContentID=403>, 18 September 2002. These proposals are discussed in detail in ch 12.

37 G Gilligan, H Bird and I Ramsay, *Regulating Directors' Duties — How Effective are the Civil Penalty Sanctions in the Australian Corporations Law?* (1999), Centre for Corporate Law and Securities Regulation, Melbourne, 23.

38 A Hepworth, 'ASIC's Use of Civil Penalties Rises', *Australian Financial Review*, 21 January 2002, 5, reporting a study undertaken by Professor Ian Ramsay from the Centre for Corporate Law and Securities at the University of Melbourne. A detailed report of the study was reported in G Moodie and I Ramsay, 'The Expansion of Civil Penalties under the Corporations Act' (2002) 30 *Australian Business Law Review* 61.

39 M Gething, *Consultation*, Sydney, 12 June 2001.

5.27 All indictable criminal matters are prosecuted by the Commonwealth DPP. The relationship between ASIC and the DPP, in terms of determining when a criminal penalty is to be sought, is discussed in chapter 9.

Australian financial markets

5.28 ASIC has certain responsibilities in relation to the ASX, Sydney Futures Exchange and other financial markets authorised by the Minister,[40] including investigating and acting against misconduct by listed companies, brokers and traders, advising the Minister about rule changes and whether to approve new markets, and monitoring the activities of the ASX as a listed company.[41] ASIC has specific functions and powers under the *Corporations Act*[42] to oversee the performance of market supervision by licensed Australian markets.[43] ASIC has memorandums of understanding with the exchanges, including the ASX, that set out their respective supervisory roles and cover matters such as exchange of information with ASIC, and procedures and requirements governing the referral of matters to ASIC.[44]

5.29 Sections 795A to 795E of the *Corporations Act* set out the circumstances in which an applicant may be granted an Australian market license. In order to obtain a licence, the Minister must be satisfied that the financial market has adequate operating rules and procedures,[45] and that it will comply with the obligations that will apply if the licence is granted.[46] The market licensee must also, to the extent that it is reasonably practicable to do so, do all things necessary to ensure that the market is fair, orderly and transparent.[47]

Australian Stock Exchange Ltd (ASX)

5.30 The ASX is Australia's most significant financial market. The role of the ASX has been described as being 'to provide and maintain a fair, efficient, well-informed and internationally competitive market for trading securities, so as to secure the confidence of investors and companies in the conduct of the market'.[48]

5.31 The ASX's supervision activities include the surveillance of trading activity to detect any unusual trading behaviour, indications of insider trading or market manipulation.

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40 'Financial market' is defined in *Corporations Act 2001 (Cth)*, s 767A.

41 Australian Securities & Investments Commission, *Annual Report 2001–2002*, Australian Securities & Investments Commission, 13.

42 These include powers to review compliance reports submitted by exchanges (s 794C), suspend trading over securities (s 794D), consider changes to market operators' rules (s 793D and 793E), and apply to a court to order compliance with the business or listing rules of an exchange (s 793C).

43 Treasury, *Submission to Senate Economics References Committee Inquiry into the Framework for the Market Supervision of Australia's Stock Exchanges* (2001), Treasury, Canberra, 3.

44 Ibid, 4.

45 *Corporations Act 2001* (Cth), s 795B(1)(c).

46 Ibid, s 795B(1)(b).

47 Ibid, s 792A(a).

48 ASX Discussion Paper 'The Role of the Australian Stock Exchange and its Listing Rules' reported in Butterworths, *Australian Corporations Law* (Looseleaf) Butterworths, vol 2, [7.1.0200].

5.32 The ASX sets standards for listed entities through Listing Rules and supervises compliance with them. The ASX also sets and supervises Business Rules, which regulate how trading takes place, and covers areas such as how clients must be treated, and how a broker must behave in order to maintain the integrity of the marketplace. In the course of an investigation, ASX officers may interview brokers, inspect their records and examine the behaviour of brokers and their compliance with the rules. If the evidence suggests a breach of Business Rules, the matter may be referred to the National Adjudicatory Tribunal (NAT), a disciplinary panel comprising industry specialists, established by the Business Rules.[49] The NAT can impose penalties including censure, suspension, repayment of profit and commission, completion of education and compliance programs, and fines of up to $250,000.[50] Decisions of the NAT can be appealed to an Appeal Tribunal.[51]

5.33 The ASX may work with ASIC to examine matters warranting investigation. The *Corporations Act* requires the ASX to provide assistance to ASIC and to report certain matters to it.[52] The ASX and ASIC have entered into memorandums of understanding which define their respective roles and their dealings with each other.

Prudential behaviour in the financial sector: Australian Prudential Regulation Authority (APRA)

5.34 APRA was established in 1998. Its single responsibility is the prudential regulation of banks, credit unions, building societies, life and general insurance companies, friendly societies and superannuation funds.[53] APRA was established following recommendations by the Wallis Inquiry that a single prudential regulator be set up for the financial services sector. It brought together the prudential supervisory responsibilities of 11 separate agencies.[54] APRA's objectives derive from the *Australian Prudential Regulation Authority Act 1998* (Cth) (APRA Act) and various other laws, such as the *Banking Act 1959* (Cth) and the *Superannuation Industry (Supervision) Act 1993* (Cth), that relate to specific industry sectors.[55]

5.35 APRA's stated mission is to 'establish and enforce prudential standards and practices designed to ensure that, under all reasonable circumstances, financial prom-

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49 Rule 14.2.

50 Australian Stock Exchange, *Supervision of Brokers*, Australian Stock Exchange, <www.asx.com.au>, 27 September 2001.

51 Rule 14.2.2(1)(a).

52 *Corporations Act 2001* (Cth), s 792D, 792B.

53 APRA regulates the compliance of superannuation funds with the prudential regulation and retirement income provisions of the *Superannuation Industry (Supervision) Act 1993* (Cth), while ASIC has responsibility for the other provisions. Legislation to transfer the regulation of excluded funds (which have less than five members) from APRA to the Australian Tax Office was passed in October 1999: Council of Financial Regulators, *Annual Report 2001* (2001), Reserve Bank of Australia, 7.

54 House of Representatives Standing Committee on Economics Finance and Public Administration, *Review of the Australian Prudential Regulation Authority; Who Will Guard the Guardians?* (2000), Commonwealth of Australia, Canberra, 5.

55 Australian Prudential Regulation Authority, *What We Do — APRA's Objectives and Funding*, Australian Prudential Regulation Authority, <www.apra.gov.au/aboutApra/>, 25 September 2001.

ises made by institutions we supervise are met within a stable, efficient and competitive financial system'.[56] The APRA Act requires APRA to 'balance the objectives of financial safety and efficiency, competition, contestability and competitive neutrality'.[57] APRA has stated that its two main functions are to promote the soundness of financial institutions by requiring them to observe minimum standards of prudent business behaviour, and to help manage the situation of financial institutions in difficulty. APRA's ultimate responsibility and accountability is to the policyholders or depositors, not to the financial institution itself.[58]

5.36 In addition to its functions and powers set out in the APRA Act, APRA is responsible for administering legislation in respect of authorised deposit-taking institutions (which include banks, building societies and credit unions),[59] insurance[60] and superannuation.[61] APRA is responsible for the supervision of 12,091 institutions, 11,402 of which are superannuation entities.[62]

5.37 With the integration of 11 Commonwealth and state agencies into APRA in 1998 and 1999,[63] APRA inherited a range of industry-based regulatory systems. The approaches to prudential regulation of different financial institutions and entities had evolved along different paths. This reflected the varied activities of the respective sectors, and also divergent supervisory philosophies.[64] APRA's stated policy goal is a three tiered framework for the prudential supervision of financial institutions and entities, involving generic legislation setting out broad objectives, flexible prudential standards in plain English and guidelines amplifying the standards.[65] This has involved reform of prudential supervision of general insurance, harmonisation of prudential standards and guidelines covering authorised deposit-taking institutions, strengthened

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56 Ibid.

57 *Australian Prudential Regulation Authority Act 1998* (Cth), s 8.

58 G Thompson, *The Prudential Regulator of the Future*, Australian Prudential Regulation Authority, <www.apra.gov.au/Speeches/00_02.htm>, 14 August 2001.

59 *Banking Act 1959* (Cth), *Financial Sector (Shareholdings) Act 1998* (Cth) and *Financial Sector (Transfers of Business) Act 1999* (Cth).

60 *Insurance Act 1973* (Cth), *Life Insurance Act 1995* (Cth) and regulations, *Insurance (Agents and Brokers) Act 1984* (Cth) and regulations, *Insurance Contracts Act 1984* (Cth) and regulations, and *Insurance Acquisitions and Takeovers Act 1991* (Cth) and regulations.

61 *Financial Sector Legislation Amendment Act (No.1) 2000* (Cth), *Superannuation Industry (Supervision) Act 1993* (Cth) and regulations, and *Retirement Savings Accounts Act 1997* (Cth) and regulations.

62 Australian Prudential Regulation Authority, *Annual Report 2002*, Australian Prudential Regulation Authority, <www.apra.gov.au/AboutAPRA/Annual-Report-2002.cfm>, 29 October 2002, 16–17.

63 On 1 July 1998 APRA absorbed the supervision functions of the Insurance & Superannuation Commission and the Bank Supervision Department of the Reserve Bank. On 1 July 1999 it took over the supervisory responsibilities of the Australian Financial Institutions Commission and eight state authorities for credit unions, building societies and friendly societies: G Thompson, 'Talk to Biennial Conference of the National Council of the Trustee Corporations Association of Australia' (Paper presented at Biennial Conference of the National Council of the Trustee Corporations Association of Australia, 25 September 2001).

64 Australian Prudential Regulation Authority, *APRA's Policy Reform Program; Policy Information Paper*, Australian Prudential Regulation Authority, <www.apra.gov.au/media_releases/londer.cfm?url=/commonspot/security/getfile.cfm&pageid=566>, 4 September 2001, 2.

65 Australian Prudential Regulation Authority, *Annual Report 2000–2001* (2001), Commonwealth of Australia, Sydney, 17.

supervision of small and medium sized superannuation funds, conclusion of work on a new regulatory framework for financial conglomerates,[66] and work assisting on a revised international accord in capital adequacy for banks.[67]

5.38 APRA is a risk-based prudential regulator. That is, it is concerned with how financial institutions control the risks in their activities in order to maximise the likelihood that they will be able to honour their obligations to their depositors and shareholders.[68] APRA describes its supervisory practice as 'more rigorous and demanding than was previously applied to most industry groups'.[69] APRA accepts that in the development of a consistent supervisory approach across all financial institutions, the risk profile of an organisation, rather than its size, will determine APRA's supervisory program for that organisation.[70]

5.39 APRA's supervision of financial institutions involves on-site visits to examine issues such as asset quality, market and balance sheet risk and operational risk, regular discussions with entities to keep up to date with the latest business developments in the group, assessment of various prudential and statutory returns, review of risk management systems, off-site reviews, desk reviews,[71] and consultations with supervised entities and auditors. APRA reports that most of its discussions with organisations relate to suggested improvements in their risk management processes. Where issues that may threaten an institution's viability are identified, more intensive supervision occurs such as additional reporting requirements, monthly monitoring of performance, regular contact between APRA and the institution, and more frequent on-site visits.[72]

5.40 All deposit-taking institutions are regulated by APRA under the one licensing regime and are covered by the provisions of the *Banking Act*. This legislation gives APRA the power to act decisively in the interests of depositors, including the power to revoke licences, to make prudential standards or issue enforceable directions, to appoint an investigator or statutory manager to an authorised deposit-taking institution in difficulty, or take control of the institution itself. If the difficulties prove intractable, APRA has the power to wind-up the institution and distribute its assets.[73]

5.41 Where the financial weakness of a life insurance company, general insurer, friendly society or superannuation fund could have a detrimental effect on the interest

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66 Such as banking and traded market activities, life and general insurance, stockbroking, funds management and superannuation.

67 Australian Prudential Regulation Authority, *Annual Report 2002*, Australian Prudential Regulation Authority, <www.apra.gov.au/AboutAPRA/Annual-Report-2002.cfm>, 29 October 2002, 31.

68 House of Representatives Standing Committee on Economics Finance and Public Administration, *Review of the Australian Prudential Regulation Authority; Who Will Guard the Guardians?* (2000), Commonwealth of Australia, Canberra, 18.

69 G Thompson, 'Perils of the Prudential Regulator' (Paper presented at Investment and Financial Services Association Annual Conference, 2 August 2001).

70 Australian Prudential Regulation Authority, *Annual Report 2000–2001* (2001), Commonwealth of Australia, Sydney, 15-16.

71 A desk review involves analysis of the institution's latest annual return and any other information available to APRA. Unsatisfactory results of desk reviews give rise to on-site visits: ibid, 8.

72 Ibid, 11.

73 Council of Financial Regulators, *Annual Report 2000*, Reserve Bank of Australia, Sydney, 7.

of members and policyholders, APRA may intervene in the management of the troubled entity.[74]

5.42 APRA has close contact with other national regulatory bodies and has entered into memorandums of understanding with the Reserve Bank of Australia, ASIC, ATO and ACCC.[75] APRA is funded by levies paid by regulated financial institutions based on a percentage of assets held by the entity.[76]

Australian Transaction Reports and Analysis Centre (AUSTRAC)

5.43 AUSTRAC is a single-activity regulator. Its main role is as an intelligence-gathering agency.[77] Its mission is to make the financial environment hostile to money laundering, major crime and tax evasion. It oversees compliance with the reporting requirements of the *Financial Transaction Reports Act 1988* (Cth) (FTRA) by the gambling industry and a wide range of cash dealers including banks, credit unions, building societies, stockbrokers and other securities dealers, merchant banks, and trust managers. In its intelligence role AUSTRAC provides financial transaction reports information to Commonwealth and state law enforcement and revenue agencies. The FTRA gives AUSTRAC powers to inspect premises, to question and search, to take court action for injunctive remedies and to arrest without warrant. The FTRA requires cash dealers to verify the identity of persons who open accounts, and to report to AUSTRAC 'suspect transactions' and 'significant cash transactions'.[78] Cash dealers must also report all international funds transfer instructions.

5.44 All of the penalties under the FTRA are criminal. These include imprisonment from one to five years, and fines.[79]

Revenue

Australian Taxation Office (ATO)

5.45 The ATO is the Commonwealth's principal revenue collection agency. It administers the enforcement of more than 130 statutory penalties[80] in more than 20 federal statutes (excluding GST-related legislation). The main taxation legislation

74 Ibid, 8.
75 House of Representatives Standing Committee on Economics Finance and Public Administration, *Review of the Australian Prudential Regulation Authority; Who Will Guard the Guardians?* (2000), Commonwealth of Australia, Canberra, 8.
76 Ibid, 10.
77 Australian Transaction Reports and Analysis Centre, *Annual Report 2001–2002* (2002), Commonwealth of Australia, Canberra, 3.
78 *Financial Transactions Reports Act 1988* (Cth), s 15A and 16.
79 AUSTRAC's enforcement approach is outlined in ch 10.
80 Australian National Audit Office, *Administration of Tax Penalties*, Report 31 (2000), Australian Government Printing Service, Canberra, 25.

administered by the ATO includes the *Taxation Administration Act 1953* (Cth), *Income Tax Assessment Act 1936* (Cth) and the *Excise Act 1901* (Cth).[81]

5.46 Penalties under taxation laws are directed at individual taxpayers, business and corporations, and to entities that have obligations to withhold tax from salaries or to pay instalments of indirect tax. The ATO is structured into Business Service Lines (BSLs). Each BSL focuses on a major market segment, such as individuals, small business, large business, superannuation, goods and services tax, and excise.

5.47 In major tax legislation about 45% of penalties are administrative.[82] Common types of administrative penalties are monetary penalties or interest charges. Some monetary penalties are for set amounts; however, most are calculated as a percentage of tax avoided or paid late, and therefore have no set upper limit. The taxation laws use a system of cumulative penalties whereby a further penalty is imposed if the original penalty is not paid or where a requirement to comply has not been met. Where the original penalty is a criminal penalty, the cumulative penalty for failure to pay the penalty or comply with requirements is a maximum fine of $5,000 or imprisonment not exceeding 12 months, or both.[83] Where the original penalty is an administrative penalty, the cumulative penalty is often the General Interest Charge (GIC).[84]

5.48 Penalties are one of a number of tools used by the ATO to obtain taxpayer compliance. In 1998 the ATO adopted a compliance model which is intended to encourage voluntary compliance by taxpayers through education and the provision of efficient service delivery.[85] Where voluntary compliance is not obtained, there is an escalation of sanctions, which include penalties.[86] The ATO acknowledged that 'one size fits all' solutions were no longer appropriate and that different approaches were required to support those trying to do the right thing whilst targeting its toughest approaches to the hardened evaders.[87]

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81 Other legislation includes the *Fringe Benefits Tax Assessment Act 1986; Petroleum Resource Rent Tax Assessment Act 1992; Sales Tax Assessment Act 1992; Social Security (Administration) Act 1999; Social Security Act 1991; Superannuation (Resolution of Complaints) Act 1993; Superannuation (Self Managed Superannuation Funds) Taxation Act 1987; Superannuation (Unclaimed Money and Lost Members) Act 1999; Superannuation Act 1976; Superannuation Contributions Tax (Assessment and Collection) Act 1997; Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997; Superannuation Guarantee (Administration) Act 1992; Superannuation Industry (Supervision) Act 1993; Termination Payments Tax (Assessment and Collection) Act 1997; Tobacco Charges Assessment Act 1955;* and the *Wool Tax (Administration) Act 1964*.

82 These figures are based on the *Taxation Administration Act 1953*, *Income Tax Assessment Act 1936* and the *Excise Act 1901*.

83 *Taxation Administration Act 1953*, s 8H.

84 The General Interest Charge (GIC) was implemented by the *Taxation Laws Amendment Act (No.3) 1999,* and replaced the Late Payment Penalty Regime. It is calculated daily on a compounding basis.

85 Australian Taxation Office, *Improving Tax Compliance in the Cash Economy* (1998), Australian Taxation Office, Canberra, 20.

86 Australian National Audit Office, *Administration of Tax Penalties*, Report 31 (2000), Australian Government Printing Service, Canberra, 23.

87 Australian Taxation Office, *New Strategy to Tackle Cash Economy*, Australian Taxation Office, <www.ato.gov.au/content.asp?doc=/content/Corporate/mr9817.htm>, 20 September 2001.

5.49 The ATO has a Code of Settlement Practice, which provides guidelines on the settlement of taxation disputes and describes the legal basis for settlements under the Commissioner's general administrative powers.[88] The Code provides guidelines on a range of alternative dispute resolution approaches to settlement of taxation disputes in appropriate circumstances. The ATO's stated policy is that, wherever possible, agreement should be reached in respect of the substantive issues before officers consider penalties or interest.[89] The ATO will litigate in matters such as clear-cut contraventions of established and articulated ATO rulings, issues relating to tax avoidance schemes, and where it is in the public interest to have judicial clarification of an issue.[90] The Code is discussed further in chapter 16 in the section dealing with settlement guidelines.

5.50 The ATO's exercise of its statutory enforcement responsibilities is shaped by informal annual enforcement priorities influenced by policy considerations, legislative change and managing reform (for example, the imposition of the GST in 2000).

5.51 During 2001–02, the ATO reported the following areas as priorities or areas of focus: aggressive tax planning;[91] reducing the marketing of and participation in mass-marketed investment schemes;[92] dealing with promoters of tax avoidance schemes;[93] risk assessments of high wealth individuals;[94] targeting the cash economy;[95] and targeting phoenix companies who accumulate debt then go into liquidation to avoid payment.[96]

5.52 The ATO has developed a detailed Prosecution Policy that states the principles guiding the ATO's enforcement response,[97] although other documents are also relevant.[98] The Prosecution Policy is not legally binding.[99] It is underpinned by a belief in voluntary compliance and that 'prosecution is not seen as an end in itself' but rather as a means of encouraging or securing compliance.[100] Although the Prosecution Policy

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88 Australian Taxation Office, *Code of Settlement Practice in Respect of Taxation Liabilities*, Australian Taxation Office, <www.ato.gov.au/content.asp?doc=/content/Professionals/Code_Settlement.htm>, 24 May 2001.

89 Ibid, 5.1.

90 Ibid, ch 4.

91 Commissioner of Taxation, *Annual Report 2001–2002* (2002), Australian Taxation Office, 86.

92 Ibid, 89.

93 Ibid, 91.

94 Ibid, 95.

95 Ibid, 96.

96 Ibid, 98.

97 Australian Taxation Office, *ATO Prosecution Policy*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/index.htm>, 9 March 2001.

98 Including the Prosecution Policy of the Commonwealth; ATO Compliance Model; Taxpayers' Charter; DPP Tax Manual; Fraud Control Policy of the Commonwealth; Commonwealth Fraud Investigations Standards; Overarching Principles for Selecting Cases for Investigation and Administrative, Civil and Criminal Sanctions; Liaison Guidelines between the Director of Public Prosecutions and the ATO; Working Guidelines between the AFP and the ATO; Withdrawal Guidelines; and internal ATO documents concerning the referral of potential prosecution cases to prosecutions staff.

99 Australian Taxation Office, *ATO Prosecution Policy*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/index.htm>, 9 March 2001, para 1.9.

100 Ibid, para 2.3.5.

primarily relates to decisions about criminal proceedings, it acknowledges the need to consider a range of alternative responses to non-compliance, 'from help and education, to audits and/or prosecution'.[101]

5.53 A feature of taxation legislation is the discretion available to the Commissioner to remit all or part of a penalty within guidelines set out in taxation rulings.[102] However, the ATO's position is that this discretion should only be exercised in exceptional circumstances as the certainty of the penalty regime would be compromised if penalties were regularly remitted.[103] The use of discretion to remit penalties by the ATO is considered further in chapter 17.

5.54 Over the years there have been a number of criticisms of ATO penalty and prosecution policies, in particular that they are inflexible, or, in other instances, that inappropriately lenient responses are made by ATO staff.[104] The ATO concedes that differential access to professional tax advice and representation is perceived as a major cause of inequity in the tax system.[105] ATO practice makes some concession to this inequity. In 2000, the ATO gave evidence to the Senate Economics References Committee that it applied penalties in 60% of cases where it adjusted tax returns lodged by tax agents and in 30% of cases where it adjusted tax returns lodged by taxpayers themselves.[106] The difference in the rates of penalty is partly explained by the requirement that taxpayers using professional agents are liable for failing to take reasonable care. Unlike taxpayers who prepare their own returns, taxpayers using tax agents are not eligible for the 'Commissioner's Guarantee' that they will not be penalised for honest mistakes.

5.55 However, it has been noted that in appropriate instances, the 'honest mistakes' of tax agents will also go unpenalised.[107] According to the ATO, differences in the applicability of the Commissioner's Guarantee arise from the expectation that a trained agent will exercise a higher standard of reasonable care than an unassisted taxpayer. This expectation is based upon recognition of the tax agent's training, education, experience, and access to a wide range of informative materials (such as ATO rulings and caselaw).[108] Because clients of tax agents are vicariously liable for the lack of reason-

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101 Ibid, para 2.3.3.

102 *Income Tax Assessment Act 1936* (Cth), s 221N; *Taxation Administration Act 1953* (Cth), s 8AAG, sch 1 s 16–45, 45–640, 298–20;.

103 Australian National Audit Office, *Administration of Tax Penalties*, Report 31 (2000), Australian Government Printing Service, Canberra, 20.

104 Senate Economics References Committee, *Inquiry into the Operation of the Australian Taxation Office* (2000), Commonwealth of Australia, Canberra, ch 2–3 and Office of the Commonwealth Ombudsman, *Annual Report 1999–2000*, Commonwealth of Australia, Canberra, 18–20.

105 Senate Economics References Committee, *Inquiry into the Operation of the Australian Taxation Office* (2000), Commonwealth of Australia, Canberra, 20.

106 Ibid, 24. Note that legislation imposes the penalty. The ATO remits the penalty in accordance with Practice Statements and 'applies' the penalty as determined appropriate: Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 3.5.

107 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 7.5.

108 Ibid, para 7.5.

able care displayed by their agents, they will ultimately be liable for a failure to exercise the standard of reasonable care required of a trained tax agent.

5.56 In 2000 the ANAO conducted an audit of the ATO's administration of tax penalties.[109] The ANAO expressed some concerns arising from its audit including that the ATO did not collect adequate system-wide data relating to penalties, and that the data it did collect was not analysed to improve the administration of penalties.[110] It was not possible to gauge differences in how various ATO Business Service Lines (BSLs) imposed penalties in different market sectors. Since the ANAO's audit the ATO has done some work to address the concerns raised by the ANAO. For example, the ATO has taken steps to implement a corporate governance framework for penalties. This framework supports a corporate approach to the imposition and remission of penalties, bringing together at a corporate level the governance processes (such as various quality assurance processes), which were previously in place separately in each BSL.[111] The ATO has also established the Penalty Policy & Practice Committee which provides a corporate focus to the imposition of penalties and will address any concerns of the ANAO.[112]

5.57 In accordance with recommendations made by the Board of Taxation, a new Inspector-General of Taxation is likely to be appointed.[113] As proposed, the Inspector-General will be responsible for investigating tax administration issues and will make recommendations to the Treasurer for systemic reform. However, he or she will not have the power to override decisions made by the ATO in relation to individual taxpayers.[114]

Border Control

5.58 Various government agencies interact to form a regulatory framework that governs the movement of goods and people into Australia. Arrangements and memorandums of understanding exist between these agencies that provide for mutual assis-

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109 See Australian National Audit Office, *Administration of Tax Penalties*, Report 31 (2000), Australian Government Printing Service, Canberra.

110 Ibid, 11.

111 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 3.13.

112 Ibid, para 3.12. The ATO has also undertaken some work in understanding the impact of particular penalties on levels of compliance. For example, the Centre for Tax Research undertook research regarding the effectiveness of penalties on compliance and a project was undertaken regarding the impact of late lodgement penalty on lodgement compliance: Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 3.10.

113 The Board of Taxation, *Inspector-General of Taxation — A Report to the Minister for Revenue and Assistant Treasurer*, <www.taxboard.gov.au/inspector_general/download/ig_report.pdf>, 1 July 2002. However, the ALP has expressed opposition to the proposal, arguing that the functions of the new Inspector-General would merely duplicate the functions already performed by the Ombudsman: T Colebatch, 'Labor to Oppose Proposed Tax Inspector Role', *The Age* (Melbourne), 16 October 2002, 10. The Senate Economics Legislation Committee reported on the Inspector-General of Taxation Bill 2002 (see <www.aph.gov.au/senate/committee/economics_ctte/igot/Report/ig_of_tax.pdf>, tabled on 3 December 2002, recommending that it proceed (subject to some amendments). The Labor members on the Committee opposed the Bill in a minority report.

114 Minister for Revenue and Assistant Treasurer, *The Inspector-General of Taxation Consultation Paper*, <www.taxboard.gov.au/consultation.html>, 1 May 2002, 18.

tance such as the sharing of information and intelligence, detention and prosecutions. The Australian Customs Service (ACS) controls movement of trade and people into and from Australia. The Australian Quarantine Inspection Service (AQIS) is responsible for quarantine and inspection systems. The Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) is concerned with the managed entry of people to Australia, while Environment Australia is concerned with the protection and conservation of the environment. The Australian Fisheries Management Authority (AFMA) is responsible for the detection and investigation of illegal fishing activities.

Australian Customs Service (ACS)

5.59 The principal roles of the ACS are to facilitate trade and the movement of people into Australia while maintaining compliance with Australian law, collecting Customs revenue, and administering specific industry schemes and trade measures. The ACS also has a role in border control and safety.[115]

5.60 The ACS administers the *Customs Act 1901* (Cth), the *Customs Tariff Act 1995* (Cth) and related legislation. It also administers legislation on behalf of other government agencies, principally in relation to the movement of goods and people across the Australian border.[116] The ACS provides air- and sea-based surveillance and response services to a number of government agencies.[117]

5.61 Targets of penalties under legislation administered by the ACS include importers, exporters and owners of goods; holders of warehouse and depot licences; operators of duty free shops; Customs brokers; aircraft operators and masters of ships; claimants of diesel fuel rebate; and any person contravening export and import laws.

5.62 The ACS operates in a self-assessment environment. It can conduct audits and impose sanctions such as warning letters; removal of Customs agents from the self-assessment scheme; revocation of deferred duty arrangements or the imposition of additional conditions; refusal of permission for movements under bond or imposition of conditions on the permission holder; imposition of administrative penalties of up to twice the Customs duty; cancellation, suspension or imposition of a conditional licence for warehouse licence holders; and prosecution action.[118]

5.63 Customs legislation provides for administrative, criminal and civil penalties and for 'Customs prosecutions', which share some of the characteristics of both criminal and civil penalties.[119] An infringement notice scheme applying to certain strict li-

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115 For example, *Border Security Legislation Amendment Act (Cth) 2002* , Schedule 7 inserts a new section into the *Customs Act* which grants the ACS significant access to passenger information with the aim of enhancing its ability to risk-assess passengers at Australia's ports of entry. The Act makes it an offence for an operator of an international passenger air service to fail to provide to ACS officers access to passenger information .

116 Australian Customs Service, *Annual Report 2000–2001* (2001), Commonwealth of Australia, Canberra.

117 Ibid, 60.

118 Australian Customs Service, *A Guide to Customs; Complying with Customs*, Australian Customs Service, <www.customs.gov.au/bizlink/comply/index.htm>, 24 May 2001.

119 Customs prosecutions are discussed further in ch 13.

ability offences was introduced by the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act (2001)* and commenced, in part, on 1 July 2002.[120]

Department of Immigration & Multicultural & Indigenous Affairs (DIMIA)

5.64 DIMIA's core activity is the managed entry of people into Australia, the settlement of migrants and refugees, and the promotion of citizenship and cultural diversity. DIMIA administers the *Migration Act 1958* (Cth), which regulates the entry of non-citizens into Australia. The Act contains powers of detention and removal of unlawful non-citizens, criminal deportation and visa cancellation on character grounds.

5.65 Penalties under the *Migration Act* are mainly criminal (85%), and many of the targets of penalties are non-citizens and non-residents. In two cases the penalty is forfeiture, disposal or destruction of a vessel. Of the remaining penalties, about half attract fines ranging from $100 to $100,000, and half attract prison sentences for periods from six months up to 20 years. The conduct which attracts the most severe penalties is the assisting of groups of five or more unlawful non-citizens entering Australia. The few administrative penalties relate mainly to transgressions by migration agents and result in revocation, cancellation or suspension of licences. In 2001–02, 102 charges were dealt with summarily and 180 were dealt with on indictment under the *Migration Act.*[121] An infringement notice scheme applies to some minor offences.[122]

Australian Quarantine Inspection Service (AQIS)

5.66 AQIS is an operating group within the Department of Agriculture, Fisheries and Forestry. It provides quarantine inspection services for the arrival of international passengers, cargo, mail, animals and plants or their products into Australia, and inspection and certification for a range of animal and plant products exported from Australia. AQIS embraces co-regulation as a basic regulatory strategy whereby requirements are set in consultation with industry.

5.67 AQIS is responsible for the administration of the *Quarantine Act 1981* (Cth) and its related legislation. AQIS provides screening services for goods and passengers at airports, seaports and mail centres.[123] Quarantine officers have wide powers to search, seize and treat goods suspected of being a quarantine risk.

5.68 AQIS also administers the *Imported Food Control Act 1992* (Cth) and related legislation which ensures that imported food complies with public health and food standards, and the *Export Control Act 1982* (Cth), which controls the process of gov-

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120 The infringement notice scheme is discussed in detail in ch 12.

121 Commonwealth Director of Public Prosecutions, *Annual Report 2001–2002* (2002), Commonwealth Director of Public Prosecutions, table 8.

122 See discussion in ch 12.

123 Department of Agriculture Fisheries and Forestry, *Quarantine Laws and the Role of AQIS*, Department of Agriculture, Fisheries and Forestry — Australia, <www.affa.gov.au/>, 4 September 2001.

ernment certification, which is a prerequisite to gaining entry to most overseas markets for most food and agricultural products. AQIS also administers the *Australian Meat and Livestock Industry Act 1997* (Cth), which provides for the licensing of meat and livestock exporters.

5.69 AQIS investigators have powers delegated to them pursuant to the Customs legislation and other Commonwealth legislation, including the *Crimes Act 1914* (Cth).[124] Their powers include authority to search premises and seize goods. Administrative sanctions can result in the revocation of an export registration and or the cancellation of an export licence. Decisions of AQIS can be appealed to the AAT or the Federal Court.

Australian Fisheries Management Authority (AFMA)

5.70 AFMA is a statutory body that administers the management of Australia's fishery resources.[125] AFMA is responsible for enforcing the *Fisheries Management Act 1991* (Cth) and the *Torres Strait Fisheries Act 1984* (Cth) through the detection and investigation of illegal activities by both domestic and foreign fishing boats in the Australian fishing zone and Commonwealth-managed fisheries. AFMA undertakes these functions in conjunction with other relevant Commonwealth agencies, with specific compliance functions being undertaken by state fisheries authorities on an agency basis. While state agencies provide the personnel and expertise, AFMA provides overall coordination, policy direction, technical advice and funding.[126] The *Fisheries Management Act* provides for administrative (35%) and criminal penalties (65%).[127] Administrative penalties range from the forfeiture of foreign boats that violate border control requirements, or forfeiture of fishing equipment or catches, to interest charges on unpaid levies. Criminal penalties include the forfeiture of vessels and fines, and terms of imprisonment for obstructing AFMA officers or providing false or misleading information.

5.71 AFMA also has responsibilities in relation to protection of the marine environment by maintaining sustainable fishery levels.

Environment

5.72 Environment Australia is the main agency charged with the protection and conservation of the environment. Environment Australia has environment protection agreements with various other agencies. The functions of AQIS in providing quaran-

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124 Department of Agriculture Fisheries and Forestry, *Compliance and Investigations*, Department of Agriculture, Fisheries and Forestry — Australia, <www.affa.gov.au/>, 11 September 2001.

125 Australian Fisheries Management Authority, *Annual Report 2001–2002* (2002), Australian Fisheries Management Authority, Canberra, 4. Broader fisheries policy, international negotiations and strategic policy issues are administered by another group within the Department of Agriculture, Fisheries and Forestry.

126 Australian Fisheries Management Authority, *About AFMA*, Australian Fisheries Management Authority, <www.afma.gov.au>, 22 June 2001.

127 Including an infringement notice scheme: see discussion in ch 12.

tine inspection services for the arrival of international passengers, cargo, mail, animals and plants or their products (discussed above at para 5.66–5.69) are aimed at protecting Australia from exotic pests and diseases. Additionally, Australia is a signatory to numerous international conventions aimed at protecting the marine environment and establishing regimes for ocean management. These international obligations are implemented by Commonwealth legislation and are enforced by the Australian Maritime Safety Authority (AMSA).

Environment Australia

5.73 Environment Australia, within the Department of Environment and Heritage, advises on and implements policies and programs for the protection and conservation of the environment. Environment Australia administers the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), which commenced in July 2000 and replaced five environmental Acts.[128] The EPBC Act is a major reform of Commonwealth environment legislation and regulates actions that will, or are likely to, have a significant impact on any matter of national environmental significance.[129]

5.74 The EPBC Act contains several compliance and enforcement mechanisms, some of which are available to the Commonwealth under environmental law for the first time. These include injunctions, environmental audits, civil and criminal penalties, infringement notices, orders to remedy environmental damage, personal liability of executive officers, and publicising of contraventions.[130]

5.75 The penal provisions of the EPBC Act are mainly criminal. Most of the remaining penalties are civil. Under the EPBC Act the Environment Minister or an interested person may apply to the Federal Court for an injunction to stop a person engaging in conduct that contravenes the Act.[131] If the Environment Minister suspects that an authorised action is having an impact greater than anticipated when the action was assessed or that a condition of the authorisation may have been contravened, the Minister may require an environmental audit. The EPBC Act provides strict liability for certain civil and criminal penalties. The most severe penalties, for matters that are likely to have a significant impact on a matter of national environmental significance, include civil penalties of up to $550,000 for an individual and $5.5 million for a corporation, or imprisonment for seven years for criminal offences.

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128 The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) replaced the *National Parks and Wildlife Conservation Act 1974* (Cth), the *Whale Protection Act 1980* (Cth), the *Endangered Species Protection Act 1992* (Cth), the *World Heritage Properties Conservation Act 1983* (Cth) and the *Environment Protection (Impact of Proposals) Act 1974* (Cth).

129 The Act identifies six matters of national environmental significance: Ramsar wetlands, listed threatened species and ecological communities, World Heritage properties, listed migratory species, the Commonwealth marine environment, and nuclear actions (including uranium mining).

130 Environment Australia, *About Environment Australia*, Environment Australia, <www.ea.gov.au/about/>, 4 September 2001. The infringement notice scheme is discussed in ch 12. The personal liability of corporate officers for corporate breaches of the law is discussed in ch 8.

131 In October 2001, the first injunction under the EPBC Act was granted to a wildlife researcher and member of the Queensland Conservation Council to prohibit use of electrified wires to protect lychee crops from spectacled flying foxes: *Booth v Bosworth* [2001] FCA 1453.

5.76 The EPBC Act empowers the Minister or the Federal Court to require a person to repair or mitigate any damage caused to the environment. Under certain circumstances, an executive officer of a body corporate can be liable for civil and criminal penalties (including up to two years' imprisonment) for a breach of the EPBC Act committed by the body corporate.[132] The EPBC Act also permits the Minister to make public any contraventions of the Act.[133]

Australian Maritime Safety Authority (AMSA)

5.77 Commonwealth legislation has been enacted to protect the marine environment and to adopt international conventions governing marine pollution. A package of 'protection of the sea' legislation was enacted in 1981 to implement international conventions and provide funding for a national plan to deal with oil and chemical spills by imposing levies. This legislation is enforced by AMSA. The Commonwealth has far-reaching powers in respect of pollution by oil and other harmful substances discharged from ships,[134] intervention to save life or protect the environment in the event of a pollution incident,[135] imposing civil liability or pursuing compensation for pollution,[136] the imposition of a levy on certain oil tankers entering Australian ports to fund national marine pollution response strategies,[137] and the dumping or incineration at sea of waste or hazardous substances.[138]

5.78 AMSA also has regulatory functions in relation to transport (see para 5.121–5.124).

Social Security

Centrelink

5.79 Centrelink is the primary agency for delivering social services and income support within the Department of Family and Community Services (FaCS). Centrelink was established in 1997 pursuant to the *Commonwealth Services Delivery Agency Act 1997* (Cth).

5.80 Centrelink is a service provider to 6.4 million customers in respect of 9.5 million individual entitlements. Its customers include people looking for work, retired

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132 The liability of corporate officers under the EPBC Act is discussed in ch 8.

133 Environment Australia, *Compliance and Enforcement*, Environment Australia, <www.ea.gov.au/epbc/compliance/index.html>, 22 May 2001.

134 The *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth) gives effect to the MARPOL Convention (International Convention for the Prevention of Pollution from Ships).

135 The *Protection of the Sea (Powers of Intervention) Act 1981* (Cth) gives effect to the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties.

136 The *Protection of the Sea (Civil Liability) Act 1981* (Cth) gives effect to the International Convention on Civil Liability for Oil Pollution Damage. The *Protection of the Sea (Oil Pollution Compensation Fund) Act 1993* (Cth) gives effect to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.

137 *Protection of the Sea (Shipping Levy) Act 1981* (Cth).

138 *Environment Protection (Sea Dumping) Act 1981* (Cth).

people, families, sole parents, people with a disability, people with a short term incapacity, students, young people, indigenous people and people from diverse linguistic and cultural backgrounds.[139] Centrelink is governed by a board with executive powers that is accountable to the Minister for Community Services. A major aspect of Centrelink's role is protection of the revenue by ensuring that only correct entitlements are paid.

5.81 Centrelink delivers services for a number of Federal Government departments,[140] state and territory governments, state and territory housing authorities, as well as the Child Support Agency, Office of Hearing Services, the Australian Electoral Commission, the ATO, the Dairy Adjustment Authority and Australian Dairy Corporation.[141] Social security recipients constitute a 'mass market' of individuals and families across Australia receiving a variety of welfare support, pensions, student allowances or public housing. More than one in five Australians receive income support, which equates to well over 2.5 million people on benefits.[142]

5.82 In 1998 the Job Network replaced the Commonwealth Employment Service (CES). The Job Network consists of a network of private community and government employment agencies which tender for the right to provide employment services by contract with the Department of Employment and Workplace Relations. Centrelink assesses and refers eligible recipients to Job Network services.

5.83 The major federal Acts conferring power and functions on Centrelink are the *Social Security Act 1991* (Cth) (SSA) and the *Social Security (Administration) Act 1999* (Cth) (SSAA). The SSA sets out the range of welfare pensions, benefits and allowances, criteria for receiving them, calculations for the rate of payment, and also contains some administrative penalties. The SSAA provides for the administration of social security law, specifies the offences[143] and provides for some administrative penalties.

5.84 In its effort to protect the revenue, Centrelink employs various measures including debt prevention policies, compliance reviews, debt raising and recovery activities, administrative penalties and referral of criminal matters to the DPP.

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139 Centrelink, *Annual Report 2001–2002*, <www.centrelink.gov.au/internet/internet.nsf/ar0102/index.htm>, 11 November 2002, 13–17.

140 Including the Department of Family and Community Services; Department of Employment and Workplace Relations; Department of Transport and Regional Services; Department of Veterans' Affairs; Department of Health and Ageing; Department of Education, State and Training; Department of Agriculture, Fisheries and Forestry Australia; Department of Foreign Affairs and Trade; Department of Finance and Administration, the Attorney-General's Department and the Department of Immigration and Multicultural and Indigenous Affairs.

141 Centrelink, *Annual Report 2001–2002*, <www.centrelink.gov.au/internet/internet.nsf/ar0102/index.htm>, 11 November 2002, ch 3.

142 Senator the Hon Amanda Vanstone and the Hon Tony Abbott MP, *Australians Working Together — Helping People to Move Forward* (2001), Department of Family and Community Services, Canberra, 4.

143 *Social Security (Administration) Act 1999* (Cth), Part 6.

5.85 The current regime of administrative penalties was introduced in July 1997. They are intended to:

- ensure that payments are made only to those who are genuinely seeking work, thereby protecting the revenue and the integrity of the welfare system;
- help or guide the unemployed to help themselves; and
- deter the particular individual and others from breaching.

5.86 Almost all penalties in the SSA and SSAA are imposed administratively: an officer of the Department records that certain requirements have not been met by the recipient, from which it flows that a 'payment reduction period' or a 'non-payment period' applies. There are two types of administrative penalties under social security legislation — administrative breach penalties and activity test breach penalties.

5.87 An administrative breach penalty is imposed when a person fails to satisfy administrative requirements; for example, failing to attend a Centrelink office as required, failing to reply to correspondence, or failing to notify relevant changes in their circumstances.

5.88 An activity test breach penalty is imposed when a person receiving payment fails to satisfy activity test requirements without a reasonable excuse. The activity test aims to ensure that an unemployed person is actively looking for work and willing to accept offers of suitable employment or undertake activities intended to improve his or her employment prospects. It may also require a person to participate in specific programs (such as 'work for the dole') or education.

5.89 Prior to 1 July 2002, job-seekers who failed to attend employment interviews (without a reasonable excuse) were subject to activity test breaches. However, the failure to attend an interview without reasonable excuse is now treated as an administrative breach, rather than an activity test breach. Consequently, the penalty provided for a breach of this nature has been reduced to a 16% reduction in payments for 13 weeks (as opposed to the previous 18% reduction for 26 weeks).[144] The issue of breach penalties has recently been the subject of considerable scrutiny.[145]

5.90 The legislation creates a system of cumulative penalties for repeated contraventions of the activity test, with penalties increasing for subsequent contraventions. Breach histories are retained for two years. Administrative penalties do not, however, accumulate.

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144 Senator the Hon Amanda Vanstone, *'Breaching Rules Change to Protect the Vulnerable', Media Release: 4 March 2002*, <www.facs.gov.au>, 4 March 2002.

145 See *Independent Review of Breaches and Penalties in the Social Security System*, <www.breachreview.org>, 22 October 2002; Commonwealth Ombudsman, *Social Security Breach Penalties — Issues of Administration* (2002), Commonwealth Ombudsman; and Senate Community Affairs Reference Committee, *Report on Inquiry into Participation Requirements and Penalties*, (2002), Commonwealth of Australia, <www.aph.gov.au/senate/committee/clac.ctte/partic_req/index.htm>, 25 September 2002.

5.91 Common types of administrative penalties imposed include reduction or cancellation of benefits. FaCS officers have power to require applicants to attend the Department (SSAA, s 63), undergo a medical examination (SSAA, s 64) and provide information (SSAA, s 192–195) such as their tax file number or that of their partner. In general, these statutory powers can only be exercised if a notice is served on the recipient (SSAA, s 196 and s 236–237).

5.92 From 1 July 2002, under the Government's welfare policy *Australians Working Together — Helping People to Move Forward*,[146] administrative penalties will be applied when a person does not meet the requirements attached to their income support payment. However, there will be no such requirement for people with a disability, age pensioners, carers, parents of children under six, or parents with a severely disabled child. In addition, it is said there will be some additional procedural safeguards and flexibility for all parents, disadvantaged people and job seekers.

5.93 Private service providers such as Job Network members may make breach recommendations to Centrelink although they cannot impose penalties themselves. Centrelink is then required to assess whether there was a 'reasonable excuse' for non-compliance before imposing a penalty.[147] The use of private contractors by Centrelink is considered further in chapter 22.

5.94 The SSAA also contains a number of criminal offences including providing a false or misleading statement or document (SSAA, s 214), failing to provide requested information (SSAA, s 187), and fraudulently receiving payments (SSAA, s 212–216). Most criminal penalties are imprisonment (from 12 months to two years) and no fines are specified. However, in respect of offences under s 212–216, the Court may impose a pecuniary penalty instead of imprisonment, and order the person to repay amounts that were not properly payable (SSAA, s 218). The legislation specifies the mental elements of the offences as intent and knowledge (SSAA, s 202–206) or 'knowingly or recklessly' making false statements (SSAA, s 212–219).

5.95 Social security offences may also be prosecuted under the *Criminal Code* as an alternative to offences under the social security legislation. The more serious offences may be brought under the *Criminal Code* as indictable offences, particularly under s 135.2 (obtaining a financial advantage from a Commonwealth entity – penalty: imprisonment for 12 months), s 135.4 (conspiracy to defraud a Commonwealth entity — penalty: imprisonment for ten years), and s 136.1 (false or misleading statements made in an application or claim for a benefit — penalty: imprisonment for 12 months).

5.96 Where offences have been committed and cases fall within referral guidelines, they are investigated by Centrelink officers (or referred to the Australian Federal Police (AFP) for investigation) and referred to the DPP for prosecution. The relationship between Centrelink and the DPP is discussed in chapter 9.

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146 Senator the Hon Amanda Vanstone and the Hon Tony Abbott MP, *Australians Working Together — Helping People to Move Forward* (2001), Department of Family and Community Services, Canberra, 4.

147 *Social Security (Administration) Act 1999* (Cth), s 63 and *Social Security Act 1991* (Cth), s 601.

Communications

5.97 Regulation of Australian communications covers three main activities: provision of broadcasting services; provision of telecommunications services; and management of the radiocommunications spectrum. The three main regulators are the Australian Broadcasting Authority (ABA), responsible for licensing and content aspects of broadcasting services and content regulation of the Internet; the Australian Communications Authority (ACA), primarily responsible for technical regulation of telecommunications services and radiocommunications spectrum; and the ACCC, which has some functions to ensure competitive provision of telecommunications and pay television services.

5.98 The roles and responsibilities of both the ABA and ACA are currently under review by the Department of Communications, Information Technology and the Arts. The review will consider a range of possible reforms, such as merging the ACA and ABA, or alternatively, retaining two discrete bodies while merging specific functions.[148]

Australian Communications Authority (ACA)

5.99 The ACA, established under the *Australian Communications Authority Act 1997* (Cth), is responsible for regulation of the telecommunications and radiocommunications industry.[149] It also regulates the universal service regime, which requires that there is access to basic telecommunications services across the country.[150]

5.100 Some of its functions include telecommunications carrier licensing, licensing and managing access to the radiofrequency spectrum, ensuring compliance with carrier licence conditions and service provider rules, and protecting consumers through safeguards.[151] Furthermore, the ACA oversees compliance with technical standards for equipment and cabling, and is responsible for the interoperability of the standard telephone service. The ACA collects revenue on behalf of the Commonwealth and represents Australia's communications interests internationally.[152]

5.101 The ACA encourages and facilitates the development of industry self-regulation by requesting that codes of practice be developed, and determining and en-

148 Department of Communications Information Technology and the Arts, *Options for Structural Reform in Spectrum Management*, <www.dcita.gov.au/download/0,6183,4_11043,00.doc>, 1 August 2002.

149 Australian Communications Authority, *The Australian Communications Authority*, Australian Communications Authority, <www.aca.gov.au/authority/aca.htm>, 20 June 2001.

150 Department of Communications Information Technology and the Arts, *Australian Communications Authority*, Department of Communications, Information Technology and the Arts, <www.dcita.gov.au/nsapi-graphics/?MIval=dca_dispdoc&ID=934>, 20 June 2001.

151 Australian Communications Authority, *The Australian Communications Authority*, Australian Communications Authority, <www.aca.gov.au/authority/aca.htm>, 20 June 2001.

152 Australian Communications Authority, *Annual Report 2001–2002* (2002), Commonwealth of Australia, Sydney, 1.

forcing mandatory standards where required.[153] The codes developed by industry are registered with the ACA.[154]

5.102 The ACA has a number of penalty provisions that it may draw upon. Under the *Telecommunications Act*, for example, the ACA can cancel a carrier's licence for, amongst other things, a failure to pay the annual charge[155] or a failure to pay the universal service levy.[156] Furthermore, the ACA may issue directions for a person to take action within a specified period, or refrain from taking that action.[157] Likewise, the ACA has the power to give directions to carriers and service providers.[158] Under the *Radiocommunications Act 1992* (Cth), the ACA may cancel an operator's certificate of proficiency.[159]

Australian Broadcasting Authority (ABA)

5.103 The ABA, established by the *Broadcasting Services Act 1992* (Cth),[160] is an independent statutory authority regulating commercial television, and commercial and public radio, in Australia. The ABA's mission is to promote the provision of broadcasting and online services and it is structured to meet one outcome: an accessible, diverse and responsible broadcasting industry.[161] The ABA has power to allocate, renew, suspend and cancel licences and to take other enforcement action under the *Broadcasting Services Act*; to conduct investigations or hearings relating to the allocation of licences; to collect fees payable; to monitor compliance with codes of practice and standards; and to investigate complaints concerning broadcasting services.[162]

5.104 The *Broadcasting Services Act* provides for a regulatory policy that stipulates that different levels of regulatory control should be applied across the range of broadcasting services, datacasting services and Internet services, according to the degree of influence that these services are able to exert in shaping community views in Australia.[163] The ABA has responsibility for monitoring the broadcasting, datacasting and Internet industries in a manner consistent with the regulatory policy, so as to produce

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153 Australian Communications Authority, *The Australian Communications Authority*, Australian Communications Authority, <www.aca.gov.au/authority/aca.htm>, 20 June 2001.

154 Department of Communications Information Technology and the Arts, *Australian Communications Authority*, Department of Communications, Information Technology and the Arts, <www.dcita.gov.au/nsapi-graphics/?MIval=dca_dispdoc&ID=934>, 20 June 2001.

155 *Telecommunications Act 1997* (Cth), s 72(1).

156 Ibid, s 72(2).

157 Ibid, s 212.

158 Ibid, s 581.

159 *Radiocommunications Act 1992* (Cth), s 124.

160 *Broadcasting Services Act 1992* (Cth), s 154(1). It began operations on 5 October 1992 replacing the Australian Broadcasting Tribunal.

161 Australian Broadcasting Authority, 'Our Mission', *ABA Corporate Plan 1999-2003*, www.aba.gov.au/aba/corp_plan/mission.htm, 22 November 2002.

162 Australian Broadcasting Authority, *Annual Report 2001–2002*, Australian Broadcasting Authority, <www.aba.gov.au/abanews/annRpt/an01-02/index.htm>, 29 October 2002, 14.

163 *Broadcasting Services Act 1992* (Cth), s 4.

regulatory arrangements that are stable and predictable, and deal effectively with contraventions of the *Broadcasting Services Act*.[164]

5.105 The ABA regulates a licensing scheme in which it can allocate, renew, suspend or cancel licences, and take other enforcement action.[165] The *Broadcasting Services Act* enables the ABA to impose a range of penalties, which are particularly onerous for offences concerning commercial broadcasting licences and datacasting transmitter licences in terms of control, directorships, foreign control of television, and cross-media rules. Where the contravention relates to a commercial television broadcasting licence or datacasting transmitter licence, there is a prescribed maximum penalty of 20,000 penalty units (ie, $2.2 million).[166] Where the contravention relates to a commercial radio broadcasting licence, there is a penalty of 2,000 penalty units.[167] Importantly, a person who contravenes these provisions is guilty of a separate offence in respect of each day during which the contravention continues.[168] There are similar penalties available for providing broadcasting services without authority.[169] The *Broadcasting Services Act* also provides for a range of offences for the contravention of conditions of licences and class licences, for which the penalties vary from 50 penalty units to 2000 penalty units.[170]

5.106 The ABA also has responsibility for assisting broadcasting service providers and datacasting service providers to develop codes of practice, and monitoring compliance with those standards.[171] Furthermore, the ABA is entrusted with developing program standards relating to broadcasting in Australia, and monitoring compliance with these standards.[172]

5.107 The ABA also has responsibility for regulating the content of Internet services.[173] To this end, the ABA has developed an enforcement scheme, instituted a complaints procedure, and is developing a community education and information program.

Australian Competition and Consumer Commission (ACCC)

5.108 Apart from its numerous other functions (see para 5.8–5.17), the ACCC is responsible for competition and economic regulation within the telecommunications industry. The ACCC administers the telecommunications-specific competitive safeguard regimes under Parts XIB and XIC of the TPA. Part XIB enables the ACCC to address anti-competitive conduct by carriers and carriage service providers, and issue tariff fil-

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164 Ibid, s 5(1).
165 Ibid, s 158 (c).
166 Ibid, s 66(1)(e).
167 Ibid, s 66(1)(f).
168 Ibid, s 66(2).
169 Ibid, s 137 and 138.
170 Ibid, s 139.
171 Ibid, s 158(h) and (i).
172 Ibid, s 158(j) and (k).
173 Australian Broadcasting Authority, *Annual Report 2001–2002*, Australian Broadcasting Authority , <www.aba.gov.au/abanews/annRpt/an01-02/index.htm>, 29 October 2002, 15.

ing directions and record-keeping rules.[174] Part XIC allows the ACCC to facilitate access to networks of carriers. This role enables the ACCC to declare services for access, approve access codes and undertakings, register access agreements, and arbitrate disputes.[175]

5.109 The ACCC also has responsibilities under the *Broadcasting Services Act* and *Telecommunications Act*. Under these Acts the ACCC deals with international conduct rules, number portability, access to facilities, price control, interconnection standards, disputes concerning access to network information, emergency call services and carriage services utilised by the Defence forces, operator services and directory assistance services.[176]

Transport

5.110 Federal regulation covers certain aspects of the air, rail and road transport industries.

5.111 There is no express constitutional grant of legislative power over aviation to either Commonwealth or state governments. However, Commonwealth powers in relation to aviation stem primarily from the overseas and interstate trade and commerce power (s 51(i)), the external affairs power (s 51(xxix)) and the Territories power (s 122). An extensive network of regulatory requirements governs the safety and operations of airlines in Australia at both the national and international level. The Department of Transport and Regional Services advises the government on aviation policy, regulates international airline operations and administers aviation security. The Civil Aviation Safety Authority (CASA) is responsible for the safety regulation of civil aviation in Australia and Australian aircraft overseas. The Australian Transport Safety Bureau investigates aircraft accidents and serious incidents, and Airservices Australia manages air traffic control, airport rescue and fire fighting services.[177]

5.112 Railways and road transport are essentially matters for state and territory regulation. However, initiatives are in place to achieve a consistent, uniform and competitive transport system throughout Australia. The Australian Transport Council, a council of state, territory and federal ministers, coordinates transport and road safety policy issues across Australia.[178] The Commonwealth has entered into various arrangements with the States regarding rail passenger and freight services.[179] The National Road

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174 Australian Competition & Consumer Commission, *The ACCC Telecommunications Group*, Australian Competition & Consumer Commission, <www.accc.gov.au/telco/telecom_.htm>, 7 August 2001.

175 Ibid.

176 Ibid.

177 Civil Aviation Safety Authority, *Overview of CASA*, Civil Aviation Safety Authority, <www.casa.gov.au/corporat/overview.htm>, 18 September 2001.

178 Australian Transport Council, *About the ATC*, Department of Transport and Regional Services, <www.dotrs.gov.au/atc/atcabout.htm>, 22 June 2001.

179 Through the Australian National Railways Commission the Commonwealth had responsibility for operating rural services in South Australian and Tasmania, and owned railway infrastructure linking remote locations throughout Australia. The Commission has recently been sold to Australian Rail Track Corporation. The Australian Rail Track Corporation, owned by the federal, New South Wales and Victo-

Transport Commission coordinates the development and implementation of a body of national road transport legislation that provides a model for state and territory legislation.[180] The Australian Transport Safety Bureau, located within the Commonwealth Department of Transport and Regional Services, investigates, analyses and reports on transport safety.

Civil Aviation Safety Authority (CASA)

5.113 CASA is an independent statutory authority established under the *Civil Aviation Act 1988* (Cth). It is responsible for the regulation of aviation safety in Australia and the safety of Australian aircraft overseas, and falls within the portfolio of the Department of Transport and Regional Services.[181]

5.114 CASA is responsible for safety regulation of civil air operations in Australian territory, and the operation of Australian registered aircraft outside Australian territory. The *Civil Aviation Act* requires CASA to regard the safety of air navigation as the most important consideration in the performance of its functions.[182]

5.115 CASA administers the *Civil Aviation Act*. That Act prescribes the drafting of Civil Aviation Regulations, safety education, surveillance and enforcement processes. The *Civil Aviation Regulations 1988* (Cth) and the *Civil Aviation Regulations 1998* (Cth), together with the *Civil Aviation Orders* made under the Regulations and the *Civil Aviation Act*, comprise the detailed legislation regarding aviation safety. The *Civil Aviation Act* and Regulations give effect to the Chicago Convention, an international convention that regulates international civil aviation.[183]

5.116 The penalties under the *Civil Aviation Act* and Regulations are directed at aircraft manufacturers, aircraft owners, aircraft hirers, pilots, maintenance personnel, handlers of dangerous goods, and any person who interferes with crew or aircraft.

5.117 CASA has a range of enforcement tools available which are set out in detail in its enforcement manual.[184] CASA states that the objectives of its enforcement activities are to promote compliance with safety rules, to educate the aviation community, to

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rian governments, operates mainland interstate rail freight services: Department of Transport and Regional Services, *Land Transport Rail Policy and Programs*, Department of Transport and Regional Services, <www.dotrs.gov.au/land/rail/reform.htm>, 10 September 2001.

180 National Road Transport Commission, *National Legislation*, National Road Transport Commission, <www.nrtc.gov.au/place/index.asp?lo=legis>, 22 June 2001.

181 Civil Aviation Safety Authority, *Annual Report 2001–02*, Civil Aviation Safety Authority, <www.casa.gov.au/corporat/ar_2002/contents.htm>, 20 November 2002, 4.

182 Civil Aviation Safety Authority, *Annual Report 2000–2001* (2001), Commonwealth of Australia, Canberra, 6.

183 The Convention on International Civil Aviation (usually called the Chicago Convention) was entered into in 1944. The Chicago Convention and several Protocols amending it are set out as Schedules to the *Air Navigation Act 1920* (Cth): Civil Aviation Safety Authority, *A Guide to Civil Aviation Regulations 1998*, Civil Aviation Safety Authority, <www.casa.gov.au/avreg/newrules/misc/casrguide.htm>, 19 September 2001.

184 Civil Aviation Safety Authority, *Enforcement Manual*, Civil Aviation Safety Authority, <www.casa.gov.au/manuals/htm/enf/enf.htm>, 18 September 2001.

identify those in the industry who require additional training or supervision, and to take enforcement action against deliberate contraventions of legislation.[185] Informal enforcement action, which includes counselling, warnings and remedial training, is generally taken where a person admits to a contravention of the Regulations. If the nature of the contravention indicates that the offender lacks skills or knowledge, CASA will require the offender to undertake further training. In July 2001, a system of infringement notices was introduced for breaches of the Regulations. Chapter 2 of CASA's *Enforcement Manual* states that '[i]nfringement Notices may be issued in situations where informal enforcement action would be appropriate but the act or omission of the non-compliant person was deliberate or the person attempted to conceal the non-compliance from CASA, where none of the circumstances set out in paragraph 2.4.2 are present, and where there is sufficient evidence of a breach of the law to sustain a prosecution.[186] There are three levels of administrative fines payable under infringement notices ranging from one to five penalty units.[187]

5.118 Operators of commercial aviation services in Australia must hold an Air Operator Certificate from CASA, and organisations carrying out maintenance on aircraft and components must hold a Certificate of Approval. Where CASA believes there has been a serious contravention of the *Civil Aviation Act* or Regulations, it may vary, suspend or cancel these certificates. Except in cases involving an immediate safety threat, certificate holders are given a reasonable opportunity to show cause why the action should not be taken.[188]

5.119 A scheme of enforceable voluntary undertakings had been proposed for some situations where prosecution or licence action would be unwarranted but where fines, counselling or warnings would be inadequate.[189] The *Civil Aviation Act* and Regulations provide for criminal penalties for contraventions of safety rules that are deliberate, serious or reckless, or are part of a pattern of contraventions. The DPP decides whether or not to prosecute offences.

5.120 The Minister for Transport commissioned a review of CASA's powers in 2001. On 18 November 2002 the Minister announced reforms to CASA that would

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185 Ibid, para 1.1.

186 Civil Aviation Safety Authority, *Enforcement Manual*, <www.casa.gov.au/manuals/htm/enf/enf.htm>, 3 May 2002, para 2.4.1. Paragraph 2.4.2 sets out the circumstances where infringement notices are not appropriate: 'Infringement notices should not be issued in situations where: the contravention is part of a pattern of contraventions committed by the person; the contravention is intentional and is serious; the offender encouraged others to breach the safety rules; the contravention led to a serious accident or otherwise seriously compromised safety; or the contravention seriously endangers lives. These sorts of contraventions should normally be dealt with by criminal prosecution'.

187 Ibid, para 2.4.

188 Civil Aviation Safety Authority, *What is 'Appropriate Regulatory Action'?*, Civil Aviation Safety Authority, <www.casa.gov.au/hotopics/action/index.htm>, 18 September 2001.

189 The Aviation Legislation Amendment Bill (No.1) 2001 (Cth), which would have given CASA power to accept an enforceable undertaking has lapsed. However, on 19 November 2002 CASA's Director of Aviation Safety stated that CASA's new enforcement sanctions will include enforceable voluntary undertakings: Civil Aviation Safety Authority, *Media Release: Reforms to CASA Improve Safety and Scrutiny*, <www.casa.gov.au/hotopics/media_rel/02-11-19.htm>, 19 November 2002.

take effect from 1 July 2003.[190] The CASA Board will be abolished and the Director of Aviation Safety will be designated as the Chief Executive Officer. The Minister will be given powers to set policy directions and performance standards for CASA but will leave day-to-day safety decisions with CASA staff. Other changes include the introduction of a demerit point system for airlines for minor breaches of safety regulations, and a new requirement for CASA to obtain Federal Court approval within five days of issuing an order grounding an airline over safety issues. CASA will be given the express power to immediately suspend an aviation permission, such as an air operators' certificate, where there is an imminent safety risk. An air standards advisory board is also to be established.[191]

Australian Maritime Safety Authority (AMSA)

5.121 AMSA is a regulatory safety agency established under the *Australian Maritime Safety Authority Act 1990* (Cth) (AMSA Act). It is largely self-funded through levies on the commercial shipping industry. AMSA reports to the Minister for Transport and Regional Services.

5.122 AMSA's vision as set out in the AMSA Act is to achieve world's best practice in providing services to Australia in maritime safety, aviation and marine search and rescue, and protection of the marine environment from ship-sourced pollution.

5.123 The *Navigation Act 1912* (Cth) is the main piece of Commonwealth legislation that regulates matters such as ship safety, coastal trade, employment of seafarers and shipboard aspects of the protection of the marine environment, as well as providing for a national search and rescue service.

5.124 As discussed at para 5.77, AMSA is also responsible for enforcing Commonwealth legislation that has been enacted to protect the marine environment and to adopt international conventions governing marine pollution.

Health and Aged Care

5.125 The Department of Health and Ageing has wide-ranging responsibilities,[192] and administers 23 statutes.[193] Some of the main areas that have regulatory functions are discussed below. These include population, health and safety matters such as food and therapeutic goods regulation, and the provision of aged care services.

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190 The Hon John Anderson MP, *Media Release A140/2002: CASA Reform*, <www.ministers.dotars.gov.au/ja/releases/2002/november/A140_2002.htm>, 18 November 2002.

191 Ibid. See also Civil Aviation Safety Authority, *Media Release: Reforms to CASA Improve Safety and Scrutiny*, <www.casa.gov.au/hotopics/media_rel/02-11-19.htm>, 19 November 2002.

192 Department of Health and Ageing, *Annual Report 2001–2002* (2002), Commonwealth of Australia, Canberra, 400.

193 Ibid, 425

Aged Care Standards and Accreditation Agency (ACSAA)

5.126 The Aged and Community Care Division (ACCD**)** of the Department of Health and Ageing is responsible for regulating community aged care and residential aged care services.[194] All residential care service providers must be accredited by the Aged Care Standards and Accreditation Agency (ACSAA) in order to receive government funding.

5.127 ACSAA is the accreditation body prescribed in the *Aged Care Act 1997* (Cth).[195] Its primary functions are the management of the residential aged care accreditation process; assistance in the improvement of service quality through education, training, dissemination of information, and identification of best practice; assessment and strategic management of services lacking accreditation; and liaison with the ACCD regarding those services not meeting relevant standards. The Accreditation Standards are designed to help ensure that all residents of aged care facilities receive a high, and continuously improving, standard of care.

5.128 While ACSAA monitors compliance with the Accreditation Standards, the Department of Health and Ageing is responsible for ensuring that aged care homes meet all of their other obligations under the *Aged Care Act 1997* (Cth) and for taking sanction action where approved providers have breached their responsibilities or failed to implement improvements, including those required by ACSAA.[196]

5.129 The Department of Health and Ageing imposes sanctions on approved providers of Commonwealth-funded residential aged care facilities in cases of serious non-compliance.[197] Information about sanctions is published by the Department on its website.[198] A range of sanctions may be imposed, depending on the circumstances of the non-compliance. These include:

- revoking or suspending approval as a provider of aged care services;[199]
- restricting approval to aged care services that are being conducted by the approved provider at the notice time;[200]

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194 See ibid, 123–159.

195 ACSAA is an independent company limited by guarantee, established under the Australian Securities and Investments Commission.

196 Department of Health and Ageing, *Annual Report 2001–2002* (2002), Commonwealth of Australia, Canberra, 129.

197 Department of Health and Ageing, *Sanctions Update*, Department of Health and Aged Care, <www.health.gov.au/acc/rescare/sanction.htm>, 11 September 2001. During the period 2001–2002 the Department of Health and Ageing took regulatory action against 142 homes, including sanctions against 12 homes and 158 notices of non-compliance. At 30 June 2002 11 of the 12 homes still had sanctions in place: Department of Health and Ageing, *Annual Report 2001–2002* (2002), Commonwealth of Australia, Canberra, 129.

198 See <www.health.gov.au/acc/rescare/sanction.htm>, 1 February 2002.

199 *Aged Care Act 1997* (Cth), s 66-1(a).

200 Ibid, s 66-1(b).

- restricting approval to care recipients to whom the approved provider is providing care at the notice time;[201]
- revoking or suspending the allocation of some or all of the places allocated to the approved provider;[202]
- varying the conditions to which the allocation is subject;[203]
- prohibiting the further allocation of places to the approved provider;[204]
- revoking or suspending the extra service status of a residential care service or prohibiting the granting of extra care service in respect of residential care services conducted by the approved provider;[205]
- revoking or suspending the certification of a residential care service in respect of which the approved provider has not complied with its responsibilities;[206]
- prohibiting the charging of accommodation bonds or the accrual of accommodation charges;[207]
- requiring repayment of some or all of any grants paid to the approved provider in respect of an aged care service in respect of which the approved provider has not complied with its responsibilities;[208] or
- such other sanctions as are specified in the Sanctions Principles.[209]

5.130 The *Aged Care Act* grants monitoring powers[210] to authorised officers.[211] Some of these powers can only be exercised with the consent of an occupier,[212] for example, monitoring compliance, and asking questions. Other powers can be exercised without an occupier's consent: for example, monitoring warrants, seizures without an offence-related warrant in emergency situations, discovery of evidence, requiring people to answer questions and requiring people on the premises to assist authorised officers.[213]

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201 Ibid, s 66-1(c)(i).
202 Ibid, s 66-1(d).
203 Ibid, s 66-1(e).
204 Ibid, s 66-1(f).
205 Ibid, s 66-1(g) and (h).
206 Ibid, s 66-1(i).
207 Ibid, s 66-1(j).
208 Ibid, s 66-1(k).
209 Ibid, s 66-1(l). The Sanctions Principles are made by the Minister under s 96-1 and have effect as a disallowable instrument.
210 Described in Ibid, s 90-4.
211 Defined in Ibid, s 90-3, to mean an 'officer of the Department appointed by the Secretary to be an authorised officer for the purposes of this Part'.
212 Ibid, s 91.
213 Ibid, s 92.

Food Standards Australia New Zealand (formerly ANZFA)

5.131 All food sold in Australia must comply with food regulations. Food Standards Australia New Zealand is a statutory authority established under the *Australia New Zealand Food Authority Act 1991* (Cth) to provide a consistent regulatory framework.[214]

5.132 Food Standards Australia New Zealand develops, varies and reviews uniform national food standards codes for Australia and New Zealand. Food Standards Australia New Zealand makes recommendations to the Australia New Zealand Food Standards Council which approves the standards, which are then automatically adopted as part of the food law of each state and territory on gazettal.

Therapeutic Goods Administration (TGA)

5.133 The TGA, within the Department of Health and Ageing, is responsible for administering the *Therapeutic Goods Act 1989* (Cth), which provides a national framework for the regulation of therapeutic goods in Australia. The *Therapeutic Goods Act* sets out the legal requirements for the import, export, manufacture and supply of medicines in Australia, as well as advertising, labelling and product appearance. The *Therapeutic Goods Act* requires any product for which therapeutic claims are made to be entered in the Australian Register of Therapeutic Goods before the product can be supplied in Australia. The TGA carries out a range of assessment and monitoring activities to ensure that all therapeutic goods available in Australia are of an acceptable standard.

5.134 The *Therapeutic Goods Act* provides for a number of administrative and criminal penalties. These include cancelling the registration or listing of goods in the Register, or revoking or suspending a licence to manufacture therapeutic goods.[215] Failure to comply with a requirement set by the Secretary carries penalties of up to 60 penalty units.[216] Criminal penalties of up to 400 penalty units apply for product tampering.[217]

5.135 The surveillance unit of the TGA is responsible for the enforcement of therapeutic goods legislation. In 2000–01, 516 referrals were made to the Unit, of which 512 matters were actioned.[218] Action ranged from advice and counselling, formal warnings and regulatory visits for minor contraventions up to and including criminal

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214 *Australia New Zealand Food Authority Act 1991* (Cth), s 2A.
215 *Therapeutic Goods Act 1989* (Cth), s 41
216 Ibid, s 30, 30A, 30B.
217 Ibid, Part 4C.
218 Department of Health and Aged Care, *Annual Report 2000–2001* (2001), Commonwealth of Australia, Canberra, 375. The Department of Health and Ageing, *Annual Report 2001–2002* (2002), Commonwealth of Australia, Canberra does not provide updated statistics in relation to the number of referrals made to the TGA Unit.

prosecutions for more serious offences.[219] For the same period the DPP reported nine summary prosecutions under the *Therapeutic Goods Act*.[220]

Gene Technology

5.136 A national scheme for the regulation of gene technology and genetically modified organisms (GMOs) in Australia was introduced in 2000 by the *Gene Technology Act 2000* (Cth) (GT Act) and associated legislation.[221] Under this scheme each State and Territory will enact its own gene technology legislation to complement, or apply, the Commonwealth legislation within its own jurisdiction.[222]

Office of Gene Technology Regulator (OGTR)

5.137 The regulatory system is managed by the Office of the Gene Technology Regulator (OGTR), a federal statutory office holder who derives power from both Commonwealth and State and Territory legislation.[223] Genetically modified (GM) products, defined by the GT Act as being 'a thing other than a GMO derived or produced from a GMO' are generally regulated by other regulatory agencies. Examples of GM products are:[224]

- GM food that is not live or viable (for example, processed food). The Australia New Zealand Food Authority is the relevant regulator.
- GM therapeutics that are not live or viable but have been derived from live or viable GMOs (for example, insulin). These are regulated by the TGA.
- GM agricultural and veterinary chemicals that are not live or viable GMOs but have been produced from GMOs. These are regulated by the National Registration Authority for Agricultural and Veterinary Chemicals (NRA).

5.138 The National Industrial Chemicals Notification and Assessment Scheme regulates GM industrial chemicals.

5.139 The OGTR was established by the GT Act.[225] The functions of the OGTR are to administer the GT Act and related legislation and assess any risks posed by GMOs,

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219 Department of Health and Aged Care, *Annual Report 2000–2001* (2001), Commonwealth of Australia, Canberra, 375.

220 Commonwealth Director of Public Prosecutions, *Annual Report 2000–2001*, Commonwealth Director of Public Prosecutions, 19. For the period 2001–02, there were 12 charges dealt with summarily under the *Therapeutic Goods Act 1989* (Cth): Commonwealth Director of Public Prosecutions, *Annual Report 2001–2002* (2002), Commonwealth Director of Public Prosecutions.

221 Office of the Gene Technology Regulator, *Handbook on the Regulation of Gene Technology in Australia* (2001) Office of the Gene Technology Regulator, Canberra, 16.

222 This framework also operates in conjunction with relevant existing Commonwealth and state schemes.

223 *Gene Technology Act 2000* (Cth), s 17.

224 Office of the Gene Technology Regulator, *Handbook on the Regulation of Gene Technology in Australia* (2001) Office of the Gene Technology Regulator, Canberra, 141–142.

225 The *Gene Technology Act 2000* (Cth) received Royal Assent on 21 December 2000, and the Office of the Gene Technology Regulator became fully operational on 21 June 2001.

inform and advise other regulatory agencies, States and Territories, and the public about GMOs and GM products, promote harmonised risk assessments for GMOs and GM products by regulatory agencies, monitor and enforce the legislation, and report to Parliament.[226] The GT Act also establishes three advisory groups to assist the OGTR.[227]

5.140 The GT Act regulates all 'dealings' with GMOs, as defined by s 10. Those regulated by the Act are, therefore, those who deal with GMOs such as those who conduct experiments with, make, develop, produce, manufacture, breed, propagate, import, grow, raise or culture GMOs or use GMOs in the course of manufacture.

5.141 The OGTR uses a variety of methods to monitor compliance with the legislation including auditing reports, undertaking routine and on-the-spot monitoring, and undertaking inspections in response to reports of alleged contraventions of the legislation.[228] The OGTR's powers of enforcement include varying, suspending or cancelling a licence, accreditation or certification; issuing directions to the licence holder; seeking an injunction to restrain an offending party from continuing a contravention; reporting a suspected contravention to Parliament; and pursuing a prosecution under the legislation. The GT Act requires the OGTR to publicly report annually and quarterly on non-compliance with the legislation and to publish information on contraventions, auditing and monitoring.[229]

Food Standards Australia New Zealand (formerly ANZFA)

5.142 As discussed at para 5.131–5.132, Food Standards Australia New Zealand develops standards for foods, including GM foods, which are regulated under state and territory food legislation. Food Standards Australia New Zealand assesses the safety for human consumption of each food produced through gene technology.[230] Under this standard, GM foods cannot be sold in Australia and New Zealand unless they have passed stringent pre-market safety assessments conducted by Food Standards Australia New Zealand.[231]

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226 *Gene Technology Act 2000* (Cth), s 27.

227 These are the Gene Technology Technical Advisory Committee, the Gene Technology Community Consultative Committee, and the Gene Technology Ethics Committee. For details of their functions see Office of the Gene Technology Regulator, *Handbook on the Regulation of Gene Technology in Australia* (2001) Office of the Gene Technology Regulator, Canberra, 26–27.

228 Ibid, 159.

229 Ibid, 161–165.

230 Australia New Zealand Food Authority, *Food Produced Using Gene Technology*, Australia New Zealand Food Authority, <www.anzfa.gov.au/foodstandards.cf>, 4 September 2001. Genetically modified food will need to pass two levels of scientific evaluation before being approved: that is, firstly an evaluation by the Genetic Manipulation Advisory Committee (GMAC) and then by Food Standards Australia New Zealand: Biotechnology Australia, *Questions & Answers*, Biotechnology Australia, <www.biotechnology.gov.au/community_issues/qa/qa.asp>, 11 September 2001.

231 Australia New Zealand Food Authority, *Food Produced Using Gene Technology*, Australia New Zealand Food Authority, <www.anzfa.gov.au/foodstandards.cf>, 4 September 2001, standard 1.5.

Therapeutic Goods Administration (TGA)

5.143 The responsibilities of the TGA described above at para 5.133–5.135 in respect of the safety, quality and efficacy of therapeutic goods available in Australia, cover GM therapeutic goods, human gene therapy and genetically manipulated pharmaceuticals. If a GMO or product of genetic manipulation technology has therapeutic uses, it will be subject to approval and regulation by the TGA.[232]

National Registration Authority for Agricultural and Veterinary Chemicals (NRA)

5.144 The NRA administers a national regulatory scheme for agricultural and veterinary (agvet) chemicals, including GM (agvet) chemicals. The NRA is responsible for the registration of agricultural and veterinary chemical products up to the point of sale. The NRA assesses and institutes 'conditions for use' of particular agricultural uses of GMOs and for chemicals applied to GMOs.[233] Where a GMO or product of genetic manipulation technology has herbicidal or pesticidal uses, it may need to be registered with the NRA.[234]

Privacy

5.145 Federal, state and territory legislation provides a regulatory framework that protects privacy. Privacy legislation deals mainly with information privacy, that is, the handling of personal information. The main federal privacy laws are administered by the Office of the Federal Privacy Commissioner (OFPC). Other privacy issues include video surveillance, telephone interception and physical intrusion into private spaces. The *Telecommunications (Interception) Act 1979* (Cth) gives the Commonwealth Ombudsman the role of inspecting the records of telephone interceptions by Commonwealth law enforcement agencies (the AFP and the NCA) and ensuring that such interceptions are conducted lawfully and properly.

Office of the Federal Privacy Commissioner (OFPC)

5.146 The OFPC is an independent organisation that reports to the federal Attorney-General.[235] Its purpose is to promote an Australian culture that respects privacy.[236] This

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232 Department of Natural Resources and Environment Victoria, *Modern Biotechnology Regulation in Australia*, Department of Natural Resources and Environment, Victoria, <www.nre.vic.gov.au>, 11 September 2001.

233 Biotechnology Australia, *Questions & Answers*, Biotechnology Australia, <www.biotechnology.gov.au/community_issues/qa/qa.asp>, 11 September 2001.

234 Department of Natural Resources and Environment Victoria, *Modern Biotechnology Regulation in Australia*, Department of Natural Resources and Environment, Victoria, <www.nre.vic.gov.au>, 11 September 2001.

235 The Office commenced on 1 July 2000. Prior to that it was part of Human Rights and Equal Opportunity Commission: Office of the Federal Privacy Commissioner, *The Operation of the Privacy Act: Annual Report 1 July 2000–30 June 2001* (2001), Office of the Federal Privacy Commissioner, Sydney, 18.

236 Ibid, 16.

is done by supporting individuals with privacy concerns, and working with organisations and agencies to improve their practices in the handling of personal information.[237]

5.147 The OFPC has legislative responsibilities under the *Privacy Act 1988* (Cth), the *Data-matching Program (Assistance and Tax) Act 1990* (Cth), the *Telecommunications Act 1997* (Cth), *Crimes Act 1914* (Cth)[238] and the *National Health Act 1953* (Cth).[239]

5.148 The *Privacy Act* is the main privacy legislation. When it was enacted, it was mainly limited to public sector agencies. Its scope was extended to cover private sector organisations with effect from 21 December 2001.[240] The *Privacy Act* provides protection to individuals by establishing Information Privacy Principles and National Privacy Principles which set out strict safeguards for the collection, use and retention of personal information. The Act also provides protection for individuals' tax file numbers and consumer credit information.

5.149 Under the *Data-matching Program (Assistance and Tax) Act*, the OFPC regulates the comparison of personal information held by the ATO and welfare assistance agencies and issues guidelines for the conduct of data-matching. The *Telecommunications Act* sets out strict rules for telecommunications carriers, carriage service providers and others in their use and disclosure of personal information. The OFPC has the role of monitoring compliance with those provisions. The *National Health Act* requires the OFPC to issue guidelines relating to the management of personal information collected from claims on the Medicare and Pharmaceutical Benefits programs. The Commonwealth 'Spent Conviction Scheme' under Part VIIC of the *Crimes Act* gives individuals the right not to disclose spent, quashed or pardoned Commonwealth or territory convictions. The OFPC deals with complaints under this scheme and also assesses applications from organisations seeking to be excluded from the operation of this law.[241]

5.150 The OFPC provides information and advice to the public, and works with organisations and agencies that have obligations to protect privacy. It handles complaints and conducts audits of the procedures for handling personal information, and also provides policy advice and training on the *Privacy Act* and works to inform and educate the community about privacy issues.[242]

5.151 Most complaints received by the OFPC regarding alleged contraventions of the *Privacy Act* are resolved through negotiation and conciliation. In most cases, where the OFPC has formed the view that the respondent has contravened the *Privacy Act*,

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237 Ibid, 16.

238 Under the Spent Convictions Scheme: *Crimes Act 1914* (Cth), s 85ZM.

239 Office of the Federal Privacy Commissioner, *About the Office of the Federal Privacy Commissioner*, Office of the Federal Privacy Commissioner, <www.privacy.gov.au/about/index.html>, 20 June 2001.

240 *Privacy Amendment (Private Sector) Act 2000* (Cth).

241 Office of the Federal Privacy Commissioner, *The Operation of the Privacy Act; Annual Report 1 July 2000–30 June 2001*, Office of the Federal Privacy Commissioner, Sydney, 63.

242 'Promotion and education are key tools used by the Office in meeting our responsibility to encourage adoption of privacy standards more broadly in the community': ibid, 44.

the respondent agrees to take appropriate action. This may include a written apology, retraining of staff, changing procedures or amending or deleting personal information. The OFPC only has powers to negotiate or order compensation for an individual for damages directly arising from an interference with privacy, but monetary compensation cannot be used as a fine to punish the respondent.[243]

5.152 While the OFPC has formal complaint determination powers under the *Privacy Act*, these also are rarely used.[244] If the OFPC finds a complaint substantiated, he or she may make a declaration that the conduct should not be repeated or continued, that the respondent should redress any loss or damage suffered by the complainant, that the complainant is entitled to compensation, or that it would be inappropriate for any further action to be taken.[245]

5.153 In relation to the private sector, the OFPC has powers to investigate complaints and to seek injunctions to prevent contraventions of the *Privacy Act*. If an organisation does not comply with a OFPC's determination, the OFPC can ask the Federal Court or the Federal Magistrates Court to order the organisation to comply. An organisation that fails to comply with a court order commits an offence.[246]

Discrimination and Human Rights

5.154 Australia has anti-discrimination legislation at the federal level as well as in all States and Territories.[247] The primary pieces of federal anti-discrimination legislation are administered by the Human Rights and Equal Opportunity Commission (HREOC). The principal constitutional basis for federal anti-discrimination legislation is Australia's international human rights obligations.[248]

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243 Office of the Federal Privacy Commissioner, *What are My Rights?*, Office of the Federal Privacy Commissioner, <www.privacy.gov.au/privacy_rights/index.html>, 15 October 2001.

244 Attorney-General's Department, *Privacy Amendment (Private Sector) Act 2000: Information Paper*, Attorney-General's Department, <www.law.gov.au/privacy/royalinfo.html>, 21 August 2001. During 1999–2000, the Privacy Commissioner did not exercise his formal determination powers under s 52: Office of the Federal Privacy Commissioner, *The Operation of the Privacy Act: Annual Report 1 July 2000–30 June 2001* (2001), Office of the Federal Privacy Commissioner, Sydney, 62. In 2000–01, the OFPC did not report any determinations: Office of the Federal Privacy Commissioner, *The Operation of the Privacy Act; Annual Report 1 July 2000–30 June 2001*, Office of the Federal Privacy Commissioner, Sydney.

245 *Privacy Act 1988* (Cth), s 52.

246 Ibid, s 55A.

247 *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Human Rights and Equal Opportunity Commission Act 1986* (Cth); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 1995* (Vic); *Anti-Discrimination Act 1991* (Qld); *Anti-Discrimination Act 1998* (Tas); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1992* (NT).

248 There is no express 'human rights' power under s 51 of the Constitution. However, the external affairs power under s 51(xxxix) allows the Commonwealth to enact laws to implement its international legal obligations: *Commonwealth of Australia v State of Tasmania (the Franklin Dam Case)* (1983) 158 CLR 1.

Human Rights and Equal Opportunity Commission (HREOC)

5.155 HREOC is an independent statutory government body established in 1986 by the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act). HREOC reports to the federal Attorney-General.

5.156 The HREOC Act gives HREOC responsibility for seven international instruments ratified by Australia.[249] The primary pieces of federal anti-discrimination legislation administered by HREOC in addition to the HREOC Act are the *Disability Discrimination Act 1992* (Cth), the *Sex Discrimination Act 1984* (Cth), and the *Racial Discrimination Act 1975* (Cth) (collectively referred to as the 'discrimination Acts'). In addition, the Aboriginal and Torres Strait Islander Social Justice Commissioner has specific functions under the HREOC Act and the *Native Title Act 1993* (Cth) in relation to the rights of Indigenous people under the law. The Sex Discrimination Commissioner also has responsibilities in relation to federal awards and equal pay under the *Workplace Relations Act 1996* (Cth).[250]

5.157 HREOC undertakes and coordinates research and educational programs to promote human rights and eliminate discrimination in relation to all the discrimination Acts. HREOC investigates alleged breaches. Where appropriate, it will endeavour to settle matters by conciliation.[251] If settlement attempts are not successful, or if HREOC considers that it is not appropriate to attempt to settle a particular matter, it will formally report on the case to the federal Attorney-General and recommend the action required for a resolution.[252] The President of HREOC may terminate a complaint where he or she believes it is not appropriate to proceed.[253] If a complaint is terminated, the complainant may still have it heard in the Federal Court or the Federal Magistrates Court.[254]

5.158 From 1992 to 1995 the three discrimination Acts contained an enforcement regime which allowed HREOC to make determinations following a public inquiry into complaints of discrimination. A determination would be lodged and registered in the

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249 The *International Covenant on Civil and Political Rights*; *International Labour Organisation Discrimination (Employment) Convention ILO 111*; *Convention on the Rights of the Child; Declaration of the Rights of the Child*; *Declaration on the Rights of Disabled Persons*; *Declaration on the Rights of Mentally Retarded Persons*; and *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.*

250 Human Rights and Equal Opportunity Commission, *About the Commission*, Human Rights and Equal Opportunity Commission, <www.hreoc.gov.au/about_the_commission/legislation/index.html>, 7 August 2001.

251 *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 11(f)(i).

252 Human Rights and Equal Opportunity Commission, *Functions and Powers*, Human Rights and Equal Opportunity Commission, <www.hreoc.gov.au/about_the_commission/legislation/index.html>, 7 August 2001

253 *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 6PH(1). Grounds for termination include the complaint being trivial or lacking in substance, the President being satisfied there was no unlawful discrimination, the complaint being lodged more than 12 months after the alleged discrimination took place, a more appropriate remedy being available, or that the complaint has already been adequately dealt with.

254 Ibid, s 46PO.

Federal Court and, if the respondent did not seek review within 28 days, the determination took effect as if it were an order of the Federal Court and could be enforced against the respondent. These enforcement provisions were held to be unconstitutional by the High Court in 1995.[255] Subsequent legislation repealed the registration and enforcement provisions of the discrimination Acts, removed HREOC's hearing function, and provided complainants with access to the Federal Court and the Federal Magistrates Court.[256] The HREOC Act now provides a new uniform scheme that deals with conciliation and investigation only. HREOC can assist applicants prepare forms for an application to the Federal Court,[257] it may provide the Court with a report on a complaint that has been terminated,[258] and it may assist the Court as *amicus curiae*.[259]

5.159 The HREOC Act provides penalties ranging from 10 penalty units (for failing to attend a compulsory conference and failing to produce documents) to $2,500 and/or three months imprisonment for a natural person and $10,000 for a body corporate for failing to employ, dismissing or otherwise interfering with a person who has made, or intends to make, a complaint or give information to HREOC.[260]

Equal Opportunity for Women in the Workplace Agency (EOWA)

5.160 EOWA is a statutory authority established by the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) (EOWA Act) to replace the Affirmative Action Agency. EOWA reports to the Minister for Employment and Workplace Relations, and is responsible for administering the EOWA Act by educating and assisting organisations to achieve equal opportunity for women.[261] The principal objects of the EOWA Act are threefold:

- to promote the principle that employment for women should be dealt with on the basis of merit;
- to promote, amongst employers, the elimination of discrimination against, and the provision of equal opportunity for, women in relation to employment matters; and
- to foster workplace consultation between employers and employees on issues concerning equal opportunity for women in relation to employment.[262]

5.161 The functions of EOWA are described in the EOWA Act, and include:

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255 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.
256 *Human Rights Legislation Amendment Act 1995* (Cth). See S Roberts and R Redman, 'Human Rights: New Role for HREOC and Federal Court in Human Rights Complaints' (2000) 38(7) *Law Society Journal* 69.
257 *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 46PT.
258 Ibid, s 46PS.
259 Ibid, s 46PV.
260 Ibid, s 26.
261 Equal Opportunity for Women in the Workplace Agency, *What is the EOWA's Role?*, Equal Opportunity for Women in the Workplace Agency, <www.eowa.gov.au/aboutus/index.html>, 7 August 2001.
262 *Equal Opportunity for Women in the Workplace Act 1999* (Cth), s 2A.

- providing advice and assistance to employers in the implementation of workplace programs;
- issuing guidelines to aid in achieving the purposes of the Act;
- monitoring the lodgement of reports as required by the Act;
- monitoring and evaluating the effectiveness of workplace programs;
- conducting research and educational programs;
- promoting understanding, acceptance and public discussion of equal opportunity for women in the workplace; and
- reviewing the effectiveness of the Act.[263]

5.162 The EOWA Act covers private sector organisations, unions, group training companies, community organisation and non-government schools with 100 or more employees, and all higher education institutions.[264] EOWA requires employers to submit a report annually on their workplace program.

5.163 The EOWA Act provides for sanctions where employers fail to meet the requirements of the Act. Firstly, where an employer fails to lodge a report, or provides a report that does not comply with the Act, EOWA may name the employer in its report to the Minister, which is tabled in Parliament.[265] Secondly, an employer may be affected by the Contract Compliance policy,[266] which provides that the Commonwealth Government and its departments and agencies may not buy goods or services from a non-compliant employer; nor may the Commonwealth Government enter into a contract with a non-compliant employer. Those organisations named in Parliament will not be eligible for grants pursuant to specific industry assistance programs.[267]

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263 Ibid, s 10.

264 Equal Opportunity for Women in the Workplace Agency, *Contract Compliance Policy in Support of Equal Opportunity for Women in the Workplace; Operational Details of the Contract Compliance Policy*, Equal Opportunity for Women in the Workplace Agency, <www.eowa.gov.au/compliance/non_compliance/index.html>, 21 June 2001.

265 *Equal Opportunity for Women in the Workplace Act 1999* (Cth), s 19; Equal Opportunity for Women in the Workplace Agency, *Non-Compliance with the Act; Naming*, Equal Opportunity for Women in the Workplace Agency, <www.eowa.gov.au/compliance/non_compliance/index.html>, 20 June 2001.

266 Note that this policy is not part of the Act; it is a Commonwealth Government policy in support of the Act: Equal Opportunity for Women in the Workplace Agency, *Contract Compliance Policy in Support of Equal Opportunity for Women in the Workplace; Operational Details of the Contract Compliance Policy*, Equal Opportunity for Women in the Workplace Agency, <www.eowa.gov.au/compliance/non_compliance/index.html>, 21 June 2001.

267 Equal Opportunity for Women in the Workplace Agency, *Non-Compliance with the Act; Contract Compliance*, Equal Opportunity for Women in the Workplace Agency, <www.eowa.gov.au/compliance/non_compliance/index.html>, 20 June 2001.

6. The Tools of Regulation

Contents

Introduction

6.1 As is clear from the later chapters of this Report, and as foreshadowed in its Discussion Paper in this Inquiry (DP 65)[1], the ALRC's recommendations involve a combination of primary and secondary legislation as well as regulator-drafted guidelines to inject greater fairness, consistency and clarity into Australia's federal civil and administrative penalties schemes.

6.2 In each case, a decision must be taken as to which of these various techniques is the most appropriate, bearing in mind in particular the extent to which the statements of principle and detail are to bind regulators. These options fall on a scale ranging from detailed, inflexible statutory criteria to informal guidelines of a purely indicative or advisory nature.

6.3 The major points on this scale are:

- primary legislation;
- delegated legislation, including regulations, disallowable instruments and quasi-legislation;[2] and
- informal guidelines, not required by legislation.

6.4 This classification recognises the distinction between the legislative and executive functions of government, distinguishing between those rules that should be made by Parliament and those which can be properly delegated to a regulator.

6.5 This chapter reviews each of these modes of regulation and considers their key characteristics including their enforceability, reviewability, flexibility and accessibility, including in relation to the latter, requirements to publish, and various modes of publication. In addition, where applicable, consideration is given to their speed of promulgation, the extent to which they agitate public debate or involve public consultation, the degree to which they signify the seriousness of a matter in need of reform, and the implications that flow from their being either mandatory or advisory.

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1 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney.

2 Quasi-legislation is a form of delegated legislation. One of the primary features that distinguishes it from regulations and disallowable instruments is that it is not subject to a general procedural regime such as that prescribed in the *Acts Interpretation Act 1901* (Cth). See discussion of quasi-legislation at para 6.110–6.128.

6.6 This chapter also explores those areas best suited to reform by way of:

- primary legislation, having regard to established principles governing the choice of primary legislation over delegated legislation;
- delegated legislation, having regard to established principles governing the use of delegated legislation; and
- informal guidelines, having regard to current regulatory law and practice.

6.7 Falling outside this scale of implementation techniques is a further option for reform canvassed in DP 65: directions to legislators.[3] These directions can be related to the performance of a task or the implementation of a principle or legislative objective in the drafting of legislation. Directions to legislators can be seen as an adjunct to the scale of implementation techniques of a differing, but nonetheless significant, nature. This chapter will also consider directions to legislators as a tool of law reform.

Implementation options

Primary legislation

6.8 At one end of the spectrum of legislative options is primary legislation. Legislation sets out the legal position definitively, or at least as definitively as language will allow. Where discretion is involved and guidelines as to the exercise of that discretion are appropriate, legislative criteria can be set out in the primary legislation.[4] At present, the legislation governing federal regulatory schemes and the civil and administrative penalties provided by those schemes is spread over many federal statutes.

6.9 Legislative reform can be implemented in various ways.

- Provisions can be enacted in the primary legislation governing each particular regulatory scheme, where appropriate.
- Alternatively, Parliament could enact a statute of general application to all federal civil and administrative penalties schemes, the provisions of which could operate as default provisions where specific legislation is silent. The advantages of this approach are that it would obviate the need to disperse legislative provisions throughout the large body of federal legislation and, as a result, reduce the possibility of inconsistency. The manner in which such a statute would operate is considered later in this chapter.

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3 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, para 1.34.

4 For example *Trade Practices Act 1974* (Cth), s 76; *Environment Protection and Biodiversity Conservation Act 1999* (Cth); s 481(3) and *Space Activities Act 1998* (Cth), s 81(2), in relation to setting penalties.

- Two separate Acts could deal with civil penalties and administrative penalties respectively. The drawback of having two separate Acts is that the scope of each may not be wide enough to cover such issues as multiple proceedings and multiple penalties.[5] Statements of principle in relation to multiple proceedings and multiple penalties appear to fit more comfortably within a single general regulatory contraventions statute. Furthermore, having two separate statutes could involve unnecessary duplication of drafting in relation to issues relevant to both civil and administrative penalties, such as publicity and the setting of penalties, and increases the possibility of inconsistency.

- Within the option of having civil penalties and administrative penalties dealt with separately is the option of having administrative penalties dealt with by an administrative procedure statute, the ambit of which would be much greater than issues relating solely to, or arising from, the enforcement of administrative penalties by regulators. A full consideration of such a statute falls outside the scope of the ALRC's present Terms of Reference. A brief consideration of the issues arising from the implementation of an administrative procedure statute is considered later in this chapter.

Delegated legislation

6.10 Primary legislation can require the making of instruments, including regulations, which carry out or give effect to the legislation. Where discretion is involved and guidelines as to the exercise of that discretion are appropriate, statute can require those guidelines to be developed and published by the regulator and:

- set out the minimum content of the guidelines in the legislation;[6]

- set out such matters that the guidelines may address;[7] or

- remain silent as to the content of any such guidelines.

6.11 A legislative provision can provide that guidelines must (or may) be formulated by the Minister or agency responsible for the administration of the Act. For ex-

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5 Multiple proceedings and multiple penalties are considered in ch 11.

6 For example, *Securities and Futures Ordinance 2002* (Hong Kong), s 199(2) sets out some factors that the Securities Futures Commission (SFC) must include in its published guidelines relating to its exercise of fining powers. Section 199(1) provides that the SFC must have regard to the published guidelines.

7 For example, *Director of Public Prosecutions Act 1983* (Cth), s 8(1) provides that, in the performance of the Director's functions and in the exercise of the Director's powers, the Director is subject to such directions or guidelines as the Attorney-General, after consultation with the Director, gives or furnishes to the Director by instrument in writing. Section 8(2) provides that, without limiting the generality of s 8(1), directions or guidelines under that subsection *may* (a) relate to the circumstances in which the Director should institute or carry on prosecutions for offences; (b) relate to the circumstances in which undertakings should be given under s 9(6); and (c) be given or furnished in particular cases. See also *Income Tax Assessment Act 1936* (Cth), s 128AE(2AD), which provides that the Treasurer must determine written guidelines for the making of determinations under subs (2AA) and that the guidelines *may* require the Treasurer to take into account specified criteria, recommendations of particular bodies, or any other factors.

ample, s 112(1) of the *Radiocommunications Act 1992* (Cth) provides that the ACA *may* make guidelines that it is to apply in exercising its powers under s 107, 108 and 111 or for the purposes of s 108(3)(a).[8] By contrast, s 146(1) of the *Social Security (Administration) Act 1999* (Cth) provides that the Minister *is* to set guidelines for the exercise of the Secretary's power to make declarations under s 145(1) that would result in the application of an activity test non-payment breach.[9]

6.12 A statute might state that guidelines:

- must or may be published;[10]
- must be published in accordance with the *Statutory Rules Publication Act 1903* (Cth);[11]
- are disallowable,[12] which means that they cease to have effect if either House of Parliament passes a motion disallowing them;[13] and
- must or may be taken into account.[14]

6.13 Instead of a provision in primary legislation providing that guidelines may or must be made, legislation can provide that regulations may authorise the issuing of guidelines.[15]

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8 *Radiocommunications Act 1992* (Cth), s 230(1) similarly provides that the Minister *may* make guidelines with respect to the exercise of the Minister's powers under s 222 to make restrictive orders. See also *Trade Practices Act 1974* (Cth) s 152CT(6), which provides that the ACCC *may* formulate guidelines for the purposes of subs (5).

9 See also *Social Security Act 1991* (Cth), s 1229C(1), which sets out the initial time frame within which the Minister *must* determine guidelines for the operation of the provisions of the Act dealing with penalty interest, and provides that the Minister must thereafter make guidelines from time to time.

10 For example, the *Fuel Quality Standards Act 2000* (Cth), s 36 provides that the guidelines for making a decision published pursuant to that section are to be made available for inspection on the Internet. The *Director of Public Prosecutions Act 1983* (Cth), s 8(3) provides that, where the Attorney-General gives or furnishes a guideline under subs (1), he or she *shall* as soon as practicable, cause a copy of the instrument to be published in the *Gazette*.

11 For example, the *Radiocommunications Act 1992* (Cth), s 112(3) provides that, despite s 46A(1)(c) of the *Acts Interpretation Act 1901* (Cth), a guideline is taken to be a statutory rule within the meaning of the *Statutory Rules Publication Act 1903* (Cth). The effect of this is that the guidelines will be published as part of the Statutory Rules Series, which increases their physical accessibility.

12 For example, the *Customs Act 1901* (Cth), s 243XA provides that the infringement notice guidelines are a disallowable instrument. The *Fuel Quality Standards Act 2000* (Cth), s 36 provides that the guidelines for making a decision under the section are a disallowable instrument; and the *Social Security Act 1991* (Cth), s 1229C(2) provides that a guideline determined under subs (1) is a disallowable instrument.

13 See *Acts Interpretation Act 1901* (Cth), s 46A and 48.

14 For example, the *Customs Act 1901* (Cth), s 243XA provides that the CEO must develop written guidelines in respect of the administration of the Division to which he or she *must* have regard when exercising powers under that Division. The *Fuel Quality Standards Act 2000* (Cth), s 22(2), provides that the Minister must develop written guidelines that he or she *must* have regard to in applying s 21(2). See also the *Superannuation Industry (Supervision) Act 1993* (Cth), s 11, which provides that when making or revoking a declaration, APRA *must* have regard to any written guidelines determined by APRA under the subsection.

6.14 Legislation providing for delegated legislation by way of guidelines should not be silent as to the status of those guidelines. Their status ought not be subject to the uncertainties (and cost) of interpretation by the common law and equity, such as the doctrine of legitimate expectation[16]. Where legislation provides for the making of guidelines, the legislation should also clearly provide that regard must be had to the guidelines, leaving it to the discretion of the decision maker as to whether or not, in the particular circumstances under review, any particular guideline is applicable. This would be consistent with the common law and would not offend the principle of non-fettering of discretion, and would be consistent with the position set out in s 5(2)(f) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act), which reproduces the common law rule against fettering.[17] As is discussed more fully at paragraph 6.147–6.149 below, the principle of non-fettering of discretion requires that in discretionary matters regard be had to the individual circumstances of each case:

> A tribunal which is called upon to exercise a discretion does not perform its duty if it acts in blind obedience to a rule or policy that it had previously adopted.[18]

Guidelines

6.15 At the 'low' end of the spectrum is the option of informal guidelines developed and published by a regulator but not pursuant to a legislative provision calling for such guidelines. As will be discussed, there are a number of different examples of such guidelines drawn from current national and international regulatory schemes which have been given a multitude of descriptions, including manuals, policy statements, charters, guidance notes and practice notes.

Supplementing implementation options

6.16 Irrespective of the manner of implementation chosen for a penalty scheme and the nature of any relevant guidelines, in many cases it will be appropriate, if not necessary, for individual regulators to supplement these schemes (and any reforms to them) by updating staff manuals, providing staff with appropriate training in relation to the application of the reforms, and providing information to the regulated communities explaining the schemes and reforms.

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15 For example, the *Financial Management and Accountability Act 1997* (Cth), s 64(1) provides that the regulations may authorise a Minister to issue guidelines to officials on matters within the Minister's responsibility. The matters must be ones about which regulations may be made under the Act. Section 64(2) of the Act provides that a guideline cannot create offences or impose penalties.

16 The doctrine of legitimate expectation is discussed in para 6.182–6.184 and in ch 14.

17 *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 5(2)(e) provides review for 'improper' exercises of power and s 5(2)(f) defines 'improper' as including a reference to 'an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case.'

18 *R v Moore; Ex parte Australian Telephone and Phonogram Officers Association* (1982) 148 CLR 600, 613.

Characteristics of implementation options

Summary

6.17 It is possible to draw some conclusions about the relative attributes and drawbacks of each of these regulatory options.

6.18 The various forms of primary legislation have different ramifications for accessibility. Regulated parties may well expect to find the laws relating to regulatory penalties in the statutes governing each specific regulatory field. If a regulatory contraventions statute of general application is implemented to operate as a series of default provisions where specific legislation is silent on an issue, two pieces of legislation will have to be consulted to understand a party's legal position. Similarly, if two separate statutes dealing with civil and administrative penalties respectively were implemented, a party facing multiple civil and administrative proceedings would need to access those two pieces of legislation as well as the particular statute governing the regulatory field to understand its position. This is arguably cumbersome, and could pose an impediment to accessibility.

6.19 As discussed below, primary legislation is relatively more accessible than delegated legislation, although this varies, depending on the form of delegated legislation used. For example, regulations, like Acts of Parliament, must be published, are available for purchase from the Government Information Shop,[19] and can be found electronically in consolidated form on the SCALEplus database,[20] as well as the Australasian Legal Information Institute (AustLII) database,[21] and no doubt elsewhere. By contrast, other delegated legislative instruments and quasi-legislation, which is not required to be published pursuant to the *Statutory Rules Publication Act 1903,* are relatively inaccessible and can be difficult to obtain. While there are a variety of ways in which regulators could make informal guidelines accessible, the reality is that they are not statutorily bound to do so and in practice have not always done so.

6.20 Primary legislation represents the most rigid implementation technique, given the processes that must be adhered to in enacting, amending or repealing legislation. The lengthy process of legislative enactment can impede any necessary amendments. By contrast, in principle, informal guidelines are the most flexible of the implementation techniques as they can generally be implemented, amended and revoked with greater ease and in a shorter period of time. Delegated legislation represents the middle ground in terms of flexibility. It is generally more flexible than primary legislation, and more rigid than informal guidelines. It enables legislators and regulators to deal with rapidly changing or uncertain circumstances.

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19 See <www.bookshop.gov.au>.
20 See <http://scaleplus.law.gov.au>.
21 See <www.austlii.edu.au>.

6.21 In principle, informal guidelines have the greatest speed of promulgation of all the implementation techniques. There are no formal processes to be adhered to, even though a regulator may choose to consult with stakeholders prior to finalising guidelines. By contrast, the legislative process entails a number of formal steps that must be taken before introducing a bill into Parliament, as well as a number of steps that must be adhered to once a bill had been introduced into Parliament.

6.22 Primary legislation and regulations and disallowable instruments, which have the same effect as an Act of Parliament, enjoy certainty as to their legal status. They are binding and carry the full force of the law. The enforceability of particular legislative provisions and regulations could depend on whether they are of a mandatory or advisory nature. By contrast, the legal status of quasi-legislation is somewhat unclear. Clearly, informal guidelines or policy are not law and cannot stipulate mandatory or determinative requirements[22] as this would amount to the making of de facto laws without authority and without regard to the normal safeguards associated with law making such as public debate and parliamentary scrutiny.[23] However, courts have stated that informal guidelines serve a useful purpose in ensuring consistency in the interpretation and application of broad statutory discretion.

6.23 Administrative decisions made under an enactment are generally reviewable under the ADJR Act. Decisions made pursuant to quasi-legislation may also be subject to review under the ADJR Act. In general, as non-statutory guidelines are not instruments within the definition of 'an enactment' under the ADJR Act, administrative decisions made pursuant to such guidelines are not reviewable under the Act. Merits review, which encompasses review of all aspects of the challenged administrative decision,[24] will be available only where it is provided for in legislation.[25]

6.24 Of all the implementation techniques, primary legislation has the greatest degree of inherent safeguards in its implementation process including public consultation,[26] public debate and parliamentary scrutiny. Bills introduced into Parliament are subject to parliamentary debate and detailed parliamentary scrutiny. Parliamentary committees are often used as forums for debate and consideration of legislation. By contrast, informal guidelines are not necessarily subject to public or parliamentary scrutiny at all before publication and, in theory, are characterised by the least degree of public debate, and public consultation.

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22 *Gerah Imports Pty Ltd v Minister for Industry Technology and Commerce* (1987) 17 FCR 1, 12 where it was stated that 'such rules are of a non-binding character.' *Re Habchi and Minister for Immigration and Ethnic Affairs* (1980) 2 ALD 623, 631; *Re Uyanik and Minister for Immigration, Local Government and Ethnic Affairs* (1989) 10 AAR 38, 43.

23 D Clark, 'Informal Policy and Administrative Law' (1997) (12) *Australian Institute of Administrative Law Forum* 30.

24 Except for the constitutional validity of any legislation under which the legislation was made: *Re Adams* (1976) 1 ALD 251.

25 For example, review by the Administrative Appeals Tribunal must be specifically provided for in legislation: *Administrative Appeals Tribunal Act 1975* (Cth), s 25.

26 See discussion at para 6.41 below, which identifies instances where public consultation will not be required for proposed legislation.

6.25 In practice, regulators may choose to consult with the public prior to finalising any informal guidelines or policy statements. Between these two extremes is delegated legislation. Only certain types of delegated legislation are subject to parliamentary scrutiny and disallowance. Regulations and disallowable instruments must be laid before Parliament and are subject to disallowance. There is no general statutory requirement for consultation prior to making delegated legislation. However, empowering provisions may require consultation with designated bodies. Quasi-legislation is not subject to parliamentary debate and disallowance and, subject to specific empowering provisions requiring consultation with designated bodies, there is no general statutory requirement for consultation prior to the implementation of quasi-legislation.

6.26 While all areas targeted for reform in this Inquiry are important, it is possible to draw some general conclusions concerning the relationship between the seriousness of an issue targeted for reform and the technique chosen for its implementation. In general, implementation by primary legislation (or by primary legislation combined with delegated legislation) reflects the high degree of seriousness associated with the area of law targeted for reform. By contrast, the least serious areas targeted for reform, although by no means trivial, are suited to implementation by informal guidelines. Similarly, the type of delegated legislation chosen to implement particular recommendations can reflect the comparative degrees of seriousness of the areas targeted for reform. For example, more serious issues are suited to delegated legislation by way of regulations and disallowable instruments given that both these types of delegated legislation, unlike quasi-legislation, have publishing requirements and are subject to parliamentary scrutiny.

6.27 Primary legislation, delegated legislation and quasi-legislation that affect business may require the preparation of a Regulatory Impact Statement (RIS). An RIS is a document prepared by the department, agency, statutory authority or board responsible for a regulatory proposal following consultation with affected parties, formalising some of the steps that must be taken in good policy formulation. It requires an assessment of the costs and benefits of each option, followed by a recommendation supporting the most effective and efficient option.

6.28 Subject to limited exceptions,[27] the preparation of an RIS is mandatory for all reviews of existing regulation, proposed new or amended regulation and proposed trea-

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27 Exceptions include regulation that is not likely to have a direct, or a substantial indirect, effect on business and is not likely to restrict competition; is of a minor or machinery nature and does not substantially alter existing arrangements; involves consideration of specific Government purchases; is required in the interest of national security; or is primary or delegated legislation which merely meets an obligation of the Commonwealth under an international agreement by repeating or adopting the terms of all or part of an instrument for which the agreement provides: Office of Regulation Review, *A Guide to Regulation — Second Edition: December 1998* (1999), Office of Regulation Review, Canberra, B3–B4. The full RIS process is inappropriate for taxation measures, particularly where prior public consultation will provide an opportunity for tax avoidance. However, the RIS required for tax proposals will examine the administrative options for ensuring compliance with tax proposals, and the costs and benefits of each alternative,

ties which will directly affect business, have a significant indirect effect on business, or restrict competition.[28] Although not specifically recommending new areas of regulation, some of the recommendations made by the ALRC may have an effect on how business is regulated generally.

6.29 The definition of 'regulation' set out in the *Guide to Regulation* published by the Office of Regulation Review in 1999 is very broad, and appears to also capture regulation implemented by way of non-statutory or informal guidelines. The *Guide* states that:

> RIS requirements are mandatory for any regulatory proposal affecting business, not just those considered by Cabinet. Other means by which regulation affecting business is proposed include by Ministerial correspondence and agreement, press releases, interviews, independent boards, other policy changes not dependent on legislative change, in meetings of Ministerial Councils and as subordinate regulation.[29]

6.30 The term 'regulation' also includes quasi-regulation, which refers to a wide range of rules or arrangements by which governments influence business to comply but which do not form part of explicit government regulation. Some examples of quasi-regulation include industry codes of practice, guidance notes, industry government agreements and accreditation schemes.[30]

6.31 Regulation affects business when it imposes a cost or confers a benefit on business. The terms 'cost' and 'benefit' are to be interpreted broadly, covering items that can be immediately quantified in monetary terms (eg, service charges, subsidies and compliance costs) as well as items that cannot (eg, restrictions on competition and environmental damage).[31] RIS requirements apply to all government departments, agencies, statutory authorities and boards that review or make regulations which have an impact on business, including agencies or boards with administrative or statutory independence.[32] Therefore these requirements would apply to regulators who are making delegated legislation.

6.32 The *Guide to Regulation* states that:

> RISs must be of a standard suitable for publication in explanatory material. RISs for non-disallowable subordinate legislation and new or amended quasi-regulation should be available to affected groups and individuals and, ideally, be published on the internet.[33]

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to ensure that compliance costs are fully taken into account and with a view to selecting the most appropriate method of compliance: Office of Regulation Review, *A Guide to Regulation — Second Edition: December 1998* (1999), Office of Regulation Review, Canberra, B4.

28 Office of Regulation Review, *A Guide to Regulation — Second Edition: December 1998* (1999), Office of Regulation Review, Canberra, B2–B3.

29 Ibid, B5.

30 Ibid, B3.

31 Ibid, B3.

32 Ibid, B3.

33 Ibid, B5.

Primary legislation

Status and implications

6.33 The Act of Parliament is the primary legislative instrument. It may authorise the making of other legislative instruments such as delegated legislation. The effects of legislation are ongoing and long lasting. Clearly drafted primary legislation promotes certainty and transparency. The statutory structuring of administrative processes and regulatory discretion may also promote consistency and predictability. It also promotes the accountability of decision makers.[34]

Enforceability

6.34 Primary legislation is binding. Where legislation sets out a definitive statement of law it is enforceable. However, the enforceability of a legislative provision regulating the exercise of discretion can depend on whether such provision is mandatory or advisory. Where primary legislation sets out criteria that must be taken into account in making a decision that involves discretion, the Minister or agency responsible for the administration of the Act is bound to have regard to those criteria. If the legislative criteria are merely advisory, the decision maker will not generally be bound to have regard to any particular criterion specified. However, how a court will treat a provision that states that a decision maker *may* do something or take something into account will depend on the circumstances of the case.[35]

Judicial review

6.35 Decisions of an administrative character made under an enactment are reviewable under the ADJR Act unless specifically excluded.[36] The ADJR Act enables judicial review of conduct leading to, or delay in, the making of such decisions, and provides for the right to obtain a statement of reasons for a decision that is made under legislation.[37] Sections 5 and 6 of the ADJR Act set out the various grounds on which a

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34 M Seidenfeld, 'Bending the Rules: Flexible Regulation and Constraints on Agency Discretion' (1999) 51(2) *Administrative Law Review* 429, 433.

35 See for example, *Finance Facilities Pty Limited v Federal Commissioner of Taxation* (1971) 127 CLR 106, which considered *Income Tax Assessment Act 1936* (Cth), s 46(3), which provided that the Commissioner 'may allow' a private company a rebate of taxation if satisfied that the shareholder would not pay a dividend to another private company during a specified period. The Commissioner argued that the provision was discretionary. The High Court ruled that, once satisfied in terms of the section, the Commissioner was obliged to allow the rebate. The Commissioner was not to be regarded as having discretion to refuse the rebate once satisfied of the existence of circumstances entitling the taxpayer to it.

36 Decisions by the Governor-General are not reviewable; nor are the decisions listed in Sch 1, such as decisions under the *Australian Security Intelligence Organisation Act 1979* (Cth), the *Telecommunications (Interception) Act 1979* (Cth), decisions making assessments or calculations of tax under the *Income Tax Assessment Act 1936* (Cth) and the *Customs Act 1901* (Cth), and decisions to prosecute any persons for any offence against a law of the Commonwealth, a State or a Territory.

37 *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 6, 7 and 13.

decision can be reviewed. Specifically, the failure by a decision maker to take into account any legislative criteria in making an administrative decision would constitute an improper exercise of power due to the failure to take into account a relevant consideration. An improper exercise of power by a decision maker is one of the grounds for judicial review of a decision specified in s 5 of the ADJR Act. Decisions are reviewable by the Federal Court and, with some exceptions, the Federal Magistrates Service.

6.36 These courts may make a number of orders on an application for an order of review in respect of a decision, including:

> (a) an order quashing or setting aside the decision, or a part of the decision, with effect from the date of the order or from such earlier or later date as the court specifies;
>
> (b) an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the court thinks fit;
>
> (c) an order declaring the rights of the parties in respect of any matter to which the decision relates;
>
> (d) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court considers necessary to do justice between the parties.[38]

Accessibility

6.37 Accessibility is fundamental to fairness. Primary legislation is relatively more accessible than delegated legislation. Nonetheless, historically, access to legislation has been an area identified for reform, with a number of recommendations made by the Access to Justice Advisory Committee, including greater consultation in the clearer drafting of legislation.[39] The *Access to Justice: An Action Plan Report* stated:

> 'Access' to legislation involves several matters. First, the law should be physically accessible … Secondly, legislation should be comprehensible by more people than just lawyers. If legislation were understandable by all educated lay persons, the law itself would become more accessible to people, and at least in some circumstances, the need to seek legal assistance would be avoided. Thirdly, the people affected by proposed legislation should be consulted during the process of law making. If this happens laws will be more likely to achieve their objectives and be better understood by those who are affected. Higher quality laws should be cheaper to administer and to comply with.[40]

6.38 The 1993 report of the House of Representatives Standing Committee on Legal and Constitutional Affairs on *Clearer Commonwealth Law* stated that 'for a law to be effective its purpose must be clear, its language and structure must aid comprehen-

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38 Ibid, s 16.

39 See Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (1994), Commonwealth of Australia, 466–473. See also Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, para 7.190–7.195.

40 Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (1994), Commonwealth of Australia, xlvi.

sion and people must have easy access to it'.[41] The Committee made a number of recommendations designed to:

- ensure that legislation is drafted with a particular audience in mind so that it is comprehensible to that audience. These recommendations involved identifying relevant target audiences for legislation and developing a program whereby several pieces of legislation would be tested each year for their comprehension by people within those audiences;[42]
- improve the structure, style and presentation of legislation; and
- improve access to legislation. In this regard the Committee stated:

> The final stage of the legislative process is to ensure public access to the legislation. There is no point in having clearly drafted legislation if it is difficult for people to gain access to it.
>
> The Commonwealth should make its legislation available as widely as possible in both printed and electronic form. As a first step in enabling access to legislation, the Attorney-General's Department should ensure that all Commonwealth legislation is in electronic form as soon as possible …
>
> The Commonwealth has a responsibility to ensure that accurate, up-to-date versions of all Commonwealth legislation are available to the community. Urgent attention should be paid to making up-to-date consolidations available in printed and electronic form.[43]

6.39 Acts of Parliament are printed in paper form. All Commonwealth Acts, as well as Bills that come before Parliament, can be purchased at the Government Information Shop.[44] Acts of Parliament are also available electronically at the websites of AustLII[45] and SCALEplus.[46]

Public consultation

6.40 Public consultation is a key feature of the legislative process. The *Legislation Handbook* states that:

> Consistent with best practice in developing legislation, consultation on proposed legislation must occur with relevant parties within government and, where appropriate, with interested parties outside government …

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41 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Clearer Commonwealth Law* (1993), Commonwealth of Australia, xiii.
42 Ibid, rec 17–19.
43 Ibid, xxvii.
44 See <www.bookshop.gov.au>.
45 See <www.austlii.edu.au>.
46 See <http://scaleplus.law.gov.au>.

> The responsibility for undertaking consultation rests mainly with the minister/department/agency sponsoring the legislation … In considering options for consultation, departments should keep in mind the role that parliamentary committees, especially Senate committees, play in the legislation process, and the widespread consultation that committee consideration may entail …
>
> The appropriate timing of, extent of and need for consultation may vary and are matters for the judgment of the minister, or consideration by Cabinet. In some cases it may be desirable for consultation to take place on general principles at the time policy issues are being developed … in other cases consultation on the draft legislation may be more appropriate … There may be cases where the urgency attached to the legislation will prevent widespread consultation.[47]

6.41 It is not necessary or appropriate to engage in public consultation for every piece of proposed legislation. The *Legislation Handbook* sets out those cases where public consultation would not usually be appropriate. Those cases include where the proposed legislation:

- would alter fees or benefits only in accordance with the Budget;
- would contain only minor machinery provisions that would not fundamentally alter existing legislative arrangements; or
- for which consultation would give a person or organisation consulted an advantage over others not consulted.[48]

6.42 In general, where the ALRC has recommended in this Report that primary legislation is the preferred implementation option, the proposed legislation appears to be appropriately suited to public consultation, subject to the exception specified above, that entails a judgment as to whether consultation would give an entity consulted an advantage over others not consulted. Clearly, at this stage, the ALRC is not in a position to draw any conclusions as to the possible application of this exception to any consultation process that may arise in relation to legislation it has proposed.

Speed of promulgation

6.43 The legislative process is relatively lengthy. There are quite a number of steps to be taken, either sequentially or simultaneously, prior to introducing a bill into Parliament. The length of time that it can take for a bill to be introduced into Parliament depends on the priority that it has been given.

Flexibility

6.44 Amendments to Acts of Parliament must generally be implemented by primary legislation. Consequently, a drawback of legislation is its lack of flexibility when it comes to amendment or repeal. The often slow and laborious process of legislative

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47 Department of Prime Minister and Cabinet, *Legislation Handbook*, Commonwealth of Australia, <www.dpmc.gov.au/pdfs/LegislationHandbookMay00.pdf>, 4 November 2002, para 1.7–1.9.

48 Ibid, para 1.10.

amendment can impede or delay necessary change. However, some legislation can be 'modified' by regulation.[49]

Legislative reform in primary legislation

6.45 In recommending that some areas in need of reform be dealt with by way of primary legislation rather than by delegated legislation, the ALRC has had regard to the recommendations made by the Administrative Review Council (ARC) in 1992. The ARC sought to introduce improved guidelines to assist in the determination of matters appropriate for inclusion in Acts of Parliament.[50] The ALRC has also had regard to Standing Order 24(1), which applies to the Senate Standing Committee for the Scrutiny of Bills; to the contents of the *Legislation Handbook*[51] published by the Department of the Prime Minister and Cabinet for use by agencies in the development of legislation; and to the Senate Regulations and Ordinances Committee's 'Guidelines on the Committee's Application of its Principles'.[52]

6.46 Standing Order 24(1) of the Senate Standing Committee for the Scrutiny of Bills requires the committee to review all primary legislation introduced into the Parliament and to report on whether they contain provisions that:

a) trespass unduly on personal rights and liberties;

b) make rights, liberties or obligations unduly dependent on upon insufficiently defined administrative powers;

c) make such rights, liberties or obligations unduly dependent on non-reviewable decisions;

d) inappropriately delegate legislative powers; or

e) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

6.47 The *Legislation Handbook* provides that Departments should give careful consideration as to whether legislation is actually needed or whether administrative action would be sufficient.[53] Legislation should not be proposed simply to give a matter 'visibility'.[54] The limited drafting resources of the Office of Parliamentary Counsel and the

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49 Such as the *Corporations Act 2001* (Cth) and the *Banking Act 1959* (Cth).

50 Administrative Review Council, *Report to the Attorney-General: Rule Making by Commonwealth Agencies*, 35 (1992), AGPS, Canberra.

51 Department of Prime Minister and Cabinet, *Legislation Handbook*, Commonwealth of Australia, <www.dpmc.gov.au/pdfs/LegislationHandbookMay00.pdf>, 4 November 2002.

52 See <www.aph.gov.au/senate/committee/regord_ctte/guidelines.htm>, 4 November 2002.

53 Department of Prime Minister and Cabinet, *Legislation Handbook*, Commonwealth of Australia, <www.dpmc.gov.au/pdfs/LegislationHandbookMay00.pdf>, 4 November 2002, para 1.3.

54 Ibid, para.1.4.

time available for government business in Parliament must be used for proposals that cannot proceed without legislation.[55]

6.48 The *Legislation Handbook* states that, while it is not possible or desirable to provide a prescriptive list of matters that should be included in primary legislation and matters that should be included in subordinate legislation, it is possible to provide some guidance.[56] The *Legislation Handbook* sets out the following matters that should only be implemented by primary legislation:

a) appropriations of money;

b) significant questions of policy, including significant new policy or fundamental changes to existing policy;

c) rules which have a significant impact on individual rights and liberties;

d) provisions imposing obligations on citizens or organisations to undertake certain activities (for example, to provide information or submit documentation, noting that the detail of the information or documents required should be included in subordinate legislation) or desist from activities (for example, to prohibit an activity and impose penalties or sanctions for engaging in an activity);

e) provisions conferring enforceable rights on citizens or organisations;

f) provisions creating offences which impose significant criminal penalties (imprisonment or fines equal to more than 10 penalty units for individuals or more than 50 penalty units for corporations);

g) provisions imposing administrative penalties for regulatory offences (administrative penalties enable the executive to receive payment of a monetary sum without determination of the issues by a court);

h) provisions imposing taxes or levies;

i) provisions imposing significant fees and charges (equal to more than 10 penalty units, consistent with (f) above);

j) provisions authorising the borrowing of funds;

k) procedural matters that go to the essence of the legislative scheme;

l) provisions creating statutory authorities (noting that some details of the operations of a statutory authority would be appropriately dealt with in subordinate legislation); and

m) amendments to Acts of Parliament (noting that the continued inclusion of a measure in an Act should be examined against these criteria when an amendment is required).[57]

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55 Ibid, para 1.4.
56 Ibid, para 1.12.
57 Ibid, para 1.12.

6.49 Notably, the matters listed at (b), (c), (f), (g), (h), (i), (k) and (m) above were those recommended by the ARC for inclusion in the *Legislation Handbook*.[58] Specific categories of matters that ought to be dealt with by way of primary legislation are set out below in so far as they are applicable to the recommendations for reform made by the ALRC.

Provisions setting civil penalties

6.50 It is significant to note that, while the ARC recommended that provisions imposing significant criminal penalties and administrative penalties for regulatory offences be dealt with by way of primary legislation, it made no such recommendation in relation to provisions imposing civil penalties. The *Legislation Handbook* also fails to mention provisions imposing civil penalties in its list of matters to be dealt with by way of primary legislation. This appears to be a significant omission. Given the potential severity of civil penalties, there does not appear to be any policy basis justifying the different treatment accorded to civil penalties. Further, given that the ARC also identified the imposition of significant fees and charges as an area to be dealt with by way of primary legislation, it would seem logical that civil penalties, the effect of which can be more drastic given that they are preceded by a finding of a contravention of the law, should also be dealt with by way of primary legislation. In any event, in practical terms such provisions have historically been implemented by way of primary legislation.

> **Recommendation 6–1.** The *Legislation Handbook* should be amended to make it clear that provisions creating contraventions which impose civil or administrative penalties should only be implemented by primary legislation.

Rules that impact on individual rights and liberties

6.51 The ARC recommended that laws that have a significant impact on individual rights and liberties should be enacted in primary legislation.[59] Examples of such laws, cited by the ARC include those relating to the powers of arrest, entry, search, seizure and forfeiture.

6.52 When considering delegated legislation, the Senate Regulations and Ordinances Committee has regard to four principles (see discussion at para 6.93 below). One of those principles is the question as to whether delegated legislation trespasses

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58 Administrative Review Council, *Report to the Attorney-General: Rule Making by Commonwealth Agencies*, 35 (1992), AGPS, Canberra, Rec 2.

59 Ibid, para 2.19–2.20.

unduly on personal rights and liberties. The Senate Regulations and Ordinances Committee has published guidelines in relation to the interpretation of these principles.[60]

6.53 In the ALRC's view, the use of the plural term 'liberties' can be construed to encompass more than loss of 'physical' liberty by way of imprisonment. It can include, for example, the loss of liberty to manage a corporation following a court order sought by ASIC after a finding of a civil penalty contravention[61] or the loss of liberty to work in a particular role after an administrative banning order.[62]

6.54 Many of the recommendations in this Report concern laws that would, in the ALRC's opinion, have a significant impact on individual rights and liberties, and would therefore be suitable for implementation in statute. These recommendations include, by way of example, Recommendations 11–2, 11–3 and 11–4 which deal with multiple proceedings and penalties; Recommendations 14–1, 14–2 and 14–4 which deal with procedural fairness; Recommendations 15–1, 15–2, 15–6 and 15–8 which deal with elements of fairness; Recommendations 18–1 and 18–3 which deal with the privilege against self-incrimination; Recommendations 19–1 and 19–3 which deal with legal professional privilege; Recommendations 27–1 to 27–4 which deal with non-monetary penalties; and Recommendation 31–1 which deals with recovery of monetary penalties and has as its subject matter the exclusion of imprisonment for default of payment of any non-criminal penalty. Those Recommendations are discussed more fully in the chapters of this Report respectively dealing with those issues.

6.55 Some recommendations made by the ALRC in this Report concern laws that would have a significant impact on individual rights and liberties and also fall under additional grounds specified in the *Legislation Handbook* as justifying implementation by way of primary legislation. For example,

- Recommendation 11–2, which deals with multiple proceedings and multiple penalties, and Recommendations 23–3 to 23–5, which deal with review of decisions by regulators, involve provisions that have a significant impact on individual rights and liberties *and* confer enforceable rights on citizens.

- Recommendation 12–8, which deals with infringement notices cuts across a number of the grounds specified in the *Legislation Handbook* as warranting implementation by way of primary legislation, including its impact on individual rights and liberties, the fact that the amount payable under an infringement notice is akin to an administrative provision imposing administrative penalties for regulatory offences, and that the right of an alleged offender to seek to have the infringement notice withdrawn confers an enforceable right on individuals.

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60 See <www.aph.gov.au/senate/committee/regord_ctte/guidelines.htm>.

61 See *Corporations Act 2001* (Cth), s 206C and s 1317E.

62 For example, *Corporations Act 2001* (Cth), s 920B(1) which explains that the effect of a banning order made by ASIC is to prohibit a person from providing any financial services or specified financial services in specified circumstances or capacities.

- Recommendation 8–2, concerning liability of corporate officers has a significant impact on individual rights and liberties and introduces a significant question of policy by requiring a fault element in legislative provisions that deems an individual to be personally liable for the contravening conduct of a corporation.[63]

6.56 All of the above recommendations are discussed more fully in the body of this Report.

Provisions creating significant criminal penalties

6.57 The ARC recommended that rules that create serious criminal offences should be laid down in Acts of Parliament. The ARC accepted the submission of the Attorney-General's Department that serious offences might be defined as those involving imprisonment or fines of more than $1000 for individuals and more than $5000 for corporations.[64] The *Legislation Handbook* defines significant criminal penalties as imprisonment or fines equal to more than ten penalty units for individuals or more than 50 penalty units for corporations.[65]

6.58 The ARC stated that in its view, where Parliament delegates power to create an offence or set penalties, the empowering statute should set clear limits on the exercise of the power, including monetary limits.

Provisions imposing administrative penalties

6.59 The ARC stated that as a general rule, it considered that administrative penalties for regulatory offences should only be imposed by Act of Parliament.[66] It described administrative penalties as

> a relatively recent innovation enabling the executive to receive payment of a monetary sum without determination of the issues by a court. Payment of the penalty avoids criminal prosecution. An administrative penalty can operate in a variety of ways, the most common being a set monetary penalty. A penalty can also be calculated by reference to, for example, in taxation or customs matters, a factor of the amount avoided.[67]

6.60 Question 7–3 in DP 65 asked whether it was necessary to provide an express default statutory statement that regulators have, unless expressly excluded by statute, the power to correct or withdraw a penalty imposed in error. This question is addressed

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63 See discussion at para 6.63 below in relation to provisions involving significant questions of policy.

64 Administrative Review Council, *Report to the Attorney-General: Rule Making by Commonwealth Agencies*, 35 (1992), AGPS, Canberra, para 2.21.

65 A penalty unit is defined in the *Crimes Act 1914* (Cth), s 4A. A penalty unit is currently equivalent to $110.

66 Administrative Review Council, *Report to the Attorney-General: Rule Making by Commonwealth Agencies*, 35 (1992), AGPS, Canberra, para 2.23.

67 Ibid, para 2.23.

in chapter 15. In the view of the ALRC, it is a logical extension of the principle that an administrative penalty should only be imposed by an Act of Parliament to assert that there should be an express default statutory statement appearing in primary, rather than delegated legislation, that regulators have the power to correct or withdraw a penalty imposed in error, unless excluded by statute. See Recommendations in chapter 15.

Amendments to Acts of Parliament

6.61 The ARC stated in its report that an amendment to an Act of Parliament should only be made by another Act of Parliament.[68] It stated that it was clearly inappropriate for a body subordinate to Parliament to amend an Act made by Parliament, especially when the amendments affect the essential elements of a scheme, change the ambit of the legislation, impose restrictions on rights, or change obligations.[69]

6.62 Some of the recommendations made by the ALRC involve amendments to Acts of Parliament, including Recommendations 13–1 and 13–3, which involve amending the *Customs Act 1901* (Cth) and the *Excise Act 1901* (Cth); Recommendations 23–1 and 23–2, which involve amending Schedule 1 to the *Administrative Decisions (Judicial Review) Act 1977* (Cth); and Recommendation 32–1 which involves amending the *Bankruptcy Act 1966* (Cth) and the *Corporations Act 2001* (Cth). Recommendation 32–2 in relation to the provability of criminal and civil penalties in insolvency and bankruptcy falls within the province of primary legislation on the basis that it involves amendments to the *Bankruptcy Act 1966* (Cth) and the *Corporations Act 2001* (Cth) as well as representing either significant new policy or a fundamental change to existing policy.

Provisions covering significant questions of policy

6.63 The ARC stated that:

> Where the substance of a proposed new rule involves a significant question of policy, including the introduction of new policy or a fundamental change to existing policy, the change should be accomplished by an Act of Parliament. Lesser details may be spelt out in delegated legislation, although all essential elements of a legislative scheme should be contained in the Act.
>
> Commonwealth employees' compensation provides a useful model. The Guide to the Assessment of the Degree of Permanent Impairment is made under the *Commonwealth Employees Rehabilitation and Compensation Act 1988* and is used to assess the level of disability for the purposes of Commonwealth employees' compensation. The primary legislation establishes the policy that a benefit will be paid where a disability is suffered. It also establishes a minimum level of disability before the benefit is paid. Provision is made for the tabling of the Guide, and the disallowance provisions in Part XII of the Acts Interpretation Act are applied. The Guide is a complex

68 Ibid, para 2.33.
69 Ibid, para 2.33.

document inappropriate for an Act of Parliament but the statement of policy under which the Guide operates is spelt out in the Act.[70]

Delegated legislation

Definition

6.64 Delegated legislation is a general description for legislative instruments made by persons or bodies other than Parliament who have been given the authority to make such legislation by an Act of Parliament.[71]

6.65 Also referred to as 'subordinate legislation', delegated legislation can include regulations, disallowable instruments and quasi-legislation. There has been substantial expansion in the list of instruments fitting within the definition of delegated legislation, particularly in the Commonwealth sphere.[72] In 1992 the ARC observed that Commonwealth delegated legislation had 'fallen into a parlous state. Different procedures for drafting, consultation, publication and parliamentary scrutiny apply'.[73]

Delegated legislation: when appropriate

6.66 Generally, matters of detail and matters liable to frequent change should be dealt with by delegated legislation.[74] A number of other matters may be included in delegated legislation in order to streamline the primary legislation.[75] However, the desirability of simplifying primary legislation is only one consideration, and others may be more important in particular cases. See the discussion of matters suitable for inclusion in primary legislation above at para 6.45.

6.67 Professor Dennis Pearce has listed three primary reasons why action is taken by delegated rather than primary legislation:

- to save pressure on parliamentary time;
- the legislation is too technical or detailed to be suitable for parliamentary consideration;

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70 Ibid, para 2.16–2.17.

71 D Pearce and S Argument, *Delegated Legislation in Australia* (2nd ed, 1999) Butterworths, Sydney, 1.

72 Administrative Review Council, *Report to the Attorney-General: Rule Making by Commonwealth Agencies*, 35 (1992), AGPS, Canberra, ix.

73 Ibid, 3. See discussion of quasi-legislation and Administrative Review Council, *Report to the Attorney-General: Rule Making by Commonwealth Agencies*, 35 (1992), AGPS, Canberra below at para 6.112–6.129.

74 Department of Prime Minister and Cabinet, *Legislation Handbook*, Commonwealth of Australia, <www.dpmc.gov.au/pdfs/LegislationHandbookMay00.pdf>, 4 November 2002, para 6.45.

75 'It may be argued that it is undesirable for Acts of Parliament to be cluttered with matters of detail. This argument assumes that principal rules are more readily comprehensible if expressed more concisely': Administrative Review Council, *Report to the Attorney-General: Rule Making by Commonwealth Agencies*, 35 (1992), AGPS, Canberra, 5.

- the legislation is to deal with rapidly changing or uncertain circumstances.[76]

Limitations on the use of delegated legislation

6.68 A number of matters need to be borne in mind as safeguards against the abuse of delegated power:

- The delegate to which the power to legislate is given must be chosen carefully;
- The form of the empowering provision must be such that it does not allow the making of whatever legislation on a matter seems appropriate to the delegate;
- Adequate publicity must be given to delegated legislation. A person must know the law with which he or she must comply; and
- Parliament must ensure that it has appropriate means available to it to review delegated legislation.[77]

6.69 The principle that a person cannot delegate legislative power that has been delegated has been accepted with only one or two minor expressions of doubt.[78] In Australia the principle has been accepted but not often applied as the validity of delegated legislation is usually determined by an analysis of the empowering provision and the delegated legislation made under that power.[79]

Delegated legislation and penalties

6.70 The courts have shown considerable reluctance to hold delegated legislation to be valid where it imposes a penalty or some other liability upon an individual and there is no clear authorisation for such a provision in the empowering Act.[80] Where the empowering Act authorises the delegated legislation to impose penalties, the delegated legislation will not necessarily be invalid. However, the ALRC's view is that penalties should generally be imposed only by primary legislation.[81] Where the operation of a regulation has an incidental punitive effect but is clearly within the authority given to

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76 D Pearce and S Argument, *Delegated Legislation in Australia* (2nd ed, 1999) Butterworths, Sydney, 5.

77 Ibid, 15.

78 Ibid, 261. There are two circumstances identified by Pearce and Argument in which the rule against sub-delegation is directly excluded. The first is when the statute empowering the making of delegated legislation also enables the legislation-making power to be sub-delegated: see *Esmonds Motors Pty Ltd v The Commonwealth* (1970) 120 CLR 463. The second is when the delegation of power can be described as plenary, in which case the sub-delegation of that power is permissible: see D Pearce and S Argument, *Delegated Legislation in Australia* (2nd ed, 1999) Butterworths, Sydney, 261.

79 See, for example, *Racecourse Co-operative Sugar Association Ltd v Attorney-General (Qld)* (1979) 26 ALR 321, 337 and *Dainford v Smith* (1985) 58 ALR 285, 290.

80 See *Bishop v MacFarlane* (1909) 9 CLR 370 and *Re the Corporation of the City of Port Adelaide; Ex parte Groom* [1922] SASR 35.

81 This was the view of the Administrative Review Council in Administrative Review Council, *Report to the Attorney-General: Rule Making by Commonwealth Agencies*, 35 (1992), AGPS, Canberra, 16–17. The ALRC acknowledges that a number of regulations already impose penalties. These penalties tend to be low level: see, for example *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth). See discussion above in relation to matters to be enacted in primary legislation at para 6.45.

make delegated legislation, the incidental effect will not result in the invalidity of the regulation.[82]

Regulations

6.71 A wide range of legislation provides that the Governor-General in Council may make regulations, not inconsistent with the legislation concerned, that carry out or give effect to the legislation.

6.72 There are few examples in Commonwealth regulation where guidance as to the exercise of a regulator's discretion to impose penalties is made as regulations. One example is r 14.03 of the *Environment Protection Biodiversity Conservation Regulations 2000* (Cth), which sets out the content of an infringement notice issued under the *Environment Protection Biodiversity Conservation Act 1999* (Cth).

Status

6.73 A 'regulation carries the full force of the law — it has the same effect as an Act of Parliament'.[83] Therefore, a statement of the law in a regulation will have the same force as it would in primary legislation. However, delegated legislation is subordinate to Acts of Parliament in that, if there is a conflict between a provision of an Act and a regulation, the Act will prevail.[84]

6.74 Importantly, where an Act provides that regulations made under the Act are to be treated as if they were enacted in the Act, regulations will have an important effect on the meaning to be given to the Act.[85] However, without this provision, delegated legislation made under an Act should not be taken into account for the purposes of interpretation of the Act.[86]

Enforceability

6.75 In the context of the current Inquiry, regulations could provide guidance as to how statutory grants of obligatory or discretionary power in primary legislation are to be exercised.[87] Depending on the nature and content of the empowering provision and the regulations, regulators could enforce these laws themselves or through the courts.

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82 See *Bray v Milera* [1935] SASR 210.

83 Parliament of Australia Senate, *Brief No 4*, Parliament of Australia, <www.aph.gov.au/senate/pubs/briefs/brief4.htm>, 20 June 2002. See also D Pearce and R Geddes, *Statutory Interpretation in Australia* (4th ed, 1996) Butterworths, Sydney, 2; and Parliament of the Commonwealth of Australia, *Senate Standing Committee on Regulations and Ordinances 110th Annual Report* (2001), Parliament of Australia, 1.

84 *Foster v Aloni* [1951] 1 VLR 481.

85 D Pearce and R Geddes, *Statutory Interpretation in Australia* (4th ed, 1996) Butterworths, Sydney, 78.

86 See, for example, *Webster v McIntosh* (1980) 32 ALR 603, 606 and *Secretary, Department of Health, Housing, Local Government and Community Services v Kaderbhai* (1994) 122 ALR 577, 583–584.

87 For example, the procedural steps to follow when issuing an infringement notice.

Regulated parties who seek to enforce these laws against regulators may seek administrative law remedies in courts or tribunals.

6.76 However, regulators may be reluctant to be given further guidance in the form of regulations. Some regulators welcomed the proposals in DP 65 requiring further guidelines providing for further criteria or procedures.[88] However, some have stressed that these guidelines should not be binding.[89]

Mandatory or advisory?

6.77 When primary legislation grants power to a public official such as a regulator, the extent to which the provision can be 'enforced' against, or is binding on, the regulator, will depend on whether the grant of power is mandatory or advisory.

6.78 Guidance as to the exercise of statutory grants of power should generally be provided for in primary legislation. However, when primary legislation grants a mandatory or advisory power to a regulator, delegated legislation may provide more detailed guidance as to how that power is to be exercised. This further guidance could take the form of additional criteria, further considerations or procedural steps. This guidance could also be either mandatory or advisory.

6.79 Legislators have attempted to distinguish mandatory provisions[90] from advisory provisions.[91] However, in some cases an apparent discretion to act has been rendered obligatory by the courts.[92] Whether a provision is regarded as mandatory or advisory will ultimately depend on the circumstances of the case and the court's assessment of what is the intended effect of the legislation.[93]

6.80 A number of agencies and government bodies consulted have stressed that their guidelines made as delegated legislation are for 'guidance only' or 'only guide-

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88 Proposals 6–1, 6–2, 7–5, 7–6, 7–7, 8–5, 12–1(d) and 15–1.

89 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002. In some cases the legal effect of a discretion provided for in delegated legislation may render the regulations invalid. This may lead to less effective regulation and enforcement, and therefore militate against regulations being used for further guidance. See *Maggs v City of Camberwell* (1925) 31 ALR 226 and *Turner v Owen* (1990) 96 ALR 119. See also in relation to statutory powers to incorporate discretions: *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746, 760 and 764.

90 A number of Commonwealth regulations require regulators to comply with certain mandatory procedures when performing their regulatory functions. For example, r 14.03 of the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) sets out that an infringement notice must contain certain information.

91 Other regulations are advisory, providing guidance on how regulatory functions are to be performed, leaving some discretion for the regulator. For example, under r 310A(4) of the *Civil Aviation Regulations 1988* (Cth), CASA may include certain matters, as set out in the regulation, in a safety audit program.

92 See, for example, in *Finance Facilities Pty Limited v Federal Commissioner of Taxation* (1971) 127 CLR 106 and above at para 6.34.

93 See *Minister for Human Services and Health v Haddad* (1996) 137 ALR 391, 399–400. For a detailed discussion of these issues and a list of cases in which a provision has been held to be obligatory or discretionary see D Pearce and R Geddes, *Statutory Interpretation in Australia* (4th ed, 1996) Butterworths, Sydney, ch 11.

lines' and therefore not binding.[94] In contrast, a Member of the Advisory Committee stressed the need for the ALRC to make a recommendation requiring a legislative direction to regulators to follow their guidelines. The same Member also stated that some allowance for divergence from guidelines may be made, but that regulators be required to state reasons for departing from the guidelines.

Judicial scrutiny and administrative review

6.81 Regulators may be reluctant to use delegated legislation to further structure discretions provided for in primary legislation because of the possibility that collateral challenges to their regulatory decisions will impede efficient regulation.[95]

6.82 The making of delegated legislation cannot be challenged under the ADJR Act as the decision is of a legislative, rather than of an administrative, character.[96] However, the courts do have power to review such legislation and have declared it invalid for a number of reasons including that formal requirements have not been complied with, unreasonableness of effect, and lack of certainty.[97]

6.83 Unless specifically excluded, administrative decisions made under delegated legislation may be reviewed under the ADJR Act.[98] Other avenues for relief would include relief under the Constitution, *Judiciary Act 1903* (Cth) and the accrued jurisdiction of both the Federal Court and the High Court (see para 20.27–20.40 for further discussion of these grounds of review). Further, if specifically provided for, a merits review tribunal could also review a decision made under or pursuant to regulations.[99]

Accessibility

Physical access

6.84 The *Acts Interpretation Act* and *Statutory Rules Publication Act* ensure that the public is notified of the making of regulations and that the regulations are published.[100] Under the *Statutory Rules Publication Act* regulations must be published as 'statutory rules'. This ensures that regulations can all be found in the one place. However, it is

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94 Australian Government Solicitor, *Consultation*, Sydney, 27 August 2002 and Australian Customs Service, *Consultation*, Canberra, 4 September 2002.

95 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.

96 See D Pearce and S Argument, *Delegated Legislation in Australia* (2nd ed, 1999) Butterworths, Sydney, 264 and *Vietnam Veterans' Affairs Association of Australia New South Wales Branch v Cohen* (1996) 46 ALD 290.

97 See M Aronson and B Dyer, *Judicial Review of Administrative Action* (2nd ed, 2000) LBC Information Services, Sydney and D Pearce and S Argument, *Delegated Legislation in Australia* (2nd ed, 1999) Butterworths, Sydney.

98 Section 3 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) provides that for the purposes of the Act, an 'enactment' will include regulations.

99 For example, *Taxation Administration Regulations 1976* (Cth), reg 33; *Space Activities Regulations 2001* (Cth), reg 11.02; *Retirement Savings Accounts Regulations 1997* (Cth), reg 6.02(3).

100 See *Acts Interpretation Act 1901* (Cth), s 48 and *Statutory Rules Publication Act 1903* (Cth), s 5(3).

not known to what extent this improves accessibility and how often regulated communities access the Statutory Rules Series.

6.85 There has been some debate as to whether regulations should be published electronically on something similar to the Federal Register of Legislative Instruments that was proposed by the Legislative Instruments Bill 1994 (Cth).[101] Such electronic publication does not, however, replace the requirements of the *Acts Interpretation Act* and the *Statutory Rules Publication Act*, and would not be mandatory.[102] Regulations are currently published online in legal databases such as AustLII and SCALEplus. A number of regulators and government agencies provide links in their websites to the legislation they administer. Many regulators also notify the making of regulations on their website. All regulations can be purchased at the Government Information Shop

6.86 Outside the statutory requirements set out above, there is no limit to how an empowering provision in an Act can require publication of regulations. Various provisions are to be found in Commonwealth legislation requiring delegated legislation to be published using various methods and media.[103]

6.87 The ALRC has made recommendations in relation to the accessibility of guidelines made as delegated legislation (see Recommendation 6–2 below). Of particular note is the requirement to make guidelines available to the public via the regulator's website.

Quality of drafting

6.88 Regulations are prone to the same criticisms as primary legislation in terms of comprehensibility.[104] Regulations are usually drafted by the Office of Legislative Drafting in the Attorney-General's Department on the instructions of the relevant minister's department, and are subject to the procedural requirements set out in the *Federal Executive Council Handbook*.[105] This process goes some way to ensuring that regulations are more clearly and consistently drafted.

6.89 Regulations should be accompanied by explanatory statements.[106] Explanatory statements are prepared for circulation to Senators and Members of Parliament when the regulations or ordinances are tabled, and are currently published on SCALEplus. Where appropriate, they could be published more widely (for example, a regulator's website could reproduce the explanatory statement or provide a link to SCALEplus) to

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101 See Federal Legislative Instruments Database (FLID) at http://frli.law.gov.au.

102 D Pearce, *Delegated Legislation* (1977) Butterworths, Sydney, 21–22.

103 On occasion the requirement is that the legislation be published in full, usually in the government *Gazette*. In other cases, it is sufficient if notification is given that the regulations have been made together with information as to where the regulations can be obtained: D Pearce and S Argument, *Delegated Legislation in Australia* (2nd ed, 1999) Butterworths, Sydney, 126.

104 In fact, due to the technical nature of many regulations, they may be more difficult to understand than the primary legislation they seek to streamline.

105 See <www.dpmc.gov.au/publications.cfm>.

106 *Federal Executive Council Handbook*, para 5.5.

assist regulator staff and the regulated community understand the purpose and detail of the delegated legislation.

Public debate and consultation

6.90 Regulations must be tabled in Parliament within 15 sitting days after being made. This encourages some public debate. However, they commence from the time that they are made (subject to their own provisions about commencement). If disallowed, they cease to have effect from the date of disallowance.

6.91 At present there is no general statutory requirement for consultation prior to making Commonwealth delegated legislative instruments.[107] However, an empowering provision may require that there be consultation with a designated person, body or general consultation,[108] or that an impact statement be prepared before the legislation is made.[109]

6.92 The preparation of an RIS which requires consultation with affected parties will be mandatory for regulations that involve 'regulation' which directly affects business, has a significant indirect effect on business, or restricts competition.[110] A discussion of RISs is at para 6.27–6.32 above.

Speed of promulgation

6.93 While not as lengthy as the primary legislative process, there are a number of steps to be taken, when making regulations. A brief summary of the process is outlined below.

- Regulations are drafted by the Office of Legislative Drafting on the instructions of the relevant minister's department;
- Once drafted they are subject to the procedural requirements set out in the *Federal Executive Council Handbook*. The Handbook states that an explanatory statement is required (see para 6.89). It also sets out the Executive Council requirements, in terms of the documentation required and the deadlines for lodging of material prior to the Executive Council meeting at which it is to be considered.

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107 This may change if a Legislative Instruments Bill as proposed in Administrative Review Council, *Report to the Attorney-General: Rule Making by Commonwealth Agencies*, 35 (1992), AGPS, Canberra is enacted.

108 See *Great Barrier Reef Marine Park Act 1975* (Cth), s 32.

109 If this is a mandatory requirement and it is not complied with, the delegated legislation could be declared invalid: see *Phillip Morris Ltd v Victoria* [1986] VR 825 and D Pearce and S Argument, *Delegated Legislation in Australia* (2nd ed, 1999) Butterworths, Sydney, 116.

110 Office of Regulation Review, *Guide to Regulation — Second Edition: December 1998*, Productivity Commission, <www.pc.gov.au/orr/reguide2/>, 16 October 2001, B2–B3.

- Where an Act confers power to make regulations, then, unless the contrary intention appears, all regulations so made 'shall be laid before each House of the Parliament within 15 sitting days of that House after the making of the regulations'. Section 48(4) of the *Acts Interpretation Act* allows any member of the House of Representatives[111] or Senate, within 15 sitting days after tabling, to give notice of a motion to disallow a regulation. If a motion to disallow a regulation is agreed to by either House, the regulation 'thereupon ceases to have effect'. Under subsection 48(3), if any regulations are not laid before each House within 15 sitting days, they cease to have effect. If no such motion is moved, the regulations continue in force.

- The Senate Standing Committee on Regulations and Ordinances is required to scrutinise each instrument referred to it on strictly technical grounds only.[112] For example, the Committee must check that an instrument is in accordance with the statute under which it is made;[113] ensure that an instrument does not trespass unduly on personal rights and liberties;[114] where appropriate, a right to external review of a decision exists;[115] and that matters contained in regulations are not matters which are more appropriately contained in an Act.[116]

- If the Senate Standing Committee on Regulations and Ordinances moves for disallowance,[117] the motion invariably results in the disallowance of the instrument in question by Parliament, unless withdrawn by the Committee.

- Section 48 of the *Acts Interpretation Act* provides that regulations take effect from the date of notification in the *Gazette* unless otherwise specified in the regulations themselves.[118]

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111 However, in practice, it is unusual for regulations and other instruments to be disallowed in the House of Representatives.

112 The Senate Standing Committee on Regulations and Ordinances has no equivalent in the House of Representatives which has similar, but rarely used, disallowance powers: *Acts Interpretation Act 1901* (Cth), s 48(4).

113 Under this term of reference, the Committee checks for technical validity: Parliament of the Commonwealth of Australia, *Senate Standing Committee on Regulations and Ordinances 110th Annual Report* (2001), Parliament of Australia, 6.

114 Under this term of reference, the Committee checks for such matters as strict liability offences, reversal of the onus of proof, abrogation of the privilege against self-incrimination, and inappropriate search and seizure powers: ibid, 6.

115 Considerations may include that discretions should be as narrow as possible, include objective criteria to limit and guide their exercise, and include review of the merits of decisions by an external, independent tribunal: ibid, 6.

116 See above at para 6.48. Considerations may include: the legislation fundamentally changes the law, legislation is lengthy and complex, legislation intends to bring about radical changes in relationships or community attitudes: ibid, 6.

117 *Acts Interpretation Act 1901* (Cth), s 48(4).

118 However, the starting date is limited by s 48(2), which prohibits regulations from taking effect prior to notification if they would prejudicially affect the existing rights of a person (other than the Commonwealth) or if they would impose liabilities on a person other than the Commonwealth for anything done or not done before the date of notification. Regulations made in contravention of these requirements are void and of no effect.

6.94 Of course, the empowering provision in primary legislation would also have been the subject of the primary legislation process. This may have an impact on the amount of time it takes to produce delegated legislation.[119]

Flexibility

6.95 The disallowance procedure has the advantage that the operation of a regulation is not delayed pending parliamentary approval. This enables the executive to respond quickly to urgent situations and generally allows it to get on with the day-to-day business of government.[120]

6.96 However, while the process of amendment and revocation of regulations is less onerous than for primary legislation, the process is still relatively lengthy. Regulations would usually be amended or revoked by regulations.[121] Where a procedure is laid down for the revocation of delegated legislation in the empowering Act, the courts will require strict compliance with that procedure if the revocation is to be effective.[122]

6.97 Where there is no statutory requirement relating to revocation of the delegated legislation but there is a procedure specified for the making of the delegated legislation, revocation can only be effected by following the same procedure.[123]

6.98 The relatively lengthy process for amendment and revocation may render regulations unsuitable for some of the ALRC's recommendations. Many regulators and government agencies may not want guidelines developed for the exercise of discretion subject to parliamentary process that could delay the making, implementation, amendment and revocation of guidelines.

6.99 Further, whereas primary legislation may be reviewed through the normal parliamentary process, the procedures for the making and supervision of delegated legislation do not contain a mechanism to ensure that it is kept up to date. The numbers of

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119 For example, the Senate Standing Committee for the Scrutiny of Bills examines and reports to the Senate on clauses of Bills which, among other things, inappropriately delegate legislative powers. Adverse reports may result in amendments to a Bill to bring a delegation within proper limits or to subject instruments made under a delegation to tabling and disallowance by the Parliament.

120 Administrative Review Council, *Report to the Attorney-General: Rule Making by Commonwealth Agencies*, 35 (1992), AGPS, Canberra, 6.12. This is, of course, subject to s 48(2) of the *Acts Interpretation Act 1901* (Cth) set out above. Regulations could also be revoked by the repeal of an empowering provision. However, there may be exceptions to this general rule. See D Pearce and S Argument, *Delegated Legislation in Australia* (2nd ed, 1999) Butterworths, Sydney, ch 25 for further discussion.

121 See, for example, *Corporations Regulations 2001* (Cth), r 10.1.01.

122 See, for example, *R v Shire of Huntley; Ex parte Tootell* (1887) 13 VLR 606 and *Barry v The City of Melbourne* [1922] VLR 577.

123 *Acts Interpretation Act 1901* (Cth), s 33(3). One issue that has arisen is the effect of Parliament disallowing regulations that amend or revoke other regulations. However, the issue has now been solved by s 48(7) of the *Acts Interpretation Act 1901* (Cth).

delegated instruments made annually means that, without a means to review the instruments, they can quickly become outdated.[124]

Conclusion

6.100 Regulations are an appropriate form of instrument for detailed matters such as how an infringement notice scheme operates (see, for example, Recommendations in chapter 12) or the content of notices (see, for example, Recommendations in chapter 14). They are also an attractive form of instrument as they are generally accessible to the public through notification in the *Gazette*, and publication in the Statutory Rules Series and now on the internet. The greater flexibility of regulations, compared to primary legislation, makes them a suitable instrument for matters that are relatively certain, but that may need to change from time to time, for example, automated processes such as infringement notices and the content of notices in relation to the imposition of penalties.

6.101 However, because of their status, potential binding nature, parliamentary scrutiny and the possibility of invalidity due to the legal effect of a discretion, regulations may be less appropriate for guidelines in relation to the exercise of a discretion that requires great flexibility to operate in a highly changeable environment. Further, it is the ALRC's view that, when Parliament intends to fetter broad discretions, this should generally be done in primary legislation. It makes sense to have the same processes available for both the granting of power and the structuring of that power. Where Parliament intends to give an agency a broad discretion, the structuring of this discretion may be better achieved through the use of informal guidelines developed by the agency (see discussion of regulators' guidelines below).

6.102 Where regulations are used to prescribe penalty processes, they should generally be developed through a process of community consultation. Further, where possible, any explanatory material in relation to those regulations should be made available to the regulated community. It is also the ALRC's view that guidelines made as delegated legislation should be made as publicly available as possible (see Recommendation 6–2 below) and that training should be provided to regulator staff in relation to them (see Recommendation 6–6 below).

Disallowable instruments

6.103 An empowering Act may authorise other instruments outside the Statutory Rules Series to be made by a Minister of the Crown or a public servant. Section 46A of the *Acts Interpretation Act* provides for certain instruments made by Ministers or their delegates to be designated 'disallowable instruments'. The effect of this is that such in-

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124 The Administrative Review Council has acknowledged that this is a problem and proposed that all existing principal instruments of a legislative character and all instruments subject to a Legislative Instruments Act (see below) should be 'sunsetted': Administrative Review Council, *Report to the Attorney-General: Rule Making by Commonwealth Agencies*, 35 (1992), AGPS, Canberra, 7.2. 'Sunsetting' is the practice of providing for legislation to cease to have effect on a specified day or after it has been in force for a designated period of time.

struments will be subject to the same parliamentary scrutiny as regulations. However they will not be called 'regulations'.

6.104 There are a number of examples of disallowable instruments in federal regulation, including the *Guidelines for Serving Infringement Notices* made under Part XIII — Division 5 of the *Customs Act 1901* (Cth) and the *Sanctions Principles* made under the *Aged Care Act 1997* (Cth).

6.105 Generally, there are no significant differences between disallowable instruments and regulations in relation to their parliamentary review and disallowance process, judicial scrutiny,[125] administrative review,[126] public debate and consultation,[127] and speed of promulgation.

6.106 The status[128] and enforceability[129] of disallowable instruments are also generally equal to that of regulations. Disallowable instruments can be made binding.[130] For example, principle 22.17 of the *Sanctions Principles* made under the *Aged Care Act* outlines the matters to which the Secretary must have regard in deciding on the length of a sanction period.

6.107 In *Octet Nominees Pty Ltd v Grimes*[131] the court considered s 40AA of the *National Health Act 1953* (Cth), which provided that a certain discretion should be exercised 'subject to any principles that have been formulated under subsection (7) and that are in force'. Section 40AA(7) empowered the Minister to formulate 'principles in accordance with which scales of fees are to be determined'. Provision was made for parliamentary disallowance and to some extent for publication of the principles.

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125 The *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 3(c) does not exclude disallowable instruments as an 'enactment'.

126 See *Neviskia Pty Ltd, Saitta Pty Ltd and Department of Health and Aged Care* [2000] AATA 1152 for a brief consideration of the *Sanctions Principles* and other principles made under the *Aged Care Act 1997* (Cth).

127 Instruments can be made as disallowable instruments for the purposes of s 46A of the *Acts Interpretation Act 1901* (Cth), and require consultation with certain persons or organisations. For example, *Child Care Act 1972* (Cth), s 12P. If a guideline made as a disallowable instrument was considered to effect business, it would most probably require an RIS. When developing the *Guidelines for serving infringement notices* under the *Customs Act 1901* (Cth) the Australian Customs Service engaged in extensive consultation, for example, providing draft guidelines for comment, information seminars and industry training.

128 There is no general statement as to the legal effect of a disallowable instrument. However, according to Pearce and Geddes, an 'Act may authorise the making of other forms of legislation by other bodies. This type of legislation, which is known collectively as delegated legislation, may appear under various titles — regulations, rules, by-laws, statutory instruments and so on. Delegated legislation should not be regarded as an inferior form of legislation — it carries out it maker's commands as effectively as does an Act of parliament': D Pearce and R Geddes, *Statutory Interpretation in Australia* (4th ed, 1996) Butterworths, Sydney, 2. See *Minister for Human Services and Health v Haddad* (1996) 137 ALR 391, 399–400.

129 See *Minister for Human Services and Health v Haddad* (1996) 137 ALR 391, 399–400.

130 See discussion at para 6.116 below of *Gerah Imports Pty Ltd v Minister for Industry Technology and Commerce* (1987) 17 FCR 1; *Octet Nominees Pty Ltd v Grimes* (1986) 68 ALR 571; and *Minister for Immigration, Local Government and Ethnic Affairs v Gray* (1994) 49 FCR 189.

131 *Octet Nominees Pty Ltd v Grimes* (1986) 68 ALR 571.

Jenkinson J found that the principles had some legal effect, assuming, but not deciding, that they were delegated legislation rather than 'administrative provisions'.[132]

6.108 Disallowable instruments may not be as accessible as regulations. The same notification requirements that apply to regulations under s 48 of the *Acts Interpretation Act* also apply to disallowable instruments. However, s 46A(1)(c) specifically exempts disallowable instruments from the requirements of the *Statutory Rules Publication Act*. Nonetheless, some guidelines made as disallowable instruments must be published pursuant to the *Statutory Rules Publication* Act.[133] As noted above, it is not known if this process actually improves accessibility and how often regulated communities access regulations through the Statutory Rules Series.

6.109 Furthermore, some disallowable instruments are available in ways in addition to the requirements under the *Statutory Rules Publication Act*. For example, both the *Guidelines for Serving Infringement Notices* made under the *Customs Act* and the *Sanctions Principles* made under *Aged Care Act* are available on the internet.

Conclusion

6.110 For the same reasons outlined above in relation to regulations, disallowable instruments are appropriate instruments for detailed matters such as how an infringement notice scheme operates or the content of notices. They are generally accessible to the public, although publication in the Statutory Rules Series is excluded from the general procedure. The flexibility of disallowable instruments, compared to primary legislation, makes them a suitable instrument for matters that are relatively certain, but that may need to change from time to time. However, they may be less appropriate for guidelines that operate in a highly changeable environment because of their status, parliamentary review and potentially binding nature.

6.111 Like regulations, where the disallowable instrument process is used to make instruments prescribing penalty processes, they should generally be developed through a process of community consultation. Further, where possible, any explanatory material in relation to those instruments should be made available to the regulated community. See also Recommendations 6–2 and 6–6 below.

Quasi-legislation

6.112 This category of delegated legislation is authorised by a wide range of legislation. The Act might allow or even require, a minister, secretaries of departments, heads

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132 Ibid, 581. Peter Bayne has observed that his Honour's finding was based on the wording of the instrument which spoke of the exercise of the discretion being 'subject to' and being exercised 'in accordance with' the principles — and the Government's intentions as revealed in the legislative history. It was also noted that the Ministerial power might be restrained by 'the pleasure of each House of Parliament': P Bayne, 'Policy Guidelines and Law — Some Intersections' (1991) 65 *Australian Law Journal* 607, 608.

133 For example, s 112(3) of the *Radiocommunications Act 1992* (Cth) provides that guidelines are a disallowable instrument and are taken to be a statutory rule within the meaning of the *Statutory Rules Publication Act 1903* (Cth). The effect of this is that the guidelines will be published as part of the Statutory Rules Series.

of statutory authorities and others to promulgate 'guidelines', 'codes of practice' or 'administrative procedures'. One of the primary features that distinguish this form of instrument from regulations and disallowable instruments is that it is not subject to a general procedural regime such as that prescribed under the *Acts Interpretation Act*.

6.113 Perhaps the most relevant example of quasi-legislation are the Public Tax Rulings made under Part IVAAA of the *Taxation Administration Act 1953* (Cth).

Status

6.114 Many writers and commentators have noted the problems associated with quasi-legislation. One of the foremost issues identified is the lack of understanding about the legal status of much quasi-legislation.[134] It is important that the status of instruments that are given some form of approval by the parliament or some other authority is clearly understood. They may be required to be taken into account when a decision is being made, but approval does not necessarily elevate them to legislative status.[135]

Enforceability

6.115 Peter Bayne has suggested

> that a guideline or a direction can at least potentially have some legal effect if there is a legislative mandate for the making of the document. This may seem axiomatic, but there are decisions which appear to be opposed to this general standpoint.[136]

6.116 In *Gerah Imports Pty Ltd v Minister for Industry Technology and Commerce*,[137] the Court considered the 1988 Global Tender Quota Scheme. Section 266(1) of the *Customs Act* provided that 'the Minister *may*, by instrument in writing, formulate a scheme for calling and dealing with tenders' [emphasis added]. There was no provision for parliamentary review. Davies J acknowledged that the scheme was in 'precise and formal terms', that it 'affected both public and private interests in a significant manner', and would be relied upon by potential importers.[138] However, his Honour held that 'the Scheme should be looked upon as a statement of guidelines, not as a prescription of legal entitlements', and concluded that 'the Scheme did not have a

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134 S Argument, 'Quasi-Legislation: Greasy Pig, Trojan Horse or Unruly Child?' (1994) 1 *Australian Journal of Administrative Law* 144, 152–153.

135 *Naval Military and Airforce Club of South Australia Inc v Federal Commissioner of Taxation* (1994) 32 ALD 385, 406.

136 P Bayne, 'Policy Guidelines and Law — Some Intersections' (1991) 65 *Australian Law Journal* 607, 608.

137 *Gerah Imports Pty Ltd v Minister for Industry Technology and Commerce* (1987) 17 FCR 1.

138 Ibid, 10.

legislative character. It was not delegated legislation. It was not a regulation or a by-law'.[139]

6.117 However, quasi-legislation may be binding on a government department or agency in that, for example, the agency may be required to act 'in accordance with' the guideline or policy.[140] In the case of taxation rulings it has been observed that:

> A tax ruling cannot, of course, have the same authoritative force as a judicial decision. But where a ruling conflicts with the view of a judge or tribunal, the Act itself brings about the result that the Commissioner must assess the taxpayer according to the view which is the more favourable to the taxpayer. From the Commissioner's perspective, therefore rulings can be absolutely binding, whereas the taxpayer has a choice.[141]

Accessibility

6.118 In preparing its report, *Rule Making by Commonwealth Agencies*, the ARC was told that

> many delegated legislative instruments are very difficult to obtain. The material is not always physically available and, where it is, access is often impeded because the material is not kept in any systematic series. This unavailability is additional to any problems associated with lack of comprehension due to the quality of drafting.[142]

6.119 Professor Dennis Pearce and Stephen Argument also identify the proliferation, poor quality of drafting of quasi-legislative instruments and inaccessibility of quasi-legislative instruments as problematic.[143] Unlike primary legislation and other types of delegated legislation, there is probably no obligation to publish quasi-legislation.[144]

6.120 However, statutory provisions that empower the making of quasi-legislation can require the instrument to be made accessible in a number of ways. Section 14ZAAI

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139 Ibid, 10. Noting that the Australian cases cited by Davies J concerned policy documents with no statutory base, Bayne has observed that: 'The sweeping character of this conclusion gave too little recognition to the fact that the scheme is made under statutory authority … It is indeed arguable that the instrument which formulated the scheme was legislative in character and was under Commonwealth law a statutory instrument subject to some publication requirements': P Bayne, 'Policy Guidelines and Law — Some Intersections' (1991) 65 *Australian Law Journal* 607, 608.

140 For example, s 243XA of the *Customs Act 1901* (Cth) provides that the CEO must develop written guidelines in respect of the administration of the Division to which he or she *must* have regard when exercising powers under the Division. Quasi-legislation can be binding on a tribunal such as the Administrative Appeals Tribunal. See, for example, s 28(4) of the *Safety Rehabilitation and Compensation Act 1988* (Cth).

141 M Aronson and B Dyer, *Judicial Review of Administrative Action* (2nd ed, 2000) LBC Information Services, Sydney, 125. See also *Payne and Commissioner of Taxation* [2002] AATA 9.

142 Administrative Review Council, *Report to the Attorney-General: Rule Making by Commonwealth Agencies*, 35 (1992), AGPS, Canberra, 61.

143 D Pearce and S Argument, *Delegated Legislation in Australia* (2nd ed, 1999) Butterworths, Sydney, 11. See also S Argument, 'Quasi-Legislation: Greasy Pig, Trojan Horse or Unruly Child?' (1994) 1 *Australian Journal of Administrative Law* 144.

144 There may be a general duty to publish delegated legislation including quasi-legislation. Peter Bayne has explored the general common law obligation: P Bayne, 'The Publication of Delegated Legislation' (1989) 63 *Australian Law Journal* 355) and Administrative Review Council, *Report to the Attorney-General: Rule Making by Commonwealth Agencies*, 35 (1992), AGPS, Canberra, para 1.22. See also *Johnson v Sargant & Sons* [1918] 1 KB 101, *Watson v Lee* (1979) 144 CLR 374, 406. See further D Lanham, 'Delegated Legislation and Publication' (1974) 37 *Modern Law Review* 510.

of the *Taxation Administration Act* sets out that the Commissioner makes a public ruling by publishing it, and publishing notice of it in the *Gazette*.[145] Unless specifically provided for in the empowering provision there is no requirement as to the drafting or scrutiny of quasi-legislation to ensure its comprehensibility.

Judicial scrutiny and administrative review

6.121 As noted above, delegated legislation can be declared invalid by a court but not under the ADJR Act. However, decisions made pursuant to quasi-legislation may be subject to review under the ADJR Act, the Constitution and the *Judiciary Act*.[146] A decision made under quasi-legislation could be specifically made appellable to the Administrative Appeals Tribunal. However, even if quasi-legislation is not an enactment for the purposes of the *Administrative Appeals Tribunal Act 1975* (Cth), it may still be considered by the AAT when reviewing a decision.

Public consultation

6.122 Without specific provision, quasi-legislation would elicit little public debate. As noted above, there is no general procedure for consultation prior to making delegated legislation in the Commonwealth sphere. However, nothing prevents primary legislation providing that quasi-legislation should be made only after consultation with interested and affected parties.[147] Further, if quasi-legislation directly affected business, had a significant indirect effect on business or restricted competition, an RIS would need to be prepared after a process of consultation.

Speed of promulgation

6.123 As there is no general procedure for making quasi-legislation, speed of promulgation will depend on the empowering provision in the primary Act. Some empowering legislation may be silent on the making procedure, others may provide for a lengthy promulgation process. Section 14ZAAJ of the *Taxation Administration Act* provides that a public ruling is made at the later of the time when it is published and the time when the notice of it is published in the *Gazette*.

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145 The public ruling must state that it is a public ruling for the purposes of the Part and include a number and subject heading by which it can be identified. The notice in the *Gazette* must include the number and subject heading by which the public ruling is identified and a brief description of the public ruling. Other examples include s 36 of the *Fuel Quality Standards Act 2000* (Cth) which provides that the guidelines for making a decision published pursuant to that section are to be made available for inspection on the Internet. See also *Environment Protection (Biodiversity and Conservation) Act 1999* (Cth), s 303CA.

146 See *Chittick v Ackland* (1984) 53 ALR 143, 153–154 and *Australian National University v Lewins* (1996) 138 ALR 1, 16. But see *Chapmans Ltd v Australian Stock Exchange Ltd* (1994) 14 ACSR 726 where the Court held that the Stock Exchange's listing rules were not an instrument for the purposes of *Administrative Decisions (Judicial Review) Act 1977* (Cth).

147 In some schemes, quasi-legislation may be made by the relevant industry body; for example, the codes and standards made under the *Telecommunications Act 1997* (Cth), Part 6.

Flexibility

6.124 There is no general procedure for the amendment or revocation of quasi-legislation. Therefore, these instruments may differ greatly in terms of flexibility. Some empowering legislation may be silent on the revocation of the instrument, if a procedure is provided for the making of the legislation, the instrument may be required to be revoked the same way it is made.[148] Other legislation may specifically provide for the revocation of the instrument. For example, s 14ZAAK of the *Taxation Administration Act* provides for the withdrawal of public rulings, the effect of withdrawal of a public ruling and the effect on a public ruling if a tax law is re-enacted or remade.

Rule making by Commonwealth agencies

6.125 The ARC addressed the concerns surrounding quasi-legislation in its 1992 report on *Rule Making by Commonwealth Agencies*.[149] The report stated that the current problems included the existence of instruments that under present arrangements are not treated as being either legislative or executive in character.[150]

6.126 The report recommended the enactment of a new Act to prescribe procedures for the making, publication and supervision of delegated legislative instruments. The Government's response to the ARC report was the drafting of a Legislative Instruments Bill. The Legislative Instruments Bill, in all its forms,[151] sought to bring some discipline to the area of delegated legislation. It would have applied to 'instruments of a legislative character'. The Bill clearly encompassed quasi-legislation. Under the 1996 version of the Bill, the effect of something being a legislative instrument is that it would have been subject to an ordered and stringent regime in relation to drafting, publication, registration, parliamentary scrutiny and, in some cases, public consultation.

Conclusion

6.127 Quasi-legislation appears to be an attractive option for the provision of further guidance in relation to the exercise of statutory grants of power. For example, Parliament could specify the further criteria to be addressed in the guidelines in the empowering Act and provide flexibility for regulators in relation to the amendment and revocation of these instruments. The public rulings used by the Commissioner of Taxation are an example of how many of the concerns of commentators about the use of quasi-legislation can be overcome by detailed prescription in the empowering provision.

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148 *Acts Interpretation Act 1901* (Cth), s 33(3).

149 Administrative Review Council, *Report to the Attorney-General: Rule Making by Commonwealth Agencies*, 35 (1992), AGPS, Canberra.

150 Ibid, 8–9.

151 In 1994 the federal (ALP) Government introduced the Legislative Instruments Bill 1994 (Cth). This Bill was, in large part, that government's response to the ARC report. A second Bill was introduced in June 1996 by the current Government. This Bill was subject to a large number of amendments in the Senate, about one-third of which were not accepted by the Government. A third Bill was introduced in 1998, but lapsed when the Parliament was prorogued in October 1998. The Legislative Instruments Bill was listed for consideration in the 2002 Winter sittings of Parliament. It was not introduced.

6.128 However, the uncertainty about the status and enforceability of these instruments, the lack of scrutiny and quality control, and their potential inaccessibility, make them inappropriate for most of the reforms proposed in this Report. Further, if a Legislative Instruments Bill was enacted in the form envisaged by the ARC, many of the flexible aspects of these instruments would be lost.

6.129 Quasi-legislation may be a suitable type of instrument for enforcement guidelines. It is the ALRC's view that criteria governing enforcement proceedings need not be subject to parliamentary scrutiny. However, the ALRC is hesitant to recommend the use of quasi-legislation considering the extensive commentary and proposed legislation in opposition to it.

Recommendation

Recommendation 6–2. In addition to any statutory requirements to publish, any guidelines (however named) made as delegated legislation or otherwise made pursuant to a legislative requirement to do so should be made available to the public:

(a) via the website of the regulator responsible for the administration of the guidelines;

(b) on publicly available legislation websites;

(c) in hard copy; and

(d) in any other appropriate medium.

Informal policies and guidelines

6.130 At the informal end of the spectrum of reform options is the option of guidelines not created pursuant to any legislative provision. These are the most common and variable form of guidelines in Commonwealth regulation. They differ in content, detail, quality and permanence; and have been given a multitude of names, including 'manuals', 'policy statements', 'charters' and 'practice notes'.

Definition

6.131 There is no legal definition of informal guidelines and policy. The name chosen by regulators is not decisive. What is determinative is the function and use to

which a guideline or policy, however named, is put.[152] 'Informal policy' has been defined as

> any set of guidelines, whether published or not whether written down or not, that regulates or guides a series of decisions authorised by law … Informal policy … is not legislation, and may take many forms.[153]

Commonwealth regulator guidelines

6.132 Consistently with the Commonwealth Government's strategy to develop a national approach to the provision of online services,[154] most Commonwealth regulators now publish a variety of documents, including informal policies and guidelines, on their websites. What follows is a brief discussion of some of the different features of informal guidelines in Commonwealth regulation.

Naming

6.133 There is no consistency in the names given to informal guidelines developed and published by Commonwealth regulators. Guideline names include: 'Guide', 'Charter', 'Manual', 'Code', 'Priorities', 'Summary', 'Policy Statement', 'Practice Note', 'Policy', 'Interpretative Decision' and 'Principles'. Some guidelines are only identified by the subject matter that they deal with.

Status

6.134 Most guidelines are silent as to their status and legal effect. However, some regulators identify the status of their informal guidelines. For example, the ATO has issued a Practice Statement on ATO Interpretative Decisions (IDs), *Practice Statement 2001/8*, which sets out when the ATO staff must examine current ATO IDs, when ATO IDs must be applied and that they are not law and neither legally nor administratively binding on the ATO.[155]

6.135 It is the ALRC's view that regulators should identify the status of their informal policies and guidelines to identify to both the regulator's staff and the regulated community those statements that have legal effect (either primary or delegated legislation) and those that do not (informal policies and guidelines). This will bring some certainty to the process for both the regulated community and the regulator's staff. The

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152 D Clark, 'Informal Policy and Administrative Law' (1997) (12) *Australian Institute of Administrative Law Forum* 30, 32.

153 Ibid, 31.

154 See <www.govonline.gov.au>, 16 September 2002 and the National Office for the Information Economy: <www.noie.gov.au>, 16 September 2002.

155 Nonetheless, if a taxpayer relies upon an ATO ID and their circumstances are materially the same as those described in the ATO ID, and the ATO ID is subsequently found to be incorrect, penalties will not be levied on the missing tax. However, interest on the missing tax may be payable depending on the circumstances of the case: Australian Taxation Office, *Practice Statement 2001/8: Interpretative Decisions*, <www.ato.law.gov.au>, 7 May 2002. Similarly, the overview of the *ATO Prosecution Policy* notes that this policy document 'does not have the force of law': Australian Taxation Office, *ATO Prosecution Policy*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/index.htm>, 9 March 2001, para 1.1.9.

ALRC has made a recommendation in relation to statements about the non-binding nature of informal guidelines below (see Recommendation 6–3(b)).

Specificity and level of detail

6.136 The subject matter of some guidelines used by regulators is quite specific; for example, ASIC's *Policy Statement 64* on failure to lodge documents.[156] Other guidelines will have broad application, such as ASIC's *Policy Statement 57* on notification of rights of review[157] or *Practice Statement 47* on public comment.[158]

6.137 Informal guidelines can be detailed. The *Prosecution Policy of the Commonwealth* is one example.[159] Another example is the ACCC's booklet on the use of their s 155 information gathering powers.[160] Other informal guidelines used by Commonwealth regulators are brief and at times very general, giving broad outlines of enforcement strategies, priorities and processes.

Presentation

6.138 Some Commonwealth regulators have a systematic method of presenting their informal guidelines. For example, ASIC utilises a system of Policy Statements[161] and Practice Notes[162] which use a numbering system and are kept on a register linked to the ASIC website.[163] The ATO has also adopted a systematic approach to the presentation of information such as public rulings and interpretative decisions.

6.139 A number of regulators do not use a system for presenting their guidelines. The ALRC's research revealed that this often affects the accessibility of these guidelines, making them difficult to obtain from a regulator's website. Often a regulator's website search engine did not assist access to informal guidelines. The ALRC considers that a systematic method of presenting guidelines assists access by both the regulator's staff and the regulated community to information about the regulator's approach

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156 Australian Securities & Investments Commission, *Policy Statement 64: Failure to lodge documents*, <www.asic.gov.au>, 3 May 2002.

157 Australian Securities & Investments Commission, *Policy Statement 57: Notification of Rights of Review*, <www.asic.gov.au>, 3 May 2002.

158 Australian Securities & Investments Commission, *Practice Statement 47: Public Comment*, <www.asic.gov.au>, 3 May 2002.

159 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*, Commonwealth Director of Public Prosecutions, <www.cdpp.gov.au/cdpp/>, 16 November 2001.

160 Australian Competition & Consumer Commission, *Section 155 of the Trade Practices Act: Information-Gathering Powers of the Australian Competition and Consumer Commission in Relation to its Enforcement Function* (2000) Australian Competition & Consumer Commission.

161 ASIC describes policy statements as 'formal declarations of our policies. They indicate how we will administer the Corporations Law and other legislation for which we are responsible': <www.asic.gov.au/asic/asic_pub.nsf>, 16 September 2002.

162 Practice Notes are 'issued for the guidance of practitioners on reporting and compliance matters': <www.asic.gov.au/asic/asic_pub.nsf>, 16 September 2002.

163 See <www.cpd.com.au/asic/>, 16 September 2002.

to compliance and enforcement. For this reason, the ALRC has made a number of recommendations in relation to the presentation of guidelines below (see Recommendations 6–3 and 6–4).

Subject matter

6.140 The subject matter dealt with in informal guidelines varies greatly across federal regulators and includes:

- compliance and enforcement policies;[164]
- general policy documents on compliance and enforcement;[165]
- informal guidelines outlining the use of certain enforcement techniques;[166]
- enforcement and target priorities;[167]
- guides on how officers of the regulator will interpret the law and exercise discretion;[168]
- leniency and immunity policies;[169]
- outlines of detailed or complex procedures;[170]

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164 See Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*, Commonwealth Director of Public Prosecutions, <www.cdpp.gov.au/cdpp/>, 16 November 2001 and Australian Taxation Office, *ATO Prosecution Policy*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/index.htm>, 9 March 2001.

165 See Australian Transaction Reports and Analysis Centre, *Compliance and Enforcement Policy*, <www.austrac.gov.au/text/cash_dealer/enforcement_policy/index.htm>, 7 May 2002; Environment Australia, *Compliance and Enforcement*, Environment Australia, <www.ea.gov.au/epbc/compliance/index.html>, 22 May 2001; Civil Aviation Safety Authority, *Enforcement Manual*, Civil Aviation Safety Authority, <www.casa.gov.au/manuals/htm/enf/enf.htm>, 18 September 2001. For a comparison see United States Federal Trade Commission, *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, <www.ftc.gov.au>, 24 October 2002; and New Zealand Commerce Commission, *Enforcement under the EIR Act*, <www.comcom.govt.nz/acts/eiract/enforce.cfn>, 24 October 2002.

166 For example, both ASIC and the ACCC provide guidance on the use of enforceable undertakings including acceptable and unacceptable terms and the consequences of non-compliance with an undertaking: Australian Competition & Consumer Commission, *Section 87B of the Trade Practices Act: A Guideline on the Australian Competition and Consumer Commission Use of Enforceable Undertakings*, Australian Competition & Consumer Commission, <www.accc.gov.au/pubs/Publications/Legislation/s87BTPA.pdf>, 23 October 2001 and Australian Securities & Investments Commission, *Practice Note 69: Enforceable Undertakings*, Australian Securities & Investments Commission, <www.cpd.com.au/asic/pn/>, 20 December 2001.

167 For example, see Australian Competition & Consumer Commission, *Corporate Plan and Priorities 2002-03*, Australian Competition and Consumer Commission, 12 November 2002 and the earlier Australian Competition & Consumer Commission, *Making Markets Work — Directions and Priorities* (1999), ACCC Publishing Unit, Canberra. For a comparison see United Kingdom Inland Revenue, *New Criminal Offence for Tax Fraud*, <www.inlandrevenue.gov.uk/bulletins/tb49.pdf>, 24 October 2002.

168 For example, see Department of Family & Community Services, *Guide to Social Security Law*, Department of Family & Community Services, <www.facs.gov.au/guide/ssguide/3.htm>, 8 November 2001.

169 See chapter 17.

- service charters;[171]
- procedural fairness guidelines;[172]
- policies on remission of administrative penalties;[173]
- statements about the regulated community's rights of review.[174]

Informal policy: when appropriate

6.141 Administrative policies are developed in response to problems faced by administrators especially where the agency is engaged in high volume decision making.[175] Some regulators may not be given statutory rule-making power and therefore may only make informal guidelines.[176] David Clark has identified a number of other reasons why administrators would make rules in the form of informal policy:

- The statutory mandate may be so vague that the administrators are genuinely perplexed as to what they must do.[177]

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170 For example, see Australian Securities & Investments Commission, *Hearings Practice Manual* (1999) Australian Securities & Investments Commission. Another example, is Australian Taxation Office, *Code of Settlement Practice in Respect of Taxation Liabilities*, Australian Taxation Office, <www.ato.gov.au/content.asp?doc=/content/Professionals/Code_Settlement.htm>, 24 May 2001.

171 See, for example, Australian Broadcasting Authority, *Service Charter*, <www.aba.gov.au/aba/serv_charter.htm>, 24 October 2002; Australian Maritime Safety Authority, *Service Charter*, <www.amsa.gov.au/sd/scharter.htm>, 24 October 2002 and the ACCC's *About ACCC* <www.accc.gov.au>. For a comparative analysis see Hong Kong Inland Revenue Department *Taxpayer's Charter*: www.info.gov.hk/ird/eng/abo/tax.htm and United Kingdom Environment Agency *Customer Charter*, www.environment-agency.gov.uk.

172 ASIC, for example, uses *Policy Statement 92: Procedural Fairness to Third Parties* when deciding its procedural fairness obligations. For a comparative analysis see Hong Kong Inland Revenue Department, *Taxpayer's Charter*, <www.info.gov.hk/ird/eng/abo/tax.htm>, 24 October 2002.

173 The ATO's remission policies are published in the form of tax rulings setting out prescriptive ranges of remissions based on mitigating and aggravating factors: see, for example, Australian Taxation Office, *TR 2000/3 Taxation Ruling — Income Tax: Remission of Penalty and General Interest Charge from RPS, PAYE and PPS Payments*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/findrul.htm>, 19 February 2002.

174 See United Kingdom Competition Commission, *Guide to Appeals under the Competition Act 1998*, <www.competition-commission.org.uk>, 24 October 2002 and New Zealand Work and Income, *Reviews and Appeals*, <www.winz.govt.nz>, 24 October 2002.

175 D Clark, 'Informal Policy and Administrative Law' (1997) (12) *Australian Institute of Administrative Law Forum* 30, 33.

176 For example, ASIC may issues guidelines as to the exercise of its various discretions in the form of policy statements and practice notes. These releases do not enjoy the force of law of the rules made by, for example, the US Securities and Exchange Commission. According to Paul Redmond, Australian companies legislation has never adopted the United States practice of delegating a rule-making power to the regulatory agency: P Redmond, *Companies and Securities Law: Commentary and Materials* (1992) The Law Book Company Ltd, Sydney, 931, fn 5.

177 *Britten v Pope* [1916] AD 150, 158.

- As a method of programming decisions that are believed, sometimes mistakenly, to be routine.
- A policy can increase consistency across decision making and enhance predictability.
- There is evidence that agencies use policies for political purposes especially to ward off criticisms of bias and subjectivity.[178]
- Agencies often have an explicit duty to adjudicate cases or disputes and to formulate policy or develop practices in the policy arena concerned.
- A policy may represent the accumulation of agency expertise in certain areas of administration.
- Policy represents a set of objectives or goals towards which an agency aspires.[179]

6.142 Of course, the development of policies that are also published can also increase transparency of administrative decision making.

Limitations on the use of informal policies

6.143 There are limitations on the benefits of policy guidelines or rules. It can be difficult to anticipate all matters that should be taken into account when exercising discretion.[180] Where rules structure discretion, there may remain discretion to choose between rules, or depart from the rules by creating new ones,[181] that can undermine the policy and public confidence.[182] Further, administrative agencies can 'use structuring to circumvent the interests of individuals'.[183] Guidelines may be applied inflexibly not taking account of the circumstances of an individual case.

6.144 Critics have noted that administrative rule making should not be used as a substitute for primary legislation or as a way of exceeding statutory power.[184] Another danger posed by guidelines is that decision makers will apply the guidelines and not the legislation. This is a particular issue if guidelines are inconsistent with the legisla-

178 Clark cites J Jowell, *Law & Bureaucracy: Administrative Discretion and Limits of Legal Action* (1975) Dunellen, Port Washington: D Clark, 'Informal Policy and Administrative Law' (1997) (12) *Australian Institute of Administrative Law Forum* 30, 33.

179 D Clark, 'Informal Policy and Administrative Law' (1997) (12) *Australian Institute of Administrative Law Forum* 30, 32–33.

180 R Baldwin and K Hawkins, 'Discretionary Justice: Davis Reconsidered' (1984) *Public Law* 570, 575.

181 Ibid, 577.

182 M Seidenfeld, 'Bending the Rules: Flexible Regulation and Constraints on Agency Discretion' (1999) 51(2) *Administrative Law Review* 429, 433.

183 R Baldwin and K Hawkins, 'Discretionary Justice: Davis Reconsidered' (1984) *Public Law* 570, 576.

184 R Baldwin, 'Accounting for Discretion' (1990) 10(3) *Oxford Journal of Legal Studies* 422, 428.

tion. Decisions made pursuant to them could therefore be struck down as *ultra vires* or invalid.[185]

Guidelines must be lawful

6.145 An informal rule or policy must be lawful.[186] It is now well established that most discretionary powers can be 'guided' by a predetermined rule, provided that the rule conforms to the governing legislation's subject matter, scope, purpose and detail.

6.146 A policy will be unlawful if it is based on an incorrect interpretation or application of legislation.[187] Any decision made by applying an unlawful policy will itself be unlawful.[188] For example, an agency cannot adopt a policy or practice not to enforce a particular law at all, or decide on substantial non-enforcement.[189] However, if by reason of genuine resource limitations, full enforcement is not possible the courts will allow selective enforcement though they must be satisfied that an illegal policy is not in place.[190]

The non-fettering principle

6.147 The courts have acknowledged that the consistent exercise of discretionary administrative power in the absence of legislative guidelines will, in itself, almost inevitably lead to the formulation of some general policy or rules relating to the exercise of the relevant power.[191]

6.148 However, it has also been stated that any matter calling for an exercise of the power must be considered 'as an individual case'.[192] This proviso to the application of informal policies and guidelines is expressed in the non-fettering principle: a 'tribunal which is called upon to exercise a discretion does not perform its duty if it acts in blind obedience to a rule or policy that it had previously adopted'.[193] It is also a ground of review under s 5(2)(f) of the ADJR Act as 'an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case'. Therefore, a non-statutory guideline cannot be the only consideration; nor can it ignore relevant statutory criteria or the merits of the individual case.

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185 See for example, *Green v Daniels* (1977) 13 ALR 1 and *Amalgamated Television Services Pty Ltd v Australian Broadcasting Tribunal* (1989) 91 ALR 363.

186 See *Becker and Minister for Immigration and Ethnic Affairs* (1977) 32 FLR 469, 161–162 and *Drake v Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 636.

187 See *Green v Daniels* (1977) 13 ALR 1; *Tang v Minister for Immigration and Ethnic Affairs* (1986) 67 ALR 177, 183.

188 *Australian Fisheries Management Authority v PW Adams Pty Ltd* (1995) 61 FCR 314.

189 *R v Commissioner of Police; ex parte Blackburn* [1968] 2 QB 118.

190 *King-Brooks v Roberts* (1991) 5 WAR 500.

191 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577.

192 *Water Conservation and Irrigation Commission v Browning* (1947) 74 CLR 492, 506.

193 *R v Moore; Ex parte Australian Telephone and Phonogram Officers Association* (1982) 148 CLR 600, 613.

6.149 The evaluation, including the weight, of these variables is left to the decision maker,[194] and he or she may attach more weight to the policy than to other factors.[195] It has been observed in some cases that policies concerning the process by which a decision is made, rather than what decision will be made, may be applied relatively inflexibly provided that their application complies with procedural fairness requirements.[196]

No dictation principle

6.150 The rule against dictation presumes that it is improper for a Minister to direct a statutory decision maker on how to exercise a discretion. The prevailing view of the courts would appear to be that, while government policy and Ministers' wishes are relevant considerations which should be taken into account and may be given weight, they must not be considered conclusive in themselves.[197]

Status

6.151 A guideline or statement of policy does not have the status of legislation.[198] It follows that an informal policy or guideline, in the event of a clash with law must conform to or be subordinate to the law.[199] See Recommendation 6–3(b) below.

Enforceability

Enforceable against the regulated community

6.152 Informal guidelines generally do not have the status of law, and therefore, cannot be enforced against the regulated community as primary legislation and delegated legislation can be.[200] In particular, if an informal guideline is inconsistent with a statutory provision, it will not be enforceable against a person.[201]

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194 *Tabag v Minister of Immigration and Ethnic Affairs* (1982) 45 ALR 705, 715–716.

195 *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54, 62.

196 See *Brian Cassidy Electrical Industries Pty Ltd v Attalex Pty Ltd* [1984] 3 NSWLR 52 and *Seldon Pty Ltd v Liquor Licensing Commission* [1990] VR 1009.

197 *Srokowski v Minister for Immigration Local Government and Ethnic Affairs* (1988) 15 ALD 775. See also *R v Mahony; Ex parte Johnson* (1931) 46 CLR 131, 145; *R v Anderson; Ex parte IPEC-Air Pty Ltd* (1965) 113 CLR 177, 192–193 and 201–202; *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54, 254 and 82–83. This view is also implicit in the jurisprudence of the AAT on the relationship between policies and decision making for both primary decision makers and in the AAT itself: *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577.

198 *Minister for Immigration and Ethnic Affairs v Conyngham* (1986) 68 ALR 441; *Knuckey v Commissioner of Taxation* (1997) 49 ALD 465; *Robinswood Pty Ltd v Federal Commissioner of Taxation* (1998) 39 ATR 305, 315–316.

199 D Clark, 'Informal Policy and Administrative Law' (1997) (12) *Australian Institute of Administrative Law Forum* 30, 32. See *Becker and Minister for Immigration and Ethnic Affairs* (1977) 32 FLR 469, 473: 'Where a policy maker forms a policy to govern or effect the exercise of his statutory discretion, the policy must conform to law'. See also *Santos Ltd v Saunders* (1988) 49 SASR 556, 569.

200 However, Aronson and Dyer suggest that if the courts were to acknowledge the 'intolerable pressures' produced by prohibiting the fettering of discretions in agencies handling high volume caseloads, they could modify the prohibition so as to allow the development of a requirement that the powers be exercised consistently. 'In developing "inconsistency" as a ground of review, the courts could then explore

Binding on the regulator

6.153 Regulators may often seek to outline, for the benefit of the regulator's staff or the regulated community, how they will exercise discretion. On a number of occasions, the courts have stated that this is a beneficial practice.[202]

6.154 Where the statute does not specify the matters to be taken into account, the courts are likely to defer to an agency's judgment unless the policy is clearly irrelevant.[203] The AAT has found that, where legislation does not provide clear direction as to how a discretion is to be exercised, decision makers may refer to informal guidelines for guidance.[204] However, the courts have also stressed 'the danger of looking at policies or guidelines as a source of the rights of a person who claims to have been aggrieved by administrative action'.[205]

6.155 Both the courts and the AAT have shown reluctance to regard non-statutory guidelines as binding. In *Gerah Imports Pty Ltd v Minister for Industry Technology and Commerce*, the Federal Court of Australia considered why courts had not found informal guidelines to be binding:

> Perhaps that is because, firstly, in Australia as elsewhere, non-statutory rules have often not been prepared with the care which the parliamentary counsel give to legislation and, secondly an end sought to be achieved by non-statutory rules has been to permit flexibility should the rules be found not to be appropriate to the facts which have occurred.[206]

6.156 In *Apthorpe v Repatriation Commission*[207] the Federal Court held that certain guidelines were neither binding nor even a mandatory criterion for decision makers to

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the possibilities of giving more force to non-statutory guidelines': M Aronson and B Dyer, *Judicial Review of Administrative Action* (2nd ed, 2000) LBC Information Services, Sydney, 110.

201 For example, in *Lanham and Department of Family and Community Services* the AAT considered a paragraph of the *Guide to Social Security* that imposed a condition on students to be qualified for Youth Allowance. The Tribunal found that the condition or requirement was not in accordance with the *Social Security Act 1991* (Cth), bearing no relation to the conditions specified in the Act. Therefore, the Tribunal found the paragraph invalid and ineffectual: *Lanham and Department of Family and Community Services* [2002] AATA 141, para 16–20.

202 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577.

203 D Clark, 'Informal Policy and Administrative Law' (1997) (12) *Australian Institute of Administrative Law Forum* 30, 36.

204 See, for example *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 and *Myddleton and Department of Family and Community Services* [2001] AATA 2 where the *Guide to Social Security* was considered in relation to exercising a discretion under s 729 of the *Social Security Act 1991* (Cth). See also *Wylie and Companies Auditors and Liquidators Disciplinary Board; Australian Securities and Investments Commission (party joined)* [1998] AATA 818 where the AAT considered ASIC Practice Note requirements.

205 *Minister for Immigration and Ethnic Affairs v Conyngham* (1986) 68 ALR 441, 452–3.

206 *Gerah Imports Pty Ltd v Minister for Industry Technology and Commerce* (1987) 17 FCR 1, 10–15.

207 In *Apthorpe v Repatriation Commission* (1987) 77 ALR 42 the department's non-statutory guidelines had been produced to assist decision makers and the merits review tribunal in determining a pensioner's level of incapacity from service-related impairments.

consider. However, it added that they were useful because there is a virtue in the department, and in the tribunal on appeal, taking a consistent approach both to the interpretation of a broad statutory discretion and to its application to like cases which present themselves for resolution.[208]

6.157 Informal policies cannot lay down mandatory or determinative requirements for this would be tantamount to the making of de facto laws.[209] Courts have held that policies expressed as 'mandatory' provide only guidance.[210]

6.158 The ALRC has made a recommendation in relation to guidelines stating that they are not legally binding (see Recommendation 6–3(b)).

Judicial scrutiny and administrative review

6.159 Professor Mark Aronson and Bruce Dyer note that, as non-statutory guidelines do not have the force of law in Australia, the opportunities for using them in judicial review applications are limited. For example, non-statutory guidelines or non-binding procedures manuals are not instruments within the definition of 'under an enactment' under the ADJR Act because their force does not stem from an Act.[211]

6.160 There might be arguments about their validity or their status as a factor to which the decision maker must pay regard, or their natural justice consequences. But as they lack the status of law in their own right, their misconstruction cannot amount in

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208 Ibid, 52. See also *Minister for Industry and Commerce and Anor v East West Trading Co Pty Ltd* (1986) 64 ALR 466, 479–80, where Morling and Beaumont JJ said of non-statutory guidelines: 'In other words we would read the statements made as intended to do no more than afford practical illustrations of situations where 'genuine' importing would not be assumed rather than an attempt to state exhaustively the legal criteria by which an importer qualifies for, or is disqualified from, an entitlement to quota allocation'. See also *Australian Competition and Consumer Commission v SIP Australia Pty Ltd* (1999) ATPR ¶41–702 and *Paggi (trading as Paggi's Aviation) and Civil Aviation Safety Authority* [2000] AATA 348, para 81 (see ch 10).

209 D Clark, 'Informal Policy and Administrative Law' (1997) (12) *Australian Institute of Administrative Law Forum* 30, 32. See *Becker and Minister for Immigration and Ethnic Affairs* (1977) 32 FLR 469, 473: 'Where a policy maker forms a policy to govern or effect the exercise of his statutory discretion, the policy must conform to law'. See also *Santos Ltd v Saunders* (1988) 49 SASR 556, 569.

210 See, for example, in *WH Broadbridge and Anor v Stammers* where their Honours stated: 'Put differently, the paragraphs following the words 'subject to', deal with matters of an essentially administrative character; as such, they should be seen as directory rather than mandatory': *WH Broadbridge and Anor v Stammers* (1987) 16 FCR 296. See also *Re Habchi and Minister for Immigration and Ethnic Affairs* (1980) 2 ALD 623 and *Re Uyanik and Minister for Immigration, Local Government and Ethnic Affairs* (1989) 10 AAR 650, 655.

211 See *Australian National University v Lewins* (1996) 138 ALR 1 (promotions procedure); *Schokker v Federal Commissioner of Taxation* (1998) 38 ATR 339 (discipline manual); and *Robinswood Pty Ltd v Federal Commissioner of Taxation* (1998) 39 ATR 305 (audit guidelines). See also *Bryant v Deputy Commissioner of Taxation* (1993) 25 ATR 419, which is considered in more detail in ch 10 at para 10.34. However, in *Sunshine Coast Broadcasters Ltd v Duncan* (1988) 83 ALR 121 the Minister had applied non-statutory guidelines against the applicant, but not against its competitors. One of the grounds of judicial review sustained by Pincus J was that the Minister's inconsistent approach was so unfair as to warrant review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

itself to an error of law.[212] Aronson and Dyer do say, however, that courts have reviewed less formal policy documents.[213]

6.161 In *Minister for Immigration, Local Government and Ethnic Affairs v Gray*[214] it was held that the administrative misconstruction of a Ministerial policy might not amount to an error of law but, if the misconstruction was serious enough, it could establish the ground of failure to take account of considerations which the decision maker was bound to consider on the basis that the policy was something to which the decision maker must pay regard.[215]

6.162 A guideline can occasionally operate as a restriction on the scope of power which a Minister or other person has delegated to the bureaucrat or agency. A breach of such a guideline would mean that the decision maker has exceeded the terms of their delegation.[216] There may be grounds upon which a policy may be attacked such as that it is unreasonable, however, attempts to mount such attacks have generally failed.[217]

6.163 It is also unlikely that certiorari is available in Australian law to quash an unlawful administrative policy or erroneous view expressed by a public body on the state of the law.[218] Other remedies such as mandamus may be available to review, in effect, an unlawful policy, where the policy thwarts the performance of a public duty.[219]

6.164 The implementation of some policies may give rise to claims of abuse of process. For example, in *Smiles v Commissioner of Taxation*[220] Davies J observed that some of the statements in the ATO *Audit Prosecution Publicity Guidelines* had gone 'too far' and had the potential, if implemented, to bring about an abuse of process.[221]

6.165 In exercising its powers of review the AAT may take into account matters of policy relied on by the primary decision maker. As noted above, this is subject to the

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212 However, in *Gerah Imports Pty Ltd v Minister for Industry Technology and Commerce* (1987) 17 FCR 1 it was stated: 'Even if non-statutory rules do not, of themselves, have binding effect, the failure of a decision maker to have regard to them or his failure to interpret them correctly may amount to an error of law justifying an order of judicial review.'

213 M Aronson and B Dyer, *Judicial Review of Administrative Action* (2nd ed, 2000) LBC Information Services, Sydney, 111.

214 *Minister for Immigration, Local Government and Ethnic Affairs v Gray* (1994) 49 FCR 189, 205–208.

215 See also *BHP Direct Reduced Iron Pty Ltd v Australian Customs Service* [1998] FCA 1346.

216 See *Kelson v Forward* (1995) 60 FCR 39.

217 *R v Ministry of Defence; ex parte Smith* [1996] 2 WLR 305 cited in D Clark, 'Informal Policy and Administrative Law' (1997) (12) *Australian Institute of Administrative Law Forum* 30, 36.

218 See for instance the prostitution containment policy of the Western Australian Police in issue in *King-Brooks v Roberts* (1991) 5 WAR 500.

219 *R v Commissioner of Police; ex parte Blackburn* [1968] 2 QB 118. However, a non-statutory instrument will not provide the source of mandamus. The duties which mandamus enforces must be public, that usually means that the duty must be sourced to a statute: *Barnett v Minister for Housing and Aged Care* (1991) 31 FCR 400.

220 *Smiles v Federal Commissioner of Taxation* (1992) 35 FCR 405.

221 See also the consideration of *Smiles* case in ch 23 in the context of the review of prosecutorial discretion.

policy being within the scope of powers conferred by statute on the primary decision maker.[222] The primary decision makers should settle matters of policy and the AAT should have regard to, and usually apply, such policies.[223] The AAT has drawn a distinction between policies formulated at the Ministerial or political level, and policies formulated at the Departmental level, and has implied that policies in the former category should be given substantially greater weight by the AAT than those in the latter category.[224]

Accessibility

Physical accessibility

6.166 It seems to be elementary that the existence of informal guidelines or policies ought to be made known to those likely to be affected by them.[225] Certainly, courts have recommended this.[226] It is hard to imagine how a policy intended to guide applicants can be of use to them if they do not know about the policy in question. Further, public access to guidelines that prescribe certain procedures or considerations of regulators increases the transparency of decision-making processes.

6.167 In the few cases where the availability of a policy has been an issue, it seems that the weight of authority supports the view that a policy must be drawn to the applicant's attention. In a number of cases, the courts have stressed that a fair hearing will be worthless if the applicant does not know that a policy may be challenged or an exception sought.[227] In some cases the court may require disclosure for the purposes of judicial review.[228]

6.168 There are no restrictions on how non-statutory guidelines could be made available to both the regulator staff and the regulated community. However, one issue is how publication can be compelled without statutory backing.

6.169 Section 9 of the *Freedom of Information Act 1982* (Cth) requires policies to be made available to the public for inspection and purchase. The section applies to documents that are provided by an agency for the use of the agency or its officers in making

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222 *Becker and Minister for Immigration and Ethnic Affairs* (1977) 32 FLR 469; *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577; *Re Evans and Secretary, Department of Primary Industry* (1985) 8 ALD 627; *Donlon and Pharmacy Restructuring Authority* (1992) 28 ALD 791.

223 *Re Lavery and Registrar, Supreme Court (Qld)* (1995) 40 ALD 72.

224 *Becker and Minister for Immigration and Ethnic Affairs* (1977) 32 FLR 469, 474–475; *Pidgon v Minister for Veterans Affairs* (1987) 10 AAR 560, 562–563; *Webster and Minister for Veterans Affairs* (1990) 21 ALD 583, 587 (para 16) and *Re Aston and Secretary Department of Primary Industry* (1985) 8 ALD 366, 375–378.

225 As noted above at para 6.140, a large number of informal guidelines are already available on the internet. However, it was noted in one of the ALRC's consultations that the internet is not sufficient publication for all members of a regulated community. Some members of the regulated community may require seminars or other forms of contact when a regulator changes its policy: National Farmers' Federation, *Consultation*, Canberra, 4 September 2002.

226 *Mohoupt v Redland Shire Council* (1975) 31 LGRA 309, 312.

227 For an exception to this, see *Peninsula Anglican Boy's School v Ryan* (1987) 7 FCR 415, 430.

228 Clark notes that this is a well established practice in New Zealand: D Clark, 'Informal Policy and Administrative Law' (1997) (12) *Australian Institute of Administrative Law Forum* 30, 46 fn 74.

decisions or recommendations, under (or for the purposes of) an enactment or scheme administered by the agency, with respect to a number of matters including 'penalties or other detriments, to which persons are or may be entitled or subject'. These documents may include manuals or other documents containing interpretations, rules, guidelines and documents containing statements of the manner, or intended manner, of administration or enforcement of such an enactment or scheme.

6.170 There are a number of exemptions under the section, including a document containing exempt matter. However, this may not preclude publication of a corresponding document.[229] Section 10 of the *Freedom of Information Act* provides an incentive to comply with s 9 as an agency may not apply a policy that has not been made available in accordance with the section.

6.171 It is likely that, subject to the exemptions under the *Freedom of Information Act*, where regulators provide guidance as to how they will exercise a statutory discretion in relation to a penalty or quasi-penalty, they will be obliged to make that guidance available in accordance with s 9 of the *Freedom of Information Act*.

6.172 The ALRC acknowledges that there will be instances where guidelines should not be made publicly available. One example suggested in a submission would be detailed risk-weighting criteria for compliance activity. Environment Australia submitted that this type of material should not be made available to the regulated community in order to avoid the regulated community conducting 'risk assessments' in relation to planned or existing illegal activities.[230] For this reason, the ALRC has made recommendations in relation internal guidelines below (see Recommendation 6–5).

6.173 However, the ALRC notes that it is the current practice of many regulators to provide copies of their guidelines on their websites (see above at para 6.140) as well as in hard copy on request. It is the ALRC's view that a regulator's guidelines in relation to penalties and quasi-penalties should be made as widely available as possible. Therefore the ALRC has made a recommendation in relation to the publication of non-statutory guidelines below (see Recommendation 6–3).

Accessible drafting

6.174 On occasion the courts and tribunals have been critical of informal policy on the grounds that it was vague and poorly drafted.[231] At times, more than one policy may exist on the same subject — confusion will then arise as to which is the operative

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229 For consideration of the effect of these exemptions on the obligation under s 9 of the *Freedom of Information Act 1982* (Cth), see *Saunders and Australian Federal Police* [2001] AATA 1006. This case involved consideration of whether the DPP *Search Warrants Manual* should have been available for inspection and purchase.

230 Environment Australia, *Submission CAP 26*, 24 October 2002.

231 See, for example, *Phillips v Secretary, Department of Immigration and Ethnic Affairs* (1994) 48 FCR 57, 81C–E; *Gerah Imports Pty Ltd v Minister for Industry Technology and Commerce* (1987) 17 FCR 1, 10.

policy.[232] To avoid this issue the ALRC has made a number of recommendations in relation to when informal guidelines are operative, withdrawn, superseded. See Recommendation 6–4 below.

6.175 It has been observed that informal policy is rarely written with the precision of legislation and thus may often be unclear.

> Where this is the case the courts will generally not inspect it too closely. On the other hand unclear policies run the risk of either being interpreted in ways adverse to the agency's objectives or being regarded as inapplicable in a given case.[233]

6.176 The ALRC notes the importance of policies being drafted in plain English that is readily accessible by both the regulator's staff and the regulated community. The ALRC has made a recommendation to this effect below (see Recommendation 6–3(a)).

Consultation

6.177 There is no general procedure for consultation prior to making informal guidelines.[234] A number of regulators regularly consult when formulating policy. ASIC, for example, places draft policy statements, policy proposals, discussion papers and public consultation papers on its website for comment prior to these documents coming into effect.

6.178 If, as procedural scholars suggest, the regulated community's perceptions of fairness are important for compliance (see chapter 15), there is considerable value in regulators consulting with regulated communities when devising policy statements and guidelines about the imposition of penalties. The ALRC recommends that, to the extent practicable, regulators should develop publicly available guidelines in consultation with the regulated community (see Recommendation 6–3(f)).

Speed of promulgation

6.179 As there is no general procedure for the development of non-statutory guidelines, it is not possible to generalise about speed of promulgation. Some guidelines may be developed by a regulator very quickly. Others may be produced after a period of consultation which may contribute to slower implementation but result in greater acceptance by the regulated community.

Flexibility

6.180 David Clark states that orthodox legal theory assumes that informal policy is highly flexible and easily changed, while the law is assumed to be relatively fixed and certain.

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232 *Commonwealth v El-Hassan* (1985) 62 ALR 305.

233 D Clark, 'Informal Policy and Administrative Law' (1997) (12) *Australian Institute of Administrative Law Forum* 30, 35.

234 However, see discussion of legitimate expectation below at para 6.182–6.184 and in ch 14.

> In practice this distinction is dubious for some policies are so deeply entrenched that they are virtually impossible to change, while some legal rules change almost overnight.[235]

6.181 However, decision makers are generally free to change or depart from a policy in individual cases, even against the wishes of a person affected.[236]

6.182 Procedural fairness may require a hearing before a policy is changed or departed from if the regulated party has a legitimate expectation that the policy would be applied (see chapter 14). Even an expectation that consultation will occur before a policy is changed does not prevent a policy from being changed. In other words, there is no legitimate expectation that a policy will never be changed and such expectations as exist based on past policy may come to an end when a new policy is announced.[237]

6.183 Importantly, the concept of legitimate expectation is not directly related to the enforceability of a guideline of policy statement.[238] There has been little support in Australia for substantive fairness as a ground of review in its own right, and this appears unlikely to change.[239]

6.184 Not all policy statements and guidelines will give rise to legitimate expectations that impose procedural obligations, only policy statements which are:

- readily available to the public;[240]
- relatively permanent;[241]
- unambiguous and relatively particularised;[242]
- deal with certain subject matter;[243] and

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235 D Clark, 'Informal Policy and Administrative Law' (1997) (12) *Australian Institute of Administrative Law Forum* 30, 32.

236 See *Attorney-General (NSW) v Quin* (1990) 93 ALR 1, 18 and *Save the Showground for Sydney Inc v Minister for Urban Affairs & Planning* (1997) 95 LGERA 33.

237 D Clark, 'Informal Policy and Administrative Law' (1997) (12) *Australian Institute of Administrative Law Forum* 30, 40.

238 The leading authority for this proposition is *Attorney-General (NSW) v Quin* (1990) 93 ALR 1, 21, 39–40, 55. There is some support in England and New Zealand for the notion that the courts are able to enforce legitimate expectations (by 'substantive protection') rather than merely requiring observance of procedural requirements before such expectations are disappointed ('procedural protection').

239 M Aronson and B Dyer, *Judicial Review of Administrative Action* (2nd ed, 2000) LBC Information Services, Sydney, 332.

240 See *Khan v Minister for Immigration and Multicultural Affairs* [1999] FCA 1790.

241 See ibid.

242 See *Harts Fidelity Pty Ltd v Chapman, Deputy Commissioner of Taxation* [1999] FCA 1033, *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 92 ALR 93 and *One.Tel Ltd v Deputy Commissioner of Taxation* (2000) 101 FCR 548.

- are not contradicted by a contrary course of conduct.[244]

Conclusion

6.185 Non-statutory guidelines are an appropriate form of instrument for regulators to detail how they will exercise certain discretions. Current practice in Australia indicates that guidelines can contribute to effective regulation by providing guidance on a range of topics, from when a regulator will use a particular enforcement option, to a regulator's obligation to act ethically and fairly. The flexibility of non-statutory guidelines make them a suitable instrument for matters that may change regularly, or that require a regulator to maintain a flexible approach.

6.186 Concerns raised by regulators as to the binding status of these guidelines would appear to be misguided. Courts and tribunals have rarely found that government agencies are bound by informal guidelines; however, they may find them informative when reviewing administrative action. Non-statutory policies or guidelines that are readily available to the public, relatively permanent, unambiguous and relatively particularised may in some circumstances raise legitimate expectations. However, as noted above, the courts have never extended the concept of legitimate expectation to substantive enforcement of a guideline or policy.

6.187 Throughout the discussion above, the ALRC has suggested a number of matters that regulators should consider when drafting non-statutory guidelines. Those matters are collectively dealt with in the Recommendations below.

6.188 A number of the chapters in this Report recommend the development of informal guidelines. As noted above, when guidelines are made (whether publicly available or internal) the regulator responsible for the administration of legislation to which the guidelines relate should ensure that training is provided to staff who make decisions pursuant to those guidelines to ensure that they are familiar with the legislation and the guidelines.

Recommendations

Recommendation 6–3. When regulators develop publicly available guidelines (however named) in the absence of a legislative requirement to do so, these guidelines should:

(a) be drafted in plain English;

243 See *Haoucher v Minister for Immigration and Ethnic Affairs,* (1990) 169 CLR 648. See also *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, 226–227 and *One.Tel Ltd v Deputy Commissioner of Taxation* (2000) 101 FCR 548, para 40.

244 See *Gull Petroleum (WA) Pty Ltd v Nashville Investments Pty Ltd* [1999] 102 LGERA 431.

(b) include a statement that they are not legally binding and are non-justiciable;

(c) be published in electronic format on the regulator's website and in hard copy;

(d) if appropriate, be published using a systematic method that is accessible to both the regulator's staff and the regulated community; for example, the Practice Note and Policy Statement numbering and presentation system used by ASIC;

(e) clearly indicate they are current and operative guidelines; and

(f) to the extent practicable, be developed in consultation with the regulated community.

Recommendation 6–4. When guidelines for public use have been superseded or withdrawn, the guidelines (however named) should clearly indicate:

(a) that they have been superseded or withdrawn;

(b) the date on which they ceased to have effect; and

(c) if they have been superseded, what they have been replaced with.

Recommendation 6–5. Guidelines (however named) developed by regulators for internal use should, as far as practicable, follow the model proposed in Recommendations 6–2 to 6–4.

Recommendation 6–6. When guidelines (however named) are made, the regulator responsible for the administration of legislation to which the guidelines relate should ensure that training is provided to staff who will make decisions pursuant to those guidelines to ensure that they are familiar with the legislation and the guidelines.

Directions to legislators

6.189 Some of the recommendations made by the ALRC in this Report lie outside the strict continuum of options comprising primary legislation, delegated legislation and informal guidelines. Rather, these recommendations, which can be characterised as directions to legislators, can be seen as an adjunct to the continuum of a differing, but nonetheless significant, nature. These directions are aimed at the performance of a specific task by legislators or the implementation of principles in the drafting of legislation. The directions are not binding. They are purely advisory.

6.190 Examples of directions to legislators include Recommendation 4–3 in relation to fault and the criminal/non-criminal distinction; Recommendation 11–1 in relation to multiple penalties; Recommendation 12–1 and 12–2 in relation to the use of infringement notices; Recommendation 18–2 in relation to the privilege against self-incrimination; Recommendation 19–2 in relation to legal professional privilege; Recommendation 20–1 in relation to accountability; and Recommendations 26–1 and 26–3 to 26–7 in relation to setting monetary penalties in legislation.

A Regulatory Contraventions Statute

6.191 In DP 65,[245] and in its discussions and consultations with interested parties and the Advisory Committee, the ALRC has canvassed the idea of a Regulatory Contraventions Statute of general application that would serve as the foundation of a scheme designed to inject greater certainty and consistency into federal regulatory law. Its purpose would be to provide a convenient and central location for various provisions relating to federal penalty and regulatory schemes generally. This would avoid the need to repeat those provisions in each statute establishing a regulatory or penalty scheme.

6.192 The provisions that would be accommodated in such a statute would be intended to clarify the law or to state certain fundamental or default provisions that would have general application over all federal regulatory and penalty schemes. In all cases, the legislation dealing with any particular scheme could expressly and clearly state that that particular scheme departs from the default provisions in the Regulatory Contraventions Statute, but this would at least have the salutary effect, in the ALRC's view, of making that departure a matter of affirmative statement and one that would require legislative expression and therefore parliamentary scrutiny and debate.

6.193 The similarity with the Commonwealth *Criminal Code* is clear. In order to understand how a Regulatory Contraventions Statute would operate, it is useful to consider the operation of the *Criminal Code*. Goode described the Model Criminal Code as

> an attempt to put in the public arena a set of best practice criminal law provisions in the form of a criminal code which can serve as a model for all Australian jurisdictions to pick up and use in whole or in part when they want to do so. The aim is, in short, voluntary consistency not compulsory uniformity, with the agenda and its results being transparent, owned by all jurisdictions and not just being driven by one … While it is clear that the goal is national consistency in serious criminal offences, none of this should be taken to mean that *everything* should be nationally based, uniform and/or consistent.[246]

6.194 By analogy, the scope of federal regulation imposing civil and administrative penalties is so wide-ranging and diverse in its nature that it would be impossible to impose national consistency in all areas under review. However, the advantage of a gen-

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245 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, para 1.34.

246 M Goode, 'Constructing Criminal Law Reform and the Model Criminal Code' (2002) 26(3) *Criminal Law Journal* 163, 163.

eral Regulatory Contraventions Statute is that general default principles could be stated to apply to all regulatory regimes unless there were clear express words contained in individual regulatory Acts expressly negating the application of those principles. This would provide a balance between the desire for consistency and the need for flexibility attuned to the particular needs and functions of individual regulatory agencies. As Goode stated in relation to the fault principles in the *Criminal Code*, they are default principles, not legislated principles:

> The real question is — what happens when the Parliament does not state what the fault elements are? Parliament can specify what it wants the law to be only if it has the will to do it. If Parliament wants a particular result … it can simply say so.[247]

6.195 The Criminal Law Officers Committee stated that:

> The Code will eventually provide model provisions capable of replacing all common law offences and the Crimes Act provisions in the common law jurisdictions, and the Criminal Code provisions in the Griffith Code jurisdictions. It will also apply the general principles of criminal responsibility to offences both in the Code and in other statutes. This does not mean that all preceding law will be irrelevant to interpretation of the Code. For example, English Courts have drawn on the pre-existing law of larceny to assist interpretation of the English Theft Act 1968. That will also be possible under this Code.[248]

6.196 Section 2.1 of the *Criminal Code* provides that:

> The purpose of this Chapter is to codify the general principles of criminal responsibility under laws of the Commonwealth. It contains all the general principles of criminal responsibility that apply to any offence, irrespective of how the offence is created.

6.197 In relation to the above it was stated that:

> [This section] applies the general principle of criminal responsibility to all offences. Of course, like other statutes, Parliament can override the provisions in this chapter of the Code, either elsewhere in the Code or in other legislation. Because of the fundamental nature of the principles of criminal responsibility we would not expect this to be done lightly.[249]

6.198 Professor Warren Pengilley makes the point, in disagreeing with the proposal to have a 'default' provision in relation to privilege, that

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247 M Goode, 'Constructing Criminal Law Reform and the Model Criminal Code' (2002) 26(3) *Criminal Law Journal* 163, 158.

248 Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapters 1 and 2 — General Principles of Criminal Responsibility* (1992), Criminal Law Officers Committee of the Standing Committee of Attorneys-General, 3.

249 Ibid, 5.

> a default position may run into the problem that it will only apply to future legislation and thus there will be no need to re-examine existing legislation. Any 'default position' would have to apply retrospectively in order to have any impact.[250]

6.199 In this regard the ALRC notes that the *Criminal Code Act 1995* (Cth) made Chapter 2 of the Code (which deals with criminal responsibility) apply immediately to all offences against the Code, and delayed the commencement of Chapter 2 to allow the legislature to consider the position in relation to existing offences.

6.200 The ambit of any Regulatory Contraventions Statute will need to be clearly defined. Particular consideration will need to be given to the extent to which such an Act also covers the field of criminal regulatory penalties. In this regard, a distinction can be drawn between default principles that apply to criminal, civil or administrative penalties and those that apply exclusively to criminal penalties. For example, default principles in relation to multiple penalties and multiple proceedings potentially have relevance in each of the criminal, civil and administrative fields, and would therefore appropriately fall within the ambit of a single Regulatory Contraventions Statute. Similarly, the issue of recovery of costs by a regulator is relevant to investigations conducted by regulators that could lead to criminal, civil or administrative penalties. Accordingly, such a provision could be appropriately implemented in a single Regulatory Contraventions Statute. By contrast, there may be an issue as to the most appropriate location of any default principle relating exclusively to criminal regulatory penalties, such as the privilege against self-incrimination. One option is to include such default provisions within the ambit of the general Regulatory Contraventions Statute. Another is to implement any default principles applying exclusively to criminal penalties in the *Criminal Code*.[251]

6.201 The ALRC remains attracted to the implementation of a Regulatory Contraventions Statute as a vehicle to house the various statements of principle or default statements of law that are found in various of its Recommendations in this Report. Such a statute would not be without its limitations, some of which are inherent in its attempting to be a law of general application over numerous diverse pre-existing schemes that each have their own logic and few, if any of which, were developed with any view to consistency across the various fields of federal regulation and penalty schemes.

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250 W Pengilley, *Submission CAP 7*, 17 July 2002, para 2.31.

251 The Attorney-General's Department submitted that 'Setting out general principles applicable to civil penalties, along the lines of Part 2 of the *Criminal Code*, has the advantage of providing certainty as to what principles and procedures apply when such penalties are being imposed': Attorney-General's Department, *Submission CAP 14*, 9 September 2002, 8. It also submitted that 'principles in relation to civil penalties should be contained in discrete legislation from the *Criminal Code*. Including criminal and civil penalty principles in the same location may create the appearance of a continuum of penalties. We do not think this would be appropriate': Attorney-General's Department, *Submission CAP 14*, 9 September 2002, 9.

6.202 The ALRC has refrained from suggesting that it be called a code as that would not be its status.[252] It would not be an all-encompassing statement of the law relating to penalty schemes — to do so would require the reversal of many well established federal regulatory statutes that have developed a mature jurisprudence. It would be counter-productive to dispense with that legal experience, and the ALRC does not seek to do so.

6.203 Nonetheless, the ALRC has seen its primary task in this Inquiry as a search for one or more mechanisms to inject into the plethora of disparate federal penalty schemes principles and statements of consistent practice and approach. For the reasons set out at length in this chapter, much of this must be by legislation, though richly supplemented by informal guidelines and statements of policy.

6.204 The ALRC concludes that this task is best accomplished by a Regulatory Contraventions Statute of general application as the means of implementing various of the reforms that it calls for elsewhere in this Report.

Recommendations

Recommendation 6–7. A Regulatory Contraventions Statute of general application should be enacted to cover various aspects of the law and procedure governing non-criminal contraventions of federal law in accordance with the Recommendations in this Report.

Recommendation 6–8. The Regulatory Contraventions Statute is not intended to be a comprehensive code but rather should be expressed:

(a) to contain certain principles of responsibility that apply to any non-criminal breach of any law of the Commonwealth;

(b) to prevail over any inconsistent Commonwealth law to the extent of that inconsistency unless that other law expressly excludes or modifies the operation of the Regulatory Contraventions Statute by express reference to that statute (or the portion of it, the operation of which is to be excluded).

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252 ASIC submitted that it 'would have reservations about the creation of some form of Code, similar to the *Criminal Code* … which would regulate the interpretation or the use of non-criminal penalties across the vast array of legislation and regulation in which civil and administrative penalty provisions appear': Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 4. ASIC noted that Chapter 2 of the *Criminal Code* only commenced its application to all Commonwealth legislation on 15 December 2001 and that its success in this regard had yet to be evaluated: Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 4.

An administrative procedures statute?

6.205 As stated earlier in this chapter, one option for legislative reform is to implement two separate Acts to deal with civil penalties and administrative penalties respectively. Administrative penalties could be dealt with in an administrative procedures statute whose ambit would be much greater than issues relating solely to, or arising from, the enforcement of administrative penalties by regulators.

6.206 Other jurisdictions have administrative procedures Acts. For example, in Sweden the *Administrative Procedure Act 1986* applies to the handling of matters by administrative authorities and the handling of administrative matters by the courts. The Act applies in principle to all public bodies that are administrative authorities, including ministries, government boards and agencies, public enterprises, county administrative boards and other government authorities. The primary objective of this Act is to protect citizens in their contact with administrative authorities. Section 3 of the Act provides that, 'where an Act or an Ordinance contains a provision that is inconsistent with this Act, that provision shall prevail'. Similarly, in the federal jurisdictions of the United States, and in many of its state jurisdictions, an Administrative Procedure Act prescribes minimum procedural safeguards that are supplemented by rules that apply to particular agencies.

6.207 By way of contrast, in the United Kingdom, the Franks Committee concluded that the desirability of a single code or a small number of codes prescribing procedural uniformity was outweighed by the need for procedural differentiation.[253]

6.208 Robert Benjamin has identified a number of factors that need to be taken into account in considering the implementation of standard administrative procedures:

> When considering the means of prescribing procedural standards to regulate administrative decision making the initial dilemma is the diversity in the nature and purposes of administrative bodies. The position which the State occupies in adjudicatory contexts will vary in each case, as will be the significance to be attached to the public interest. Other variables include the machinery through which adjudication is made; the means by which an administrative proceeding may be determined; the manner or ability to specify issues; and the volume of determinations to be made.[254]

6.209 Dr Geoffrey Flick has considered the advantages and disadvantages of implementing an administrative procedures statute.[255]

> Given the diverse jurisdictions and responsibilities of individual tribunals, a detailed code of procedure applicable to all tribunals, is inadvisable, if not impossible. Any statutory enactment would have to prescribe only minimum procedural requirements. The advantages of such a code include the introduction of some uniformity into a field

253 Referred to in G Flick, *Natural Justice Principles and Practical Application* (2nd ed, 1984) Butterworths, Sydney, 23.
254 R Benjamin, *Administrative Adjudication In the State of New York* (1942), 24–36 cited in ibid, 23.
255 G Flick, *Natural Justice Principles and Practical Application* (2nd ed, 1984) Butterworths, Sydney, 24–25.

> where variety is a major characteristic;[256] provision of advance notice to the parties of the broad outlines of the procedure to be followed; a greater assurance that the fundamentals of fair play in action will be observed; and the flexibility of each tribunal to supplement the code with particularised rules to meet the individual requirements of its own problems.[257] On the other hand, arguments against the enactment of a code include the fact that any code which is sufficiently broad to cover all adjudications would have to be drafted so widely as to provide only illusory safeguards;[258] the claim that it would cause delay and expense; that it would be circumvented in practice …
>
> There are also arguments for and against the formulation of individualised rules for each agency … Undoubtedly the administrator is the one most familiar with his own field and is the one who can best adapt detailed procedures to particular problems … However, individualised rules mean little uniformity of procedure between tribunals and this lack of uniformity is the cause of much criticism in both England[259] and the United States.

6.210 Flick concluded that

> a code of minimum procedural requirements has many advantages and that arguments of lack of flexibility can be answered by the freedom of allowing each tribunal to continue to formulate rules to meet the needs of its own problems. A detailed study of the *Administrative Procedure Act* in the United States justifies such an approach.[260]

6.211 It is outside the scope of the present Inquiry to make any recommendation in relation to the general implementation of any administrative procedure statute. In any event, as previously stated, the ALRC considers that there a number of drawbacks associated with having two separate statutes that deal with civil penalties and administrative penalties separately irrespective of the ambit of the Act dealing with administrative penalties. The ALRC favours the implementation of a single Regulatory Contraventions Statute which deals with both civil and administrative penalties.

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256 R Benjamin, *Administrative Adjudication In the State of New York* (1942), 24 cited in ibid, 24.

257 M Harris, 'A Critical Analysis of the Composition, Hearing Procedures, and Appellate Structure and Powers of South Australian Administrative Tribunals', (1972) 4 *Adelaide Law Review* 389, 407–409 cited in G Flick, *Natural Justice Principles and Practical Application* (2nd ed, 1984) Butterworths, Sydney, 24.

258 Cf *J Farmer, 'A Model Code of Procedure for Administrative Tribunals — An Illusory Concept' (1970) 4 New Zealand University Law Review 105* at 110 cited in G Flick, *Natural Justice Principles and Practical Application* (2nd ed, 1984) Butterworths, Sydney, 25.

259 J Farmer, 'A Model Code of Procedure for Administrative Tribunals — An Illusory Concept' (1970) 4 *New Zealand University Law Review* 105.

260 G Flick, *Natural Justice Principles and Practical Application* (2nd ed, 1984) Butterworths, Sydney, 25.

Part B

Corporate Responsibility

7. Corporate Responsibility

Contents

Introduction

7.1 The Terms of Reference require the ALRC to report on whether principles relating to criminal liability — including fault elements, corporate criminal responsibility, vicarious responsibility, and strict responsibility — should apply to liability for administrative and civil penalties.

7.2 This chapter considers corporate responsibility as it relates to liability for criminal and non-criminal penalties.[1] In this chapter, the terms 'corporate responsibility' and 'body corporate' have been used to describe all situations where liability is assigned to a legal entity other than an individual, natural person.[2] In most part, this accords with the general legal meaning of a corporation as a registered company but in some circumstances it also includes other collective legal entities such as partnerships or associations.

7.3 Notions of corporate responsibility are critical to this Inquiry as many pieces of federal legislation under which criminal and regulatory penalties may be imposed are directed at the activities of bodies corporate.[3] The ALRC's research reveals a range of issues to be considered in the area of corporate responsibility. The area is a complex one about which much has been written by theorists and academics[4] and in which there is an extensive body of caselaw overlapping and supplementing statutory provisions.

7.4 The first section of this chapter reviews the accepted theories of corporate responsibility and considers how these theories attempt to translate the moral responsibility of corporate bodies for wrongdoing into a coherent system of legal responsibility. Many of these theories have influenced the methods used to assign liability to corporate bodies at common law and under statute. The ALRC has considered these theories and methods of ascribing liability to corporate bodies in developing general provisions relating to corporate liability for inclusion in a general Regulatory Contraventions Statute.[5]

7.5 The second section of this chapter considers the common law and statutory mechanisms that assign liability to corporate bodies for the physical elements of an offence or contravention. The common law and statutory mechanisms that assign liability to corporate bodies for fault elements are considered in the third section of the chapter. It is beyond the scope of this Inquiry to examine in detail the terms of specific offence provisions; instead, this section aims to provide an overview of the main methods of assigning corporate responsibility under statute and to look in particular at how statutory provisions which 'deem' a body corporate to be liable for the conduct of individuals have been used.[6]

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1 Much has been written about the criminal responsibility of corporate bodies for death and physical injury; it is beyond the scope of this Inquiry to review that literature in detail. See in particular the writings of Braithwaite, Coffee, Fisse and Wells.

2 The term 'body corporate' is also used in Part 2.5 of the *Criminal Code*.

3 See, for example, the *Trade Practices Act 1974* (Cth).

4 See in particular the writings of Braithwaite, Coffee, Fisse, Freiberg and Wells.

5 See Recommendations 7–1 to 7–3.

6 Many of the examples given in this chapter relate to the *Trade Practices Act 1974* (Cth) (TPA). The TPA regulates the conduct of corporate bodies. Its constitutional validity stems in most part from its being a law with respect to corporations under s 51(xx) of the Constitution. For this reason, primary liability (criminal and civil) under the TPA is always expressed as attaching to corporations but does so by looking at the conduct of individuals. As the conduct of individuals is deemed to be the conduct of the relevant corporation, the TPA provides a useful source of jurisprudence on the issue of corporate responsibility. Liability assigned to a corporation for the conduct of individuals constitutes derivative liability, and this concept of derivative liability is central to the concept of corporate responsibility.

Legal difficulties

7.6 Whilst it is generally accepted that bodies corporate should be accountable for their conduct,[7] particularly where that conduct introduces harm into the community and causes damage, there is an ongoing debate about whether bodies corporate have a separate collective identity from the individuals who make up the corporation or undertake activities in its name.

7.7 There are several major legal barriers to holding corporate bodies responsible for criminal offences and non-criminal regulatory contraventions.[8] Perhaps most salient is that, as an abstract legal construct, a body corporate has no physical existence and thus no capacity for physical action or the possession of intention or knowledge.[9]

7.8 The legal fiction of corporate personality has largely overcome this obstacle. A body corporate is recognised at law as a legal person with substantially the same general rights and obligations as a natural person.[10] Clearly, however, the law cannot treat a body corporate in entirely the same way as a natural person.[11] There are two fundamental differences between corporate legal persons and natural persons:

- a body corporate lacks a physical body; and
- a body corporate does not have a single mind capable of forming the state of mind to act.

7.9 This second limitation has caused the most difficulty for the development of a coherent theory of corporate responsibility. Generally, corporate liability will be founded on the basis of the actions, knowledge and intentions of those natural persons involved in the activities of the body corporate (that is, the liability of the body corporate will be derivative).[12] Difficulty arises, however, in deciding *which* natural persons (and their actions) involved in the affairs of the body corporate can be held to be indicative of the intention of the body corporate as a whole. Corporate liability can be as-

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7 See, for example, L Friedman, 'In Defense of Corporate Criminal Liability' (2000) 23(3) *Harvard Journal of Law and Public Policy* 833, J Coffee cited in R Mokhiber, *No Mind, No Crime?*, <http://multinationalmonitor.org/focus/focus.9704.html>, 2 December 1997 and Australian Law Reform Commission, *Sentencing: Penalties — Discussion Paper*, DP 30 (1987), Australian Law Reform Commission, Sydney, para 284.

8 See H Glasbeek, 'Occupational Health and Safety Law: Criminal Law as a Political Tool' (1998) 11 *Australian Journal of Labour Law* 95.

9 R Grantham, 'Attributing Responsibility to Corporate Entities; A Doctrinal Approach' (2001) 19 *Companies and Securities Law Journal* 168, 169.

10 This legal fiction has been given statutory force by s 124 of the *Corporations Act 2001*, which states that a 'company has the legal capacity and powers of an individual both in and outside this jurisdiction'.

11 Although many statutory provisions attempt to do this. See for example, s 4B of the *Crimes Act 1914* (Cth), which deems bodies corporate capable of committing offences and which provides a formula for converting sanctions in the form of a term of imprisonment into a pecuniary penalty.

12 R Grantham, 'Attributing Responsibility to Corporate Entities; A Doctrinal Approach' (2001) 19 *Companies and Securities Law Journal* 168, 169.

signed only by determining for *what* actions of *which* personnel a body corporate should be held accountable.

7.10 Assigning liability is not a wholly legal process but also includes considerations of policy. The intended purpose for which a penalty is imposed will be an important factor in determining whether a corporation ought in principle to be responsible.

7.11 It has largely been for policy reasons of accountability and fair and equitable treatment that the legal fiction of corporate personality has been accepted and continues to be developed. Yet there is tension between the fundamental legal nature of corporate bodies (as entities designed to limit the liability of investors) and the expansion of notions of corporate responsibility. Notions of corporate responsibility attempt to balance the competing interests of investors with those of the community at large, which expects that corporate bodies will be held accountable for the consequences of their conduct.

Theories of corporate responsibility

7.12 A range of theories of corporate responsibility have been developed in an attempt to found a principled basis for the application of the law to corporate bodies as legal persons. The two main theories of corporate responsibility are outlined below.

The 'organic' approach

7.13 The central element of the organic approach to corporate responsibility (also referred to as the doctrine of 'identification' or 'directing mind and will') is that:

> The actions, knowledge and intention of the individual are treated as if they were the actions, knowledge and intention of the company itself. The company is thus held responsible for events in the real world by, in essence, deeming the individual's actions, knowledge and intention to have been those of the company.[13]

7.14 Australian academic Ross Grantham notes that this approach merges the individual and the body corporate into one legal identity; allows corporate liability to be assigned in circumstances where traditional agency principles would not apply; and allows modification of the general law to accommodate core principles of corporations law.[14]

7.15 The notion of primary liability of a body corporate by identification of the conduct of directors or senior managers as conduct of the body corporate was firmly established in *Tesco Supermarkets Ltd v Nattrass*.[15] This case is discussed further below at para 7.47–7.50.

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13 Ibid, 170–171.
14 Ibid.
15 *Tesco Supermarkets Ltd v Nattrass* [1972] 8 AC 153.

7.16 One criticism of the identification theory is that it takes too limited a view of corporate liability.[16] Diffusing or decentralising responsibility in a body corporate makes it easy to avoid liability. Senior management can remain removed from the activities of the body corporate that constitute contraventions, yet it is senior management that sets the policies and business objectives of the body corporate which may lead to the contravening conduct. Stewart Field and Nico Jörg note:

> The limits of criminal liability constructed by the identification doctrine do not reflect properly the limits of the moral responsibility of the corporation itself. This cannot be limited to responsibility for the acts of high-ranking officials such as company directors. Priorities in hierarchical organizations like corporations are set predominantly from above. It is these priorities that determine the social context within which a corporation's shop-floor workers and the like make decisions about working practices.[17]

7.17 They are critical of the gap allowed by the identification doctrine between the 'mind' (senior management) of the body corporate and its 'hands' (ordinary workers), the assumption being that the hands do not act under the control of the mind. The current law concerning the attribution of corporate criminal responsibility on the basis of the 'directing mind and will' principle is discussed at para 7.47–7.50.

7.18 A variant of the organic approach is 'attribution liability' as described by the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission*.[18] This theory examines the corporate structure in more detail and seeks to ascertain those responsible for the area of activity in which the offence took place and to attribute responsibility to the body corporate for the conduct of the relevant individuals. The current law concerning attribution liability is discussed at para 7.52–7.56

Organisational blameworthiness

7.19 In contrast to the organic approach, the theory of organisational blameworthiness, or enterprise liability, treats the body corporate as an entity capable of aggregate action and intention. This concept, developed in Australia primarily by Brent Fisse,[19] overcomes some of the limitations of the organic approach developed in *Tesco Supermarkets Ltd v Nattrass*.[20]

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16 See for example S Field and N Jörg, 'Corporate Liability and Manslaughter; Should We be Going Dutch?' (1991) *Criminal Law Review* 156.

17 Ibid, 159.

18 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.

19 B Fisse, 'Recent Developments In Corporate Criminal Law and Corporate Liability to Monetary Penalties' (1990) 13 (1) *University of New South Wales Law Journal* 1; B Fisse, 'The Attribution of Criminal Liability to Corporations; A Statutory Model' (1991) 13 *Sydney Law Review* 277; B Fisse, 'Who Carries the Corporate Can? Allocation of Responsibility for Offences or Breaches of Civil Penalty Provisions' (Paper presented at Penalties; Policy, Principles and Practice in Government Regulation, Sydney, 8 June 2001).

20 *Tesco Supermarkets Ltd v Nattrass* [1972] 8 AC 153.

7.20 Fisse criticises the *Tesco* approach for unduly restricting corporate criminal liability 'to the conduct or fault of high-level managers, a restriction that makes it difficult to establish liability against large companies'.[21] This is because in a large body corporate, the activities that might give rise to a contravention are often undertaken by middle or lower management without the direct involvement of upper management.

7.21 Instead, Fisse favours an approach based on a concept of organisational blameworthiness. This concept has three main features:

> First, vicarious liability is imposed in relation to the external elements of an offence but not in relation to the mental element. Secondly, liability in relation to the mental element is not based on the *Tesco* principle but on the concept of organizational blameworthiness, as reflected by a corporate policy of non-compliance or a failure to take reasonable precautions and to exercise due diligence. Thirdly, liability is extended to cases of reactive corporate fault, in the sense of a corporate policy of unresponsive adjustment to having committed the external elements of an offence, or failure to take reasonable precautions or to exercise due diligence in light of having committed the external elements of an offence.[22]

7.22 Fisse notes that organisational blameworthiness also incorporates the concept of 'aggregate fault'. This concept allows the aggregation of the acts of individuals to demonstrate more serious fault on the part of the body corporate as a whole.[23]

7.23 Australian law has adopted two of the three elements of organisational blameworthiness:

- vicarious responsibility for the physical element of the offence (discussed below para 7.34–7.45); and
- corporate culture and policy as expressing corporate intention or the fault element of the offence, which is embodied (to some extent) in the corporate criminal responsibility provisions of the *Criminal Code* (discussed later in this chapter).

7.24 The third element, reactive corporate fault, has not been adopted to date in Australian law.[24] Fisse defines 'reactive corporate fault' as

> unreasonable corporate failure to devise and undertake satisfactory preventive or corrective measures in response to the commission, by personnel acting on behalf of the organization, of the actus reus of the offence.[25]

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21 B Fisse, 'The Attribution of Criminal Liability to Corporations; A Statutory Model' (1991) 13 *Sydney Law Review* 277, 277.

22 Ibid, 279–280, footnotes omitted.

23 This concept is used in the *Criminal Code* when identifying the fault element in relation to negligence: s 12.4(2). See discussion below at para 7.140–7.148.

24 Although it is an aspect of due diligence and has been taken into account in determining the quantum of penalties by assessing the effectiveness of compliance programs. See discussion of due diligence as a mitigating factor in ch 4.

25 B Fisse, 'Sentencing Options against Corporations' (1990) 1(2) *Criminal Law Forum* 211, 253.

7.25 Fisse argues that reactive fault is an appropriate basis of corporate liability as it looks at the response of a body corporate once it has committed the physical elements of an offence.[26] He identifies one of the advantages of the reactive fault approach to corporate liability as ease of proof — it will often be easier to show whether a body corporate has implemented a 'specific policy and programme for undertaking internal discipline or preventive reform' in response to a situation than to assess the adequacy of a general compliance program.[27]

Assigning liability to a body corporate at common law

7.26 The methods of determining the conduct for which a body corporate will be liable at common law have to some extent been overtaken in Australia by statutory formulations of liability such as the *Criminal Code* and various provisions that deem a corporation to be directly liable for the conduct of specified individuals.[28]

7.27 However, this does not mean that the common law is irrelevant. The assignment of liability using common law principles is often an integral component of both criminal offences and non-criminal regulatory contraventions. In the area of corporate responsibility this is especially so as the means of identifying the fault element for corporations has, until the introduction of the *Criminal Code*, been almost exclusively drawn from the common law.

Liability for persons 'acting as an agent'

7.28 Historically, the attribution to a body corporate of rights, duties and liabilities was conceived of entirely in terms of the principles of agency.[29]

7.29 Agency is an important method of attributing liability under statute (and for tortious acts). The conduct of an agent that is within the scope of that person's actual or apparent authority is deemed to be conduct of the body corporate under s 84(2) of the *Trade Practices Act 1974* (Cth) and similar provisions in other legislation.

7.30 The attribution of liability using agency principles was considered by the High Court in *Scott v Davis*.[30] Although the case concerned civil liability for a tortious act (negligence), the discussion of agency is relevant to non-tortious situations. Two ele-

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26 B Fisse, 'Recent Developments In Corporate Criminal Law and Corporate Liability to Monetary Penalties' (1990) 13 (1) *University of New South Wales Law Journal* 1, 17.

27 B Fisse, 'The Attribution of Criminal Liability to Corporations; A Statutory Model' (1991) 13 *Sydney Law Review* 277, 286.

28 Section 84(2) of the *Trade Practices Act 1974* (Cth) and other similar deeming provisions are discussed below at para 7.78–7.85.

29 R Grantham, 'Attributing Responsibility to Corporate Entities; A Doctrinal Approach' (2001) 19 *Companies and Securities Law Journal* 168, 169.

30 *Scott v Davis* (2000) 204 CLR 333.

ments were considered to be critical in founding the liability of a principal for the conduct of its agent:

- Was the agent acting under the 'direction and control' of the principal?
- Was the agent acting within the 'scope of his or her actual or apparent authority'?

7.31 In a dissenting judgment, McHugh J proposed an extension of the principles of agency to include circumstances where the negligent person is acting as a delegate of the principal; that is, where that person is undertaking a task that the principal had agreed to perform.

> [A]n analysis of the authorities justifies the conclusion that a principal is also liable for the wrongful acts of an agent where the agent is performing a task which the principal has agreed to perform or a duty which the principal is obliged to perform and the principal has delegated that task or duty to the agent, provided that the agent is not an independent contractor. The principal is also liable for the wrongful acts of a person who is acting on the principal's behalf as a representative and not as an independent principal and within the scope of the authority conferred by the principal.[31]

7.32 Traditional concepts of agency rely on the notion of 'control' (that is, it is the characterisation of the relationship between the principal and agent which is important). McHugh J's proposed extension focusses instead on the facts of the case and on the substance of the transaction between the agent and the third party.

7.33 The majority and dissenting judgments in *Scott* identified three principles of agency. These principles might be relevant to any development of a new basis for assigning liability for conduct to a corporation:

- direction and control;
- scope of authority; and
- delegation of authority.

Vicarious liability for employees

7.34 A body corporate is vicariously liable for the actions of its employees, servants and agents where the activity amounting to the contravening conduct was undertaken 'within the scope' of that person's employment.[32] Once the primary liability of the employee, servant or agent is established (using general principles of liability and taking into account any available defences), the body corporate, as employer, is vicariously liable provided that the person was acting within the course and scope of his or her employment when the contravention was committed. This concept originated in the

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31 Ibid, 346 (McHugh J).

32 This method of assigning liability is not limited to corporations. An unincorporated employer such as a partnership or individual can also be vicariously liable for the conduct of its employees, servants or agents.

law of torts, however, it has now been extended to attribute liability to a body corporate for the conduct of an individual in criminal law and regulatory law.

7.35 In *Hollis v Vabu Pty Ltd* (the *Bicycle Couriers* case),[33] the majority of the High Court found a courier company vicariously liable for the negligent act of one of its bicycle couriers (he had knocked down and seriously injured a pedestrian whilst riding on a footpath) on the basis that the courier was an employee acting in the course of his employment.[34]

Policy basis of vicarious liability

7.36 In the *Bicycle Couriers* case, the policy rationale for the vicarious liability of corporate bodies for the conduct of their employees was described as based on two main concepts:

- enterprise risk; and
- deterrence of future harm.

7.37 Enterprise risk considers the 'provision of a just and practical remedy for the harm suffered as a result of the wrongs committed in the course of the conduct of the defendant's enterprise'[35] — that is, whether it is fair and just to require the body which introduces the potential harm into the community to be responsible if that harm eventuates. Enterprise risk looks at who will be able to provide effective compensation for the harm caused. In that respect, it looks for the 'deep pocket'. The majority of the High Court approved this policy rationale.[36]

7.38 Assigning liability to the employer for the conduct of employees may also encourage the employer to take steps to prevent future harm. (deterrence of future harm). 'Employers are often in a position to reduce accidents and intentional wrongs by efficient organisation and supervision'.[37] Justice McHugh held that 'the "deterrence of future harm" justification for imposing vicarious liability is therefore applicable to Vabu and its couriers, in the sense that it encourages accident reduction and provides incen-

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33 *Hollis v Vabu Pty Ltd* (2001) 181 ALR 263.

34 Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ in a joint judgment. Callinan J dissented on the basis that the appellant was bound by the concession he had made in the Court of Appeal that the relationship was one of principal and independent contractor.

35 *Hollis v Vabu Pty Ltd* (2001) 181 ALR 263, 275 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

36 Ibid, 275 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ). McHugh J also approved this policy basis: 288–9. The Court cited with approval the Supreme Court of Canada's expression of the fairness element of this concept: 'The employer puts in the community an enterprise which carries with it certain risks. When those risks materialize and cause injury to a member of the public despite the employer's reasonable efforts, it is fair that the person or organization that creates the enterprise and hence the risk should bear the loss': quoting McLachlin J of the Supreme Court of Canada in *Bazley v Curry* [1999] 2 SCR 534, 552–555; *Hollis v Vabu Pty Ltd* (2001) 181 ALR 263, 288 (McHugh J).

37 Quoting McLachlin J of the Supreme Court of Canada in *Bazley v Curry* [1999] 2 SCR 534, 552–555; *Hollis v Vabu Pty Ltd* (2001) 181 ALR 263, 288 (McHugh J).

tive for the discipline of workers guilty of wrongdoing'.[38] This concept of organisational reform is advocated by Fisse[39] and underpins the use of organisational reform orders as tailored corporate sanctions (see discussion in chapter 28).

Control

7.39 The concept of control as an important element of vicarious liability was also considered in the majority judgment in the *Bicycle Couriers* case. Control has traditionally been an important test in determining whether a person is an employee or an independent contractor. As the majority noted:

> It has long been accepted, as a general rule, that an employer is vicariously liable for the tortious acts of an employee but that a principal is not liable for the tortious acts of an independent contractor.[40]

7.40 The majority found that the requisite level of control existed because:

> Vabu retained control of the allocation and direction of the various deliveries. The couriers had little latitude. Their work was allocated by Vabu's fleet controller. They were to deliver goods in the manner in which Vabu directed … as the two documents relating to work practices suggest, to its customers they *were* Vabu and effectively performed all of Vabu's operations in the outside world. It would be unrealistic to describe the couriers other than as employees.[41]

7.41 It is clear from this case that the level of control exercised by the employer over the organisation of work and the allocation of tasks to individual workers is important in determining what is meant by 'the course of employment'. This emphasis on control by the employer of the overall work of employees does not absolve the employer however from vicarious liability where an employee performs an allocated task in an unauthorised manner.

Acting within the course of employment[42]

7.42 It has been accepted by Australian courts that an employee may be acting within the course of employment even where that employee performs an authorised activity in an unauthorised manner. In *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union*,[43] the Full Court of the Federal Court consid-

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38 Ibid, 289 (McHugh J).

39 See generally the writings of Brent Fisse; for example, B Fisse, 'The Attribution of Criminal Liability to Corporations; A Statutory Model' (1991) 13 *Sydney Law Review* 277.

40 *Hollis v Vabu Pty Ltd* (2001) 181 ALR 263, 273 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

41 Ibid, 279 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

42 This phrase is also used extensively in cases concerning the entitlement to compensation for work-related injuries. The concept of 'course of employment' is also used in sexual harassment and other discrimination cases. In these contexts, the phrase has been very broadly interpreted in order to give effect to the public policy objectives of the legislative schemes. Many of these cases do not provide useful guidance for assigning criminal liability to corporate bodies for the conduct of their employees and must be distinguished. For this reason they have not been discussed in this chapter.

43 *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530. (Ryan, Moore and Goldberg JJ).

ered that a union was vicariously liable for the conduct of one of its organisers even though that organiser had been acting without the express authority of the union.[44]

7.43 In *Tiger Nominees Pty Ltd v State Pollution Control Commission*,[45] the corporation was held vicariously liable for the conduct of its employees even though the employees were not acting in accordance with explicit work instructions. The public welfare purpose of the legislation was considered to support the finding of vicarious liability.

> Having regard to the language employed in the Act the object of the legislature was to prohibit 'pollution' of the waters. To convict a servant/principal is one step towards achieving that object, and is provided for in the Act. However, in my view the effective fulfilment of the statutory purpose requires that employers be regarded as potentially vicariously responsible for acts of their employees.[46]

7.44 These cases raise issues about the extent to which employers should be liable for the unauthorised conduct of employees and the extent to which courts will extend the concept of vicarious liability to achieve the policy objectives of the legislation.

Effect of employee's personal liability

7.45 A body corporate may also be held vicariously liable for the conduct of its employees if that conduct makes the employee primarily liable for contravention of the relevant statute. In *Mallan v Lee*,[47] the corporation had been charged with a contravention of s 230 of the *Income Tax Assessment Act 1936* (Cth) on the basis that the public officer of the corporation (Mallan) had knowingly and willingly understated the corporation's income on its annual tax return. The High Court held that Mallan could be held primarily liable for the contravention as the person who had committed the offence (by preparing the tax return). It also found that the corporation was vicariously liable for the conduct of its employee.

> The purpose of the express reference [in s 230] to the company is to make the corporation vicariously liable, not to exclude the liability of the public officer or other agent of the company whose act and guilty mind form the essential elements of the offence.[48]

7.46 The direct personal liability of individuals is discussed further in chapter 8.

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44 Ibid, 546.
45 *Tiger Nominees Pty Ltd v State Pollution Control Commission* (1992) 25 NSWLR 715.
46 Ibid, 720 (Gleeson CJ).
47 *Mallan v Lee* (1949) 80 CLR 198.
48 Ibid, 215 (Dixon J).

'Directing mind or will' theory

7.47 Another important way in which liability for conduct will be assigned to a body corporate is the 'directing mind or will' or organic approach. The notion of primary liability of a body corporate by identification of the conduct of directors or senior managers as conduct of the body corporate was firmly established in *Tesco Supermarkets Ltd v Nattrass*.[49] In *Tesco*, the House of Lords held that a corporation could be criminally liable for the acts of its officers who had sufficient seniority within the corporation to be accepted as 'acting for the company'[50] or 'those to be described as the directing mind of the company in question'.[51]

7.48 The court in *Tesco* founded liability on the basis of the formal management structure of the corporation. The seniority tests proposed by the various judges included:

- persons entrusted with the exercise of the powers of the corporation through the memorandum and articles of association or by the directors;[52]
- persons having actual control of the operations of the corporation and not required to report to others on how control is exercised;[53] and
- normally the board of directors, the managing director and perhaps superior officers.[54]

7.49 The rule established in *Tesco* was adopted in Australia by the High Court in *Hamilton v Whitehead*.[55] In *Hamilton*, the High Court held a corporation to be liable for the actions of its managing director because the managing director had 'knowledge of all the material circumstances [and] was "knowingly concerned" in the commission of the offences committed by the company'.[56]

7.50 Under the *Tesco* principle, the conduct of junior employees and managers below the top tier of control of the body corporate would be unlikely to be held to constitute conduct of the body corporate itself. Applying *Tesco* strictly, direct liability of a body corporate would only be found in limited circumstances. This limitation of the

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49 *Tesco Supermarkets Ltd v Nattrass* [1972] 8 AC 153.

50 This is embodied in the *Criminal Code* by use of the concept of the 'high managerial agent'. A 'high managerial agent' is defined as 'an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy': *Criminal Code*, s 12.3(6). This definition includes references to all three theories of corporate liability: scope of authority, attribution and culture.

51 N Hawke, *Corporate Liability* (2000) Sweet and Maxwell, London, 35.

52 *Tesco Supermarkets Ltd v Nattrass* [1972] 8 AC 153, 200 (Diplock LJ).

53 Ibid, 187 (Dilhorne LC).

54 Ibid, 171 (Reid LJ).

55 *Hamilton v Whitehead* (1988) 166 CLR 121.

56 Ibid, 128. *Hamilton* was also important in establishing that, where a corporation is directly liable under statute, an officer of the corporation can be charged as an accessory in relation to the same offence. See discussion of accessorial or indirect liability of individuals in ch 8.

Tesco principle has been criticised by numerous commentators.[57] In her article on the *Criminal Code*, Tahnee Woolf notes:

> Whilst it may be possible under the doctrine to find a small company liable for the fault of its senior managers, larger companies are able to escape liability by decentralizing responsibility within their organization so that those in senior positions cannot be blamed when something goes wrong.[58]

7.51 The issue raised by *Tesco* about whether liability should be assigned on the basis of the formal management structure of the body corporate is considered below at para 7.57–7.63.

'Attribution' theory

7.52 The *Tesco* principle was qualified by the Privy Council (on appeal from the High Court of New Zealand) in *Meridian Global Funds Management Asia Ltd v Securities Commission*.[59] Rather than taking the general *Tesco* approach of identifying the 'directing mind and will' of the corporation, Lord Hoffman held that it was necessary to determine whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act of the company.[60]

7.53 The approach taken in *Meridian* to the 'attribution' to the corporation of an individual's knowledge was

> that the determination of those whose actions are to be attributed appears no longer to be solely the province of the company's internal hierarchy. It is the nature of the functions performed by the individual that seems crucial. This may entail the attribution to the company of actions of employees at a level lower than was previously the case. … The criterion for attribution, focusing upon those who had responsibility for the matter with which the rule is concerned, is not predicated upon the individual's ability to control or influence the overall conduct of the company, only the matter with which the rule is concerned.[61]

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57 See for example B Fisse and J Braithwaite, *Corporations, Crime and Accountability* (1993) Cambridge University Press, Cambridge; B Fisse and J Braithwaite, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1988) 11 *Sydney Law Review* 468; S Field and N Jörg, 'Corporate Liability and Manslaughter; Should We be Going Dutch?' (1991) *Criminal Law Review* 156; and T Woolf, 'The Criminal Code Act 1995 (Cth) — Towards a Realist Vision of Corporate Criminal Liability' (1997) 21 *Criminal Law Journal* 257.

58 T Woolf, 'The Criminal Code Act 1995 (Cth) — Towards a Realist Vision of Corporate Criminal Liability' (1997) 21 *Criminal Law Journal* 257, 258. Fisse is also critical of this discriminatory effect: B Fisse, 'Recent Developments In Corporate Criminal Law and Corporate Liability to Monetary Penalties' (1990) 13 (1) *University of New South Wales Law Journal* 1, 6–7.

59 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.

60 Ibid, 507.

61 R Grantham, 'Corporate Knowledge: Identification or Attribution?' (1996) 59 *Modern Law Review* 732.

7.54 The principles of attribution developed in *Meridian* have not been expressly adopted by the Australian High Court[62] but have been considered in recent cases by the Federal Court.[63]

7.55 Professor Celia Wells comments favourably on the attribution principle established in *Meridian*:

> *Meridian* suggested a promising line of reasoning. If the question to be considered is who in the company is actually in charge of x, y, or z matters, then their knowledge may be attributed to the company even though they may fall well outside the 'gang of four' (or five or six) directors whom *Tesco v. Nattrass* recognizes as the nerve-centre of command.[64]

7.56 Whether an examination of how responsibility for discrete functions of a corporation can be attributed provides a more appropriate test for assigning liability to a corporation for the conduct of individuals than the more formal structural approach taken by the identification approach is considered below.

Formal or functional authority

7.57 As noted above, the 'directing mind or will' theory, as enunciated in *Tesco*, tends to found liability based on the formal structure of body corporate. In contrast, the attribution theory developed in *Meridian* takes a more functional approach to the delegation of authority in corporate bodies. In DP 65 the ALRC asked, whether, given the complexity of modern corporate structures, formal delegation of authority or functional authority is the appropriate test for corporate liability.[65]

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62 In substance, however, the *Meridian* principle of attribution does not appear to significantly differ from the method used by the High Court to attribute 'knowledge' of the officers of the corporation to the corporation in *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563 (see discussion below at para 7.106–7.107).

63 The principles were applied by Heerey J in *Australian Competition and Consumer Commission v Simsmetal Ltd* (2000) ATPR ¶41–764. In *Simsmetal*, the conduct of the corporation's scrapmetal manager for South Australia was accepted as sufficient to found liability of the corporation for contravention of the *Trade Practices Act* prohibition on making a market-sharing arrangement with a competitor. Citing *Meridian* with approval, Heerey J held that 'for the purpose of scrap acquisition in South Australia, he [the manager] *was* Simsmetal': *Australian Competition and Consumer Commission v Simsmetal Ltd* (2000) ATPR ¶41–764, 40,997. Goldberg J also referred to *Meridian* in *Australian Competition & Consumer Commission v Australian Safeway Stores Pty Ltd (No 2)* [2001] FCA 1861. In that case, however, his Honour held that the person did not satisfy the test of authority in respect of the relevant conduct (authority to negotiate supply and pricing terms for bread in Victorian supermarkets) on either the *Tesco* or *Meridian* principles.

64 C Wells, *Corporations and Criminal Responsibility* (2nd ed, 2001) Oxford University Press, Oxford, 104. She notes that *Meridian* has been rejected in England by the Court of Appeal in *Attorney General's Reference No 2(1999)* [2000] QB 796.

65 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Question 16–2.

Consultations and submissions

7.58 All submissions received in response to this question agreed that functional authority was the more appropriate test.[66] Professor Michael Adams stated that those with functional authority within a modern body corporate must attract liability for the actions of the corporation:

> Given the complexity of modern corporate structures, formal delegation can result in an apparent transfer of authority while the transferor retains functional authority. Thus, if the test of corporate liability is that of formal delegation, delegates may bear the entire burden, while those driving the corporation escape liability.[67]

7.59 Environment Australia stated that functional authority provides a more appropriate test since the actions of employees at lower levels, who have responsibility for the matters with which the rule is concerned, can be attributed to the body corporate (and not predicated upon the individual's ability to control the overall conduct of the body corporate).[68]

7.60 ASIC submitted that functional, or 'purported', authority of the officer or agent is the relevant authority for the purposes of third parties dealing with the body corporate and that functional authority has more flexibility to reflect more accurately the actual workings of a body corporate and therefore to identify individuals who in fact make decisions, carry on business or otherwise do acts for and on behalf of a body corporate.

> While formal delegation may be an indication of areas of responsibility, the actual authority that officers, employees and agents of a corporation operate under, or purport to have, is a better indication of conduct that should be taken to be that of the corporation.[69]

7.61 ASIC considered that formal delegation would be too narrow a test where third parties have been adversely affected by the conduct of officers, employees or agents acting in accordance with their actual (express or implied) or apparent authority.[70] It noted that s 128 and 129 of the *Corporations Act 2001* (Cth) set out various assumptions that can be made by third parties in relation to dealing with a body corporate.

> These assumptions may be made even if the officer or agent of the corporation has acted fraudulently. In relation to officers and agents of the corporation, a person may assume that anyone who is held out by the corporation to be an officer or agent has

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66 M Adams, *Submission CAP 12*, 5 September 2002, Environment Australia, *Submission CAP 26*, 24 October 2002, Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.

67 M Adams, *Submission CAP 12*, 5 September 2002.

68 Environment Australia, *Submission CAP 26*, 24 October 2002.

69 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.

70 Ibid.

> authority to exercise the powers and perform the duties customarily performed or exercised by that kind of officer or agent of a similar corporation.[71]

7.62 ASIC concluded that corporate liability for contraventions of civil penalty provisions ought to reflect the authority that an officer or agent of the body corporate purports to have, and on which third parties dealing with the corporation are entitled to rely.[72]

Conclusion

7.63 It is the ALRC's view that a combination of a formal and functional authority approach provides the appropriate test. A formal authority approach by itself would be too narrow a test, whereas a functional approach provides a more appropriate test that accounts for the complexity of modern corporate structures. As discussed below, a number of statutory mechanisms have adopted both a formal and a functional approach in attributing liability to a body corporate, and the ALRC has incorporated both approaches into default provisions relating to corporate responsibility for inclusion in the proposed Regulatory Contraventions Statute.[73]

Defining liability for criminal and non-criminal penalties

7.64 It has not been possible to maintain a strict distinction between liability for criminal offences and non-criminal regulatory contraventions in relation to corporate responsibility. In this area the distinction does not provide a useful method of analysis.[74] Instead, the distinction between liability for conduct (or the physical elements of the offence) and liability for intention (or the fault elements of the offence) has been highlighted. However even these categories are not mutually exclusive and, in many cases, principles used to assign liability for conduct will be the same as those used to discern corporate intention.

Criminal liability

7.65 Criminal liability requires proof beyond reasonable doubt that an offence has been committed. There are generally two major components to establishing criminal liability:

- the physical element or elements, or *actus reus*, constituting the offence must have taken place; and
- the requisite fault element or state of mind (or *mens rea*) must have been present in the mind of the offender (also commonly called the 'mental element').

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71 Ibid.
72 Ibid.
73 See Recommendations 7–1, 7–2 and 7–3 below at para 7.103 and 7.157.
74 However, as noted in ch 4, the ALRC has stated that the distinction between criminal and civil penalty liability should be maintained.

7.66 Criminal liability for offences against federal laws has now been largely codified in the *Criminal Code*.

7.67 For offences of strict or absolute liability, it will be enough to prove that the proscribed conduct or physical elements took place and that the persons who engaged in that conduct were acting 'as' or 'on behalf of' the corporation.

Liability for civil penalties

7.68 Criminal offences and non-criminal contraventions will often be distinguished by the need to prove fault or a mental element. As noted above, criminal offence provisions generally require proof of the mental element making up the offence together with the relevant physical element, whereas contraventions attracting civil penalties will generally only require proof of a physical element. Therefore, common law and statutory mechanisms that assign liability to corporations for physical elements will be relevant to contraventions that attract civil penalties.

7.69 However, the ALRC's review of offences and civil penalty provisions in various legislative schemes has shown that this is not always the case.[75] At times, some contraventions that attract a civil penalty require proof of fault.[76] Although this rarely arises, it is sometimes also necessary to consider common law and statutory mechanisms that assign liability to corporations for fault elements in civil penalty provisions.

Quasi-penalties and true administrative penalties

7.70 Attribution of physical elements to corporate bodies may often be relevant to quasi-penalties, particularly in the area of licensing regimes. Attribution methods may also, in limited circumstances, be relevant to true administrative penalties. However, quasi-penalties and true administrative penalties do not generally require proof of a fault element to establish liability.[77]

Assigning liability for physical elements under statute

Criminal Code

7.71 The *Criminal Code* uses traditional agency principles to establish the liability of a corporation for the physical elements of an offence. Section 12.2 requires the physical element of the offence to be committed 'by an employee, agent or officer acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority'.

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75 See ch 4.

76 See, for example, *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 494(1) and *Corporations Act 2001* (Cth), Part 7.

77 See general description of quasi-penalties and true administrative penalties in ch 2.

7.72 However, Professor Bob Baxt has noted that, whereas the common law approaches used to establish a body corporate's liability require the relevant employee to commit both the physical elements of the offence and the requisite fault element (if the relevant offence is not one of strict liability)

> the Code takes a more holistic view of the potential criminal liability of a body corporate such that the co-existence (in the one employee) of the physical and fault elements of the offence will not be a pre-requisite to the establishment of the criminal liability of a body corporate under the Code.[78]

7.73 Section 12.2 sets out the circumstances under which conduct will be attributed to a body corporate for the physical element of an offence provision. There is no requirement of a fault element.

> Rather, the fault element of the body corporate's offence (provided it is not one of strict liability) is established separately under sections 12.3 and 12.4 of the Code, without any specific requirement that the fault element is attributable to the individual employee who committed the physical element.[79]

7.74 Woolf has noted that s 12.2 has a wider scope than the common law view of *actus reus* because under the *Tesco* identification doctrine a body corporate is only responsible for acts committed by senior management.[80]

> In contrast, under the Code, a corporation will be responsible for the *actus reus* of a crime regardless of the level of seniority of the offender within the company. It must be noted, however, that the MCCOC [Model Criminal Code Officers Committee] stressed in their final report that this provision was not so wide as to impose vicarious liability, because liability under the Code ultimately depends on the establishment of direct fault on the part of the corporation itself.[81]

7.75 Also observing that s 12.2 broadens the range of employees whose conduct can be attributed to a body corporate, Baxt notes that the term 'within the actual or apparent scope of his or her employment' most broadens the scope of employees whose conduct can be attributed to the body corporate, as opposed to the adoption of the term 'within his or her actual or apparent authority'.

> This is because (as noted by Australian courts in their application of vicarious liability to attribute corporate criminal liability) the scope of a person's employment is not necessarily limited by what he or she has 'actual or apparent authority' to do.

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78 R Baxt, 'Ascribing Civil and Criminal Liability for Company Employees and Directors — Who Carries the Corporate Can?' (Paper presented at Penalties; Policy Principles & Practice & Government Regulation, Sydney, 9 June 2001), 4.

79 Ibid, 4. See para 7.108–7.147 for discussion of s 12.3 and 12.4 of the *Criminal Code*.

80 T Woolf, 'The Criminal Code Act 1995 (Cth) — Towards a Realist Vision of Corporate Criminal Liability' (1997) 21 *Criminal Law Journal* 257, 259.

81 Ibid , 259. Woolf acknowledges Fisse's argument that a broad agency approach to *actus reus* 'poses little danger of injustice provided that corporate criminal liability is confined to cases of corporate blameworthiness': B Fisse, 'The Attribution of Criminal Liability to Corporations; A Statutory Model' (1991) 13 *Sydney Law Review* 277, 281 cited in T Woolf, 'The Criminal Code Act 1995 (Cth) — Towards a Realist Vision of Corporate Criminal Liability' (1997) 21 *Criminal Law Journal* 257, 260.

> For if there was a limit, at least in the case of a junior employee, it frequently would be possible to exclude the operation of the criminal law by arguing that the employee did not have the 'actual or apparent authority' to commit an unlawful act. The inclusion of both terms arguably ensure that the individuals, with whose conduct can be attributed to the body corporate, must at least have been purporting to act in their capacity as officers of the body corporate.[82]

7.76 Baxt argues that this statutory formula reduces the likelihood of attribution occurring in situations where it was the intention of the relevant individual to injure the body corporate.[83]

7.77 Baxt concludes that the *Criminal Code* expands the potential to establish the primary liability of a body corporate

> because it recognises that, as corporate structures become increasingly diffuse, the 'directing minds and wills' become even more removed from the day to day actions of the body corporate, such that it may be impossible to attribute the culpable acts to them and thus to the body corporate. Since this approach allows the court to find corporate liability for illegal acts performed by persons in middle or lower-tier management, it will reduce the ability of larger bodies corporate to escape liability by decentralising responsibility within their organisation. The practical implication of these changes is that bodies corporate will be brought within the full gamut of the criminal law.[84]

Trade Practices Act, s 84(2)

7.78 An alternative formulation is found in s 84(2) of the TPA, which deems a corporation liable for the conduct of specified individuals.[85] It provides that 'any conduct engaged in on behalf of a body corporate'

> (a) by a director, servant or agent of the body corporate within the scope of the person's actual or apparent authority; or
>
> (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant or agent of the body corporate,

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82 R Baxt, 'Ascribing Civil and Criminal Liability for Company Employees and Directors — Who Carries the Corporate Can?' (Paper presented at Penalties; Policy Principles & Practice & Government Regulation, Sydney, 9 June 2001), 3–4.

83 Baxt notes that Grantham observes that such a position is consistent with the common law approach as demonstrated in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, 503: R Baxt, 'Ascribing Civil and Criminal Liability for Company Employees and Directors — Who Carries the Corporate Can?' (Paper presented at Penalties; Policy Principles & Practice & Government Regulation, Sydney, 9 June 2001), 4.

84 R Baxt, 'Ascribing Civil and Criminal Liability for Company Employees and Directors — Who Carries the Corporate Can?' (Paper presented at Penalties; Policy Principles & Practice & Government Regulation, Sydney, 9 June 2001).

85 This expression of liability (or a substantially similar expression) is used in many statutes; see for example *Corporations Act 2001* (Cth), s 762(4); *Customs Act 1901* (Cth), s 257; *Excise Act 1901* (Cth), s 145A; *Proceeds of Crime Act 1987* (Cth), s 85 and *Australian Securities and Investments Commission Act 2001* (Cth), s 12GH.

> where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, servant or agent;
>
> shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.

7.79 Section 84(2)(a) applies the traditional common law formulations of tortious liability on the basis of agency and vicarious liability for the actions of directors and employees to liability for penalties. Section 84(2)(b) extends these principles to the conduct of persons other than directors, servants or agents (presumably independent contractors) where those persons have acted with the express or implied consent or agreement of a director, servant or agent and the director, servant or agent had the actual or apparent authority to give that consent or agreement.

7.80 Section 84(2) involves a number of key concepts:

- When is conduct engaged in *on behalf of* a corporation?
- What is the scope of *actual* authority?
- What is the scope of *apparent* authority?

Meaning of 'on behalf of'

7.81 This phrase has been considered in a number of cases and has generally been viewed as having no 'strict legal meaning'.[86] It has been noted, however, that:

> The phrase suggests some involvement by the person concerned with the activities of the company. The words convey a meaning similar to the phrase 'in the course of the body corporate's affairs or activities' … Section 84(2) refers to conduct by directors and agents of a body corporate as well as its servants. Also, the second limb of the subsection extends the corporation's responsibility to the conduct of other persons who act at the behest of a director, agent or servant of the corporation. Hence the phrase 'on behalf of' casts a much wider net than conduct by servants in the course of their employment, although it includes it.[87]

7.82 In *NMFM Property Pty Ltd v Citibank Ltd (No 10)* Lindgren J reviewed the relevant authorities and concluded that

> an act is done 'on behalf of' a corporation for the purpose of subs 84(2) if either one of two conditions is satisfied: that the actor engaged in the conduct intending to do so 'as representative of' or 'for' the corporation, or that the actor engaged in the conduct in the course of the corporation's business, affairs or activities.[88]

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86 *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27, 37.

87 Ibid, 37, cited in *NMFM Property Pty Ltd v Citibank Ltd (No 10)* (2000) 107 FCR 270, 549–550. In *Trade Practices Commission v Tubemakers of Australia Ltd* (1983) 76 FLR 455, Toohey J considered that s 84(2) was 'concerned with the conduct of persons representing a body corporate and of others acting at the direction or with the consent or agreement of those persons': *Trade Practices Commission v Tubemakers of Australia Ltd* (1983) 76 FLR 455, 475.

88 *NMFM Property Pty Ltd v Citibank Ltd (No 10)* (2000) 107 FCR 270, 550.

Does s 84(2) extend the common law?

7.83 The leading authority on s 84(2) is *TPC v Tubemakers of Australia Ltd*.[89] In *Tubemakers*, Toohey J said:

> In my view s.84(2) is not intended to be an exhaustive statement of corporate responsibility under the *Trade Practices Act*. ... It does not seek to make a corporation vicariously responsible; consistently with the theory expressed in *Lennard's Carrying Co. Ltd* and *Tesco*, conduct of those persons is conduct of the corporation.[90]

7.84 His Honour further noted that s 84(2) was

> an extension of the principles expressed in *Tesco* and, where proceedings are brought under Part IV of the *Trade Practices Act*, a corporation may be held liable either in accordance with the principles in *Tesco* or by the application of s.84(2).[91]

7.85 Lockhart J also noted this extension of the common law in *Walplan Pty Ltd v Wallace*, and described s 84(2) as:

> An enlarging provision ... It extends to proceedings, both civil and criminal, and is designed to eliminate the necessity to apply the various and at times divergent tests of the common law relating to a corporation's responsibility for the acts of its servants or agents. It extends those common law principles in order to facilitate proof of a corporation's responsibility.[92]

Preliminary view

7.86 In DP 65 the ALRC expressed the preliminary view that the provisions relating to liability of corporations for the physical elements of an offence specified in the *Criminal Code* should apply to determining liability for conduct that attracts civil penalties.[93]

Consultations and submissions

7.87 In response to Proposal 16–1, ASIC accepted that

> in principle, provisions in the Code relating to the liability of corporations should apply to determining liability for conduct that attracts civil penalties. However, as noted

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89 *Trade Practices Commission v Tubemakers of Australia Ltd* (1983) 76 FLR 455. For more recent considerations of the provision see *Australian Competition and Consumer Commission v Maritime Union of Australia* (2001) 114 FCR 472 and *Australian Competition & Consumer Commission v Australian Safeway Stores Pty Ltd (No 2)* [2001] FCA 1861.

90 *Trade Practices Commission v Tubemakers of Australia Ltd* (1983) 76 FLR 455, 474–475.

91 Ibid, 476.

92 *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27, 38.

93 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Proposal 16–1.

> above, it is expected to be some time before the practical operation of the Criminal Code can be properly assessed and commented upon.[94]

7.88 Professor Michael Adams did not agree with the Proposal:

> Generally speaking, the relevant provisions within the *Criminal Code* are inapplicable to civil liability — burden of proof, need for fault elements, and the standard of proof are all sole residents of the criminal domain, and should remain so.
>
> In the interests of clarifying a line already blurred by the hybrid concept of civil penalty provisions, the *Criminal Code* should not be applied to civil actions or civil penalties. The *Criminal Code* cannot be used to govern civil penalties, their proof requirements or their enforcement — we should seek to maintain, or perhaps re-establish, the necessary divide between the criminal and civil jurisdictions.[95]

7.89 Some Members of the Advisory Committee preferred a formulation based on s 84 of the TPA.[96]

7.90 However, the Victorian Bar supported the application of the *Criminal Code* provisions in relation to the criminal liability of corporations, and therefore supported Proposal 16–1.[97] Environment Australia also expressed unqualified support for the Proposal.[98]

Conclusion

7.91 The ALRC sees benefit in stating a default position in relation to the attribution of liability for physical elements of non-criminal contraventions to corporate bodies for the conduct of individuals. The difficulties in distinguishing clearly between conduct which is criminal and conduct which attracts civil consequences identified in chapter 11 of this Report have directed the ALRC to consider the criminal liability models outlined above.

7.92 There are strong reasons why the mechanism that attributes liability to a body corporate should be the same when determining liability for criminal and non-criminal penalties. Two models presented themselves to the ALRC: the model contained in s 12.2 of the *Criminal Code* and the model utilised in s 84 of the *Trade Practices Act*.

7.93 The ALRC notes that the approach taken in the *Criminal Code* to liability for the physical elements of an offence does not differ greatly from the traditional common law tests of primary liability of a body corporate for the conduct of agents where those agents have acted within the scope of their authority, or vicarious liability for the conduct of employees where those employees have acted in the course of their employment. The ALRC also acknowledges that to date s 12.2 of the *Criminal Code* has not been tested in the courts, and commentary on it is scarce.

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94 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.
95 M Adams, *Submission CAP 12*, 5 September 2002.
96 Advisory Committee members, *Advisory Committee meeting*, 17 October 2002.
97 The Victorian Bar, *Submission CAP 22*, 14 October 2002.
98 Environment Australia, *Submission CAP 26*, 24 October 2002.

7.94 Whilst substantially restating the common law, s 84(2) of the TPA has been held to extend the common law to encompass at least the identification approach, and possibly the attribution approach, to assigning corporate liability.

7.95 The ALRC notes the criticisms of the identification approach and the lack of caselaw on the attribution approach. The ALRC's research and consultations to date have not identified any significant criticism of the other methods used to assign liability to a body corporate for the conduct of individuals.

7.96 The ALRC is attracted to s 12.2 of the *Criminal Code* for a number of reasons. Firstly, the *Criminal Code* model provides a realistic and holistic view of the modern body corporate. As noted by Baxt, s 12.2 allows the court to find corporate liability for illegal acts performed by persons in middle or lower-tier management, therefore reducing the ability of larger corporate bodies to escape liability by decentralising responsibility within their organisation.[99] This is consistent with the ALRC's and other's preference for a functional approach to assigning liability, as opposed to a formal approach.

7.97 Another reason to enact a default provision in a general Regulatory Contraventions Statute that mirrors s 12.2, is the recent enactment of provisions that provide that where the physical elements of a contravention have been made out civil penalty consequences will follow but that if, in addition, a specific fault element in respect of the conduct can also be made out, criminal consequences will apply.[100] The ALRC sees no reason why, if the same physical elements can attract criminal and civil penalty consequences, the mechanism to attribute liability for the physical elements to a body corporate should differ.[101]

7.98 The ALRC also notes Baxt's comments that s 12.2 takes a more holistic view of the potential criminal liability of a body corporate such that the co-existence (in the one employee) of the physical and fault elements of the offence will not be a prerequisite to the establishment of the criminal liability of a body corporate under the *Criminal Code*.

7.99 Further, because s 12.2 includes consideration of both 'actual or apparent scope of his or her employment' and 'within his or her actual or apparent authority', a provision based on this formula reduces the likelihood of attribution occurring in situations where it was the intention of the relevant individual to injure the body corporate by wilful misconduct.

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99 R Baxt, 'Ascribing Civil and Criminal Liability for Company Employees and Directors — Who Carries the Corporate Can?' (Paper presented at Penalties; Policy Principles & Practice & Government Regulation, Sydney, 9 June 2001).

100 See, for example, *Corporations Act 2001* (Cth), s 181 and 184 and *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 142 and 142A. These provisions are discussed further in ch 4 and 11.

101 See discussion of formal and functional authority above at para 7.57–7.63.

7.100 Importantly, the statutory formula in s 12.2 is enacted in a legislative instrument of general application, the *Criminal Code*. It is now the default provision that applies, subject to express statutory statement to the contrary, to criminal offences in all federal legislation. The words 'Express statutory statement to the contrary' are important. The ALRC acknowledges that a provision similar to s 12.2 would not suit every situation that required proof of a physical element in order to establish liability for a non-criminal contravention.

7.101 The application of a default provision that mirrored s 12.2 in a general Regulatory Contraventions Statute, could be excluded by an express statement in another statute. The Explanatory Memorandum to the Criminal Code Bill 1994 (Cth) itself contemplated departure from the *Criminal Code* in relation to corporate liability.[102]

7.102 One submission suggested that application of a provision similar to s 12.2 would further blur the line between civil and criminal liability.[103] However, the proposal to apply the *Criminal Code* to civil penalty provisions was not intended to import features of criminal liability to non-criminal penalties such as the higher burden of proof. Rather, the Proposal suggested only that the mechanism for attributing liability to corporate bodies used in the *Criminal Code* should also be applied to non-criminal liability.

7.103 It is the ALRC's view that the use of the s 12.2 of the *Criminal Code* model (relating to physical elements) in a general Regulatory Contraventions Statute would not blur the distinction between criminal and civil liability. Rather, it is a mechanism for determining liability; and is not in itself exclusively applicable to criminal liability. The use of the model would not impose any criminal fault elements or defences into a civil penalty scheme.

Recommendation

Recommendation 7–1. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, if a physical element of a non-criminal contravention 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.

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102 Cited in J Longo, 'Market Misconduct Provisions of the Financial Services Reform Act: Challenges for Market Regulation' (Paper presented at Centre for Corporate Law and Securities Regulation Seminar: 'Market Misconduct and the Financial Services Reform Bill', Sydney, 14 August 2001), 19. Section 769B of the *Corporations Act 2001* (Cth), introduced by the *Financial Services Reform Act 2001* (Cth) is such an example. Some commentators have stated that it is not clear why Part 2.5 of the *Criminal Code* does not apply to Part 7. See M Adams, 'Does Increasing Criminality Make for Better Reform of the Financial Services Industry?' (2002) 14(2) *Australian Journal of Corporate Law* 202, 217 and J Longo, 'Market Misconduct Provisions of the Financial Services Reform Act: Challenges for Market Regulation'

Assigning liability for fault elements under statute

7.104 As noted in chapter 4, non-criminal contraventions that attract a civil penalty rarely require proof of a fault element. However, the ALRC's research has revealed instances where contraventions that attract civil penalties will require proof of both physical and fault elements. For example, under s 13 of the *Sydney Airport Demand Management Act 1997* (Cth), the operator of an aircraft is liable for a civil penalty for an 'off-slot movement' only if this is done 'knowingly or recklessly'. Although these provisions are rare, it is necessary to also examine how statutory mechanisms attribute liability for fault elements to a body corporate.

Trade Practices Act, s 84(1)

7.105 Section 84(1) of the TPA provides that, when it is necessary to prove that a corporation had a particular state of mind, 'it is sufficient to show that a servant or agent of the person, being a servant or agent by whom the conduct was engaged in within the scope of the servant's or agent's actual or apparent authority, had that state of mind'.[104] This section is similar to the expression of liability for conduct used in s 84(2).[105]

7.106 Section 84(5) defines what 'state of mind' is required. It includes 'knowledge, intention, opinion, belief or purpose of the person and the person's reasons for the person's intention, opinion, belief or purpose'.

7.107 How 'knowledge' of an individual may be attributed to a corporation under s 84(1) was considered by the High Court in *Krakowski v Eurolynx Properties Ltd*.[106] *Eurolynx* was concerned with representations made by the vendor concerning the rental income expected from a leased property purchased by Mr and Mrs Krakowski. The High Court found that the knowledge of the persons who had initiated and conducted negotiations on behalf of the corporation was properly to be considered to be the knowledge of the corporation. It adopted a functional rather than formal approach, holding that:

(Paper presented at Centre for Corporate Law and Securities Regulation Seminar: 'Market Misconduct and the Financial Services Reform Bill', Sydney, 14 August 2001), 19.

103 M Adams, *Submission CAP 12*, 5 September 2002.

104 This expression of liability (or a substantially similar expression) is used in many statutes; see for example *Airports Act 1996* (Cth), s 224; *Australian Securities and Investments Commission Act 2001* (Cth), s 12GH; *Corporations Act 2001* (Cth), s 762; *Fisheries Management Act 1991* (Cth), s 164; *Gene Technology Act 2000* (Cth), s 188; *Life Insurance Act 1995* (Cth), s 250; *Radiocommunications Act 1992* (Cth), s 306; *Social Security (Administration) Act 1999* (Cth), s 229 and 231; *Superannuation Industry (Supervision) Act 1993* (Cth), s 338; and *Telecommunications Act 1997* (Cth), s 575 and 576.

105 See above at para 7.78–7.85.

106 *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563.

> A division of function among officers of a corporation for different aspects of the one transaction does not relieve the corporation from responsibility determined by reference to the knowledge possessed by each of them.[107]

7.108 This approach is similar to that taken by the Privy Council in *Meridian*, where the particular circumstances, rather than the formal corporate structure, were decisive of the liability of the corporation for the conduct of individuals involved in the contravention.

Criminal Code

Fault elements other than negligence

7.109 Under the *Criminal Code*, liability for the fault element of a criminal offence may be assigned to a body corporate on a broader basis than liability for the physical element. Section 12.3(1) of the *Criminal Code* provides:

> 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.

7.110 This expression of liability is very broad, much more expansive that the *Tesco* principle or the more traditional agency theory.

> Given the 'flatter structures' and greater delegation to relatively junior officers in modern corporations, … the *Tesco* test — which among other things, requires the prosecution to prove, beyond reasonable doubt, that the officer was at a sufficiently high level to be regarded as 'the directing will and mind' of the corporation — is no longer appropriate.[108]

7.111 Authorisation or permission may be established by proving that the corporation's board of directors or high managerial agents:[109]

- carried out the relevant conduct personally, acting intentionally, knowingly or recklessly or expressly, tacitly; or
- impliedly authorised or permitted the commission of the offence by another person.

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107 Ibid, 583.

108 Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapters 1 and 2 — General Principles of Criminal Responsibility* (1992), Criminal Law Officers Committee of the Standing Committee of Attorneys-General, 107.

109 'High managerial agent' is defined in the *Criminal Code* as 'an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy': s 12.3(2). Whilst this definition is similar to the *Tesco Supermarkets Ltd v Nattrass* [1972] 8 AC 153 formulation, it is not limited in the same formal hierarchical way as *Tesco*. Whereas *Tesco* looked at the formal delegation of authority, this definition looks at the substance of the person's role within the corporation, and is therefore more closely aligned to 'attribution liability' as expressed in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.

7.112 These two tests focus on the actions of senior management. Woolf has observed that these tests will be most relevant to smaller companies 'where the board or high managerial agents have greater control over company activities and a more omniscient awareness of misconduct in the lower ranks'.[110]

7.113 Section 12.3(3) of the *Criminal Code* provides that, if a body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission, it cannot be proven that a body corporate expressly, tacitly or impliedly authorised or permitted the commission of an offence by establishing 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.[111]

7.114 Baxt has noted that this provision is a safeguard to exonerate bodies corporate where a renegade senior officer has committed or authorised illegal conduct despite precautions taken by the board.[112] Woolf has observed that the due diligence proviso 'thus alleviates the problems associated with the common law doctrine in situations where the directing minds of the company are in conflict'.[113]

Compliance culture

7.115 One significant departure that the *Criminal Code* makes from established common law and statute is in its use of 'compliance culture' in determining corporate liability. Under s 12.3(2), liability for fault elements other than negligence may also arise from the existence of a corporate culture that 'directed, encouraged, tolerated or led to non-compliance' with the relevant law, or the failure of the body corporate 'to create and maintain a corporate culture that required compliance with the relevant provision'.[114]

7.116 Woolf has observed that in this statement the drafters of the Code

> have expressly acknowledged that the only way to adapt traditional notions of mens rea to corporations is to take cognisance of organisational criteria. Whilst a corpora-

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110 T Woolf, 'The Criminal Code Act 1995 (Cth) — Towards a Realist Vision of Corporate Criminal Liability' (1997) 21 *Criminal Law Journal* 257, 262.

111 For a general discussion of due diligence see ch 4. For a discussion of due diligence as a threshold test for liability of corporate officers see ch 8.

112 R Baxt, 'Ascribing Civil and Criminal Liability for Company Employees and Directors — Who Carries the Corporate Can?' (Paper presented at Penalties; Policy Principles & Practice & Government Regulation, Sydney, 9 June 2001), 8.

113 T Woolf, 'The Criminal Code Act 1995 (Cth) — Towards a Realist Vision of Corporate Criminal Liability' (1997) 21 *Criminal Law Journal* 257, 261.

114 *Criminal Code*, s 12.3(2)(c)–(d).

> tion does not have a 'mind' as such, it does manifest its intention via a complex organisational process, which can be interpreted and assessed.[115]

7.117 Gayle Hill notes that:

> The provisions relating to corporate culture significantly extend the scope for corporate criminal responsibility beyond the current position at common law. One intention of these provisions seems to be to catch cases where a company's formal documents appear to require compliance, while in reality non-compliance is expected or tolerated.[116]

7.118 The Explanatory Memorandum to the Criminal Code Bill 1994 (Cth) noted that:

> The rationale for holding corporations liable on this basis is that '… the policies, standing orders, regulations and institutionalised practices of corporations are evidence of corporate aims, intention and knowledge of individuals within the corporation. Such regulations and standing orders are authoritative, not because any individual devised them, but because they have emerged from the decision making process recognised as authoritative within the corporation'. … It extends the *Tesco* rule by allowing the prosecution to lead evidence that the company's unwritten rules tacitly authorised non-compliance or failed to create a culture of compliance. It would catch situations where, despite formal documents appearing to require compliance, the reality was that non-compliance was expected.[117]

7.119 This is a functional rather than formal view of the corporation. It looks to what actually happens in the corporation, not what is written in the corporation's formal policies, procedures or compliance manuals. Corporate culture theory 'locates corporate blame in the procedures, operating systems or culture of a company'.[118]

7.120 Fisse notes:

> Corporate policy is the corporate equivalent of intention, and a company that conducts itself with an express or implied policy of non-compliance with a criminal prohibition exhibits corporate criminal intentionality.[119]

7.121 Woolf describes the *Criminal Code* approach as 'realist', acknowledging that a corporation is capable of acting as a discrete entity, made up of sub-units with differing responsibilities.

> [T]he Code takes cognizance of the complex nature of the corporate decision-making process and the diffusion of responsibility within corporations, and acknowledges that it may sometimes be simplistic to merely correlate the culpability of certain individu-

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115 T Woolf, 'The Criminal Code Act 1995 (Cth) — Towards a Realist Vision of Corporate Criminal Liability' (1997) 21 *Criminal Law Journal* 257, 263.

116 G Hill, 'Is Your Corporate Culture Criminal?' (2000) 10(4) *Australasian Risk Management* 5, 6.

117 Explanatory Memorandum to the Criminal Code Bill 1994 (Cth), 44.

118 C Wells, 'Corporate Criminal Liability; Developments in Europe and Beyond' (2001) 39(7) *Law Society Journal* 62, 62.

119 B Fisse, 'Recent Developments In Corporate Criminal Law and Corporate Liability to Monetary Penalties' (1990) 13 (1) *University of New South Wales Law Journal* 1, 15–16.

> als with the culpability of the corporation, without an investigation of the entire corporate structure.[120]

7.122 Wells describes the use of 'corporate culture' as 'a clear endorsement of an organizational or systems model' of corporate liability.[121] In its final report, the Model Criminal Code Officers Committee noted that:

> Although the term 'corporate culture' will strike some as too diffuse, it is both fair and practical to hold companies liable for the policies and practices adopted as their method of operation. There is a close analogy here to the key concept in personal responsibility — intent. Furthermore, the concept of 'corporate culture' casts a much more realistic net of responsibility over corporations than the unrealistically narrow *Tesco* test.[122]

Factors relevant to compliance culture

7.123 Factors relevant to the application of the corporate culture provisions are outlined in s 12.3(4) to 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.

7.124 According to Baxt, the first of these factors is likely to have the effect of capturing situations where the board or high managerial agent had authorised similar contraventions in the past but played no part in the particular incident in question.[123] Woolf notes that, the insertion of s 12.3(4)(b) specifically draws the court's attention to unofficial corporate practices.[124] She notes Fisse's comments that the perceptions of middle- and lower-level personnel provide an 'acid test of the efficacy of a corporate

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120 T Woolf, 'The Criminal Code Act 1995 (Cth) — Towards a Realist Vision of Corporate Criminal Liability' (1997) 21 *Criminal Law Journal* 257, 259.

121 C Wells, *Corporations and Criminal Responsibility* (2nd ed, 2001) Oxford University Press, Oxford, 136.

122 Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapters 1 and 2 — General Principles of Criminal Responsibility* (1992), Criminal Law Officers Committee of the Standing Committee of Attorneys-General, 109.

123 R Baxt, 'Ascribing Civil and Criminal Liability for Company Employees and Directors — Who Carries the Corporate Can?' (Paper presented at Penalties; Policy Principles & Practice & Government Regulation, Sydney, 9 June 2001), 9.

124 T Woolf, 'The Criminal Code Act 1995 (Cth) — Towards a Realist Vision of Corporate Criminal Liability' (1997) 21 *Criminal Law Journal* 257, 263.

compliance system'.[125] Without this provision, companies could avoid liability by adopting impressive compliance systems on paper that do not work in reality.[126]

What is 'corporate culture'?

7.125 'Corporate culture' is defined in the *Criminal Code* as 'an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place'.[127] A body corporate's corporate culture is not determined simply by an examination of the policies and manuals it has developed. Hill notes that:

> Corporate culture includes the attitudes and practices within a company, or the relevant part of the company. The attitudes and practices of the employees themselves will often be the best determinant of this.[128]

7.126 The Explanatory Memorandum to the Criminal Code Bill 1994 (Cth) provides the following illustrations:

> [The provision] extends the *Tesco* rule by allowing the prosecution to lead evidence that the company's written rules tacitly authorised non-compliance or failed to create a culture of compliance. It would catch situations where, despite formal documents appearing to require compliance, the reality was that non-compliance was expected. For example, employees who know that if they do not break the law to meet production schedules (for example, by removing safety guards or equipment), they will be dismissed. The company would be guilty of intentionally breaching safety legislation. Similarly, the corporate culture may tacitly authorise reckless offending (for example, recklessly disregarding the substantial and unjustifiable risk of causing serious injury by removing the equipment guards). The company would be guilty of a reckless endangerment offence.[129]

A role for compliance programs

7.127 The definition of 'corporate culture' in s 12.3(6) of the *Criminal Code* suggests that corporate bodies will need to establish effective cultures of compliance, rather than just written compliance policies. Baxt has suggested that under the s 12.3(6) definition

> intention, knowledge or recklessness could be attributed to a body corporate as a whole where one mutinous branch or subdivision was in the practice of engaging in unlawful conduct in defiance of body corporate policy … This suggests the need for

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125 B Fisse, *Howard's Criminal Law* (5th ed, 1990) The Law Book Company Ltd, Sydney, 292 cited in T Woolf, 'The Criminal Code Act 1995 (Cth) — Towards a Realist Vision of Corporate Criminal Liability' (1997) 21 *Criminal Law Journal* 257, 263.

126 See B Fisse, *Howard's Criminal Law* (5th ed, 1990) The Law Book Company Ltd, Sydney, 292 in T Woolf, 'The Criminal Code Act 1995 (Cth) — Towards a Realist Vision of Corporate Criminal Liability' (1997) 21 *Criminal Law Journal* 257, 263. The effectiveness of compliance programs as a mitigating factor in determining the quantum of a penalty is discussed in ch 4.

127 *Criminal Code*, s 12.3(6).

128 G Hill, 'Is Your Corporate Culture Criminal?' (2000) 10(4) *Australasian Risk Management* 5, 6.

129 Explanatory Memorandum to the Criminal Code Bill 1994 (Cth), cited in G Hill, 'Is Your Corporate Culture Criminal?' (2000) 10(4) *Australasian Risk Management* 5.

> bodies corporate to have effective overall monitoring systems in place to assess the level of compliance in each department.[130]

7.128 The need for corporate compliance programs to be meaningful indications of corporate responsibility has also been noted by Dr Simon Longstaff:

> The thing needed in today's conditions is an organisation that can efficiently and effectively govern itself with a fair measure of self-regulation in which individuals take personal responsibility for applying the corporation's 'ethical compass'. This then allows flexible responses to changing conditions — but with well-defined cultural boundaries based on a clearly articulated ethical framework that is consistently applied across every part of the organisation.[131]

7.129 Baxt has argued that this move towards assigning liability on the basis of the particular compliance culture gives legislative force to the emphasis placed on the development and implementation of legal compliance programs supported by the Federal Court in *ACCC v Safeway Stores Pty Ltd*[132] and by regulators such as the ACCC.

> There is an onus on the body corporate to create and *maintain* a corporate culture of compliance ... The 'corporate culture' provisions cover not only the official corporate policies of non-compliance with the law, but also the elusive situation where, despite formal documents appearing to require compliance, the reality was that non-compliance was expected. To establish this it may be necessary in the appropriate case for the prosecution to lead evidence of the body corporate's unwritten rules, informal procedures and unofficial policies in order to expose the true workings of the organization.[133]

7.130 Hill also warns:

> To reduce the risk of being found criminally liable under any of the provisions… prudent companies ought to be acting now to ensure that they have effective legal compliance programs in place.[134]

7.131 In its submission to the ALRC, the Australian Association for Compliance Professionals of Australia (ACPA) submitted that effective compliance programs

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130 R Baxt, 'Ascribing Civil and Criminal Liability for Company Employees and Directors — Who Carries the Corporate Can?' (Paper presented at Penalties; Policy Principles & Practice & Government Regulation, Sydney, 9 June 2001), 10–12.

131 S Longstaff, 'Can Corporate Culture Determine Criminal Responsibility?' (2000) *The St James Ethics Centre (Autumn)* 8, 8. This description of the role of compliance programs is consistent with the internal organisational responsibility advocated by Braithwaite and Fisse.

132 See *Australian Competition and Consumer Commission v Safeway Stores Pty Ltd* (1997) 145 ALR 38, *Australian Competition and Consumer Commission v Rural Press Ltd and Others* (1999) 96 FCR 141 and *Australian Competition and Consumer Commission v ABB Transmission & Distribution Ltd* (2001) 23 ATPR ¶41–815.

133 R Baxt, 'Ascribing Civil and Criminal Liability for Company Employees and Directors — Who Carries the Corporate Can?' (Paper presented at Penalties; Policy Principles & Practice & Government Regulation, Sydney, 9 June 2001), 10–11. See also B Baxt, 'New Federal Criminal Code and its Implications for Compliance' (2002) 5(4) *Inhouse Counsel* 37.

134 G Hill, 'Is Your Corporate Culture Criminal?' (2000) 10(4) *Australasian Risk Management* 5, 6.

should be seen as one of the most effective ways of securing ongoing compliance with the law throughout organisations and therefore deserving of active encouragement and perhaps even being more widely required (as occurs in the *Corporations Act* in relation to managed investments and the new financial services provisions).[135] This would suggest that an effective compliance program could be an indicator of a body corporate's level of compliance. ACPA submitted that

> consideration should be given to greater mandating of compliance programs for both criminal and civil penalty regimes. ACPA notes that, to an extent, Chapter 2 of the *Commonwealth Criminal Code* impliedly goes a significant way down this path, but in relation to criminal regimes only. This aim could be assisted by making Part 2.5 of Chapter 2 of the *Criminal Code* apply to the wide range of Acts from which it is presently excluded. ACPA believes that this step would be a major impetus towards achieving effective compliance.[136]

7.132 Compliance programs are considered further in chapter 29.

Adopting 'corporate culture' for civil penalty provisions

7.133 In DP 65 the ALRC asked whether a 'corporate culture' approach to liability for conduct would be appropriate as it would allow recognition that issues of authority involve questions of intention, representation and belief.[137]

Consultations and submissions

7.134 In response, ASIC noted that there may be instances where the misconduct of a 'rogue' senior manager may not be said to be indicative of, or determinative of, a corporation's culture.[138] The ALRC notes the comments of Baxt in relation to the operation of s 12.2 to reduce the likelihood of attribution occurring in situations were it was the intention of the relevant individual to injure the body corporate,[139] and the protection afforded by the due diligence proviso in s 12.3(3) of the *Criminal Code*.[140]

7.135 Professor Michael Adams stated that a corporate culture approach to corporate liability acknowledges that authorisation from management or directors can come in forms other than accepted formal channels. It imposes a positive, continuing duty upon the corporation as a whole to create, adopt and maintain a culture that encourages compliance with the law.[141]

7.136 Adams also noted:

> The corporate culture approach adopted under Part 2.5 of the *Criminal Code* is an innovative method of detecting intention, knowledge or recklessness on behalf of a cor-

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135 The Australian Compliance Institute, *Submission CAP 8*, 30 August 2002.
136 Ibid.
137 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Question 16–3.
138 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.
139 See para 7.76 above.
140 See para 7.113–7.114 above.
141 M Adams, *Submission CAP 12*, 5 September 2002.

> poration in relation to the commission of an offence. Such an approach ensures that the appropriate mental element (eg, intention) can be attributed to a body corporate that expressly, tacitly or impliedly authorises or permits the commission of an offence.[142]

7.137 Environment Australia submitted that corporate culture is both a useful and appropriate indicator of a company's intent and attitude towards compliance, which may otherwise be masked by ostensibly compliant procedures, practice and policies.[143]

Conclusion

7.138 The ALRC considers that s 12.3 of the *Criminal Code*, and in particular the 'corporate culture' provisions, provide an appropriate test for attributing civil penalty liability to corporate bodies. The ALRC believes that this mechanism acknowledges the reality of modern corporate bodies by taking a functional approach. A functional approach was overwhelmingly favoured in submissions to the ALRC (see above at para 7.57–7.63).

7.139 The ALRC notes that one commentator has identified a number of drafting flaws that render s 12.3(5) of the *Criminal Code* meaningless.[144] The ALRC agrees with this conclusion and therefore has not included an equivalent of s 12.3(5) in Recommendation 7–2.

Liability for negligence

7.140 Section 12.4(1) of the *Criminal Code* states that the test for negligence set out in s 5.5 of the Code applies equally to bodies corporate and to natural persons. Under s 5.5, a person will be negligent if his or her conduct involves 'such a great falling short of the standard of care that a reasonable person would exercise in the circumstances' and 'such a high risk that the physical element exists or will exist' that the conduct 'merits criminal punishment'. This test has been modified in Part 2.5 to take into account the peculiarities of the corporate form. Section 12.4(2) states that, if:

> (a) negligence is a fault element in relation to a physical element of an offence; and
>
> (b) no individual employee, agent or officer of the body corporate has that fault element;
>
> that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).

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142 Ibid.
143 Environment Australia, *Submission CAP 26*, 24 October 2002.
144 See T Woolf, 'The Criminal Code Act 1995 (Cth) — Towards a Realist Vision of Corporate Criminal Liability' (1997) 21 *Criminal Law Journal* 257, 267.

7.141 Baxt has noted that the most significant departure of the *Criminal Code* from the traditional approach is that the conduct of 'any number of … employees, agents or officers' can be aggregated to determine whether, when 'viewed as a whole', the body corporate was negligent. This is an expansion from the traditional approach for two reasons:

- it allows the court to regard the conduct of not just the 'directing mind and will' of the body corporate but the conduct of an 'individual employee, agent or officer';[145]
- it allows the court to aggregate the conduct of such natural persons.[146]

7.142 The Model Criminal Code Officers Committee stated that in some cases this may involve balancing the acts of some servants against those of others in order to determine whether the company's conduct as a whole was negligent.[147]

7.143 Section 12.4(3) provides that negligence may also be further established if the prohibited conduct was substantially attributable to:

- inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
- failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

7.144 This arrangement is consistent with Fisse's concept of 'organisational blameworthiness' as the determinant of liability for corporations.[148]

7.145 Baxt has observed that, because of the operation of s 12.4, it will no longer be necessary

> for the prosecution to prove criminal negligence on the part of any one individual within the body corporate. The focus of the inquiry is instead placed squarely upon the body corporate as a whole…

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145 Baxt notes that 's 12.4(2) 'states that the collective negligence provision applies where "no individual employee, agent or officer of the body corporate" can be shown to have been criminally negligent. This seems to imply that it may be possible to establish corporate negligence by proof of individual negligence without resort to the collective negligence provision. It seems unlikely, however, that a court would interpret this to mean that the negligence of any employee, regardless of their rank, will be imputed to the body corporate. That would be to allow vicarious corporate liability, which would clearly contradict the stated intention of the Model Criminal Code Officers Committee to apply traditional primary liability to bodies corporate': R Baxt, 'Ascribing Civil and Criminal Liability for Company Employees and Directors — Who Carries the Corporate Can?' (Paper presented at Penalties; Policy Principles & Practice & Government Regulation, Sydney, 9 June 2001), 8.

146 Ibid, 8.

147 Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapters 1 and 2 — General Principles of Criminal Responsibility* (1992), Criminal Law Officers Committee of the Standing Committee of Attorneys-General, 113.

148 B Fisse, 'The Attribution of Criminal Liability to Corporations; A Statutory Model' (1991) 13 *Sydney Law Review* 277, 374.

> By specifying that negligence may be proved on the part of the body corporate 'as a whole', the Code implicitly acknowledges that bodies corporate have a 'collective capacity' which can in some cases be far more powerful than that of any individual, and that they are subject to a distinctly corporate standard of care.[149]

Consultations and submissions

7.146 As noted in chapter 4,[150] Ian Leader-Elliott in his submission argued that the definition of negligence in the *Criminal Code* approaches incoherence and suggested that the definition would be unsuitable for use for non-criminal regulatory contraventions. He also submitted that the concept itself might serve no purpose for defining such breaches in any statement of general principles.[151]

7.147 The negligence provisions in the *Criminal Code* were not addressed in any detail in submissions to the ALRC. In its submission to the ALRC, ASIC stated that s 12.4 of the *Criminal Code* is an appropriate test. ASIC noted, however, that it was not in the position to comment more specifically on the effectiveness of the *Criminal Code* as it 'is expected to be some time before the practical operation of the *Criminal Code* can be properly assessed and commented upon'.[152]

Conclusion

7.148 The situations where negligence will be prescribed as a fault element in civil penalty provisions will be rare. Further, the ALRC does not seek to import the definition of criminal negligence outlined in s 5.5 of the *Criminal Code* into civil penalty provisions or a Regulatory Contraventions Statute. Rather, the ALRC considers that the default mechanism by which negligence as a fault element can be attributed to a body corporate under the *Criminal Code* should be adapted to apply to civil penalty provisions under a Regulatory Contraventions Statute where negligence is an existing fault element in those provisions (see Recommendation 7–3 below).

Preliminary view

7.149 In DP 65 the ALRC noted the view of the Criminal Law Officers Committee[153] and other commentators[154] that the test of liability established in *Tesco* is too restrictive in the criminal context. Therefore the ALRC proposed that subject to clear,

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149 R Baxt, 'Ascribing Civil and Criminal Liability for Company Employees and Directors — Who Carries the Corporate Can?' (Paper presented at Penalties; Policy Principles & Practice & Government Regulation, Sydney, 9 June 2001), 13–14.

150 See ch 4.

151 I Leader-Elliott, *Submission CAP 11*, 30 August 2002.

152 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.

153 Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapters 1 and 2 — General Principles of Criminal Responsibility* (1992), Criminal Law Officers Committee of the Standing Committee of Attorneys-General.

154 See especially Fisse and Wells.

express statutory statements to the contrary, provisions in the *Criminal Code* relating to the liability of corporations should apply to determining liability for conduct that attracts civil penalties.[155]

Consultations and submissions

7.150 In its submission to the ALRC, ASIC noted that it is expected to be some time before the practical operation of the *Criminal Code* can be properly assessed. However, ASIC did agree that in principle provisions in the *Code* relating to the liability of corporations should apply to determining liability for conduct that attracts civil penalties.

7.151 Adams did not support the proposal (see his comments at para 7.88). Environment Australia did not comment on the Proposal.[156] However, the Victorian Bar Association submitted to the ALRC that it supports the application of the *Criminal Code* provisions in relation to the criminal liability of corporations and therefore supported Proposal 16–2.[157]

Conclusion

7.152 As was observed in relation to the *Criminal Code* mechanisms for attributing physical elements to corporate bodies, there are strong reasons why the same mechanisms that attribute responsibility to a corporation for the state of mind of individuals should be the same when determining liability for which criminal and civil penalties can be imposed. Here again, two models presented themselves to the ALRC. The model contained in s 12.3 and 12.4 of the *Criminal Code*, and the model used in s 84 of the TPA.

7.153 The primary reasons why s 12.3 and 12.4 of the *Criminal Code* are attractive to the ALRC is that they provide a realistic approach to the modern body corporate. These sections acknowledge that the 'directing mind and will' notion of a body corporate is not always the reality and they are designed to deal with the complex nature of corporate decision-making and the diffusion of responsibility within corporations.

7.154 The ALRC is particularly attracted to the notion of 'corporate culture' as it looks beyond formal policies as evidence of compliance, considering compliance culture as a whole, with the capacity to capture situations where a body corporate's formal documents appear to require compliance while in reality non-compliance is expected or tolerated. The ALRC also notes the support for 'corporate culture' in the writings of academics, practitioners and in submissions received by the ALRC.

7.155 Another reason to enact a default provision that mirrors s 12.3 and 12.4 in a Regulatory Contraventions Statute is the recent enactment of civil penalty provisions that set out fault elements in relation to a physical element, where the same physical

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155 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Proposal 16–2.
156 Environment Australia, *Submission CAP 26*, 24 October 2002.
157 The Victorian Bar, *Submission CAP 22*, 14 October 2002.

element with additional fault elements can also result in liability for a criminal penalty.[158] The ALRC sees no reason for using one mechanism to attribute liability for fault elements to a corporation in relation to a civil penalty provision, and another in relation to criminal penalties, particularly where both criminal and civil penalty liability require proof of the same physical elements and the same and additional fault elements.

7.156 Significantly, s 12.3 and 12.4 are enacted in a legislative instrument of general application. They are now the default provisions that apply to all federal criminal offences, subject to express statement to the contrary in individual statutes. The ALRC acknowledges that these provisions will not be appropriate to every legislative scheme using civil penalty provisions. Accordingly, the ALRC considers that the application of such provisions in a Regulatory Contraventions Statute of general application may be excluded by statute in the same way the *Criminal Code* can (see chapter 6).

7.157 One of the submissions received by the ALRC suggested that enactment of a provision similar to s 12.3 and 12.4 of the *Criminal Code* in a non-criminal Regulatory Contraventions Statute would further blur the line between criminal and civil penalty liability.[159]

7.158 The ALRC disagrees. It is the ALRC's view that the use of s 12.3 and 12.4 of the *Criminal Code* as a model would not blur the distinction between criminal and civil penalty liability. It is not the ALRC's intention that these sections, if adapted and enacted in a Regulatory Contraventions Statute, would import features of criminal liability such as a higher standard of proof. Further, it is not the ALRC's intention to impose the *Criminal Code* definition of 'negligence' into a Regulatory Contraventions Statute. As noted in relation to Recommendation 7–1, s 12.3 and 12.4 are simply mechanisms for determining liability.

Recommendations

Recommendation 7–2. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary:

(a) If intention, knowledge or recklessness is a fault element in relation to a physical element of a non-criminal contravention, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the non-criminal contravention.

158 See, for example, *Corporations Act 2001* (Cth), s 1041E, 1041F and 1043A.
159 M Adams, *Submission CAP 12*, 5 September 2002.

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

(i) 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 non-criminal contravention; or

(ii) 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 non-criminal contravention; or

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

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

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

(d) Factors relevant to the application of paragraph (b)(iii) or (b)(iv) include:

(i) whether authority to commit a non-criminal contravention of the same or a similar character had been given by a high managerial agent of the body corporate; and

(ii) whether the employee, agent or officer of the body corporate who committed the non-criminal contravention believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the non-criminal contravention.

(e) In this provision:

board of directors means the body (by whatever name called) exercising the executive authority of the body corporate.

corporate culture means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place.

high managerial agent means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.

Recommendation 7–3. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary:

(a) If:

(i) negligence is a fault element in relation to a physical element of a non-criminal contravention; and

(ii) no individual employee, agent or officer of the body corporate has that fault element;

that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents of officers).

(b) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

(i) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or

(ii) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

8. Liability of Corporate Officers

Contents

Introduction

8.1 The focus of chapter 7 was the circumstances in which a body corporate will be held responsible for the physical and fault elements of criminal offences and non-criminal contraventions. However, it is important to note that liability does not only flow from the individual to the body corporate, it may also extend from the body corporate to the individual — so that an individual may be liable separately from the body corporate, in respect of the same offence or contravention.

8.2 This chapter considers the ways in which individual liability may arise in the context of corporate responsibility, in circumstances where the individual has either been involved in the proscribed conduct; or is deemed to be responsible because of the individual's involvement in the management of the body corporate.

8.3 The first section of the chapter considers the theoretical debate that surrounds individual liability for corporate offences and contraventions. The second section outlines three methods of establishing individual liability:

- concurrent liability (direct liability);
- accessorial liability (indirect liability); and
- managerial liability (deemed liability).

8.4 Assigning liability on the basis of these three methods does not appear to create any particular difficulties in the legislation analysed by the ALRC. However, the extent to which individuals should be held morally responsible (as opposed to legally liable) for corporate conduct because of occupying a position of control within the management of the corporation is a different issue.

8.5 The third section of this chapter focuses on deemed liability of corporate officers. Whereas concurrent and accessorial individual liability are relatively straightforward, managerial liability provisions raise a number of issues, in particular:

- the seniority of officers who should be deemed liable for the conduct of a corporation;
- fairness issues raised by reversing the onus of proof;
- the role of fault;
- threshold tests for liability; and
- the differential (if any) that should exist between a penalty imposed on a corporation and an individual.

Individual liability or corporate responsibility?

8.6 Commentators, as well as those who made submissions to this Inquiry, generally support individual liability, many noting that it may encourage greater transparency in management processes, and improve accountability and performance standards accordingly.[1] Human agents of prohibited conduct will thus face the legal ramifications of their acts and will not be able to abuse or hide behind the corporate structure.[2]

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1 See N Hawke, *Corporate Liability* (2000) Sweet and Maxwell, London; Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002; Australian Taxation Office, *Submission CAP 16*, 17 September 2002; Environment Australia, *Submission CAP 26*, 24 October 2002; M Adams, *Submission CAP 12*, August 2002; Customs Brokers & Forwarders Council of Australia Inc, *Submission CAP 17*, 16 September 2002; The Victorian Bar, *Submission CAP 22*, 14 October 2002.

2 Corporate regulatory agencies have historically been more likely to take action against corporate bodies than individuals: B Fisse and J Braithwaite, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1988) 11 *Sydney Law Review* 468, 470. However, this tendency appears to be diminishing. In the wake of the recent high profile corporate collapses such as

8.7 Brent Fisse, in particular, is critical of allowing individuals to shift responsibility onto a body corporate, arguing that corporate liability can undermine individual accountability so that, for example, in the criminal arena prosecutors

> are able to take the short-cut of proceeding against corporations rather than against their more elusive personnel. As a result, individual accountability is frequently displaced by corporate liability, which serves as a rough-and-ready catch-all device.[3]

8.8 Other commentators agree that the corporate structure should not shield those who should be personally liable for socially damaging activities.

> Fines against corporations may be manifestly inadequate in achieving the criminal law's stated aim of deterrence — particularly if the amount imposed is either small or cannot be enforced — when compared with the threat of a prison term for company directors or alternative penalties, premised more explicitly on the need for a public denunciation of the act.[4]

8.9 For a penalty to be meaningful as a deterrent it must have an impact on the entity penalised. Penalties imposed on corporations, especially monetary penalties, have the potential to be displaced by the corporation onto 'innocent' third parties (shareholders, employees and consumers).[5] This 'spillover' effect has been criticised as potentially lessening the deterrent value of corporate criminal liability.

> Corporations tend to factorise possible costs relating to litigation and monetary penalties in their overheads. These overheads are passed on to consumers and shareholders. Thus the victim of corporate offences — society — pays for the costs of the harm done to it ... Another ironic outcome of this state of affairs is that where monetary penalties are imposed on a company in decline the company may collapse and its employees lose their jobs. Thus innocent people suffer for the wrongs of others.[6]

8.10 The rationale for the recent CLERP 9 proposals to introduce new penalties for failure to meet continuous disclosure obligations under the *Corporations Act 2001* (Cth) is to allow monetary penalties to be imposed on individuals in addition to corporate bodies.

One.Tel and HIH, ASIC has instituted cases against several directors, including Jodee Rich and Rodney Adler. See, for example, *ASIC v Adler* [2002] NSWSC 483. In 2001–02, 19 individuals were imprisoned for corporations offences — the longest sentence imposed was 10 years for defrauding investors of $5.4 million: Australian Securities & Investments Commission, *Annual Report 2001–2002*, Australian Securities & Investments Commission, 26–27.

3 B Fisse, 'Who Carries the Corporate Can? Allocation of Responsibility for Offences or Breaches of Civil Penalty Provisions' (Paper presented at Penalties; Policy, Principles and Practice in Government Regulation, Sydney, 8 June 2001), 2. See discussion in ch 7.

4 S Chesterman, 'The Corporate Veil, Crime and Punishment; *The Queen v Denbo Pty Ltd and Timothy Ian Nadenbousch*' (1994) 19 *Melbourne University Law Review* 1064, 1065.

5 Ibid, 1070.

6 G Acquaah-Gaisie, 'Enhancing Corporate Accountability in Australia' (2000) 11 *Australian Journal of Corporate Law* 146, 146–7.

> The prospect of financial penalties being imposed on individuals may operate as a more credible and effective deterrent than the prospect of financial penalties being imposed on a body corporate.[7]

8.11 In support of corporate liability, critics of personal liability question whether it will 'hopelessly compromise the limited liability company'.[8] By removing the corporate veil, personal liability limits the protection afforded by limited liability. If the protective framework of limited liability is weakened, then, it is argued, corporate investment may be discouraged. This may be a particular problem in smaller companies in which the status of shareholders can be complicated by the fact that they are also directors, creditors or employees. Thus, the corporate structure, established in part to encourage enterprise by limiting investors' financial liability — regarded as socially beneficial — also has the potential to shield individual corporate officers from their criminal liability, which is seen as socially detrimental. Fisse contends that the aim is to find the proper mix of individual and corporate responsibility, rather than accept that each form of liability is distinct: with responsibility allocated either to individual 'masterminds' or to a 'defective corporate system or a criminogenic corporate culture'.[9]

8.12 It is accepted, therefore, that in some circumstances individual liability is an important adjunct to corporate liability to ensure that individuals are appropriately penalised and to ensure that penalties imposed in respect of corporate misconduct cannot be displaced. This rationale creates a dual role for individual liability — it becomes both a method for determining liability (of the individual and the corporation) and a form of derivative penalty in itself,[10] tailored to accommodate the particular characteristics of corporations and the particular difficulties associated with imposing meaningful penalties on them.

Assigning liability to individuals

8.13 There are three different types of individual liability which need to be considered in relation to corporate responsibility:

- concurrent liability — where both the individual and the body corporate may be separately liable as principals in respect of the same offence or contravention (a form of direct liability);

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7 Treasury, *CLERP 9: Corporate Disclosure — Strengthening the financial reporting framework*, <www.treasury.gov.au/contentitem.asp?pageId=&ContentID=403>, 18 September 2002, 145. The CLERP 9 proposals are discussed further in ch 12 and 26.

8 N Hawke, *Corporate Liability* (2000) Sweet and Maxwell, London, 89. However see the recent comments in *Woodgate v Davis* (2002) 20 ACLC 1314 and Young J in *Manpac Industries Pty Ltd v Ceccattini* (2002) 20 ACLC 1304.

9 B Fisse, 'Who Carries the Corporate Can? Allocation of Responsibility for Offences or Breaches of Civil Penalty Provisions' (Paper presented at Penalties; Policy, Principles and Practice in Government Regulation, Sydney, 8 June 2001), 2.

10 A derivative penalty refers to a penalty imposed directly on a person other than the person having primary liability for the contravention; for example, penalties imposed on directors deemed to be liable for a contravention committed by the body corporate. Imposing penalties on individuals arguably ensures that they have a meaningful deterrent effect.

- accessorial liability — where the individual is liable as an accessory to an offence or contravention for which the body corporate is principally liable (a form of indirect liability); and

- managerial liability — where the individual is deemed to be liable as a principal for an offence or contravention because of that individual's role and status in the management of the body corporate (a form of deemed liability).

8.14 If it is accepted that, in respect of certain regulatory offences and non-criminal contraventions, individuals should be held liable on a concurrent or separate basis to the body corporate, it is necessary to consider how such liability may be assigned. The following section of the chapter considers the present law, which uses a mix of common law principles and statutory provisions to assign liability to individuals for corporate offences or contraventions.

Direct liability of individuals

8.15 Individuals will be directly liable for offences or contraventions where there is a clear legislative statement that those individuals are liable in addition to corporate bodies and where those individuals have taken part in the prohibited conduct. Liability, therefore, depends upon the statute giving rise to the offence or contravention. Australian legislation at federal and state and territory level has imposed a range of binding obligations on directors as a means of attempting to raise standards and increase transparency.[11] Corporate officers may be directly liable as individuals or deemed to be liable on the basis of their involvement in the management of the body corporate.[12]

8.16 In *Australian Prudential Regulation Authority v Holloway*,[13] Mansfield J found that the director, Holloway, was liable in addition to the corporation, holding that he was the 'human face' of the company, its principal, its manager and its working director. He gave instructions and advice on its behalf, and he and his wife were its shareholders.

8.17 The Court held that there was a clear legislative intent that directors could be individually liable in addition to corporate bodies, and that they should therefore be

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11 N Hawke, *Corporate Liability* (2000) Sweet and Maxwell, London, 80. For example, the *Corporations Act* specifies duties of directors: R Schulte, 'The Future of Corporate Limited Liability in Australia' (1994) 6 *Bond Law Review* 64; environmental protection laws impose liability on directors and other corporate officers: T Howard, 'Liability of Directors for Environmental Crime: The Anything-but-Level Playing Field in Australia' (2000) 17(4) *Environmental and Planning Law Journal* 250; and directors can be liable for taxation offences: V Morabito, 'Will the New Millennium Breathe New Life into Section 252(1)(j) of the Income Tax Assessment Act 1936 (Cth)?' (2000) 18 *Company and Securities Law Journal* 248.

12 See discussion of managerial liability below at para 8.28–8.34.

13 *Australian Prudential Regulation Authority v Holloway* (2000) 35 ACSR 276. This case concerned a contravention of s 85(1) of the *Superannuation Industry (Supervision) Act 1993* (Cth) concerning the investment of superannuation funds in unit trusts.

exposed to monetary penalties. However, since Holloway was in effect the 'alter ego' of the corporation, he held that Holloway should not face an equal penalty to the corporation since this would mean that double the monetary penalties would apply than if Holloway had chosen to conduct his practice as a sole principal rather than through the medium of a registered corporation. On the basis of this reasoning, Holloway was fined $35,000 and the corporation was fined $222,000. Mansfield J noted that:

> It is, of course, easy to imagine cases where justice would require that penalties be reduced below what otherwise might be in recognition of the circumstance that a multiplicity of offenders is accidental and quite unrelated to the merits of the case.[14]

8.18 Dr Gerald Acquaah-Gaisie supports holding directors responsible for corporate conduct as they have a duty to ensure that the company is run efficiently and does not harm others.

> A corporate wrongdoing would indicate a prima facie case of failure by the management to perform its duties effectively. Even if it were proven that the director or directors had no active hand in the wrongdoing, given that they bear ultimate responsibility for the conduct of their underlings, they may appropriately be held vicariously responsible for misdeeds in the corporation.[15]

Indirect liability of individuals

Common law

8.19 A person may be criminally liable for an offence committed by another person where the first person can properly be said to have been complicit in the unlawful act. The common law expression of accessorial liability is that the person has 'aided, abetted, counselled or procured' the criminal conduct. 'Aiding' and 'abetting' refer to participation in the actual offence (for example, being involved at the scene of the crime). 'Counselling' and 'procuring' refer to providing assistance prior to the commission of the offence (for example, by helping plan the offence or providing other preliminary assistance). The common law expression of accessorial liability has been incorporated into numerous federal statutes.

Criminal Code, s 11.2(1): 'aid, abet'

8.20 Section 11.2(1) of the *Criminal Code* restates the common law definition of accessorial liability that:

> A person who aids, abets, counsels, or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.[16]

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14 *Tiger Nominees Pty Ltd v State Pollution Control Commission* (1992) 25 NSWLR 715, 722.

15 G Acquaah-Gaisie, 'Enhancing Corporate Accountability in Australia' (2000) 11 *Australian Journal of Corporate Law* 146, 226.

16 This provision replaced s 5(1) of the *Crimes Act 1914* (Cth), which also referred to being 'knowingly concerned in, or party to, the commission of an offence'.

8.21 The precursor to s 11.2(1), s 5 of the *Crimes Act 1914* (Cth), was considered by the High Court in *Giorgianni v R*.[17] The High Court held that, to be convicted as an accessory on the basis of having 'aided, abetted, counselled or procured' the commission of an offence, it must be shown that the person did so intentionally.

> No one may be convicted of aiding, abetting, counselling or procuring the commission of an offence unless, knowing all the essential facts which made what was done a crime, he intentionally aided, abetted, counselled or procured the acts of the principal offender. Wilful blindness, in the sense that I have described, is treated as equivalent to knowledge but neither negligence nor recklessness is sufficient.[18]

8.22 *Giorgianni* has been criticised by leading commentators as too restrictive, that 'knowledge' plus 'intention' is too stringent a test.[19]

Trade Practices Act, s 75B: 'involved in a contravention'

8.23 The liability of individuals for contraventions of the *Trade Practices Act 1974* (Cth) (TPA) is expressed as accessorial liability to the contravention committed by the body corporate.[20] Accessorial liability of individuals is defined by s 75B(1) of the TPA:[21]

> A reference in this Part to a person involved in a contravention of a provision of Part IV, IVA, IVB or V, or of section 75AU or 75AYA, shall be read as a reference to a person who:
>
> (a) has aided, abetted, counselled or procured the contravention;
>
> (b) has induced, whether by threats or promises or otherwise, the contravention;
>
> (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or
>
> (d) has conspired with others to effect the contravention.[22]

8.24 In *Yorke v Lucas*,[23] the critical issue in determining whether a managing director (Lucas) was individually liable was the meaning of s 75B of the TPA. The High Court held that, whilst no mental element was required to found liability for the pri-

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17 *Giorgianni v R* (1985) 156 CLR 473.

18 Ibid, 487–488 (Gibbs CJ).

19 B Fisse, *Howard's Criminal Law* (5th ed, 1990) The Law Book Company Ltd, Sydney.

20 This expression of liability is used in numerous pieces of federal legislation, see for example *Customs Act 1901* (Cth); *Trade Practices Act 1974* (Cth); *Telecommunications Act 1997* (Cth); *Environment Protection and Biodiversity Conservation Act 1999* (Cth); *Australian Securities and Investments Commission Act 2001* (Cth); *Corporations Act 2001* (Cth).

21 The constitutional validity of this method of assigning liability was upheld by the High Court in *Fencott v Muller* (1983) 152 CLR 570.

22 Section 75B applies to both non-criminal contraventions and criminal offences, and therefore imports criminal concepts into a civil penalties regime.

23 *Yorke v Lucas* (1985) 158 CLR 661.

mary contravention of the TPA by a body corporate, the accessorial liability of an individual could not be proven without at least knowledge of the essential facts.[24]

8.25 The principle established in *Yorke* has particular significance where the primary offence is one of strict or absolute liability. The primary offender may be convicted without any proof of intention; the accessory can only be convicted if the prosecution proves the mental element of 'knowledge'. This added element for individual liability provides a level of protection for individuals potentially implicated in corporate misconduct.

Who may be held liable as an accessory?

8.26 An individual may not be held liable as an accessory unless a body corporate has committed an offence or contravention. Where the body corporate is *vicariously* liable for the offence or contravention, a person may only be held liable as an accessory on the basis of his or her acts as an employee or officer of the body corporate.[25] This general principle was established in *Mallan v Lee*[26] and was affirmed in the trade practices context in *Wright v Wheeler Grace & Pierucci Pty Ltd*.[27]

8.27 Where the body corporate is *directly* liable for the contravention, a person may be held liable as an accessory on the basis of his or her acts as an employee or officer of the body corporate where that person is the 'directing mind or will' of the body corporate. This principle was established in *Hamilton v Whitehead*,[28] in which both the corporation and the director whose actions resulted in the contravention were held to be liable, the corporation as a principal and the director as a person involved in the contravention (that is, as an accessory). Mason CJ, Wilson and Toohey JJ quoted Bray CJ in *R v Goodall*[29] and agreed with his conclusion that

> the logical consequence of *Salomon's Case* ... is that the company, being a legal entity apart from its members, is also a legal person apart from the legal personality of the individual controller of the company, and that he in his personal capacity can aid and abet what the company speaking through his mouth or acting through his hand may have done.[30]

Deemed liability of individuals

8.28 The third type of individual liability arises where an individual is deemed to be liable on the basis of his or her involvement in the management of the body corporate. In recent years there has been an increasing trend towards provisions that deem directors and other senior corporate officers personally liable for a contravention where the

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24 Ibid, 670.
25 See discussion of vicarious responsibility in ch 7.
26 See discussion of *Mallan v Lee* (1949) 80 CLR 198 at para 7.45.
27 *Wright v Wheeler Grace & Pierucci Pty Ltd* (1988) ATPR ¶40–865, 49,377 (French J).
28 See also discussion of *Hamilton v Whitehead* (1988) 166 CLR 121 at para 7.49.
29 *R v Goodall* (1975) 11 SASR 94.
30 *Hamilton v Whitehead* (1988) 166 CLR 121, 128. The situation in *Hamilton* needs to be distinguished from situations in which the legislation specifically provides for separate concurrent liability of the individual and the body corporate.

body corporate has contravened the legislation and may also be held liable for such a contravention. This represents a departure from accessorial liability as proof of knowledge of or involvement *in the contravention* is not an essential element; generally, involvement *in the management* of the body corporate will be sufficient.[31]

8.29 Several pieces of Commonwealth legislation provide for personal liability on the basis of involvement in the management of the offending or contravening corporation. Most of the deeming provisions reviewed by ALRC relate to criminal offences, for example, s 8Y of the *Taxation Administration Act 1953* (Cth) (TAA); s 495 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act); s 188 of the *Corporations Act*; s 40B of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (Cth) (*Hazardous Waste Act*); s 230F of the *Life Insurance Act 1995* (Cth); Division 9 of Part VI of the *Income Tax Assessment Act 1936* (Cth) (ITAA) and s 11CG of the *Banking Act 1959* (Cth).[32] However, s 494 of the EPBC Act is a deeming provision that specifically relates to civil penalties.

8.30 Under s 493 of the EPBC Act, any person, whether a director or not, who is concerned in, or takes part in, the management of the corporation[33] may be liable for either a civil penalty (under s 494) or a criminal penalty (under s 495) if that person:

- knew or was reckless or negligent as to whether a contravention would occur;
- was in a position to influence the conduct of the corporation in relation to the contravention; and
- failed to take all reasonable steps to prevent the contravention.

8.31 The legislation which preceded the EPBC Act at federal level did not provide for the individual liability of company officers.[34] Patrick Brazil and Kevin Boreham note that the introduction of s 493 in the EPBC Act brought the federal legislation into line with state environmental legislation, which generally imposes individual liability on company officers. They note that:

> Experience has shown that it is not enough to impose civil penalties for breaches of environmental regulations directly on a company. Regulators in the States, and now at

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31 Although lack of influence and reasonable steps threshold tests for liability afford some protection: see discussion below at paras 8.75–8.92.

32 It was also the proposed basis for liability under the Crimes (Workplace Deaths and Serious Injuries) Bill 2001 (Vic). This Bill was defeated by the Opposition parties in the Victorian Legislative Council on 5 June 2002. It would have introduced new criminal offences for corporate bodies of corporate manslaughter (proposed s 13) and negligently causing serious injury (proposed s 14) into Part 1 of the *Crimes Act 1958* (Vic). In the Bill, a 'senior officer' was defined as having the same meaning as 'officer' in the *Corporations Act*: cl 3 (proposed s 11). An 'officer' included a director and any person who makes decisions which affect the whole or a substantial part of the business: *Corporations Act 2001* (Cth), s 9.

33 See para 8.43–8.55 for discussion of the scope of corporate officers who may be deemed liable under deeming provisions.

34 *Environment Protection (Impact of Proposals) Act 1974* (Cth).

> the Commonwealth level, have moved to impose penalties on those personally responsible for environmental damage.[35]

8.32 The deeming of a person 'concerned in the management of the corporation' to be personally responsible for wrongs of the corporation has also been adopted at federal level in taxation legislation. Section 8Y(1) of the *Taxation Administration Act* provides that:

> Where a corporation does or omits to do an act or thing the doing or omission of which constitutes a taxation offence, a person (by whatever name called and whether or not the person is an officer of the corporation) who is concerned in, or takes part in, the management of the corporation shall be deemed to have committed the taxation offence and is punishable accordingly.

8.33 The effect of this provision is to reverse the onus of proof: an officer may escape liability if he or she can prove that he or she was not 'directly or indirectly knowingly concerned in, or party to' the relevant act or omission and did not 'aid, abet, counsel or procure the particular act or omission'.[36]

8.34 This provision is used to establish the criminal liability of directors for tax offences committed by their companies.[37] It was introduced in 1984 to overcome perceived problems in ascribing liability to body corporate officers under existing provisions in the ITAA. These problems stemmed from the interpretation given by the Full Court of the Federal Court to s 252(1)(j) of the ITAA.[38] However, the use of s 252(1)(j) is likely to be rare, as the ATO has stated in its Prosecution Policy that:

> Where a decision is made to seek a sanction against a natural person who is associated with a defaulting corporation, section 8Y will generally be more appropriate than the 'public officer' provisions such as section 252 of the ITAA 1936.[39]

Preliminary view

8.35 The ALRC's research, its consultations and the submissions it received, did not identify any problems with the principles used to assign legal liability to an individual for criminal offences and non-criminal contraventions committed by a body corporate. The three types of liability — direct, indirect and deemed — do not appear

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35 P Brazil and K Boreham, 'The Liability of Company Officers for Corporate Breaches of the New Federal Environment Legislation' (2000) 19 *Australian Mining and Petroleum Law Journal* 145, 147.

36 *Taxation Administration Act 1953* (Cth), s 8Y(2).

37 See V Morabito, 'Will the New Millennium Breathe New Life into Section 252(1)(j) of the Income Tax Assessment Act 1936 (Cth)?' (2000) 18 *Company and Securities Law Journal* 248.

38 Under this provision the actions of the public officer of a company are deemed to be the actions of the company itself and any notices given to, or proceedings taken against, the public officer are deemed to have been given to, or taken against, the company itself. The effect of this provision is to make the company and the public officer jointly liable for any penalty imposed for taxation offences: ibid, 252. The Full Federal Court considered s 252(1)(j) in *Reynolds v Deputy Federal Commissioner of Taxation* (1984) 55 ALR 653.

39 Australian Taxation Office, *ATO Prosecution Policy*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/index.htm>, 9 March 2001, para 11.2.3.

to create any particular difficulties, and which type of individual liability was to apply was clearly expressed in the legislation analysed by the ALRC.[40]

8.36 In DP 65 Proposal 16–3 stated that the liability of individuals should remain concurrent with corporate liability and that the basis of such liability — direct, indirect or deemed — should be clearly expressed in the legislation creating the offence or contravention.[41]

Consultations and submissions

8.37 In its submission ASIC agreed with the Proposal noting that instances of deemed liability (by way of a rebuttable presumption)[42] are already clearly identified under the *Corporations Act*.[43] The Victorian Bar supported the Proposal, but not to the extent that Proposal 16–3 did not accept the *Criminal Code* as the default position in relation to the liability of individuals or contemplates the development of special rules of accessorial liability for individuals.[44] Several other submissions supported Proposal 16–3.[45]

Conclusion

8.38 The ALRC notes that the recent 'Insider Trading Proposals Paper' released by the Corporations and Markets Advisory Committee favoured the definition of insider trading continuing to include concurrent liability of entities as well as natural persons:

> Limiting the legislation to natural persons could undermine any incentive for entities to control the flow of information within their organisations.[46]

8.39 The ALRC accepts that the *Criminal Code* sets out the default position in relation to the liability of individuals for federal criminal offences. However, the mechanisms by which liability is attributed to an individual will ultimately depend on the nature of the regulated community, the legislative scheme and its policy objectives. Each of the mechanisms outlined above are proving equally effective in the context of their particular legislative and regulatory schemes. The ALRC's view is that it is un-

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40 However, see discussion of issues raised by managerial liability provisions below at para 8.42–8.92.

41 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Proposal 16–3.

42 *Corporations Act 2001* (Cth), s 761F.

43 *Corporations Act 2001* (Cth), s 188. See Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.

44 The Victorian Bar, *Submission CAP 22*, 14 October 2002.

45 Australian Taxation Office, *Submission CAP 16*, 17 September 2002; Environment Australia, *Submission CAP 26*, 24 October 2002; M Adams, *Submission CAP 12*, August 2002; Australian Customs Service, *Submission CAP 25*, 23 October 2002.

46 Corporations and Markets Advisory Committee, *Insider Trading Proposals Paper* (2002), Corporations and Markets Advisory Committee, 40.

necessary to propose one as a default provision in a Regulatory Contraventions Statute as this is a matter better dealt with separately in each particular regulatory scheme.

8.40 Environment Australia noted in its submission that Proposal 16–3 reaffirmed existing principles.[47] The ALRC agrees with this observation. Rather than rephrase the proposal as a recommendation, the ALRC affirms Proposal 16–3 as a statement of principle to guide legislators.

8.41 The ALRC confirms its view that, where it is already provided for in federal legislation, the liability of individuals should remain concurrent with corporate liability. Further, the basis of such liability — direct, indirect or deemed — should be clearly expressed in the legislation creating the offence or contravention.

Issues raised by managerial liability provisions

8.42 As noted above, individual liability for corporate misconduct is usually on the basis of accessorial liability for involvement in the offending conduct. This form of liability is, however, conditional on the person being found to have knowledge of the elements constituting the contravention.[48] Section 75B of the TPA is an example of this form of provision. This contrasts with managerial liability, which does not require a finding of knowledge of the elements of a contravention by a corporation as a condition precedent to the personal liability of a director or other officer of the corporation. Generally, involvement in the management of the corporation will be sufficient.[49]

Meaning of 'corporate officer'

8.43 Section 493 of the EPBC Act and s 40B of the *Hazardous Waste Act* refer to 'executive officers'. Both Acts define an 'executive officer' as 'a person, by whatever name called and whether or not a director of the body, who is concerned in, or takes part in, the management of the body'. The TAA defines an 'officer' in the same way[50] and further states that 'an officer of a corporation shall be presumed, unless the contrary is proved, to be concerned in, and to take part in, the management of the corporation'.[51] Section 8Y also provides an expansive definition of 'officer' on the basis of the formal position held.

8.44 This is different from s 9 of the *Corporations Act* (which is used in the *Life Insurance Act* and the *Banking Act* to impose liability on an 'officer' of the corporation).[52] Section 9 of the *Corporations Act* defines an 'officer' as:

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47 Environment Australia, *Submission CAP 26*, 24 October 2002.

48 See *Yorke v Lucas* (1985) 158 CLR 661 and other cases discussed at para 16.153–16.161 in Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney and above at para 8.24–8.25.

49 Although proof of lack of involvement or influence might afford a defence in some cases. See discussion below at para 8.49–8.55 and 8.87–8.92.

50 *Taxation Administration Act 1953* (Cth), s 8Y(1).

51 *Taxation Administration Act 1953* (Cth), s 8Y(3).

52 See s 230F of the *Life Insurance Act 1995* (Cth) and s 11CG of the *Banking Act 1959* (Cth).

(a) a director or secretary of the corporation; or

(b) a person:

(i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or

(ii) who has the capacity to affect significantly the corporation's financial standing; or

(iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation); or

(c) a receiver, or receiver and manager, of the property of the corporation; or

(d) an administrator of the corporation; or

(e) an administrator of a deed of company arrangement executed by the corporation; or

(f) a liquidator of the corporation; or

(g) a trustee or other person administering a compromise or arrangement made between the corporation and someone else.

8.45 Clause (a) restates the traditional approach of defining an officer by reference to the formal structure of the corporation. Clause (b) represents a functional approach by asking who, in fact, controls the activities of the corporation.[53] Clauses (c) to (g) apply only in situations involving the actual or potential insolvency of the corporation.[54]

8.46 Legislation which names 'directors' or occupants of other company positions (without the requirement that the person be actually concerned in the management of the corporation) as potentially liable generally represents a formal approach as it relies on the position occupied by the person in the official hierarchy of the corporation rather than on the particular circumstances of the case. Whilst this form of expression of liability is narrow (only occupants of named positions will be caught), it is likely to

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53 Referred to in some literature as 'shadow directors': see for example S Watson, 'Who Hides behind the Corporate Veil? Finding a Way out of the "Legal Quagmire"' (2002) 20 *Companies and Securities Law Journal* 198. See discussion of functional authority in ch 7.

54 In theory, this means that a receiver or other person appointed to manage a corporation may be held personally liable under derivative liability provisions. However, this result seems unlikely given the Court's view (in a case considering personal liability under s 592 of the *Corporations Law* for incurring debts whilst insolvent) that a receiver's function is limited to managing assets on behalf of creditor rather than the overall management of the corporation: *Re North City Developments Pty Ltd; Ex parte Walker* (1990) 20 NSWLR 286.

be easier to assign liability to an individual as it removes the need to prove actual involvement in the management of the corporation.

8.47 On the other hand, legislation that takes a more functional approach (in basing liability on proof of involvement in management) creates a wider pool of potentially liable persons as there is no need for the person to occupy a specific position in the formal hierarchy of the corporation. In some circumstances, this may mean that liability will fall on middle or even lower management.[55] The scope of 'concerned in, or taking part in, management' is discussed below.

8.48 The importance of the differences between the various definitions is not clear. At a minimum it is evident that a director will be potentially personally liable under each piece of legislation. The extent of liability of other officers appears to depend on their level of involvement in the relevant conduct of the corporation.

A person 'concerned in, or taking part in, management'

8.49 In *Barac (trading as Exotic Studios) v Farnell*,[56] the Full Court of the Federal Court considered the meaning of 'taking part in the management of a business' in the context of a worker's compensation claim for injury received whilst the claimant was employed as a receptionist at a brothel. Beaumont J (quoting Miles CJ at first instance) noted that:

> Not all employees in a business are concerned in its management. Management of a business is generally regarded as involving something in the nature of the exercise of a discretionary power of control and direction of the business ... Miles CJ referred to the cases which distinguish between 'working in a brothel and taking part in its management. In the latter situation it is regarded as necessary that a substantial degree of control or responsibility in the use of premises for the purpose of prostitution is proved.'[57]

8.50 *Holpitt Pty Ltd v Swaab*[58] considered when a person is 'concerned in the management of the company' for the purposes of s 556 of the *Companies (New South Wales) Code*. The critical issue in this case was whether the company secretary could properly be described as a 'person concerned in the management' of the company. Burchett J of the Federal Court held that the secretary was not a person concerned in the management of the company because:

- the company's articles stated that the directors would manage the company;

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55 Note, however, s 494 and 495 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), which require that a person be 'concerned in the management' of the corporation and that in relation to the specific contravention the person be 'in a position to influence the conduct of the body in relation to the contravention'.

56 *Barac (trading as Exotic Studios) v Farnell* (1994) 53 FCR 193. Whilst the main issue in the case was whether the contract of employment was tainted by the illegality of the overall enterprise, the extent of the claimant's involvement in the management of the business was also considered.

57 Ibid.

58 *Holpitt Pty Ltd v Swaab* (1992) 33 FCR 474.

- it was clear from the *Companies Code* that the 'office of secretary does not, in itself, involve management';[59]
- s 556 was a criminal provision and should, therefore, not be loosely construed; and
- there seemed no reason to depart from statements made in *Gibson v Barton*, in which Blackburn J stated:

> A manager would be, in ordinary talk, a person who had the management of the whole affairs of the company; not an agent who is to do a particular thing, or a servant who is to obey orders, but a person who is intrusted with power to transact the whole of the affairs of the company.[60]

8.51 Burchett J also noted that:

> If his role is a junior one, giving him no real influence on the decision, or if his role is that of an outside professional, who might advise, but would certainly not be taking the decision, there is no reason to think that the language of the section should be stretched to include him.[61]

8.52 Other cases on s 592 of the *Corporations Law* (the equivalent of s 556 of the *Companies (New South Wales) Code*)[62] have held that:

- Authorising a person to use company cheques was 'clear evidence' that the person giving the authority (who had the title 'financial controller') 'took part in the management' of the company.[63]
- A company accountant did not have the required decision-making role.[64]
- A receiver did not take part in the management of the company 'since the receiver's function was to manage assets on behalf of a secured creditor to facilitate enforcement of the creditor's security, rather than to manage the company'.[65]

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59 Ibid, 476.
60 *Gibson v Barton* (1875) 10 QB 329, 336 cited in Ibid, 477.
61 Ibid, 476–7.
62 See now, *Corporations Act 2001* (Cth), s 588G. Note, however, that s 588G only applies to 'directors' whereas the previous s 592 applied to 'any person who was a director of the company, or took part in the management of the company'.
63 *ASIC v Parkes* [2001] NSWSC 377, para 84.
64 *Sycotex Pty Ltd v Baseler* (1994) 122 ALR 531.
65 *Re North City Developments Pty Ltd; Ex parte Walker* (1990) 20 NSWLR 286. Note that this case is contrary to some provisions that expressly include a receiver in the definition of an 'officer'. It would seem that, as a general rule, liability will attach to persons named in the relevant provision or persons concerned in the management of the corporation, although it might be possible to argue that, if a named person can prove that she or he was not in fact concerned in the management of the corporation they should

8.53 These cases establish that 'control', 'direction' and 'responsibility' will be critical determinants of involvement in management. The ability to make discretionary judgments will also be important.

Consultations and submissions

8.54 As noted above, provisions which name 'directors' or occupants of other company positions as potentially liable generally represent a formal approach, whereas legislation that takes a more functional approach creates a wider pool of potentially liable persons as there is no need for the person to occupy a specific position in the formal hierarchy of the corporation Question 16–2 in DP 65, the ALRC asked whether, given the complexity of modern corporate structures, formal delegation of authority is the appropriate test for corporate liability or is functional authority more important. All submissions received in response to this question agreed that functional authority was the more appropriate test.[66]

Conclusion

8.55 The discussion above has noted the different approaches (a combination of formal and functional approaches) taken in legislation to expressing the test to determine when an individual will be deemed to be liable for the conduct of the corporation. The ALRC's view is that any legislative definition should be broad enough to include both persons who are *formally* involved in the management of the corporation (by occupying particular positions in the corporate hierarchy) and persons who, whilst they may not occupy particular named positions, are *actually* involved in the management of the corporation. Paragraph (b) of the definition of 'officer' s 9 of in the *Corporations Act* fulfils these requirements. The ALRC, therefore, recommends that any provision that deems an individual to be personally liable for the contravening conduct of a corporation should do so by including a definition which encompasses a substantive approach to involvement in management.

Recommendation

Recommendation 8–1. The Regulatory Contraventions Statute should provide that any provision in legislation that deems an individual to be personally liable for the contravening conduct of a corporation should define the individual who may be liable as an individual (by whatever name called and whether or not the individual is an officer of the corporation) who is concerned in, or takes part in, the management of the corporation and includes an individual:

not be liable as it would be contrary to the intention of the provision, which is to hold persons concerned in decision making liable for the consequences of their decisions.

66 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002; Environment Australia, *Submission CAP 26*, 24 October 2002; Australian Taxation Office, *Submission CAP 16*, 17 September 2002; M Adams, *Submission CAP 12*, August 2002. These submissions are discussed in detail in ch 7 at para 7.58–7.62.

(a) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or

(b) who has the capacity to affect significantly the corporation's financial standing; or

(c) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the individual in the proper performance of functions attaching to the individual's professional capacity or his or her business relationship with the directors or the corporation).

Reversing the onus of proof

8.56 Traditionally, the onus of proof has been on the person seeking the penalty to prove the elements of an offence or contravention. Some of the deeming provisions discussed above expressly displace this common law rule and reverse the onus of proof.[67] However, not all deeming provisions do so.[68]

8.57 Reversing the onus of proof is achieved by deeming certain facts to be so without the need for evidence to substantiate them unless the alleged offender produces evidence sufficient to disprove the allegation. There are a number of justifications for reversing the onus of proof:

- Some contraventions may be considered to be so serious, measured against generally prevailing community standards, that reversing the onus of proof is justified by the need to ensure that someone is found guilty and punished for the contravention.

- There may be aspects of a case that would be too difficult for the regulator or prosecutor to prove; for example, because confidentiality obligations or privileges prevent them gaining access to critical documents or information.[69] If this is the case, there may be some justification for removing the need for the regulator or prosecutor to obtain such documents or information by making them unnecessary.

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67 See for example, *Taxation Administration Act 1953* (Cth), s 8Y; *Corporations Act 2001* (Cth), s 188; *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (Cth), s 40B; and *Life Insurance Act 1995* (Cth), s 230F.

68 See for example *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 494.

69 See ch 18 and ch 19.

- The contravention may be one that only affects a particular segment of the community and it may be that that segment is considered to be capable of safeguarding its own interests.[70]

- Another reason why it may be considered justified to reverse the onus of proof is where it is felt necessary to overcome difficulties in assigning liability to certain parties. Much has been written about the difficulty of assigning criminal liability to a corporation. Deeming an individual to be responsible for the conduct of the corporation (unless that person can prove a defence) is one method of ensuring that 'someone pays' for the misconduct.

8.58 The Senate Legal and Constitutional References Committee most recently considered the issue of reversing the onus of proof in its inquiry into proposed amendments to s 46 and s 50 of the *Trade Practices Act*.[71] In the Trade Practices Amendment Bill (No 1) 2000 it was proposed that s 46 of the TPA be amended so that, once the ACCC had proved that a corporation had market power, the burden of proof would shift to the corporation to prove that it had not used its market power for a proscribed purpose. The purpose of the amendment was noted by the Committee to be 'to increase the likelihood of the ACCC succeeding in actions against corporations'.[72] 'Such a claim is difficult to substantiate because of the problem of obtaining adequate evidence of the company's purpose and of establishing that a company acted for an improper purpose'.[73]

8.59 Supporters of the proposed amendment noted that this 'approach, where the defendant would be deemed to have breached s 46(1) unless able to prove otherwise, would more fairly distribute the cost and effort involved in litigation between plaintiff and defendant'.[74] Opponents of the proposed amendment noted that 'by removing the presumption of innocence [the amendment], was contrary to the fundamental principles of law'.[75]

8.60 Similar issues were raised in response to the proposed amendment in submissions to the Dawson Committee's Review of the TPA. Again, the erosion of the presumption of innocence was emphasised.[76] The Australian Chamber of Commerce and Industry and the Business Council noted that reversing the onus of proof also involves

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70 An example of this type of situation, is the ongoing proposals that the onus of proof in misuse of market power cases under s 46 of the TPA be reversed (on the basis that a corporation which has market power will be sufficiently well resourced to defend itself).

71 Senate Legal and Constitutional References Committee, *Inquiry into s 46 and s 50 of the Trade Practices Act: Report* (2002), Parliament of Australia.

72 Ibid, para 3.6.

73 Ibid, para 3.7.

74 Ibid, para 3.14.

75 Ibid, para 3.32.

76 See, for example, Enertrade, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/151_Submission_Enertrade.pdf>, 6 August 2002 and Institute of Public Affairs Ltd, *Submission to the Review of the Trade Practices Act 1974*, <http://tpareview.treasury.gov.au/content/subs/018_submission_ipa.pdf>, 4 July 2002.

shifting the cost of litigation from the regulator to the regulated community.[77] Some suggested that the number of successes the ACCC has had with s 46 means that there is no need for amendment.[78] In opposing a reversal of the onus of proof, the Law Council of Australia (Business Committee) raised general fairness issues noting that:

> A contravention of s 46 is conduct of a quasi-criminal nature and carries with it the prospect of 'heavy pecuniary penalties' and significant negative publicity, among other sanctions. As a matter of fairness, the ACCC and other applicants ought to be required to plead a positive case and present evidence to support it. This will ensure that companies are not required to defend themselves in the absence of clear evidence of each of the substantive requirements of s 46.[79]

Conclusion

8.61 The ALRC makes no recommendation in relation to the reversal of the onus of proof in relation to deeming provisions. Whether or not it is appropriate to reverse the onus of proof will depend on the legislative scheme. The ALRC acknowledges that in some legislative schemes reversing the onus of proof will be justified due to, for example, the seriousness of the offence or contravention, difficulties of proof or assigning liability and the nature of the regulated community. However, it is the ALRC's view that legislators must always balance efficacy arguments for reversing the onus of proof against fairness issues such as the harshness of the penalty and the impact on the segment of the regulated community that is likely to be subject to the deeming provision.

Role of fault

8.62 Most deeming provisions for criminal offences surveyed by the ALRC require a fault element. For example, s 495(1) of the EPBC Act deems an executive officer liable for a number of offences.[80] The provision also requires proof of several additional matters if the executive officer is to be deemed liable, including that an 'executive officer of the body knew that, or was reckless or negligent as to whether, the contravention would occur'. A similar example is s 40B of the *Hazardous Waste Act*.

8.63 Other provisions that deem criminal liability do not require proof of a fault element and are expressed to be strict liability offences. For example, s 188 of the *Corporations Act* provides for deemed criminal liability of company secretaries, or for directors of a proprietary company without a secretary, if a company commits certain

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77 Australian Chamber of Commerce & Industry, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/104_Submission_ACCI.pdf>, 17 July 2002.

78 Business Council of Australia, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/071_Submission_BCA.pdf>, 11 July 2002 and Law Council of Australia, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/138_Submission_LCA.pdf>, 30 July 2002.

79 Law Council of Australia, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/138_Submission_LCA.pdf>, 30 July 2002.

80 *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 489, 490 and 491.

offences under the Act.[81] Section 188(2A) provides that an offence based on these offences is one of strict liability, therefore, they do not require proof of a fault element. Most of these offences attract only low penalties,[82] however, a failure to lodge certain notices can attract a penalty of 10 penalty units or imprisonment for three months or both.[83]

8.64 The provisions that deem liability for a civil penalty require proof of a fault element.[84] Like s 495, s 494 of the EPBC Act (civil penalties for executive officers of bodies corporate), requires proof that an executive officer of the body 'knew that, or was reckless or negligent as to whether the contravention would occur'.

Submissions

8.65 The ALRC received a number of submissions in relation to whether there was a role for fault in non-criminal contraventions.[85] Some submissions supported Proposal 17–6 in DP 65 that there was no role for fault in civil penalty provisions,[86] and that fault assists in distinguishing civil from criminal penalties.[87] Others saw a role for fault in distinguishing between the seriousness of certain behaviour in the context of non-criminal contraventions.[88] Some submissions stated that there is a role for fault beyond the criminal sphere.[89]

Conclusion

8.66 Deeming provisions are efficient mechanisms for attributing liability to individuals for offences and contraventions of corporations. As the ATO submitted,

> a legislative scheme which imposes primary and strict or absolute liability on a corporation, with scope to bring the liability for taxation offences at least down to the level of individuals who are closely linked to the decision making that led to the contravention, is an appropriate one for ATO purposes.[90]

8.67 However, the ALRC also sees a number of risks associated with these provisions. Deeming provisions often attribute liability to an individual merely because of the office they hold within a body corporate and reverse the onus of proof. To further

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81 These offences relate to s 142 (requirement for companies to have a registered office), 145 (requirement for registered office of public company to be open to public), 345 (annual returns) and 205B (lodgment of notices with ASIC) of the *Corporations Act 2001* (Cth).

82 For example, failure to have a registered office only attracts a penalty of 5 penalty units: *Corporations Act 2001* (Cth), s 142.

83 Section 8Y of the *Taxation Administration Act 1953* (Cth) is another example of a strict liability deeming provision, although some of the offences that the deeming provision relates to will require proof of a fault element.

84 This is unusual as most non-criminal contraventions do not include a fault element. The role of fault in civil penalty schemes is considered further in ch 4.

85 See ch 4 of DP 65 and Proposal 4–1.

86 Attorney-General's Department, *Submission CAP 14*, 9 September 2002.

87 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002 and M Adams, *Submission CAP 12*, August 2002.

88 I Leader-Elliott, *Submission CAP 11*, 30 August 2002.

89 Ibid, K Yeung, *Submission CAP 20*, 9 October 2002.

90 Australian Taxation Office, *Submission CAP 16*, 17 September 2002.

dispense with the need to prove fault, in the ALRC's view, would risk unfairness to those who are subject to these provisions.

8.68 The ALRC acknowledges that there is a limited role for fault in civil penalty provisions. However, the ALRC also notes the comments of the Senate Standing Committee for the Scrutiny of Bills in its report on the application of absolute and strict liability offences that 'fault liability is one of the most fundamental protections of criminal law; to exclude this protection is a serious matter'.[91] In the ALRC's view, the potential for unfairness of deeming provisions necessitates the inclusion of the protection of a fault element in provisions that deem an individual liable for a civil penalty.

8.69 However, it may not be appropriate for deeming provisions in all legislative schemes to require proof of a fault element. For example, where the penalty level is very low the risk of unfairness is diminished and there may be no need for the protection of a fault element.

Recommendation

Recommendation 8–2. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, any legislation that deems an individual to be personally liable for the contravening conduct of a corporation should include a fault element that the individual knew that, or was reckless or negligent as to whether, the contravening conduct would occur.

Relationship between corporate and individual penalties

8.70 As discussed in chapter 26, much of the legislation reviewed by the ALRC provides for higher penalties if the contravention is by a body corporate rather than by an individual. However, between, and even within, statutes there are variations in the ratio between the levels of corporate and individual penalties. Typically, it is a multiple of five, but this is not always the case.[92]

8.71 In chapter 26, the ALRC recommended that, unless there are compelling reasons otherwise, any legislation that does not provide for a differential between the civil penalty for a natural person and that for a body corporate, should be amended to do so. Further, the ALRC has recommended that for the sake of consistency with the *Crimes Act 1914* (Cth), a penalty for a body corporate should be five times that for a natural person for the same contravention, unless there are compelling reasons otherwise.

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91 Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002), AGPS, 283.

92 This is the default provision for criminal fines provided in s 4B of the *Crimes Act 1914* (Cth). See ch 26.

8.72 The ALRC recommends that the pecuniary penalty applicable to any provision that deems an individual to be personally liable for the contravening conduct of a corporation should not be more than one-fifth of the maximum penalty that may be imposed on the corporation for the non-criminal contravention.[93]

Recommendation

Recommendation 8–3. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, the pecuniary penalty applicable to any provision that deems an individual to be personally liable for the contravening conduct of a corporation should not be more than one-fifth of the maximum penalty that may be imposed on the corporation for that criminal offence or non-criminal contravention.

8.73 There may be reasons to depart from this formula, for example, where the seriousness of the offence or contravention warrants the individual being liable to a greater penalty in proportion to the liability of a body corporate, to increase the deterrent effect of the penalty. For example, s 494(2) of the EPBC Act provides that s 494(1) is a civil penalty provision and the Federal Court may order a person contravening s 494(1) to pay a pecuniary penalty 'not more than the pecuniary penalty the Court could order an individual to pay for contravening the civil penalty provision contravened by the body corporate'.

8.74 Some provisions allow for the penalty imposed on an individual to equal that imposed on a body corporate. This is the case under Division 9 of Part VI of the ITAA. Although not a deeming provision, Division 9 of Part VI, imposes a liability on directors that could be viewed as both a concurrent and managerial liability.[94] Under this Division, a company's liability and the penalties imposed on directors for an unpaid amount are parallel liabilities. When an amount is paid to discharge one of the liabilities each of the other liabilities is discharged to the extent of the same amount. The director is also entitled to an indemnity from the company for any amount paid.[95] The ALRC does not make a recommendation in relation to this model of joint and several liability.

'Reasonable steps' and 'due diligence'

Reasonable steps

8.75 In addition to fault elements, many deeming provisions in federal legislation provide a further threshold test for liability that requires proof that the individual failed to either:

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93 This is consistent with the recommendation made in ch 26.
94 Australian Taxation Office, *Submission CAP 16*, 17 September 2002.
95 See *Income Tax Assessment Act 1936* (Cth), s 222ANA.

- take all reasonable steps to prevent the contravention;[96] or
- take reasonable steps to ensure that a direction was complied with.[97]

8.76 These two tests are variations on the requirement of 'due diligence'. Deeming provisions in the *Banking Act* and the *Life Insurance Act* requires proof that the officer failed to take 'reasonable steps'.[98] Arguably, this is a less strict test than the requirement under the EPBC Act and the *Hazardous Waste Act* that '*all* reasonable steps' be taken.[99]

8.77 Section 496 of the EPBC Act lists matters which must be considered by a court in determining whether an executive officer failed to take 'all reasonable steps' to prevent a contravention. The court must look at what action was taken by the officer before the contravention (proactive steps taken) and in response to the contravention (reactive steps taken). The court is specifically directed to consider:

> (a) what action (if any) the officer took directed towards ensuring the following (to the extent that the action is relevant to the contravention):
>
> (i) that the body arranges regular professional assessments of the body's compliance with this Act and the regulations;
>
> (ii) that the body implements any appropriate recommendations arising from such an assessment;
>
> (iii) that the body has an appropriate system established for managing the effects of the body's activities on the environment;
>
> (iv) that the body's employees, agents and contractors have a reasonable knowledge and understanding of the requirements to comply with this Act and the regulations, in so far as those requirements affect the employees, agents or contractors concerned; and
>
> (b) what action (if any) the officer took when he or she became aware that the body was contravening:
>
> (i) this Act; or

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96 *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 494 and 495; *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (Cth), s 40B.

97 *Banking Act 1959* (Cth), s 11CG; *Life Insurance Act 1995* (Cth), s 230F.

98 See *Banking Act 1959* (Cth), s 11CG; *Life Insurance Act 1995* (Cth), s 230F.

99 The legislation in the Australian Capital Territory provides the most detailed guidance. Section 153 of the *Environment Protection Act 1997* (ACT) sets out five criteria that the court may have regard to when determining whether a person should be personally liable for an offence. The criteria are similar to those specified in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and those proposed by Ormiston J in *R v Bata Industries Ltd (No 2)* (1992) 70 CCC (3rd) 394; (1992) 7 CELR (NS) 245. Other States provide less detailed criteria: see, for example, *Environment Protection Act 1993* (SA), s 124; *Environmental Management and Pollution Control Act 1994* (Tas), s 55.

(ii) the regulations; or

(iii) if the body contravened Part 3 or section 142 or 142A—any environmental management plan that was prepared by the body, and approved by the Minister, as required by a condition attached to an approval under Part 9 for the purposes of a provision of Part 3 of the body's taking of an action.[100]

8.78 These provisions suggest that the existence of some form of compliance system will assist in determining whether 'reasonable steps' have been taken. In many pieces of federal legislation the existence and efficacy of a compliance program is relevant to determining liability.[101]

8.79 Some deeming provisions also provide for 'reasonable steps' as a specific defence, rather than a threshold test for liability. This is generally where the onus of proof has been reversed.[102]

Due diligence

8.80 Some state and territory legislation provides a defence of 'due diligence' to personal liability of corporate officers. In New South Wales, Queensland and Victorian environment protection legislation, no statutory definition of 'all due diligence' or 'all reasonable steps' is provided. The scope of the defence must, therefore, be determined on the basis of applicable caselaw. In *Australian Iron & Steel Pty Ltd v Environment Protection Authority*, Abadee J (after reviewing the relevant authorities) concluded that 'the notion of due diligence appears to involve an absence of negligence or fault'.[103] In *State Pollution Control Commission v Kelly*,[104] Hemmings J held that, although it was not necessary to show that a standard of perfection had been met, the defence of due diligence requires consideration of precautions which should have been taken — 'a mind concentrated on the likely risks'.[105] Professor William Duncan and Samantha Traves note that the defence requires 'the taking of active steps and practical measures to ensure that a corporation is undertaking best industry practices'.[106]

8.81 The most comprehensive source of judicial statements on the scope of the 'due diligence' defence are Canadian environmental law cases. In Canada, 'due diligence' is a defence available to directors and other officers of corporations charged with environmental offences under provincial law. The leading Canadian case is *R v Bata Indus-*

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100 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 496(1). *Hazardous Waste Act* s 40B(4) is similar, except that the reaction of the officer to a contravention is not included.

101 See discussion of due diligence and compliance programs in relation to Chapter 2.5 of the *Criminal Code* in ch 7 at para 7.112–7.130.

102 See, for example, *Corporations Act 2001* (Cth), s 188.

103 *Australian Iron & Steel Pty Ltd v Environment Protection Agency* (1992) 29 NSWLR 497, 510.

104 *SPCC v Kelly* (1991) 5 ACSR 607 (Hemmings J).

105 Quoted in P Lowe, 'A Comparative Analysis of Australian and Canadian Approaches to the Defence of Due Diligence' (1997) 14(2) *Environmental and Planning Law Journal* 102, 104.

106 W Duncan and S Traves, *Due Diligence* (1995) LBC Information Services, North Ryde cited in P Lowe, 'A Comparative Analysis of Australian and Canadian Approaches to the Defence of Due Diligence' (1997) 14(2) *Environmental and Planning Law Journal* 102, 106.

tries Ltd.[107] Where, Ormston J of the Ontario Provincial Court held that it was necessary to 'establish that [the directors] exercised all reasonable care by establishing a proper system to prevent [the] commission of the offence and by taking reasonable steps to ensure the effective operation of the system'.[108] Ormston J listed a number of factors relevant to establishing a due diligence defence that are similar to those in s 496 the EPBC Act. Zada Lipman and Lachlan Roots have noted that, although the decisions of Canadian and other courts are not binding on Australian courts, it is likely that a court will have regard to this judgment, given the paucity of the caselaw on point.[109]

8.82 The ALRC has discussed the use of due diligence as a defence generally in chapter 4, and in the context of corporate responsibility in chapter 7.

Consultations and submissions

8.83 Ian Leader-Elliott proposed that a Regulatory Contraventions Statute should provide for a defence of 'due diligence' to be generally available unless specifically excluded.[110] He suggested that this would operate in place of the defences of 'mistake of fact'[111] and 'intervening conduct or event',[112] which are found in the *Criminal Code*. The Australian Association for Compliance Professionals of Australia (ACPA) submitted to the ALRC that compliance programs should be encouraged by rewards.[113] One such reward suggested by ACPA was the due diligence defence.[114] For further discussion of these submissions see chapter 7 at para 7.130.

Conclusion

8.84 As noted above, the ALRC has identified a number of risks associated with deeming provisions. These risks relate to the harshness of attributing liability to an individual merely because of the office that individual holds within a body corporate, often in conjunction with a reversal of the onus of proof. Therefore, the ALRC has recommended that deeming provisions should require proof of a fault element: See Recommendation 8–2.

8.85 Most deeming provisions in federal legislation, in addition to requiring proof of fault, also provide for a 'reasonable steps' threshold test for liability. Consistency is just one consideration in recommending that deeming provisions should include due

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107 *R v Bata Industries Ltd (No 2)* (1992) 70 CCC (3rd) 394; (1992) 7 CELR (NS) 245.

108 Following the earlier case of *R v Sault Ste. Marie* (1978) 85 DLR (3d) 161 (Supreme Court of Canada), cited in P Lowe, 'A Comparative Analysis of Australian and Canadian Approaches to the Defence of Due Diligence' (1997) 14(2) *Environmental and Planning Law Journal* 102, 106.

109 Z Lipman and L Roots, 'Protecting the Environment through Criminal Sanctions: The Environmental Offences and Penalties Act 1989 (NSW)' (1995) 12(1) *Environmental and Planning Law Journal* 16, 27.

110 I Leader-Elliott, *Submission CAP 11*, 30 August 2002.

111 *Criminal Code*, s 12.5

112 *Criminal Code*, s 10.1

113 See ch 17 for a discussion of immunity from prosecution.

114 The Australian Compliance Institute, *Submission CAP 8*, 30 August 2002.

diligence as a default threshold test. It is the ALRC's view that when a provision deems an individual liable for the contravening conduct of a corporation, it is appropriate to provide a further 'hurdle' to proving liability in the form of a 'reasonable steps' threshold test (see Recommendation 8–4 below). Fairness would dictate that a corporate officer who took precautions, to prevent a contravention or acted immediately in response to a contravention, should not be held liable for the contravention of a corporation.

8.86 The ALRC is particularly attracted to the definition of 'reasonable steps' in s 496 of the EPBC Act, but notes that this definition will not be suitable for every regulatory scheme.

If the individual has 'no influence'

8.87 The ALRC has recommended that a definition of corporate officer, similar to s 9 of the *Corporations Act*, should be adopted as a default provision in the proposed Regulatory Contraventions Statute.[115] This definition includes both a formal approach and functional approach. The functional part of the definition provides some protection for those individuals in a corporation who do not have functional authority within the corporation. It is appropriate that these individuals are not deemed liable for the contraventions of a body corporate when they have no control or influence over the body corporate.

8.88 However, there may also be cases where an individual has influence or control over the corporation generally, but had no influence over the corporation for the purposes of the corporation's contravening conduct. A number of deeming provisions acknowledge this by including a threshold test of liability that the 'corporate officer was in a position to influence the conduct of the body in relation to the contravention'.[116] An example is that under Div 9 of Part VI of the ITAA, a director may have a defence in recovery proceedings if they can prove that because of illness or some other good reason they did not take part in the management of the company.[117]

Conclusion

8.89 The ALRC's views in relation to a threshold test of influence over a body corporate for the purposes of a contravention, are similar to those expressed above in relation to the 'reasonable steps' threshold test.

8.90 Firstly, the ALRC's recommendation in relation to a threshold test of 'influence over a body corporate for the purposes of the contravention' generally represents the present situation for many deeming provisions in federal legislation. The ALRC

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115 See Recommendation 8–1 above.

116 See, for example, *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 494 and 495; *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (Cth), s 40B. A similar formulation of the liability of a 'senior officer' was proposed in the Crimes (Workplace Deaths and Serious Injuries) Bill 2001 (Vic).

117 *Income Tax Assessment Act 1936* (Cth), s 222AOJ.

also considers that when a provision deems an individual liable for the contravening conduct of a corporation, and in effect reverses the onus of proof, it is appropriate to provide a further threshold test 'of influence over the corporation for the purposes of the contravention'.

8.91 The complexity of modern corporations and the diffusion of authority within them make it difficult to trace the actions of every officer, agent and employee. The 'no influence' test takes a functional approach to the corporation — one that acknowledges that persons who hold certain positions within a corporation may not necessarily have influence over every aspect of a corporation's activities. The ALRC and others preference for a functional approach to assigning liability for corporate conduct generally, as opposed to a formal approach, is outlined in chapter 7.

8.92 As a matter of fundamental fairness, if it can be shown that the corporate officer had no influence over the body corporate for the purposes of the contravention, it follows that they should not be held liable for that contravention simply because they hold a particular position within the corporation.

Recommendation

Recommendation 8–4. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, any provision in legislation that deems an individual to be personally liable for the contravening conduct of a corporation should include as a threshold test for liability that:

(a) the individual failed to take all reasonable steps to prevent the contravening conduct; and

(b) the individual was in a position to influence the conduct of the body corporate in relation to the contravening conduct.

Part C
Enforcement Options

9. Regulators and the DPP

Contents

Role of the DPP

9.1 The Commonwealth Director of Public Prosecutions (DPP) is responsible for the majority of prosecutions under federal criminal law.[1] Regulatory agencies typically lack independent authority to pursue criminal prosecutions although some agencies, such as the Australian Taxation Office (ATO), the Australian Securities and Investments Commission (ASIC) and the Australian Competition and Consumer Commission (ACCC), have power to prosecute certain offences.[2]

1 Commonwealth Director of Public Prosecutions, *About the DPP*, <www.cdpp.gov.au/cdpp/dppinfo.html>, 23 October 2002.

2 See discussion at para 9.22–9.28 and para 9.42–9.45.

9.2 Regulators generally refer suspected criminal breaches to the DPP, which then decides whether to pursue criminal charges. Therefore, the decision to pursue a criminal, civil or administrative penalty is often influenced by the role of the DPP.[3]

Prosecution Policy of the Commonwealth[4]

9.3 Decisions by the DPP to initiate criminal proceedings are made in accordance with the Prosecution Policy of the Commonwealth, which expressly states that the prosecution of suspected criminal offences should not be automatic.[5] Rather, the decision whether to prosecute is regarded as the most important step in the process.[6] The criteria governing the decision to prosecute include:

- the public interest in pursuing a prosecution (including the interests of the victim, the suspected offender and the community at large);
- maintaining the confidence of the community in the criminal justice system;
- fairness (but not weakness) and consistency (but not rigidity);
- the need to tailor general principles to individual cases;
- the effective use of finite resources;
- the availability of admissible, substantial and reliable evidence;
- whether there is a reasonable prospect of conviction and the likely strength of the prosecution's case in court; and
- the risk of prosecuting an innocent person.

9.4 The Prosecution Policy of the Commonwealth provides a detailed list of questions to be considered when evaluating the quality of the evidence.[7] It also lists the factors to be considered in determining whether the public interest requires a prosecution,

3 However, as was noted in ASIC's submission, a number of factors may affect the choice of remedy, for example, the fact that some contravention provisions require proof of a state of mind, and the availability of evidence: Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 7–8.

4 'The DPP took two steps in relation to prosecution policy during 2001–2002. The first was to invite all Australian DPPs to review their policies on the decision to prosecute, with a view to ensuring as much uniformity as possible on that issue. The second was to begin an internal review of the entire range of guidelines in the Prosecution Policy of the Commonwealth. The last such review was undertaken in 1992. It is likely that there have been changes since then in the law enforcement environment and in community attitudes, which may be relevant to the way in which prosecution discretions should be exercised': Commonwealth Director of Public Prosecutions, *Annual Report 2001–2002* (2002), Commonwealth of Australia, 13.

5 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*, Commonwealth Director of Public Prosecutions, <www.cdpp.gov.au/cdpp/>, 16 November 2001, para 2.1.

6 Ibid, para 2.2.

7 Ibid, para 2.7.

and states that the factors should be applied and weighted according to the particular circumstances of each case.[8] Factors relevant to the public interest include:

- the seriousness of the alleged offence or whether it is of a 'technical' nature only;
- the staleness of the alleged offence;
- the availability and efficacy of any alternatives to prosecution;
- the prevalence of the alleged offence and the need for deterrence, both personal and general;
- whether the alleged offence is of considerable public concern;
- the likely length and expense of a trial; and
- whether the alleged offender is willing to cooperate in the investigation or prosecution of others, or the extent to which the alleged offender has done so.

9.5 The availability of an alternative enforcement mechanism is a particularly important public interest consideration.[9] The Prosecution Policy gives examples such as the Customs prosecution procedure under the *Customs Act 1901* (Cth)[10] and the administrative penalties that can be levied under various taxation Acts. The fact that a mechanism of this kind is available does not necessarily mean that criminal proceedings should not be instituted.[11] The alleged offence may be of such gravity that prosecution is the appropriate response. However, in accordance with the Prosecution Policy,[12] the availability of an alternative enforcement mechanism is a relevant factor to be taken into account in determining whether the public interest requires a prosecution.[13]

9.6 The Prosecution Policy of the Commonwealth also outlines a number of factors which 'must clearly not' influence a decision whether or not to prosecute. These are:

- the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved;
- personal feelings concerning the alleged offender or the victim;
- possible political advantage or disadvantage to the Government or any political group or party; or

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8 Ibid, para 2.10.
9 Ibid, para 2.12.
10 Issues surrounding Customs prosecutions are discussed in ch 13 of this Report.
11 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*, Commonwealth Director of Public Prosecutions, <www.cdpp.gov.au/cdpp/>, 16 November 2001, para 2.12.
12 Ibid, para 2.10(j).
13 Ibid, para 2.12.

- the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.[14]

9.7 The DPP has a discretionary power to confer immunity from prosecution on informants if 'appropriate to do so'.[15] The immunity is in the form of an undertaking signed by the DPP that any information or disclosure given by the person is not admissible in evidence against the person in any civil or criminal proceedings in a federal court or in a court of a State or Territory (other than in perjury proceedings).[16] Informal guidelines structure the exercise of this discretion.

9.8 While the focus of this Inquiry is civil and administrative penalties, the Prosecution Policy is of particular interest to the ALRC as a possible model for enforcement policies and guidelines structuring the use of non-criminal penalties. These policies are discussed in chapter 10 of this Report.

Choice of response

9.9 The Prosecution Policy states that the key consideration in deciding to initiate criminal proceedings is to ensure that the charge adequately reflects the nature and extent of the criminal conduct on the evidence, and will provide the court with an appropriate basis for sentencing.[17] Ordinarily, the charge will be the most serious available, subject to issues such as available defences and the strength of the evidence.[18] Other considerations influencing the choice of charges are that:

- charges should not be laid to provide scope for subsequent charge-bargaining; and

- charges should be laid under the provisions of a relevant specific Act (where applicable) rather than under the general provisions of the *Crimes Act 1914* (Cth).[19]

9.10 Where the legislation allows a choice between criminal and non-criminal enforcement, it has been stated that criminal penalties are 'the most punitive sanctions in the regulatory armoury and therefore not to [be] considered lightly'.[20] Criminal prosecutions are generally regarded as the ultimate deterrent due to the persuasive threat of imprisonment (where available) and the stigma of a criminal conviction and public trial.

9.11 Officers of the DPP have identified that, where there is a choice among civil, criminal or administrative penalties, it can be difficult to identify the point at which the

14 Ibid, para 2.13.
15 *Director of Public Prosecutions Act 1983* (Cth), s 9(6).
16 For further discussion of this immunity see ch 17.
17 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*, Commonwealth Director of Public Prosecutions, <www.cdpp.gov.au/cdpp/>, 16 November 2001, para 2.18.
18 Ibid, para 2.19.
19 Ibid, para 2.20–2.21.
20 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.

criminal 'card' goes on the table.[21] For example, the investigative path would be very different if a decision were made too early to pursue a civil rather than criminal remedy. On the other hand, it can be detrimental to the proper planning of an investigation and the effective and efficient use of resources if the decision is made too late. For example, ASIC has noted that there may be cases where the regulator may be forced to make an election at a particular stage of the investigation as some investigatory steps which are available to it can only be used in criminal investigations as the evidence obtained can only be used in criminal trials.[22]

9.12 Civil penalties are a pragmatic way of responding to contraventions and may be relatively easier to pursue than a criminal prosecution. However, it is dangerous to use civil penalties in order to avoid having to discharge the criminal onus of proof, and it is improper to threaten alleged offenders with the possibility of a criminal penalty if there is no intention of charging them with a criminal offence.[23]

9.13 The availability and use of both civil and criminal penalties for the same conduct has been described as a 'real problem' for the DPP.[24] DPP officers commented to the ALRC that the idea of a pyramid of enforcement presupposes that all regulators approach issues in the same way. They suggested that civil and criminal penalties could have separate fault elements so that the fault element is what 'ups the ante' and converts a non-criminal contravention to a criminal offence.[25] This approach has been used in recent legislation such as the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act).[26]

Criminal process

9.14 Some aspects of the criminal process can present problems for the prosecuting agency. It can be difficult to prove culpability, responsibility and intention to the criminal standard.[27] The high criminal standard of proof (beyond reasonable doubt) also makes it difficult to take successful criminal action.

9.15 In consultations with the ALRC, officers of the DPP emphasised the importance of having the option of criminal as well as civil and administrative proceedings. It has been noted, however, that other enforcement options can seem more attractive to regulators wanting to restore confidence in the market since criminal prosecutions can take considerable time and resources.

9.16 Few ACCC matters have gone to the DPP. This is because, up until recently,[28] the *Trade Practices Act 1974* (Cth) (TPA) had few criminal penalties available and has

21 Office of the Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 20 February 2001.
22 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.
23 Office of the Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 20 February 2001.
24 Ibid.
25 Ibid. See discussion of this model in ch 11 of this Report.
26 See, for example, *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 18–18A.
27 Office of the Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 20 February 2001.
28 In 2001 new offences were introduced into the *Trade Practices Act 1974* (Cth) by the *Treasury Legislation Amendment (Application of Criminal Code) Act (No 1) 2001* (Cth).

been designed around civil penalty provisions. Instead, the ACCC has tended to favour enforceable undertakings and has stated that its use of them is intended to

> stop the offending conduct so that the damage occurring in the marketplace is minimised — this has seen the increasing use of s.87B court enforceable undertakings to achieve swift outcomes such as corrective advertising.[29]

9.17 In consultations, officers of the DPP expressed concerns about the lack of guidance where there is an option of customising or negotiating penalties to suit the circumstances as this creates a 'very wide discretion' and risk of inconsistency in responding to the same conduct.[30] Criminal penalties are less vulnerable to this problem because of the principle in criminal law that the punishment must be proportionate to the crime.[31] The officers of the DPP stated that the scope for negotiated outcomes in relation to criminal penalties is limited.[32]

Matters referred to the DPP

9.18 The initial decision to investigate possible contraventions, and therefore to commence proceedings, often comes from an investigative or administrative agency. The DPP is not an investigative agency and can only act when there has been an investigation by the Australian Federal Police or another investigative agency. However, the DPP often provides legal advice and other assistance during the investigative stage, particularly in large and complex matters.[33] The DPP does not necessarily have any involvement in the decision about who is targeted.[34]

9.19 The following tables indicate the sources of referrals to the DPP.

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29 Australian Competition & Consumer Commission, *The Australian Competition and Consumer Commission — Role and Functions* (1999), Australian Competition & Consumer Commission, 17. See discussion of enforceable undertakings in ch 16.

30 Office of the Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 20 February 2001.

31 Ibid.

32 Ibid.

33 Commonwealth Director of Public Prosecutions, *About the DPP*, <www.cdpp.gov.au/cdpp/dppinfo.html>, 23 October 2002. The Commonwealth's main investigative agencies are the Australian Federal Police, the National Crime Authority and ASIC. However, many other agencies have an investigative role as part of their administrative function and the DPP receives briefs of evidence from, and provides legal advice to, a wide range of different agencies. All decisions in the prosecution process are made in accordance with the guidelines laid down in the Prosecution Policy of the Commonwealth: Commonwealth Director of Public Prosecutions, *About the DPP*, <www.cdpp.gov.au/cdpp/dppinfo.html>, 23 October 2002.

34 Office of the Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 20 February 2001.

Table 1: ***Offences dealt with by the DPP by referring agency***[35]

By Referring Agency	Summary Offences Defendants Dealt With		Indictable Offences Defendants Dealt With	
	2000–2001	**2001–2002**	**2000–2001**	**2001–2002**
ACCC	4	4	-	-
ACS	23	37	12	14
AEC	155	4	-	-
AFP	582	484	565	403
AQIS	5	4	2	1
ASIC	35	23	40	37
ATO	236	177	15	29
Centrelink	2,948	3,144	29	34
CASA	32	29	-	-
DIMIA	45	40	13	4
Other	635	524	58	60
Total	**4,700**	**4,470**	**734**	**582**

Table 2: ***Offences dealt with by the DPP by legislation***[36]

By Legislation	Summary Charges Dealt With		Indictable Charges Dealt With	
	2000–2001	**2001–2002**	**2000–2001**	**2001–2002**
ASIC Act	7	2	2	-
Civil Aviation Act	102	83	-	-
Corporations Law	30	28	27	36
Crimes Act	577	471	273	214
Customs Act	92	103	249	207
Electoral Act	-	-	-	-
Migration Act	121	102	378	180
Quarantine Act	4	5	-	4
Social Security Act	3,953	5,218	-	-
Taxation legislation	291	202	2	-
Trade Practices Act	6	4	-	-
Other	1,348	1,172	161	262
Total	**6,531**	**7,390**	**1,092**	**903**

9.20 The statistics above reveal that social security prosecutions have comprised the bulk of the DPP's caseload. In 2001–02, around 70% of all summary cases referred to the DPP were from Centrelink. In the same year, about 71% of all summary charges dealt with by the DPP came under the *Social Security Act 1991* (Cth).

35 Commonwealth Director of Public Prosecutions, *Annual Report 2001–2002* (2002), Commonwealth of Australia, table 11, 27.

36 Ibid, table 8, 25–26.

9.21 By contrast, in 2001–02 the DPP dealt with only four summary criminal matters under the TPA. The DPP dealt with 23 summary and 37 indictable offences referred by ASIC in 2001–02. Further, the DPP dealt with 177 summary and 29 indictable matters referred by the ATO in 2001–02, or 202 summary and no indictable offences under taxation legislation. These lower referral figures are partly explained by the fact that these regulators, by arrangement with the DPP, have the power to prosecute certain offences.

Relationships with regulators

ATO and the DPP

9.22 The DPP has specialist tax prosecution units in Sydney, Melbourne, Brisbane, Adelaide, Perth and Canberra.[37] At present the DPP does not prosecute all criminal offences relating to taxation. There is an agreement between the DPP and the ATO that ATO officers may conduct summary prosecutions for offences under the *Taxation Administration Act 1953* (Cth) and other tax laws.[38]

9.23 Prosecution action by the ATO is guided by the principles of the Taxpayers' Charter and the Compliance Model. The ATO has a framework of policy documents and guidelines structuring the use of penalties for criminal contraventions and their relationship with criminal referrals to the DPP. Most of these policies are contained in the ATO Prosecution Policy.

ATO Prosecution Policy[39]

9.24 The ATO Prosecution Policy specifies the categories of case that must be referred to the DPP for prosecution, unless there is prior agreement with the regional DPP office permitting the ATO to prosecute.[40] These categories include:

- all prosecutions for offences against the *Crimes Act 1914* (Cth) or the *Crimes (Taxation Offences) Act 1980* (Cth);
- all offences where the maximum penalty available includes a term of imprisonment exceeding 12 months;
- any case where, in the ATO's view, there is a realistic possibility of the court sentencing the defendant to a term of imprisonment in the event of a conviction;

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37 Commonwealth Director of Public Prosecutions, *Annual Report 2000–2001*, Commonwealth Director of Public Prosecutions, 12.

38 Australian Taxation Office, *ATO Prosecution Policy*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/index.htm>, 9 March 2001, para 4.4.1.

39 Ibid. In 2002 the ATO published an amended Prosecution Policy. The Prosecution Policy remains, for the most part, unchanged. However, the amendments published in 2002 include a new part in Chapter 3 on the *Criminal Code* to reflect the *Criminal Code Act 1995* (Cth) coming into operation on 15 December 2001.

40 For judicial consideration of the ATO Prosecution Policy see *Bryant v Deputy Commissioner of Taxation* (1993) 25 ATR 419. This case is summarised in ch 10, fn 50.

- all cases which involve novel or difficult questions of law or previously untested sections; and
- any cases which involve prominent or high profile figures or which, for any reason, are likely to attract public attention.[41]

9.25 The ATO Prosecution Policy states that criminal prosecutions are undertaken by the DPP or by the ATO in-house prosecutors following the 'DPP/ATO Investigation and Prosecution Liaison Guidelines'.[42] The ATO Prosecution Policy delineates the enforcement functions of, and relationship between, the ATO Fraud unit, the ATO in-house prosecutors, the DPP and the Australian Federal Police (AFP). The role of the ATO, particularly the ATO Fraud unit, is to:

- identify potential cases for prosecution;
- investigate those potential cases, assess and collect additional evidence and prepare a brief;
- refer matters to the DPP or the ATO in-house prosecutors with a recommendation as to the charge to be laid;
- assist the DPP when asked;
- refer potential serious fraud to the AFP, and either assist in the investigation or conduct investigations where the AFP is unable to deal with a referral;
- monitor former prosecutions to confirm that the taxpayers are now complying; and
- where relevant, follow up a court decision (eg, recovering reparation orders).[43]

9.26 The ATO's Prosecution Policy states that the ATO should consult with the DPP during investigations of more serious offences[44] and must refer suspected cases of serious fraud to the AFP for investigation.[45] The role of the AFP is to investigate serious fraud and support government agencies in their own investigations.[46] The ATO's Prosecution Policy lists a number of indicators which 'should alert ATO officers to the possibility' of serious fraud.[47] If the AFP rejects the case because of resource con-

41 Australian Taxation Office, *ATO Prosecution Policy*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/index.htm>, 9 March 2001, para 4.4.1.
42 Ibid, para 3.2.1
43 Ibid, para 4.2.4.
44 Ibid, para 4.2.2.
45 Ibid, para 4.5.1.
46 By, for example, executing search warrants, providing surveillance support when possible and appropriate, providing computer crime support when possible, and providing forensic service support when possible and appropriate: ibid, para 4.2.5.
47 Ibid, para 4.5.3. For example, the maintenance of more than one set of records, the use of false names or false documents, large unexplained gaps in documents, the evasion of a large amount of tax, the repeated commission of offences over a number of years, actions by company directors which cause a significant

straints or other reasons, the ATO may investigate on its own and prepare a brief of evidence for referral to the DPP.[48]

ASIC and the DPP

9.27 ASIC generally refers criminal matters to the DPP when it has completed its own investigations, although it involves the DPP in potentially serious criminal investigations at an early stage.[49] By arrangement with the DPP, ASIC conducts minor regulatory prosecutions.[50] DPP officers have commented that ASIC and the DPP make decisions together at an early stage.[51] However, decisions in the investigative phase remain the responsibility of ASIC and those made in the course of a prosecution are those of the DPP. The two agencies retain their distinct roles.[52]

> ASIC and DPP have settled guidelines for investigating and prosecuting corporate crime. The DPP provides early advice to the ASIC in the investigation of suspected offences. This is particularly important in large fraud cases where investigations can be long and resource intensive. Early involvement by the DPP can assist ASIC in identifying those areas that are most likely to result in prosecution. There is regular liaison between ASIC and the DPP at head of agency, management and operational levels.[53]

ACCC and the DPP

9.28 There is an internal agreement between the ACCC and the DPP covering the referral of matters to the DPP for prosecution. In consultation with the ALRC, the ACCC stated that the ACCC consents to matters being criminally prosecuted and that the ACCC often handles prosecutions itself.[54]

9.29 In 2001–02, four summary criminal matters were referred by the ACCC to the DPP.[55] In contrast, during the year over 60 court proceedings were commenced[56] and

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loss of revenue to the Commonwealth, failure to remit a significant amount of revenue, significantly overclaimed deductions, or bribery or attempted bribery of ATO officers.

48 Ibid, para 4.5.1.

49 Australian Securities & Investments Commission, *Annual Report 1999–2000*, Commonwealth of Australia, Canberra, 34.

50 Commonwealth Director of Public Prosecutions, *Annual Report 2001–2002* (2002), Commonwealth of Australia, 20.

51 Office of the Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 20 February 2001.

52 G Delaney, *Correspondence*, 5 April 2002.

53 Commonwealth Director of Public Prosecutions, *Annual Report 2001–2002* (2002), Commonwealth of Australia, 20.

54 Australian Competition & Consumer Commission, *Consultation*, Canberra, 5 June 2000.

55 Commonwealth Director of Public Prosecutions, *Annual Report 2001–2002* (2002), Commonwealth of Australia, Table 11.

56 It is not known what percentage of these proceedings were civil penalty proceedings or criminal proceedings commenced by the ACCC.

as at 30 June 2002, 74 matters were still in court.[57] Further, the ACCC accepted 38 enforceable undertakings under s 87B of the TPA.[58]

Centrelink and the DPP

9.30 The DPP has specialist Centrelink prosecution units in Sydney and Melbourne.[59] 'The use of specialist units allows the DPP to develop expertise in particular areas of the law and gives the investigators a single point of contact with the DPP and a single source of advice'.[60] See the number of Centrelink referrals at para 9.19, table 1 and prosecutions under social security law above at para 9.19, table 2.

ABA and the DPP

9.31 In its 10-year history, the Australian Broadcasting Authority (ABA) has only once approached the DPP to seek enforcement of a criminal penalty.[61] In its submission to the ALRC, the ABA noted that serious breaches of the *Broadcasting Services Act 1992* (Cth) are rare and the facts that give rise to the breach tend to be complex and vary from case to case. The ABA stated that it has limited resources for enforcement activities.[62] The ABA noted that this lack of enforcement could also be due to the limited range of penalties available under the *Broadcasting Services Act*.[63]

Issues raised by regulators and the DPP

Consistency

9.32 The consistency of treatment of offenders across different fields of regulation, particularly concerning fraud, is of concern to the DPP and a major reason for the DPP's existence.[64] For example, penalties imposed under tax legislation are not necessarily consistent with those imposed under social security legislation. As a result of the extensive use of administrative penalties for tax contraventions, the DPP is only called in for tax cases where very serious offences have occurred.[65]

9.33 The ATO responded to this concern noting that the DPP has agreed that ATO officers may conduct summary prosecutions for offences under the *Taxation Administration Act* and other laws. The DPP has also agreed that ATO officers may prosecute

57 Australian Competition & Consumer Commission, *ACCC Annual Report 2001–2002*, <http://www.accc.gov.au/fs-pubs.htm>, 11 November 2002, Chairman's Review, 2.
58 Ibid, Chairman's Review, 2.
59 Commonwealth Director of Public Prosecutions, *Annual Report 2000–2001*, Commonwealth Director of Public Prosecutions, 12.
60 Ibid, 13.
61 'On the occasion that the ABA sent a brief to the DPP, it subsequently informed the DPP that it did not wish to pursue the matter after the DPP questioned the public interest grounds for the prosecution. On other occasions, the ABA has decided against sending a brief to the DPP on the basis that the ABA was not satisfied that it had sufficient evidence to make out a case to the level required by the DPP's prosecution policy': Australian Broadcasting Authority, *Submission CAP 23*, 14 October 2002, 4.
62 Ibid, 2.
63 Ibid, 3.
64 Office of the Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 20 February 2001.
65 Ibid.

some cases that fall into specified categories by agreement with the appropriate regional office of the DPP. During the 2001–02 financial year, ATO officers conducted approximately 13,000 prosecutions. The ATO submitted that these arrangements may account for the low number of referrals to the DPP from the ATO compared to other agencies.[66]

9.34 Some commentators have stated that the role of the DPP can bring consistency at the expense of flexibility. Louise Castle and Simon Writer have noted in relation to the proposed criminalisation of hard core cartel behaviour under the TPA:

> There is a trade-off for the introduction of criminal sanctions: the loss of its flexibility in handling prosecutions … Under a criminal regime all serious cartel matters will need to be referred to the Cth DPP for prosecution. Negotiations on penalty will be conducted by the DPP and will be governed by different considerations, particularly the need for obvious consistency between cases now that criminal principles apply, which is not something that is evident from the current operation of the opaque penalty negotiation process. This will necessarily involve a reduction in the ACCC's role in the negotiation and settlement of matters, a greater role for judges and prosecutors at the sentencing stage and a de-emphasis on the obtaining of record penalties and maximum publicity by the regulator.[67]

Priorities

9.35 In consultations with the ALRC, officers of the ACCC commented that the criminal process can be slow and conservative in dealing with marketplace problems.[68] The ACCC's loss of control of cases once they have been referred to the DPP was also a concern.[69]

9.36 Similar comments have been made in relation to ASIC and its relationship with the DPP. Although there is a Memorandum of Understanding between ASIC and the DPP, its interpretation is said to vary according to the person involved and the region.[70]

9.37 It has been reported that ASIC has been frustrated by the number of cases rejected for trial by the DPP.[71] One academic has stated that the relationship between ASIC and the DPP is often difficult[72] and another has noted that the relationship often involves 'incongruent priorities'[73] and differences of attitude and perspective.[74] One reason for an incongruence of priorities may be confusion on the part of the various

66 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, 23–24.
67 L Castle and S Writer, 'More Than a Little Wary: Applying the Criminal Law to Competition Regulation in Australia' (2002) 10(1) *Competition and Consumer Law Journal* 1.
68 Australian Competition & Consumer Commission and Australian Government Solicitor, *Consultation*, Brisbane, 13 June 2000.
69 Ibid.
70 G Gilligan, H Bird and I Ramsay, *Regulating Directors' Duties — How Effective are the Civil Penalty Sanctions in the Australian Corporations Law?* (1999), Centre for Corporate Law and Securities Regulation, Melbourne; I Ramsay, *Consultation*, Melbourne, 7 April 2000.
71 I McIlwraith, 'Watchdog Bares Teeth at Insurers', *The Age* (Melbourne), 26 February 2001, 1.
72 I Ramsay, *Consultation*, Melbourne, 7 April 2000.
73 G Gilligan, *Consultation*, Melbourne, 26 February 2001.
74 I Ramsay and H Bird, *Consultation*, Melbourne, 26 February 2001.

agencies as to what each other's priorities actually are. Officers of the DPP commented to the ALRC that they had received mixed messages as to the relative priority ASIC places on criminal and non-criminal penalty proceedings.[75]

9.38 In response to this comment ASIC submitted that its overriding priority is to pursue the most appropriate remedy for each particular case, bearing in mind the circumstances of that case including the evidence that is available after an appropriately detailed investigation.[76]

> It may be that any 'mixed messages' merely reflect the necessity for ASIC to consider matters on a case by case basis rather than adopting a general preference for either criminal or civil remedies.[77]

9.39 The major inconsistency relates to the basic objectives of the different bodies. The regulation of the marketplace, which is the focus of regulators like ASIC and the ACCC, is said to require immediate response to contraventions, restoration of the status quo and prevention of future problems, whereas the DPP is required to be concerned with the circumstances and culpability of a particular contravention in the past. It is obvious that these objectives may lead to contradictory views on how to deal with a case.

9.40 In its submission, ASIC acknowledged that its relationship with the DPP has been the subject of much comment and analysis, not all of if which is well founded or properly considered. ASIC noted that the relationship has evolved over the years and that ASIC believes that any differences of opinion are generally resolved through the long standing procedures for regular liaison and open communication with the DPP.[78]

Speed

9.41 Criminal prosecutions necessarily take longer than imposing administrative (and perhaps civil) penalties, but it has been argued that systemic problems with the court system should not prevent the prosecution of criminal behaviour.[79] Officers of the DPP have argued that prosecutions remain a 'huge deterrent', and administrative penalties like banning orders can still be imposed before or after a criminal prosecution.[80] DPP officers have noted that proceedings for civil penalties are not always faster.[81]

Criminal prosecutions by regulators

9.42 One issue raised in the ALRC's consultations was whether regulatory agencies should be given power to pursue criminal prosecutions in their respective fields of regulation.

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75 Office of Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 5 June 2000.
76 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 8.
77 Ibid, 9.
78 Ibid, 7.
79 Office of the Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 20 February 2001.
80 Ibid.
81 Office of Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 5 June 2000.

9.43 Difficult issues arise between regulators and the DPP despite the existence of prosecution policies. In a Victorian case, the ATO negotiated with a taxpayer who had not declared income to correct the non-declaration, and advised him that the matter was finalised. However, the DPP subsequently charged the taxpayer with the criminal offence of fraud against the Commonwealth.[82]

9.44 Unlike the ATO, ACCC and ASIC other regulatory agencies have not been given comparable powers to conduct their own criminal prosecutions. One reason for this is the risk that regulators could become too involved in the investigation and over-prosecute. However, agencies such as ASIC, the ACCC and the Australian Customs Service (ACS) already undertake both investigation and litigation of civil penalty proceedings.

9.45 There is an argument that an independent statutory body such as the DPP is needed to assess cases for prosecution and ensure that the whole process is seen to be independent. The culture and role of a prosecutor are distinct from those of a regulatory agency.[83] Consistency of principle and priorities is most easily achieved by a single prosecutor with an overview of the full range of criminal regulatory penalties.[84]

Conclusion

9.46 Many of the issues identified above could be cured if regulators who administer criminal, civil or administrative penalty schemes developed and published enforcement guidelines setting out their enforcement approach. These guidelines are the subject of chapter 10.

9.47 Further, clearer lines of communication could be articulated in Memorandums of Understanding (MOUs) developed by regulators and the DPP that detail the use of criminal and non-criminal penalties and their relationship with referrals to the DPP (see Recommendation 9–1 below). These MOUs could inject some consistency in relation to the matters that are referred by a regulator to the DPP. Where a matter is ambiguous in terms of whether it should attract criminal or civil liability, MOUs could outline how liaison is to occur between a regulator and the DPP and provide mechanisms for resolving any conflict between the regulator and the DPP.

9.48 A more detailed account of the relationship between regulators and the DPP could be provided in guidelines that implement the terms of an MOU. To ensure that any MOUs and guidelines are effective, regulators and the DPP will need to provide training to staff who will be subject to the MOU and guidelines so that they are familiar with the terms and operation of the MOU and guidelines (see Recommendation 9–2 below).

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82 *R v Morris* (1992) 61 ACrimR 233. In consultation, members of the Victorian Bar criticised the exclusion of the ATO from the decision to pursue the criminal penalty: The Victorian Bar Association, *Consultation*, Melbourne, 29 May 2001.

83 Office of the Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 20 February 2001.

84 Attorney-General's Department, *Consultation*, Canberra, 19 February 2001.

Memorandums of understanding

9.49 It goes without saying that prosecuting and regulatory agencies need to communicate and work together when faced with a choice of enforcement responses. In a review of Commonwealth enforcement agencies it was reported that 'most of the participating agency heads believe there is a need for greater co-operation between agencies on important co-ordination and operational issues'.[85]

9.50 Most regulators now have MOUs with other agencies, including the DPP. For example, ASIC, the ACS, Centrelink and the ATO each have an MOU with the DPP. At present, the MOUs between the DPP and regulators are not publicly available.

9.51 These MOUs typically outline the relationship between the regulator and the DPP in relation to:

- the investigation and litigation process;
- liaison between the regulator and the DPP;
- the referral of cases to the DPP;
- referral to other state and federal agencies;
- where appropriate, prosecution by the regulator;
- actions to recover penalties or costs and expenses.

9.52 Some MOUs provide further detail on many of the issues outlined above, for example:

- at what stage the DPP will first become involved in a matter;
- the regulator's staff who will liaise with the DPP;
- when the DPP can provide advice on various issues including search warrants;
- detailed procedures for consultation with, and for referral of, matters to the DPP;
- the commitment of resources;
- information sharing and the treatment of confidential information;
- procedures for dealing with conflict between the regulator and the DPP in relation to enforcement.

9.53 The ALRC's survey of MOUs between various federal regulators and the DPP revealed that not all MOUs addressed the same topics and provided the same level of

85 Attorney-General's Department, *Report of the Review of Commonwealth Enforcement Arrangements* (1994), AGPS, Canberra, 226.

detail. This is to be expected as regulators differ in their enforcement approach and access to enforcement tools such as criminal and non-criminal penalties.

9.54 However, the survey also revealed that a number of MOUs did not address issues that could potentially cause inconsistency and tension between a regulator and the DPP. For example, a number of regulators now administer legislation where parallel and subsequent criminal and non-criminal enforcement is possible for substantially the same conduct.[86] These issues should be addressed in an MOU.

9.55 As outlined above, there have been occasions when a regulator has negotiated an outcome with a person and advised that the matter was finalised; and then the DPP have subsequently charged the person with a criminal offence. In recent years, a number of federal regulators have utilised negotiated outcomes, rather than the criminal or civil justice system, to obtain regulatory enforcement. These techniques may include the acceptance of enforceable undertakings[87] and penalty negotiations. In one consultation it was noted that the Prosecution Policy of the Commonwealth is not helpful in relation to settlement of matters.[88] Where these options are available or used by a regulator, it would be appropriate to detail in an MOU how these negotiated methods intersect with referrals to the DPP.

9.56 Related to this issue, is the issue of regulator policies on the granting of leniency and immunity.[89] The DPP also has the power to confer immunity from prosecution.[90] Conflict could arise between the DPP and the regulator in relation to the granting of leniency or immunity. The grant of immunity by a regulator may mean that the DPP never learns of a case that might otherwise be appropriate for prosecution. Where such policies exist, regulators and the DPP could detail protocols for liaison in connection with the granting of leniency or immunity.

Guidelines

9.57 In addition to MOUs, a number of federal regulators have developed guidelines which implement the terms of the MOU between them and the DPP. For example, the *Guidelines for the Working Arrangement Between the Office and the ASC for the Investigation and Prosecution of Serious Corporate Wrongdoing* outlines in detail a close relationship between the two offices.[91] There is liaison at various stages of the process. These arrangements result in a coordinated approach to enforcement.

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86 These issues are addressed in ch 11.

87 In its submission to the ALRC, ASIC noted in response to Proposal 6–1 of DP 65 that 'if the guidelines were to extend to the use of enforceable undertakings in some or all cases, that extension should not be allowed to undermine the ability of this remedy to provide creative and tailored responses to non-criminal breaches': Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 12.

88 Australian Government Solicitor, *Consultation*, Sydney, 27 August 2002.

89 See ch 10 for discussion of these policies.

90 *Director of Public Prosecutions Act 1983* (Cth), s 9(6).

91 The Australian Securities and Investments Commission (ASIC) was formerly named the Australian Securities Commission (ASC).

9.58 The ATO also has liaison guidelines with the DPP, the purpose of which 'is to ensure the efficient and proper exercise of the Prosecution function'.[92]

9.59 Due to the varied nature of federal regulators and their enforcement tools, the ALRC has not made these more detailed guidelines the subject of a recommendation. It is the ALRC's view that, if further detail is required to give effect to MOUs, this can be agreed upon between the regulator and the DPP. However, when these internal guidelines are developed they should, to the extent practicable, be done so in accordance with Recommendation 6–5.

Training of staff

9.60 It was noted in DP 65 that, if a regulator's staff are properly trained in how procedural rules operate, they are more likely to comply with them.[93] This observation applies equally to the successful implementation of MOUs. As noted above, despite the existence of an MOU between a regulator and the DPP, the interpretation of that MOU by regulator staff can vary according to the regulator staff involved and the region.[94] Therefore, the ALRC has recommended that when a regulator and the DPP develop an MOU, they should ensure that training is provided to staff who will be subject to the MOU to ensure that they are familiar with its terms and operation.

Preliminary view

9.61 In DP 65 the ALRC suggested options for reform in the alternative.[95] These options for reform are now divided across two chapters of this Report. The options for reform outlined in this chapter only address the issues raised by the relationship between the regulator and the DPP when the regulator administers legislation under which both criminal and non-criminal penalties may be imposed or arise.

9.62 The more general option for reform concerning guidelines structuring the use of penalties and quasi-penalties for non-criminal contraventions in the form of enforcement policies is now contained in recommendations in chapter 10 of this Report.

9.63 The alternative options for reform outlined in DP 65 were that:

- Uniform guidelines should be developed for adoption by all regulators structuring the use of penalties for non-criminal regulatory contraventions and their relationship with criminal referrals to the DPP;

92 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, 23.

93 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, para 7.60–7.64. See also section on training in ch 14 of this Report.

94 See para 9.36 above.

95 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Proposal 6–1.

- Alternatively, all regulators with penalty powers should individually develop customised guidelines structuring the use of penalties for non-criminal regulatory contraventions and their relationship with criminal referrals to the DPP.[96]

Consultations and submissions

9.64 The ALRC received a mixed response to this proposal. A number of submissions did not support the first option — the development of uniform guidelines for adoption by all regulators structuring the use of penalties for non-criminal regulatory contraventions and their relationship with criminal referrals to the DPP. Some regulators felt that uniform guidelines would not be appropriate for all legislative and regulatory regimes in which civil and administrative penalties are used.[97]

9.65 ASIC was also concerned that a uniform set of prescriptive guidelines applicable to all Commonwealth regulators would not leave sufficient flexibility for ASIC to have regard to unique considerations, such as its statutory aim to promote confidence in the financial system,[98] when determining what is an appropriate regulatory outcome.[99]

9.66 Both Dr Karen Yeung[100] and the ATO[101] supported the use of guidelines (uniform and customised) for the use of penalties for non-criminal regulatory contraventions and their relationship with criminal referrals to the DPP.[102] The ATO noted that it already has such guidelines in place in the form of the ATO Prosecution Policy, Taxpayers' Charter and the Compliance Model.[103]

9.67 Environment Australia also supported both uniform and customised guidelines, the latter being an adjunct to the former. It noted that there would be a need to consult closely with regulators in this process to identify those aspects of 'generic' application, and those that would be more appropriately dealt with at the individual agency level. Environment Australia also suggested that guidance about the weighting to be given to particular issues in varying circumstances would be useful and would contribute to greater consistency and community perceptions about fairness.[104]

9.68 The second option — that all regulators with penalty powers should individually develop customised guidelines structuring the use of penalties for non-criminal regulatory contraventions and their relationship with criminal referrals to the DPP —

96 Ibid, Proposal 6–1.
97 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 11; Australian Broadcasting Authority, *Submission CAP 23*, 14 October 2002, 2.
98 *Australian Securities and Investments Commission Act 2001* (Cth), s 1(2)(b).
99 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 12.
100 K Yeung, *Submission CAP 20*, 9 October 2002, 4.
101 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, 22.
102 Some officers of the Australian Government Solicitor also expressed general support for the development of guidelines: Australian Government Solicitor, *Consultation*, Sydney, 27 August 2002.
103 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, 22.
104 Environment Australia, *Submission CAP 26*, 24 October 2002, 1–2.

received more general support from regulators.[105] ASIC preferred this option, but noted that individually developed guidelines should not be too prescriptive to enable regulators to respond appropriately to contraventions on a case-by-case basis.[106] 'It should not, for instance, be required that ASIC obtain the DPP's approval before conducting civil or administrative enforcement'.[107]

9.69 Environment Australia stated that they saw the second option in the Proposal as an adjunct, rather than an alternative, to uniform guidelines. They stated that customised guidelines can deal with issues at a level not appropriate for uniform guidelines (specific legislative features, cultural, community, industry and factual circumstances). Environment Australia also noted that the agency was developing such guidelines for the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), setting out criteria and principles to be taken into account when determining when administrative, civil and criminal remedies are appropriate.[108]

9.70 Proposal 6–2 in DP 65 stated that any guidelines developed for adoption by all regulators with penalty powers, or customised guidelines developed individually by any such regulators structuring the use of penalties for non-criminal regulatory contraventions and their relationship with criminal referrals to the DPP, should be published. The Proposal gained broad support from regulators and commentators, particularly as publication can bring greater transparency, accountability and consistency.[109]

9.71 ASIC stated that it would not be opposed to publishing guidelines on its use of non-criminal penalties. However, it was concerned about collateral challenges to enforcement decisions that could be raised by the publication.[110] ASIC also noted that it should retain the right to supplement any published guidelines with internal confidential policies which would not be inconsistent with the published guidelines.[111]

9.72 Environment Australia raised a similar point, noting that some material in guidelines may need to be restricted to internal use and edited for public release, such as detailed risk weighting criteria for compliance activity, to avoid the regulated community conducting 'risk assessments' in relation to planned or existing illegal activities.[112]

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105 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 12; Australian Taxation Office, *Submission CAP 16*, 17 September 2002, 22; Australian Broadcasting Authority, *Submission CAP 23*, 14 October 2002, 2; Environment Australia, *Submission CAP 26*, 24 October 2002.

106 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 12.

107 Ibid, 12.

108 Environment Australia, *Submission CAP 26*, 24 October 2002, 3.

109 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 13; Australian Taxation Office, *Submission CAP 16*, 17 September 2002, 24; Australian Broadcasting Authority, *Submission CAP 23*, 14 October 2002, 2; K Yeung, *Submission CAP 20*, 9 October 2002, 4; Environment Australia, *Submission CAP 26*, 24 October 2002, 2.

110 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 12.

111 Ibid, 13.

112 Environment Australia, *Submission CAP 26*, 24 October 2002, 2.

9.73 In DP 65 the ALRC asked what status should attach to guidelines structuring the use of penalties for non-criminal regulatory contraventions and their relationship with criminal referrals to the DPP.[113]

9.74 Submissions from regulators agreed that the status of these guidelines should be informal non-statutory guidelines.[114] However, submissions differed as to the binding nature of these guidelines, and the provision for administrative review. The ATO submitted that agencies should be administratively bound by such policies, noting its own system of Practice Statements.[115] ASIC believed that an agency which acts in a manner which is inconsistent with its published guidelines should be subject to the usual processes of Parliamentary and other scrutiny, including scrutiny by the Commonwealth Ombudsman. However, it stressed that the guidelines should not be legally enforceable or provide any grounds for judicial review of interim steps in the enforcement process.[116]

9.75 Environment Australia suggested that transparency and accountability for adhering to the guidelines could be achieved by means other than legal enforceability; for example, in an annual report or in a manner similar to annual regulatory plans.[117]

9.76 Yeung stated that a general policy statement on regulatory enforcement should have the same status as the Prosecution Policy of the Commonwealth. However, she also noted that persons aggrieved by a regulator's failure to comply with a policy ought to be at liberty to seek judicial review and that this may require 'that any such guidelines are directly promulgated by reference to express legislative power to ensure that judicial review is available'.[118]

Conclusion

9.77 The ALRC considers that regulators who administer legislation under which criminal penalties may be imposed should, together with the DPP, develop and publish a MOU that details the use of non-criminal penalties and their relationship with criminal referrals to the DPP.

9.78 As noted above, the bulk of submissions received by the ALRC have stressed the variable and idiosyncratic nature of federal regulatory and legislative schemes. The ALRC agrees that this reality necessitates guidelines in the form of MOUs that would be individually developed by the regulator with the DPP. It is the ALRC's view that uniform guidelines could be rendered useless if they had to be extremely broad and

113 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Question 6–1.
114 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 13; K Yeung, *Submission CAP 20*, 9 October 2002, 4; Australian Taxation Office, *Submission CAP 16*, 17 September 2002, 24; Environment Australia, *Submission CAP 26*, 24 October 2002.
115 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, 24.
116 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 13.
117 Environment Australia, *Submission CAP 26*, 24 October 2002, 2.
118 K Yeung, *Submission CAP 20*, 9 October 2002, 4.

general to accommodate the various regulatory and legislative schemes at the federal level.

9.79 The recommendation largely reflects current practice as a number of regulators who administer criminal and non-criminal penalties already have MOUs with the DPP. The majority of consultations and submissions supported the use of guidelines that were not legally enforceable. MOUs are not legally binding documents, but rather administrative arrangements between agencies.

9.80 The ALRC notes that regulators and the DPP do not currently publish MOUs. However, it is the view of the ALRC, together with the majority of agencies and individuals that made submissions, that publication is essential to ensure transparency, accountability and consistency. It is the ALRC's view that the interests of transparency and accountability outweigh concerns of collateral challenges to enforcement decisions. The ALRC's research reveals that although these guidelines can give rise to administrative review in terms of procedural fairness, when guidelines are made as informal instruments, collateral challenges are few and are rarely successful.[119]

9.81 The ALRC considers that the content of the MOUs recommended in this chapter should, as appropriate, address the issues that are currently the subject of MOUs between regulators and the DPP. These topics include the investigation and litigation process, liaison between the regulator and the DPP, referral of cases to the DPP, referral to other state and federal agencies, prosecution by the regulator, disagreement between the regulator and the DPP in relation to enforcement, and actions to recover penalties or costs and expenses.

9.82 The MOUs between regulators and the DPP should also address parallel and subsequent criminal and non-criminal enforcement arising from the same or substantially the same conduct (where applicable), leniency and immunity policies in relation to criminal and non-criminal penalties, and enforceable undertakings and penalty negotiations.

9.83 To enable successful implementation of these MOUs, the ALRC recommends that, when a regulator and the DPP develop an MOU, the regulator and the DPP should ensure that training is provided to staff who will be subject to the MOU to ensure that they are familiar with its terms and operation.

9.84 The ALRC has not made any recommendation in relation to guidelines which further implement the terms of MOUs. It is the ALRC's view that these guidelines can be agreed upon between the regulator and the DPP, and should not have to be published. However, to the extent practicable, these internal guidelines should be developed in accordance with Recommendations 6–2 to 6–4.

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119 See ch 6 for further discussion of informal guidelines.

Recommendations

Recommendation 9–1. Regulators who administer legislation under which criminal penalties may be imposed should, together with the DPP, develop and publish a Memorandum of Understanding that addresses the following matters (unless clearly inappropriate in the circumstances):

(a) the investigation and litigation process;

(b) liaison between the regulator and the DPP;

(c) the referral of cases to the DPP;

(d) the referral of cases to other state and federal agencies;

(e) prosecution by the regulator;

(f) parallel and subsequent criminal and non-criminal enforcement arising from the same or substantially the same conduct;

(g) disagreement between the regulator and the DPP in relation to enforcement;

(h) leniency and immunity policies;

(i) enforceable undertakings and settlement negotiations; and

(j) actions to recover penalties or costs and expenses.

Recommendation 9–2. When a regulator and the DPP develop a Memorandum of Understanding in accordance with Recommendation 9–1, the regulator and the DPP should ensure that training is provided to relevant staff to ensure that they are familiar with it.

10. Regulators' Enforcement Policies

Contents

Introduction

10.1 In DP 65 the ALRC considered the role of the Commonwealth Director of Public Prosecutions (DPP) in relation to federal regulators who administer legislation under which both criminal and non-criminal penalties can be imposed or arise. The ALRC also suggested alternative options for reform:

- Uniform guidelines should be developed for adoption by all regulators structuring the use of penalties for non-criminal regulatory contraventions and their relationship with criminal referrals to the DPP; or

- Alternatively, all regulators with penalty powers should individually develop customised guidelines structuring the use of penalties for non-criminal regulatory contraventions and their relationship with criminal referrals to the DPP.[1]

10.2 As noted in chapter 9 of this Report, the ALRC has now divided these options for reform across two chapters. The recommendations outlined in chapter 9 address the issues raised by the relationship between the regulator and the DPP when the regulator administers legislation under which both criminal and non-criminal penalties may be imposed or arise. This chapter considers the more general option for reform of

1 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Proposal 6–1.

developing guidelines that structure the use of penalties and quasi-penalties for non-criminal contraventions in the form of enforcement policies.[2]

10.3 Regulators favour having a wide range of regulatory tools at their disposal to give them the flexibility to respond most appropriately to a given situation. This flexibility needs to be balanced with what has been described as a principle of good regulation, which is an attempt to standardise the exercise of discretion so as to reduce inconsistencies between government regulators, reduce uncertainty and lower compliance costs.[3]

10.4 Publicly available enforcement policies can facilitate consistency in choice of enforcement response and assist in keeping regulators accountable for their decisions to pursue penalties and quasi-penalties. By documenting a regulator's enforcement objectives, philosophy and approach, enforcement policies can also guide a regulator's staff when making enforcement decisions. Furthermore, publicly available guidelines can promote deterrence by guiding the regulated community in complying with predictable standards.

10.5 The first section of this chapter broadly considers some of the factors that will impact on enforcement decisions of regulators. The second section will consider a selection of enforcement policies that are currently made publicly available by Australian federal regulators. More specific factors that will impact on a regulator's enforcement decisions will be outlined here.

10.6 The following section of the chapter considers Proposal 6–2 in DP 65 in relation to publicly available enforcement policies, and submissions and consultations received by the ALRC in relation to this Proposal. Finally, the chapter will detail the ALRC's view on enforcement policies and outline its recommendations.

Factors influencing enforcement

10.7 Regulators' actions in enforcing compliance vary according to differing regulatory contexts.[4] Factors which account for different enforcement styles include the legal framework of the regulation and the sanctions it provides to the regulator, the interaction between the regulator and the regulated community, the nature of the regu-

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2 True administrative penalties are not specifically dealt with in this chapter as there is usually no exercise of discretion in relation to them; they arise by operation of legislation.

3 Council of Australian Governments, *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies* (1997), Department of Prime Minister and Cabinet, Canberra, 7.

4 Dr Julia Black cautions against taking the study of one agency, or several agencies involved in the same type of regulation, and generalising those findings across all agencies when looking at enforcement approaches: J Black, 'Managing Discretion' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001), 6.

lated community, the regulator's statements of objectives, the nature and seriousness of the contravention, and general principles of procedural fairness.[5]

10.8 This section of the chapter is not intended to set out an exhaustive list of factors that may influence a regulator's enforcement decisions. The purpose of this section is to provide a broad profile of matters that will impact on a regulator's enforcement decisions. Other factors that may be relevant to enforcement decisions are raised in the context of current practice at para 10.24–10.59.

Legal framework

10.9 The precision with which regulatory goals are set out by legislation can influence the regulatory approach. Generally, the more complex and precise the rules, the less scope there is for the exercise of discretion by the regulator. Alternatively, legislators may deliberately avoid setting down precise objectives because they want regulators to have the freedom to address problems as they arise in the future.[6] Different enforcement strategies call for different kinds of rules.[7] If prosecutions are the main mode of enforcement, precise rules are called for.[8] If the promotion of good practice is the objective, less precise but more flexible rules may be more effective.[9]

Interaction between the regulator and the regulated

Nature of regulated party

10.10 The character and habits of the regulated party affect the enforcement approach adopted by the regulator. A regulator's perceptions of the regulated may be based on matters such as the amount of time, money and energy which the latter devotes to compliance with regulation, and the attitude of its managers and employees towards compliance.[10]

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5 K Yeung, 'Negotiated Compliance Strategies: The Quest for Effectiveness and the Importance of Constitutional Principles' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 8 June 2001), 6; J Black, 'Managing Discretion' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001), 6; R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) Oxford University Press, Oxford, 99. See also ch 14.

6 R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) Oxford University Press, Oxford, 78.

7 Australian Broadcasting Authority, *Submission CAP 23*, 14 October 2002; Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.

8 See for example Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*, Commonwealth Director of Public Prosecutions, <www.cdpp.gov.au/cdpp/>, 16 November 2001; Australian Taxation Office, *ATO Prosecution Policy*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/index.htm>, 9 March 2001.

9 R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) Oxford University Press, Oxford, 101.

10 J Black, 'Managing Discretion' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001), 10.

10.11 Research has shown that most regulated entities are generally inclined to comply and, when they do not, it is usually because of ignorance and incompetence rather than deliberate intent.[11] If the regulated party is well-intentioned but ill-informed, persuasion and education may be more appropriate than prosecution. If the regulated party refuses to comply, a stricter response may be needed. Commentators agree that it is important to use the appropriate strategy or combination of strategies for a given circumstance — the issue is not whether to punish or persuade, but when to punish and when to persuade.[12]

Nature of the contravention

10.12 Other factors that influence a regulator's enforcement strategy include the nature of the contravention (whether one-off or persistent), the seriousness of the contravention, and whether the contravention was careless, negligent or deliberate.[13]

10.13 Prosecutions are most likely to be pursued where a contravention gives rise to an immediate risk, a direct harm has already resulted, or breaches are flagrant, repeated or extreme in their culpability.[14] Whether a one-off contravention will be regarded as an accident or a deliberate contravention will depend on the regulator's assessment. This assessment in turn is influenced by the regulator's overall characterisation of the regulated party.[15] If the contravention is regarded as an accident, and the regulated party is not a persistent offender, it is less likely that a punitive approach will be used unless the contravention was severe.[16]

Relational distance between the regulator and the regulated

10.14 Another important influence on the enforcement approach adopted by the regulator is what has been described as the relational distance between the regulator and the regulated.[17] The relational distance can be measured by the scope, frequency and duration of interactions between the regulator and regulated, the length of their relationship, and their social network.[18] Research suggests that the greater the relational distance, the greater the use of formal enforcement approaches. Where there is a clear

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11 Ibid, 13.

12 Ibid, 17, citing J Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (1985) State University of New York Press, Albany, NY.

13 K Yeung, 'Negotiated Compliance Strategies: The Quest for Effectiveness and the Importance of Constitutional Principles' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 8 June 2001), 6; Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*, Commonwealth Director of Public Prosecutions, <www.cdpp.gov.au/cdpp/>, 16 November 2001; Australian Taxation Office, *ATO Prosecution Policy*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/index.htm>, 9 March 2001.

14 J Black, 'Managing Discretion' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001), 13; R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) Oxford University Press, Oxford, 99.

15 J Black, 'Managing Discretion' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001), 13.

16 Ibid, 13.

17 Ibid, 11.

18 Ibid, 11.

case of a contravention of the law and little or no contact between the offender and the enforcer, prosecution would probably result. However, if regulatory contact occurs on a regular basis, it is more likely that a relationship directed towards compliance will develop between the regulator and the regulated.[19]

Capture

10.15 Where cooperative relationships exist between the regulator and the regulated, there is a risk that the two might become too close and the regulator will be 'captured'. One type of capture is where the regulator becomes the protector of the regulated industry rather than of the public interest. Regulators might become influenced by different interest groups, such as the regulated entity, political parties or consumer groups.[20] Dr Toni Makkai and Professor John Braithwaite identify three distinct forms of capture: identification with industry, sympathy with the particular problems that regulated firms confront in meeting standards, and the absence of toughness.[21]

10.16 It is outside this Inquiry's Terms of Reference to substantially address the issue of capture. However, it is the ALRC's view that, if accountability and transparency are built into enforcement decision making, certain types of capture may be less likely to occur. A published enforcement policy may be one such accountability and transparency mechanism (see discussion at para 10.62 below).

Statements of objectives

10.17 The more clearly an objective is articulated in the legislation, the easier it is to identify the likely approach of the regulator. Clear statements of the principles and purposes guiding legislation and regulators, and stated aims and objectives of regula-

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19 For example, because the administration of a licensing regime creates a continuing relationship between the regulator and the licence holder, this is a form of regulation that can lend itself to the pyramid model of escalation of penalties proposed by Braithwaite and others: for example, I Ayres and J Braithwaite, *Responsive Regulation; Transcending the Deregulation Debate* (1992) Oxford University Press, New York. However, this is not always allowed by the legislation. It has been noted that, where regulators only have access to drastic sanctions such as the cancellation of a licence, they paradoxically become almost powerless to regulate since they have no way of sanctioning the large majority of contraventions, which would justify smaller penalties. An example of this is the Australian Broadcasting Authority (ABA). The Productivity Commission commented in the context of the ABA's Commercial Radio Inquiry that under the current system of cascading sanctions, the ABA lacks powers to deal immediately with serious breaches of codes of practice: Productivity Commission, *Broadcasting*, 11 (2000), AusInfo, Canberra, 478–479. The ABA also noted the limited range of enforcement options under the *Broadcasting Services Act 1992* (Cth) in its submission to the ALRC: Australian Broadcasting Authority, *Submission CAP 23*, 14 October 2002.

20 R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) Oxford University Press, Oxford, 36.

21 T Makkai and J Braithwaite, 'In and Out of the Revolving Door: Making Sense of Regulatory Capture,' (1995) 1 *Journal of Public Policy* 61 in R Baldwin, C Scott and C Hood (eds), *A Reader on Regulation* (1998) Oxford University Press, Oxford, 173.

tors, help to signal their approach, indicating the areas of responsibility they consider most important and the methods they intend to rely on most.

10.18 Where these objectives are not set out in legislation, statements of regulators' objectives may be found elsewhere such as in annual reports, policy documents and general information contained on websites, including speeches and media releases. Some examples of regulators' statements of objectives follow:

- Whereas the *Trade Practices Act 1974* (Cth) (TPA) expresses its objectives in rather general terms — '[t]he object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'[22] — the Australian Competition and Consumer Commission (ACCC) in its *Corporate Plan and Priorities 2001–02* describes its primary responsibility as ensuring 'individuals and businesses comply with competition, fair trading and consumer protection laws' by using a wide range of 'responses' such as 'action through the courts, administrative settlements, education and consultation'.[23]

- The *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) sets out the Australian Securities and Investments Commission (ASIC) objectives in general terms.[24] The aims set out in the ASIC Act direct the organisation towards education, licensing and strategic enforcement action. Statements in speeches by ASIC Commissioners give a somewhat clearer idea of how ASIC seeks to achieve these objectives:

  > We use the right regulatory tool to achieve the best outcome. … Education and consumer alerts … may be more effective and reach a wider audience more cheaply and effectively, than a conviction or civil order … we will take strong and decisive action to enforce the law when we need to.[25]

- Income tax legislation provides no specific outline of purpose, only a general statement of the subject matter in the long title of the *Income Tax Assessment Act 1997* (Cth), which describes itself as 'An Act about income tax and related matters'. On its website, the Australian Taxation Office (ATO) describes its function as follows:

  > The Australian Taxation Office (ATO) manages and shapes the revenue systems that give effect to social and economic policy and fund services for Australians … The ATO's main role is to administer legislation for taxes and excise (other than customs

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22 *Trade Practices Act 1974* (Cth), s 2.

23 Australian Competition and Consumer Commission, *Corporate Plan and Priorities 2001–02* (2001) ACCC, 5.

24 *Australian Securities and Investments Commission Act 2001* (Cth), s 1(2). They include maintaining, facilitating and improving the performance of the financial system; promoting the confident and informed participation of investors and consumers in the financial system; and receiving and processing information and where necessary disseminating information as quickly as possible to the public; and enforcing and giving effect to the laws that confer functions and powers on it.

25 J Segal, 'ASIC Issues: An Update on the Last 12 Months' (Paper presented at Insurance Council of Australia, 10 August 2000).

> duty). The ATO also works with other government departments on policy matters relating to taxation and excise. When policies are determined by the federal Government, the ATO instructs parliamentary counsel in the preparation of necessary legislation …
>
> The ATO's efforts are guided by the Taxpayers' Charter, the related compliance model, the ATO Strategic Statement and the current agency agreements, as well as the business plans developed by individual areas. The ATO also asks the community to evaluate its performance in achieving agreed standards of service as set out in the Taxpayers' Charter and agency agreements.[26]

- The ATO's current Strategic Statement outlines the ATO's general purpose, vision and guiding principles.[27] The ATO Compliance Model and the Taxpayers' Charter together provide the philosophies that guide the ATO's operations.[28] The ATO Compliance Model would appear to follow a pyramid of enforcement. In its submission to the ALRC, the ATO gave examples where the compliance model shaped the ATO's approach to achieving compliance. One example was the ATO's educative approach to the implementation of the new tax system (GST). This was contrasted with methods for dealing with serious non-compliance, which employ a planned 'sanctions' strategy prior to imposing penalties.[29] The ATO stated that:

  > In line with the escalation process it is envisaged that sanctions will be planned to begin at the administrative level and progress through to criminal law sanctions as the extent of serious non-compliant behaviour escalates.[30]

- The ATO also noted its Co-operative Compliance Model, which is an adaptation of the ATO Compliance Model for use with large businesses.

Preliminary view

10.19 In DP 65 the ALRC sought to evaluate whether and how statements of objectives — whether informal or statutory — affect regulatory practice. The ALRC asked whether statements of objectives were helpful and if objectives could be framed in realistic and pragmatic terms so that they transcend general principles.[31]

Consultations and submissions

10.20 The ATO supported statements of objectives as they are helpful in guiding staff in setting priorities and dealing with clients. They noted that objectives can be

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26 <www.ato.gov.au/content.asp?doc=/content/Corporate/18064.htm>, 24 July 2001.
27 Australian Taxation Office, *Submission CAP 16*, 17 September 2002.
28 Ibid.
29 Ibid.
30 Ibid.
31 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Question 4–1.

framed in realistic and pragmatic terms so that they are more than simply general principles and that ATO staff are guided by various statements of objectives and philosophies, the most significant of which are:

- the ATO's Strategic Statement;
- the Taxpayers' Charter;[32] and
- the ATO Compliance Model.[33]

10.21 Andrew Hudson submitted that a statement of objectives would be helpful.[34] Dr Karen Yeung also supported statements of enforcement policy and objectives, emphasising the need for accountability and transparency in the exercise of discretionary governmental power.[35]

10.22 Environment Australia stated that the statements of objectives contained in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) are directly reflected in regulatory practice. The objects of the EPBC Act are set out in the Act (section 3) and these provide high-level guidance for regulatory practice in Environment Australia.[36]

> More broadly, the objects are incorporated into a number of decision-making and procedural elements of the Act and are an important element in administration of provisions of the Act generally and minimise the risk of unintended or counter-productive outcomes. The existence and use of objects mean that decision-making is more likely to be consistent with the policy intent of the legislation.[37]

Regulators' culture and practices

10.23 As enforcement action taken by regulators is required to fit into the legal framework permitted by legislation, so too are regulators required to conform to other standards. As regulatory decisions involve the exercise of public power affecting the community and individuals, they should be made in a manner which conforms with principles which have been described as political morality or constitutional values.[38] These principles include requiring a regulator to act in a manner which is legal, consis-

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32 For discussion of the Taxpayers' Charter see ch 15 at para 15.79–15.80 and 15.183.
33 Australian Taxation Office, *Submission CAP 16*, 17 September 2002.
34 A Hudson, *Submission CAP 19*, 8 October 2002.
35 K Yeung, *Submission CAP 20*, 9 October 2002. See further below at para 10.62.
36 For example, in deciding whether to proceed with civil or criminal proceedings under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), Environment Australia considers whether the likely outcome will be consistent with, and will further, the objects of the Act.
37 Environment Australia, *Submission CAP 26*, 24 October 2002. See further below at para 10.57.
38 K Yeung, 'Negotiated Compliance Strategies: The Quest for Effectiveness and the Importance of Constitutional Principles' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 8 June 2001), 12; J Black, 'Managing Discretion' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001), 16; T Makkai and J Braithwaite, 'Procedural Justice and Regulatory Compliance' (1996) 20(1) *Law and Human Behavior* 83, 84.

tent, rational, proportionate, transparent, accountable and procedurally fair. These principles are discussed in detail in chapter 14 and chapter 15.

Enforcement policies

10.24 This section looks at the current practice of Australian federal regulators in relation to enforcement policies, whether they be criminal prosecution policies or policies that apply to both criminal and non-criminal enforcement mechanisms.

10.25 As will be seen, some of these policies outline the regulator's enforcement approach or targeting priorities, others detail the various enforcement tools available to the regulator. Some enforcement policies set out the criteria that may guide a regulator's discretion to pursue a particular enforcement action, such as the imposition of a quasi-penalty. A number of other policies detail other matters such as the choice of penalty and the regulator's relationship with enforcement agencies such as the DPP.

10.26 The ALRC has chosen to focus on the policies outlined below as they reflect a range of enforcement approaches, were publicly available and illustrate the varied content of enforcement policies and statements utilised by federal regulators in Australia.

Prosecution Policy of the Commonwealth

10.27 The Prosecution Policy of the Commonwealth[39] is discussed in greater detail in chapter 9. The focus of this chapter is how the Prosecution Policy outlines the DPP's prosecution philosophy, criteria governing the decision to prosecute and choice of penalty issues.

10.28 The introduction to the Prosecution Policy cites a 1981 Report by the UK Royal Commission on Criminal Procedure which stated that the prosecution system should be judged by the broad standards of fairness, openness and accountability, and efficiency.[40] The introduction further notes that these standards are 'useful standards for assessing the operation of the Commonwealth prosecution system in Australia; they also afford worthy objectives for the DPP'. Such standards should also guide regulators who have the legislative power to commence civil penalty proceedings or impose quasi-penalties for non-criminal contraventions.

10.29 Decisions to initiate criminal proceedings are made by the DPP in accordance with the Prosecution Policy. The Prosecution Policy outlines various criteria governing the decision to prosecute and also lists a number of factors which 'must clearly not' in-

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39 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*, Commonwealth Director of Public Prosecutions, <www.cdpp.gov.au/cdpp/>, 16 November 2001.

40 Cited in ibid, para 1.4.

fluence a decision whether or not to prosecute.[41] These criteria are outlined in chapter 9 at para 9.3–9.6.

10.30 The Prosecution Policy also provides a detailed list of questions to be considered when evaluating the quality of the evidence.[42] It also outlines the factors to be considered in determining whether the public interest requires a prosecution, and states that the factors should be applied and weighted according to the particular circumstances of each case.[43] The availability of an alternative enforcement mechanism is a particularly important public interest consideration.[44] These factors are outlined in chapter 9 at para 9.4.

10.31 The Prosecution Policy states that the key consideration in deciding to initiate criminal proceedings is to ensure that the charge adequately reflects the nature and extent of the criminal conduct on the evidence, and will provide the court with an appropriate basis for sentencing.[45] Ordinarily, the charge will be the most serious available, subject to issues such as available defences and the strength of the evidence.[46] Other considerations influencing the choice of charges are that:

- charges should not be laid to provide scope for subsequent charge-bargaining; and
- charges should be laid under the provisions of a relevant specific Act (where applicable) rather than under the general provisions of the *Crimes Act 1914* (Cth).[47]

10.32 In DP 65 the ALRC noted that the Prosecution Policy is of particular interest as a possible model for enforcement policies and guidelines structuring the use of non-criminal penalties. The ALRC acknowledges that the Prosecution Policy is directed at criminal penalties and procedures that are specific to the criminal process. Further, the role of the DPP as an agency that makes decisions whether to prosecute independently of those who are responsible for an investigation is quite different from the role of many federal regulators, who combine the roles of investigating and commencing civil penalty proceedings or imposing administrative or quasi-penalties.

10.33 However, some of the topic areas covered in the Prosecution Policy, and the style of the Prosecution Policy could inform the development of enforcement policies in relation to civil penalties and quasi-penalties (see discussion below at para 10.96–10.101).

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41 Ibid, para 2.13.
42 Ibid, para 2.7.
43 Ibid, para 2.10.
44 Ibid, para 2.12.
45 Ibid, para 2.18.
46 Ibid, para 2.19.
47 Ibid, para 2.20–2.21.

ATO Prosecution Policy

10.34 By arrangement with the DPP a few regulators conduct their own summary prosecutions, including the ATO. In carrying out this task, the ATO utilises a Prosecution Policy.[48] This document is an informal policy statement and has no force in law.[49]

10.35 The ATO Prosecution Policy outlines the ATO's approach to prosecutions and interpretation of offence provisions in legislation.[50] However, the decision to prosecute under most of this legislation is one for the DPP in accordance with the Prosecution Policy of the Commonwealth.

10.36 The ATO Prosecution Policy sets out the ATO's regulatory philosophy — the premise of taxpayers acting honestly and voluntarily complying with their taxation obligations.[51] It also outlines a number of principles which the ATO will have regard to when deciding whether prosecution action is the most appropriate manner in which to deal with non-compliance. These principles include that:

- Taxpayers are expected to organise their taxation affairs to ensure they meet their taxation obligations;[52]
- When deciding the most appropriate manner in which to deal with outstanding taxation obligations, the Commissioner will give considerable weight to the taxpayer's compliance. This includes:
    - the taxpayer's compliance history and attitude to compliance, and the overall compliance risk as demonstrated by the taxpayer's actions or inaction;

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48 This document is part of a set of documents that guide prosecution activity within the ATO. Other relevant documents include: Prosecution Policy of the Commonwealth, ATO Compliance Model, Taxpayers' Charter, DPP Tax Manual, Fraud Control Policy of the Commonwealth, Liaison Guidelines between the DPP and the ATO, Working Guidelines between the AFP and the ATO, Withdrawal Guidelines and internal documents.

49 Australian Taxation Office, *ATO Prosecution Policy*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/index.htm>, 9 March 2001, para 1.1.9. In *Bryant v Deputy Commissioner of Taxation* (1993) 25 ATR 419 Whitlam J briefly considered the status of the *ATO Prosecution Policy*, which at that time was made as an Income Tax Ruling. The applicant in that case submitted that s 10 of the *Freedom of Information Act 1982* (Cth) (which provides that unpublished guidelines are not to prejudice the public) meant that, as a corollary, published guidelines could be regarded as laying down 'procedures required by law to be observed' within the meaning of s 5(1)(b) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Whitlam J stated that he failed to see how s 10 of the *Freedom of Information Act 1982* (Cth) could elevate such guidelines to the status of law.

50 Legislation administered by the Commissioner of Taxation, and the *Crimes Act 1914* (Cth), *Criminal Code Act 1995* (Cth), *Crimes (Taxation Offences) Act 1980* (Cth), *Financial Transactions Reports Act 1988* (Cth) and other Commonwealth legislation administered by other agencies.

51 Australian Taxation Office, *ATO Prosecution Policy*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/index.htm>, 9 March 2001, para 2.2.1.

52 See ibid, para 2.3.1–2.3.2. 'A Taxpayer's attitude to compliance can, in part, be gauged from whether the taxpayer has satisfied, or has attempted to satisfy, this principle': Australian Taxation Office, *ATO Prosecution Policy*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/index.htm>, 9 March 2001, para 2.3.2.

- the likelihood that the respective compliance improvement strategy will influence the taxpayer to change his or her attitude to compliance within a reasonable period of time;
- whether any of the various strategies are an appropriate response to the taxpayer's actions or compliance attitude; and
- the seriousness of the taxpayer's conduct.[53]

- Prosecution is not seen as an end in itself. It is a means of encouraging or securing compliance, not only by a specific taxpayer but also by the wider taxpaying community generally.[54]
- A matter will not proceed to prosecution where an administrative penalty by itself, or some other administrative response, is appropriate.[55]
- A prosecution should not be instituted or continued unless there is sufficient admissible evidence likely to prove that an offence has been committed by the taxpayer. There must a reasonable prospect of a conviction on that evidence.[56]
- A prosecution should not be instituted or continued unless it is consistent with the Prosecution Policy of the Commonwealth and in the public interest.[57]
- The ATO will maintain appropriate professional standards in prosecution work.[58]
- The ATO will not include terms in settlement agreements that prosecution action will not be taken against any particular taxpayer. Only the DPP has statutory authority to give immunity from prosecution.[59]

10.37 In addition to the general principles outlined above, the ATO Prosecution Policy outlines some of the principles that will guide its decision to prosecute specific offences under tax legislation. The types of offences addressed include false or misleading statements, falsifying or concealing identity, obstruction, sales tax offences, and goods and services tax offences.[60] For each of these types of offences, the ATO Prosecution Policy gives an overview of the offence and then outlines the ATO's policy in relation to it.[61] For example, the ATO Prosecution Policy states in relation to false or misleading statements that a number of factors will be relevant when deciding whether to prosecute, including the amount of revenue involved; the degree of negli-

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53 Australian Taxation Office, *ATO Prosecution Policy*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/index.htm>, 9 March 2001, para 2.33–2.3.4.
54 Ibid, para 2.3.5.
55 Ibid.
56 Ibid, para 2.3.6.
57 Ibid, para 2.3.7.
58 Ibid, para 2.3.8.
59 Ibid.
60 Ibid, see ch 5–20.
61 See, for example, ibid, para 9.1.1–9.1.6.

gence, recklessness, or knowledge; the degree of dishonesty; personal circumstances; compliance history with taxation laws; the degree of cooperation; and the professional or educational background of the person.[62]

10.38 The ATO Prosecution Policy also gives examples of how the ATO may exercise its prosecutorial discretion in relation to specific offences in particular situations.[63]

ATO Code of Settlement Practice

10.39 The ATO has a Code of Settlement Practice, which provides guidelines on the settlement of taxation disputes, and describes the legal basis for settlements under the Commissioner's general administrative powers.[64] The Code states that, wherever possible, agreement should be reached in respect of the substantive issues before officers consider penalties or interest. The Code also states that the ATO will litigate in matters such as clear-cut contraventions of established and articulated ATO rulings, issues relating to tax avoidance schemes, and where it is in the public interest to have judicial clarification of an issue.[65]

CASA Enforcement Manual

10.40 The Civil Aviation Safety Authority (CASA) has published a detailed *Enforcement Manual*.[66] Chapter 1 of the *Enforcement Manual* sets out the underlying philosophy of CASA's enforcement policy which includes:

- CASA is open and consistent in its enforcement activities to win the confidence and trust of both the aviation industry and the public;
- consistency can only be achieved if decisions on enforcement are being made (with the advice of the officers and managers in the field) by a limited number of centralized managers directly responsible to the Director …
- if enforcement action is considered necessary and is to be taken against those who put aviation safety at risk, the primary consideration (unless there is an immediate threat to air safety) will be that they receive procedural fairness, which is the right for their case to be heard by an impartial decision maker.

10.41 The *Enforcement Manual* addresses the tools available to CASA when taking enforcement action: counselling/warning; remedial training; requiring a person to un-

62 Ibid, para 6.3.1.
63 See, for example, ibid, para 6.7.1.
64 Australian Taxation Office, *Code of Settlement Practice in Respect of Taxation Liabilities*, Australian Taxation Office, <www.ato.gov.au/content.asp?doc=/content/Professionals/Code_Settlement.htm>, 24 May 2001.
65 Ibid, ch 4. See also ch 16 of this Report.
66 Civil Aviation Safety Authority, *Enforcement Manual*, Civil Aviation Safety Authority, <www.casa.gov.au/manuals/htm/enf/enf.htm>, 18 September 2001. A similarly detailed document is the US Department of Justice, *Antitrust Division Manual* published on the internet at <www.usdoj.gov.au>.

dergo an examination; variation, suspension or cancellation of certificates and authorisations; issue of infringement notices; and prosecution action.[67] CASA divides these tools into three categories: informal enforcement action,[68] civil enforcement action[69] and criminal enforcement action.[70]

10.42 Chapter 2 of the *Enforcement Manual* sets out the graduated enforcement approach adopted by CASA and outlines general principles that will guide the use of each of these tools. For example, in relation to infringement notices:

> Infringement Notices may be issued in situations where informal enforcement action would be appropriate but the act or omission of the non-compliant person was deliberate or the person attempted to conceal the non-compliance from CASA, where none of the circumstances set out in paragraph 2.4.2 are present, and where there is sufficient evidence of a breach of the law to sustain a prosecution.[71]

10.43 The *Enforcement Manual* also sets out the factors which should not influence the decision to take enforcement action,[72] enforcement processes and decision-making considerations (including enforcement process flow charts),[73] considerations relevant to conducting an investigation, defences, mitigating or aggravating circumstances, and considerations relevant to decisions to discontinue enforcement action. Importantly, the *Enforcement Manual* addresses multiple enforcement options and referrals to the DPP.[74]

10.44 In *Paggi (trading as Paggi's Aviation) and Civil Aviation Safety Authority*,[75] the AAT considered CASA's *Enforcement Manual*. The applicant submitted that CASA had not followed its own policy of a graduated response and had offered no

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67 Each of these enforcement tools (and their use and purpose) is detailed in separate chapters in Part 2: Civil Aviation Safety Authority, *Enforcement Manual*, <www.casa.gov.au/manuals/htm/enf/enf.htm>, 3 May 2002, ch 4–8.

68 Informal enforcement action includes any action that does not have the potential to go before a court or review tribunal: counselling, remedial training, and requiring a person to undertake an examination.

69 Civil enforcement action refers to any action where there is a potential to have the matter go before a civil court or review tribunal: enforceable voluntary undertakings, and variation, suspension and cancellation of Air Operator's Certificates and civil aviation authorisations.

70 Criminal enforcement action refers to any action where there is a potential to have the matter go before a criminal court: infringement notices and prosecution.

71 Civil Aviation Safety Authority, *Enforcement Manual*, <www.casa.gov.au/manuals/htm/enf/enf.htm>, 3 May 2002, para 2.4.1. Paragraph 2.4.2 sets out the circumstances where infringement notices are not appropriate: 'Infringement notices should not be issued in situations where: the contravention is part of a pattern of contraventions committed by the person; the contravention is intentional and is serious; the offender encouraged others to breach the safety rules; the contravention led to a serious accident or otherwise seriously compromised safety; or the contravention seriously endangers lives. These sorts of contraventions should normally be dealt with by criminal prosecution'.

72 Based on Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*, Commonwealth Director of Public Prosecutions, <www.cdpp.gov.au/cdpp/>, 16 November 2001, para 2.13.

73 These matters are too detailed to consider here. See Civil Aviation Safety Authority, *Enforcement Manual*, <www.casa.gov.au/manuals/htm/enf/enf.htm>, 3 May 2002, ch 2–3.

74 Civil Aviation Safety Authority, *Enforcement Manual*, Civil Aviation Safety Authority, <www.casa.gov.au/manuals/htm/enf/enf.htm>, 18 September 2001, para 2.9. See ch 11 on multiple penalties and proceedings.

75 *Paggi (trading as Paggi's Aviation) and Civil Aviation Safety Authority* [2000] AATA 348.

counselling or education to the applicant to bring him into compliance with the *Civil Aviation Act 1988* (Cth). The AAT stated that this was true. However, it impliedly acknowledged that the regulator must be allowed a flexible enforcement approach:

> It was open for the respondent to try a more educational approach but in this case the early discovery that the applicant had changed a propeller and carried out other significant illegal maintenance persuaded it to take the more drastic response … CASA has been reorganised in an attempt to tighten up and increase the effectiveness of its regulation of air safety.[76]

AUSTRAC Compliance and Enforcement Policy

10.45 The Australian Transaction Reports and Analysis Centre (AUSTRAC) has a relatively brief *Compliance and Enforcement Policy.*[77] The Policy sets out AUSTRAC's range of compliance and enforcement powers including powers of inspection, issue of guidelines to cash dealers about their obligations under the *Financial Transaction Reports Act 1988* (Cth) (FTRA) and Regulations, and injunctions under the FTRA. AUSTRAC can also seek relief under the *Judiciary Act 1903* (Cth) and refer a matter to the AFP for investigation or directly to the DPP.

10.46 The Policy states that AUSTRAC's compliance and enforcement approach has three aims:

- to ensure compliance with the FTRA by all cash dealers, solicitors and members of the general public;
- an organised and effective process of education, consultation with and assistance to cash dealers, solicitors and members of the public, in order to ensure that they are able to more effectively comply with the legislation; and
- a consistent framework for decisions by AUSTRAC to refer non-compliance for investigation and prosecution or to take other enforcement action.[78]

10.47 The emphasis of the *Compliance and Enforcement Policy* is AUSTRAC's educative and remedial approach to regulation.[79] For example, AUSTRAC sets out that it will consider all reasonable proposals for a rectification program where non-compliance is found. In some circumstances, however, this will not be appropriate: for

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76 Ibid, para 81.

77 Australian Transaction Reports and Analysis Centre, *Compliance and Enforcement Policy*, <www.austrac.gov.au/text/cash_dealer/enforcement_policy/index.htm>, 7 May 2002. Documents of similar detail are used by various regulators in overseas jurisdictions.

78 Ibid, para 1.3.

79 See for example, ibid, 2 and 3.

example, where non-compliance is connected to other serious conduct or is part of a history of non-compliance.[80]

10.48 The *Compliance and Enforcement Policy* also sets out a three-step process for dealing with non-compliance.[81] Step 1 involves AUSTRAC contacting a person who has not complied with the law to outline their non-compliance and suggest compliance measures. Where a cash dealer fails to act upon this initial contact within an acceptable time frame, the matter will be escalated to Step 2. Step 2 involves the issuing of a notice.[82] Step 3 involves contact by senior AUSTRAC officers to advise that further failure to comply within a specified period of time will result in referral to the AFP for investigation with a view to prosecution. The Policy outlines when AUSTRAC may proceed immediately to Step 3 or referral to the AFP and briefly sets out the factors relevant to AUSTRAC taking enforcement action rather than prosecution.[83]

ACCC Corporate Plan and Priorities 2001–02

10.49 In 2002 the ACCC published *ACCC Corporate Plan and Priorities 2002-03*.[84] This document sets out the ACCC's role and mission, describing its values, commitments and responsibilities, and priorities for 2002–03. The publication generally states that the ACCC's primary responsibility is to ensure individuals and businesses comply with competition, fair trading and consumer protection laws using a wide range of responses such as taking court action, administrative settlements, education and consultation.[85]

10.50 The *ACCC Corporate Plan and Priorities 2002–03* also sets out a number of methods utilised by the ACCC to achieve compliance. These include:

- responding quickly to allegations of breaches of competition, fair trading and consumer legislation;
- seeking appropriate remedies when there is a breach of the law;
- publicising litigation and education activities;
- liasing with and informing business and consumer associations about the law so that they can, in turn, inform their members and customers.[86]

10.51 The document also sets out how the ACCC measures the performance of its compliance strategies.[87]

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80 Ibid, para 3.1.
81 Ibid, para 3.3.
82 The Policy sets out the content of the notice: ibid, para 3.3.
83 Ibid, para 4.2.
84 Australian Competition & Consumer Commission, *Corporate Plan and Priorities 2002/03*, ACCC, 12 November 2002.
85 Ibid, 4.
86 Ibid, 7.
87 Ibid, 8.

10.52 In 1999 the ACCC published *Making Markets Work — Directions and Priorities*.[88] This document is similar to *Corporate Plan and Priorities 2001–02*; however, it provides more detail on the ACCC's enforcement approach. The publication generally sets out the ACCC's regulatory philosophy, which is event-driven (reacting to the market place), the development of strategies to pre-empt and prevent market failure, and securing compliance with the *Trade Practices Act 1974* (Cth) by means of persuasion, education and litigation.[89]

10.53 *Making Markets Work* also outlines the tools available to the ACCC in addition to litigation including administrative settlement, compliance programs and adjudication.

> Frequently the most appropriate response to a particular market problem is a combination of these tools in an integrated strategy, For example, completed litigation invariably triggers information and liaison activities to maximise its deterrent and educative effect.[90]

10.54 The publication also sets out factors that influence the ACCC's selection of matters for enforcement:

> The Commission is necessarily selective in its choice of enforcement actions. It must give priority to action that is likely to have the greatest positive influence on compliance generally and, where possible, will achieve redress or compensation for interests adversely affected.[91]

10.55 In broad terms, the ACCC's selection of enforcement actions is influenced by whether a particular matter involves:

- apparent blatant disregard of the law;
- a history of previous contraventions of the law including overseas contraventions;
- significant public detriment and/or a significant number of complaints;
- the potential for action to have worthwhile educative or deterrent effect;
- a significant new market issue; and a likely outcome that would justify the use of resources.[92]

10.56 *Making Markets Work* also sets out the specific priorities and selection criteria the ACCC would apply to anti-competitive conduct, consumer protection, mergers,

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88 Australian Competition & Consumer Commission, *Making Markets Work — Directions and Priorities* (1999), ACCC Publishing Unit, Canberra.
89 Ibid, 6.
90 Ibid, 6.
91 Ibid, 7.
92 Ibid, 7.

small business issues, adjudication, and price changes related to the New Tax System.[93]

Environment Australia Compliance and Enforcement guidelines

10.57 Environment Australia uses an informal guideline entitled *Compliance and Enforcement*.[94] This document is a brief policy statement on the use of injunctions, environmental audits, civil and criminal penalties and remediation of environmental damage. In its submission to the ALRC, Environment Australia noted that it was currently developing guidelines for the EPBC Act which will set out the criteria and principles to be taken into account when determining when administrative, civil and criminal remedies are appropriate.[95]

Customs and Infringement Notice Guidelines

10.58 The Australian Customs Service (ACS) now uses *Guidelines for Serving Infringement Notices*.[96] These Guidelines set out the process for serving notices, how to exercise discretion, the content of an infringement notice, extending time for payment and the withdrawal of an infringement notice. Further information includes the elements of offences and details in relation to the calculation of penalties under the infringement notice scheme. Whereas the majority of enforcement policies surveyed by the ALRC are made as informal policies, the ACS infringement notice guidelines are made as a disallowable instrument.[97] These guidelines are discussed in detail in chapter 12 of this Report.

Enforceable undertaking policies

10.59 Both ASIC and the ACCC provide guidance on the use of enforceable undertakings including acceptable and unacceptable terms and the consequences of non-compliance with an undertaking.[98] The ACCC policy is set out in a guideline called 'Section 87B of the Trade Practices Act',[99] ASIC's policy is set out in one of their Practice Notes.[100] See the detailed discussion of these policies in chapter 16 of this Report.

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93 Ibid, 8–14.

94 Environment Australia, *Compliance and Enforcement*, Environment Australia, <www.ea.gov.au/epbc/compliance/index.html>, 22 May 2001.

95 Environment Australia, *Submission CAP 5*, 22 January 2002.

96 Australian Customs Service, *Guidelines for Serving Infringement Notices, Customs Act 1901 Part XIII – Division 5*, 1 June 2002.

97 See discussion of guidelines made as disallowable instruments in ch 6.

98 CASA provides similar guidance in Civil Aviation Safety Authority, *Enforcement Manual*, Civil Aviation Safety Authority, <www.casa.gov.au/manuals/htm/enf/enf.htm>, 18 September 2001, ch 6.

99 Australian Competition & Consumer Commission, *Section 87B of the Trade Practices Act: A Guideline on the Australian Competition and Consumer Commission Use of Enforceable Undertakings*, <www.accc.gov.au/pubs/Publications/Legislation/s87BTPA.pdf>, 23 October 2001.

100 Australian Securities & Investments Commission, *Practice Note 69: Enforceable Undertakings*, Australian Securities & Investments Commission, <www.cpd.com.au/asic/pn/>, 20 December 2001.

The value of regulators' enforcement policies

10.60 Submissions received by the ALRC as well as the ALRC's own research, and consultations, have identified a number of benefits of regulators developing, publishing and implementing enforcement policies. These benefits include: improving the understanding of the regulated community as to what compliance requires, accountability and transparency, consistency, guidance to regulator staff, a coordinated approach with other regulators and agencies, and the accumulation of expertise.

10.61 Procedural justice scholars have noted that, if the regulated community has an understanding of the rules that regulate it, it is more likely to comply with those rules.[101] Enforcement policies can assist compliance by communicating to the regulated community the purpose of penalties, the types of activity that will attract certain enforcement action and how the regulator will exercise its enforcement discretion. Furthermore, public availability can promote deterrence by guiding the regulated community in complying with predictable standards.

10.62 An enforcement policy can be an effective tool in achieving greater transparency and accountability. Dr Karen Yeung submitted to the ALRC that accountability and transparency in the exercise of discretionary governmental power is essential in democratic societies.

> This is particularly true of the discretion to enforce the law, because it involves the bringing to bear of the coercive power of the state against the citizen. Accordingly, statements of enforcement policy/objectives by all governmental agencies entrusted with the task of enforcing the law (whether regulatory or otherwise) ought to be encouraged and promoted.[102]

10.63 As was noted in DP 65, discretionary decisions to target, investigate or take penalty proceedings against certain entities, or classes of entities, are influenced by many considerations.[103] Unequal treatment, or selective enforcement, can result in uncertain expectations and distrust among the regulated.[104] Inconsistency in targeting decisions can also lead to perceptions of unfairness.

10.64 Enforcement policies have the capacity to encourage consistency in enforcement decision making and to explain apparent inconsistencies. It was noted in one consultation that there was scope for a 'routinisation' of penalties in the face of considerable inconsistency at the most fundamental level — the choice of which pen-

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101 See, for example, T Makkai and J Braithwaite, 'Procedural Justice and Regulatory Compliance' (1996) 20(1) *Law and Human Behavior* 83.

102 K Yeung, *Submission CAP 20*, 9 October 2002.

103 See Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, ch 10.

104 P Finkle and D Cameron, 'Equal Protection in Enforcement; Towards More Structured Discretion' (1989) 12(1) *Dalhousie Law Journal* 34, 35.

alty scheme to pursue.[105] It was observed in another consultation that enforcement policies will assist a consistent approach to penalties where matters arise in different state jurisdictions.[106]

10.65 Where regulators are faced with a choice of enforcement response for the same conduct, enforcement policies can assist in choosing the appropriate response. The choice between criminal, civil and quasi-penalties may necessitate the regulator adopting a coordinated approach with other regulators or an independent enforcement agency such as the DPP. As outlined earlier in this Report, numerous federal regulators already utilise policies that set out criteria involved in the decision to pursue one or more types of enforcement action that include statements about their relationship with the DPP.[107]

10.66 In many cases legislation provides some general guidance as to the considerations that should be taken into account when choosing the appropriate penalty. For example, s 65-2 of the *Aged Care Act 1997* (Cth) sets out a number of matters that the Secretary must consider when deciding whether it is appropriate to impose sanctions on an approved provider for non-compliance with the Act.

10.67 However, elsewhere the legislative mandate may be vague. For example, prior to many of the CLERP reforms, the relationship between criminal liability and civil penalties was not clearly drawn under the *Corporations Law*.[108] Under the pre-CLERP *Corporations Law*, some ASIC staff reported that they were hesitant to use civil penalty provisions:

> [T]he uncertainty of what the directors' duties provisions actually mean has sort of flowed into our uncertainty about running a civil penalty case as well.[109]

10.68 It was observed in one consultation that some agencies can be reluctant to prosecute because of a lack of experience and knowledge.[110] The development of enforcement policies may encourage regulators to adopt a particular and coordinated enforcement approach. Furthermore, by setting out the range of regulatory tools available to a regulator, an enforcement policy could also develop the confidence in a regulator to use those enforcement tools.[111] Obviously, where enforcement policies are used to provide guidance to a regulator's staff, a regulator will need to provide training to staff

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105 Australian Compliance Professionals Association, *Consultation*, Brisbane, 15 February 2001.
106 Australian Government Solicitor, *Consultation*, Sydney, 27 August 2002.
107 See ch 9.
108 See discussion of these provisions in ch 11.
109 Cited in G Gilligan, H Bird and I Ramsay, *Regulating Directors' Duties — How Effective are the Civil Penalty Sanctions in the Australian Corporations Law?* (1999), Centre for Corporate Law and Securities Regulation, Melbourne, 51.
110 Australian Government Solicitor, *Consultation*, Sydney, 27 August 2002.
111 David Clark has noted that informal policies, that are consistent with legislation, will be appropriate when the statutory mandate is so vague that administrators are genuinely perplexed as to what they must do. Administrators may choose to issue more detailed internal guidelines to operationalise or make more concrete legal standards: see D Clark, 'Informal Policy and Administrative Law' (1997) (12) *Australian Institute of Administrative Law Forum* 30, 32–33 and ch 6 of this Report.

who will make decisions pursuant to those guidelines to ensure that they are familiar with the legislation and the policies.[112] See Recommendation 6–6.

10.69 An enforcement policy can represent the accumulation of agency expertise in, and approach to, enforcement. The ALRC's survey of numerous regulator's websites, journals, newspapers and other publications has revealed that regulators make statements about their enforcement approach and proposed targets in various ways (see above at para 10.18). Rather than relying on statements of policy in various mediums and publications, the ALRC sees value in regulators developing a central policy where statements about enforcement approach can be accessed by both the regulated community and the regulator's staff.

10.70 It is important regulators have flexibility as to which enforcement approach to adopt. Some of the consultations and submissions received by the ALRC stressed that regulators need flexibility and that each case should be dealt with on its own as a discrete and individual matter.[113]

10.71 The ALRC also recognises that not all information about enforcement is appropriate for publication. In DP 65 the ALRC noted that there are sometimes good reasons for not providing information on, for example, targeting policy.[114] This issue was also raised in consultations and submissions.

10.72 The ALRC has learned that many federal regulators use internal enforcement policies and manuals that are not available to the public. The ALRC acknowledges the need for some regulators to develop enforcement policies that are not publicly available. However, the ALRC would emphasise that these internal enforcement policies should not be inconsistent with publicly available enforcement policies.

Preliminary view

10.73 As noted above, in DP 65 the ALRC considered the role of the DPP and the Prosecution Policy of the Commonwealth in relation to federal regulators and suggested some options for reform. The alternative proposals for reform were:

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112 See ch 6 and 14.

113 Australian Corporate Lawyers Association, *Consultation*, Melbourne, 26 February 2001; Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 12–13.

114 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, para 7.109. The ALRC also acknowledged that these same considerations can apply to policies to not notify of a penalty decision: see Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, para 7.90; *Norwest Holst Ltd v Secretary of State for Trade* [1978] 1 Ch 201; and Northrop J in *Sixth Ravini Pty Ltd v Deputy Commissioner of Taxation* (1985) 85 ATC 4307.

- Uniform guidelines should be developed for adoption by all regulators structuring the use of penalties for non-criminal regulatory contraventions and their relationship with criminal referrals to the DPP; or

- Alternatively, all regulators with penalty powers should individually develop customised guidelines structuring the use of penalties for non-criminal regulatory contraventions and their relationship with criminal referrals to the DPP.[115]

10.74 As noted above, the ALRC has now divided these options for reform across two chapters. The recommendations outlined in this chapter consider the more general option of guidelines that structure the use of penalties and quasi-penalties for non-criminal contraventions in the form of enforcement policies.

Consultations and submissions

10.75 It should be noted that the consultations and submissions outlined below were not received in response to a proposal specifically relating to the development and publication of enforcement policies. However, many of those agencies and individuals that submitted to this Inquiry made comments relevant to enforcement policies.

10.76 As noted in chapter 9, the ALRC received varied responses to the Proposal in DP 65. A number of submissions did not support the first option outlined in the Proposal — the development of uniform guidelines for adoption by all regulators structuring the use of penalties for non-criminal regulatory contraventions and their relationship with criminal referrals to the DPP. Some regulators felt that, because federal legislative and regulatory regimes differ so greatly, uniform guidelines would not be appropriate.[116]

10.77 ASIC also raised the issue of flexibility — a uniform set of prescriptive guidelines applicable to all Commonwealth regulators would not leave sufficient flexibility for regulators to have regard to unique considerations, such as their statutory aims, when deciding what enforcement action to take.[117]

10.78 However, in consultation the Australian Government Solicitor (AGS) noted that some agencies do have established rules in relation to the decision to prosecute and the decision to settle. However, it was thought that there should be 'a set of overarching ground rules' and that additions could be made on an agency-by-agency basis.[118] One AGS lawyer stated that such policies would be important if matters ran in different state jurisdictions. Another AGS lawyer noted that smaller agencies can be reluctant to prosecute because of a lack of experience and knowledge.[119]

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115 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Proposal 6–1.

116 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 11; Australian Broadcasting Authority, *Submission CAP 23*, 14 October 2002, 2.

117 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 12.

118 Australian Government Solicitor, *Consultation*, Sydney, 27 August 2002.

119 Ibid.

10.79 Both Dr Karen Yeung[120] and the ATO[121] supported the use of guidelines (uniform and customised) for the use of penalties for non-criminal contraventions and their relationship with criminal referrals to the DPP.[122] Environment Australia also supported both uniform and customised guidelines. It explained how both uniform and customised guidelines could be developed and operate:

> It will be important to consult closely with regulators in this process to identify those aspects of 'generic' application — and those that would be more appropriately dealt with at the individual agency level. Guidelines need to be cast in a way that caters to the broad range of different legislative regimes, cultural and factual circumstances. It is suggested that guidance about the weighting to be given to particular issues in varying circumstances would be useful and would contribute to greater consistency and community perceptions about fairness.
>
> We consider that customized guidelines developed at the individual agency level are more of an adjunct, rather than an alternative, to uniform guidelines for use by all regulators. Customized guidelines can deal with issues at a level not appropriate for uniform guidelines — they can address specific legislative features as well as relevant cultural, community, industry and factual circumstances.[123]

10.80 In consultation with the ALRC, a lawyer from AGS suggested using the Prosecution Policy of the Commonwealth as a starting point — the guidelines could set out specific matters relevant to the decision to prosecute which would provide a reasonably clear statement as to what agencies should do with a matter.[124] Another AGS lawyer at the same consultation agreed, stating that the Prosecution Policy of the Commonwealth would be ideal as it simply provides a list of factors and is not prescriptive.[125]

10.81 Yeung commented that the Prosecution Policy of the Commonwealth

> is an extremely helpful and important statement of the principles and practice applied by the DPP in exercising its discretion to commence and maintain criminal prosecutions … The success of the DPP's Prosecution Policy illustrates that statements of objectives of this nature can be drafted in a manner which is pragmatic but nonetheless committed to key principles.[126]

10.82 ASIC, on the other hand was opposed to both uniform or customised guidelines being modelled too closely on the Prosecution Policy of the Commonwealth. It was thought that if these guidelines were based on the Prosecution Policy of the Commonwealth

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120 K Yeung, *Submission CAP 20*, 9 October 2002, 4.
121 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, 22.
122 Some officers of the Australian Government Solicitor also expressed general support for the development of guidelines: Australian Government Solicitor, *Consultation*, Sydney, 27 August 2002.
123 Environment Australia, *Submission CAP 26*, 24 October 2002, 1–2.
124 Australian Government Solicitor, *Consultation*, Sydney, 27 August 2002.
125 Ibid.
126 K Yeung, *Submission CAP 20*, 9 October 2002.

> they may concentrate too heavily on a perceived need for consistency and not sufficiently recognise the various factors which ASIC must consider when developing an enforcement response to suspected wrongdoing. This is not to say that the Prosecution Policy is not an important and valuable document. However, it is appropriate that different factors[127] be taken into account when considering civil rather than criminal enforcement and accordingly it is not appropriate that any guidelines on the use of civil and administrative penalties should be too closely based on the considerations set out in the Prosecution Policy.[128]

10.83 The second option in the Proposal — that all regulators with penalty powers should individually develop customised guidelines structuring the use of penalties for non-criminal regulatory contraventions and their relationship with criminal referrals to the DPP — received more general support.[129] ASIC emphasised the need for flexible guidelines to enable regulators to respond appropriately to contraventions on a case-by-case basis.[130]

> For instance, the guidelines should not overly restrict a regulator's ability in any given case of suspected wrongdoing to choose among the regulatory responses available to it. They should not require a regulator always to choose a particular remedy for particular types of cases. Further, if the guidelines were to extend to the use of enforceable undertakings in some or all cases, that extension should not be allowed to undermine the ability of this remedy to provide creative and tailored responses to non-criminal breaches …
>
> To the extent that the guidelines may cover the question of election between civil and administrative penalties and criminal referrals to the DPP, they should not unduly fetter the ability of an independent regulator to pursue civil and administrative remedies in appropriate cases.[131]

10.84 Proposal 6–2 in DP 65 suggested that any guidelines developed for adoption by all regulators with penalty powers, or customised guidelines developed individually by any such regulators structuring the use of penalties for non-criminal contraventions and their relationship with criminal referrals to the DPP, should be published. This Proposal gained broad support from regulators and other commentators, particularly as publication can bring greater transparency, accountability and consistency.[132]

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127 ASIC outlined a number of matters that it may consider when considering what enforcement action to take including its statutory aims, the level of sophistication of the offender, the complexity of the misbehaviour, the matter may be one of a group of similar matters, what enforcement action will have the effect of deterring a particular type of behaviour or of sending a strong message to the markets and the financial industry: Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.

128 Ibid.

129 Ibid; Australian Taxation Office, *Submission CAP 16*, 17 September 2002; Australian Broadcasting Authority, *Submission CAP 23*, 14 October 2002; Environment Australia, *Submission CAP 26*, 24 October 2002.

130 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.

131 Ibid, 12.

132 Ibid, 13; Australian Taxation Office, *Submission CAP 16*, 17 September 2002, 24; Australian Broadcasting Authority, *Submission CAP 23*, 14 October 2002, 2; K Yeung, *Submission CAP 20*, 9 October 2002, 4; Environment Australia, *Submission CAP 26*, 24 October 2002, 2; Australian Government Solicitor, *Consultation*, Sydney, 27 August 2002. See ch 9 at para 9.64–9.76 for a detailed discussion of submissions in response to this Proposal.

10.85 ASIC stated that it agreed with the Proposal. However, it was concerned about collateral challenges to enforcement decisions that could be raised by the publication:

> If the guidelines are to be published, they should not be required to be so prescriptive as to provide a basis for a variety of collateral challenges to ASIC's enforcement decisions. The persons against whom ASIC takes enforcement action are often well-resourced and represented by a team of senior legal practitioners. There have been instances where ASIC has had enforcement decisions challenged for what are essentially tactical reasons.[133]

10.86 ASIC also noted that it should retain the right to supplement any published guidelines with internal confidential policies which would not be inconsistent with the published guidelines.[134]

10.87 Environment Australia raised a similar point noting that

> there may be some material in guidelines that may need to be restricted to internal use and edited for public release, such as detailed risk weighting criteria for compliance activity, to avoid the regulated community conducting 'risk assessments' in relation to planned or existing illegal activities.[135]

10.88 In DP 65 the ALRC asked what status should attach to guidelines structuring the use of penalties for non-criminal regulatory contraventions and their relationship with criminal referrals to the DPP.[136]

10.89 Submissions from regulators agreed that the status of these guidelines should be informal non-statutory guidelines.[137] However, submissions differed as to the administrative review consequences of using such guidelines and the binding nature of these guidelines.[138]

Conclusion

10.90 The ALRC considers that regulators who administer legislation under which criminal, civil or administrative penalties may be imposed or arise should develop and publish enforcement guidelines setting out their enforcement approach.

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133 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 12. One AGS lawyer noted that claims of legitimate expectations should be avoided. The decision to prosecute and choice of penalty should not be the subject of judicial review: Australian Government Solicitor, *Consultation*, Sydney, 27 August 2002. See also ch 23.

134 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.

135 Environment Australia, *Submission CAP 26*, 24 October 2002, 2.

136 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Question 6–1.

137 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 13; K Yeung, *Submission CAP 20*, 9 October 2002, 4; Australian Taxation Office, *Submission CAP 16*, 17 September 2002, 24; Environment Australia, *Submission CAP 26*, 24 October 2002.

138 See ch 9 for discussion of submissions on this point.

Uniform or customised guidelines?

10.91 There are obvious advantages in developing uniform guidelines across all regulators, not the least of which is consistency across regulators. The DPP has noted that the availability of multiple penalties for the same conduct creates a 'real problem'. DPP officers commented to the ALRC that the idea of a pyramid of enforcement presupposes that all regulators approach issues in the same way. Uniform guidelines could go some way to creating this consistency.[139]

10.92 However, chapter 5 outlines the wide variety of regulators in the Commonwealth sphere, their different legislative mandates and the range of enforcement tools available to them and, consequently, their varied culture and enforcement approaches. This was also stressed in a number of submissions received by the ALRC outlined above.

10.93 An examination of the regulatory tools available to ASIC and the ACCC, and their regulatory style and enforcement approach, compared to ATO and Centrelink is sufficient to reveal how difficult meaningful uniform guidelines would be to implement. For this reason the ALRC has concluded that regulators should each develop their own enforcement guidelines which outline their individual enforcement policies.

10.94 This recommendation largely reflects current practice as a number of regulators who administer criminal and non-criminal penalties already have published enforcement policies. For some regulators, this will mean little change. However, other regulators may need to develop these policies from scratch. The ALRC would suggest that regulators who do not currently have enforcement policies refer to current enforcement policies used by Australian regulators as outlined above at para 10.24–10.59 and in chapter 6. In its survey of enforcement policies the ALRC found that, of all the enforcement tools available to regulators, civil penalties received (by far) the least attention in enforcement policies.

10.95 The ALRC recognises that regulators require flexibility when making enforcement decisions. For this reason, the ALRC has not made a recommendation in relation to what status enforcement policies should have. As noted above, most regulators utilise enforcement policies that are made as informal policies. However, some regulators have enforcement policies made as delegated legislation.

Content of enforcement policies

10.96 A regulator's need for flexibility has also led the ALRC to avoid prescribing in any detail the content of these enforcement policies. However, the ALRC considers that a number of matters should be detailed in these enforcement policies, unless clearly inappropriate in particular situations. The ALRC has based this minimum content on current practice and consultations and submissions.

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139 Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 20 February 2001.

10.97 **The various types of action available to the regulator to seek or impose penalties and quasi-penalties.** In the interests of transparency and accountability, the regulator should outline the types of enforcement action it can take against the regulated community. This information should detail what the tools are and their legislative basis.

10.98 **The principles behind each of those types of action.** This information should include the regulator's enforcement objectives, philosophy and approach. It should also include an explanation of why these tools are used in response to particular activity. These principles should be of a similar detail to the general principles outlined in the ATO Prosecution Policy. This is not to say that they should be the same; rather the tone and purpose of the general principles outlined in the ATO Prosecution Policy would be appropriate for non-criminal enforcement options such as civil penalties and quasi-penalties. Regulators may also detail a graduated enforcement approach such as that outlined in the CASA *Enforcement Manual* and AUSTRAC *Compliance and Enforcement Policy*.

10.99 **The criteria involved in the decision to pursue one or more of these types of action.** It is critical that any such criteria outlined in enforcement policies be consistent with the legislation under which the enforcement action is available. The purpose of setting out these criteria is to assist regulator staff exercise discretion, and choose the most appropriate enforcement option, particularly where more than one enforcement action is available for the same conduct. For this reason the ALRC has recommended that regulators ensure that training is provided to staff who will make decisions pursuant to those policies to ensure that they are familiar with the legislation and the policies. See Recommendation 6–6.

10.100 The publication of these criteria also provides some transparency to the decision-making process. For this purpose, the level of detailed criteria, such as that outlined in the ATO Prosecution Policy or the CASA *Enforcement Manual*, might be a starting point.

10.101 **The regulator's relationship with other regulators and enforcement agencies.** This is the subject of recommendations in chapter 9. However, where criminal and non-criminal enforcement responses are available to the regulator for the same conduct, any criteria governing the use of these responses would necessitate consideration of the Prosecution Policy of the Commonwealth. The ALRC has also included 'other regulators' in this recommendation. At present there appears to be little regulatory overlap in the Commonwealth sphere.[140] However, this issue may arise in the fu-

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140 One exception is the overlap between the ACCC and ASIC in relation to consumer protection responsibilities. The ACCC and ASIC have a cooperation agreement outlining their respective roles: Australian Competition & Consumer Commission, *Summary of the Trade Practices Act 1974: September 2001* (2001), ACCC Publishing Unit, Canberra, 90.

ture and there may be situations where state and federal regulators of the same or a similar field of activity may need to coordinate enforcement action.

Public availability

10.102 The ALRC notes the concerns of some regulators in relation to publication. However, it is the ALRC's view, together with the majority of regulators and individuals that made submissions, that publication is essential to ensure transparency, accountability and consistency. As was noted in chapter 6, the interests of transparency and accountability outweigh concerns of collateral challenges to enforcement decisions. Where enforcement guidelines are made as delegated legislation, under certain circumstances they may be enforced against the regulator. However, the ALRC's research reveals that when guidelines are made as informal instruments, collateral challenges are few and are rarely successful.

10.103 However, to accommodate some of the concerns of regulators, the ALRC has also suggested the development of internal enforcement guidelines that are not required to be published (if it is considered necessary to supplement the publicly available policy). The ALRC recognises that not all information about enforcement is suitable for publication. In particular, detailed risk weighting criteria for compliance activity should not be published as the regulated community may then conduct cynical or inappropriate 'risk assessments' in relation to planned or existing illegal activities.[141] However, these internal enforcement policies must not be inconsistent with publicly available enforcement policies or legislation. Furthermore, as the purpose of the policies is to assist regulator staff make enforcement decisions, it will be essential that regulators provide training to staff who will make decisions pursuant to those policies to ensure that they are familiar with them and the legislation in accordance with Recommendation 6–6.

Recommendations

Recommendation 10–1. Regulators who administer legislation under which criminal, civil or administrative penalties may be imposed or arise should develop and publish enforcement guidelines setting out their enforcement approach. These guidelines should cover the following matters, unless clearly inappropriate in the circumstances:

(a) the types of action available to the regulator;

(b) the principles behind each of these actions;

(c) the criteria involved in the decision to pursue one or more of these actions; and

141 Environment Australia, *Submission CAP 26*, 24 October 2002, 2.

(d) the regulator's relationship with other regulators and enforcement agencies.

Recommendation 10–2. Regulators who administer legislation under which criminal, civil or administrative penalties may be imposed or arise should, where necessary to supplement guidelines made pursuant to Recommendation 10–1, develop internal enforcement guidelines to provide guidance to staff who undertake enforcement activities. These internal guidelines must not be inconsistent with guidelines developed and published in accordance with Recommendation 10–1.

11. Multiple Proceedings and Multiple Penalties

Contents

Introduction

11.1 The ALRC has been asked to report on the relationship between civil and administrative penalties and criminal liability in respect of the same conduct, including joint proceedings, double jeopardy, elections and bars to proceedings. Under many pieces of federal legislation, the same conduct can attract more than one type of liability, and more than one type of penalty or quasi-penalty. Further, some of the legislation considered in this Inquiry allows criminal and civil proceedings to be undertaken si-

multaneously or sequentially in respect of the same conduct.[1] In other legislation, criminal and civil penalties are contained in entirely separate schemes.

11.2 Much of the reasoning behind the availability of multiple penalties is the flexibility it provides to regulators — allowing them to match appropriate responses to breaches. However, the ability to pursue a number of enforcement options presents risks in relation to multiple punishment and the potential use of evidence gathered for one proceeding in other proceedings.

11.3 In DP 65, the ALRC asked a number of questions regarding how these models of liability operate in practice and how regulators deal with issues raised by multiple penalties and multiple proceedings. The ALRC proposed that the ability to choose between civil and criminal penalties remain, but that the provisions that allow this be made explicit and clear, that there be certain bars to double punishment, and that protections be given to restrict the use of evidence.[2]

Why allow multiple penalties for the same conduct?

11.4 There are a number of reasons why it may be appropriate to allow criminal and civil proceedings to be undertaken simultaneously or sequentially in respect of the same conduct.

11.5 The availability of a variety of regulatory responses can benefit both the regulator and the regulated. Legislative provision for a range of responses allows the regulator to tailor its action to the circumstances of a particular contravention. In turn, the person on whom the penalty is imposed is more likely to receive an appropriate and proportionate penalty.

11.6 Penalties differ in speed of application, process and severity.[3] Several actions may be an appropriate response to the same conduct.

> In ASIC's view it is important for a regulator to be able to select the most appropriate regulatory response to wrongdoing. Such regulatory responses can fulfil a range of different purposes … Actions taken to compensate other parties and actions taken to remove people from working in an industry are not primarily punitive. Such actions are taken for the purpose of compensating victims or protecting the community from further wrongdoing. Accordingly it will be entirely appropriate in some circumstances for such actions to be taken in addition to punitive orders including criminal prosecutions or proceedings seeking a pecuniary penalty order.[4]

11.7 Alternative means of sanctioning offenders may be called for where there is a lack of options in a regulator's armoury. Professor Allan Fels, ACCC Chairman, has called for a greater variety of sanctions, including imprisonment, to be included in the *Trade Practices Act 1974* (Cth) (TPA), claiming that more severe penalties are needed

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1 See ch 2 for discussion of the nature of penalties.
2 See ch 8 of DP 65.
3 See ch 3 for discussion of the purpose of penalties.
4 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.

because of an increase in 'hard core collusive behaviour'.[5] Currently collusive behaviour attracts a civil penalty under Part IV of the Act. Under the model put forward by the ACCC, a dual system of criminal and civil sanctions will be available, with criminal penalties being reserved for large business engaging in serious domestic and international cartel activity.[6]

11.8 An insufficient range of regulatory options in legislation can reduce the regulator's ability to be effective. The Australian Broadcasting Authority (ABA) has submitted that 'a lack of flexible remedies inhibits its capacity to engage in negotiations that might produce better compliance by licencees'. The ABA noted that the availability of primarily criminal penalties for major breaches under the *Broadcasting Services Act 1992* (Cth) is problematic for a number of reasons including: that many of the important offences contain subjective elements which make successful criminal prosecution difficult, and the absence of 'moral culpability' for many of the offences tends to reduce willingness to enforce criminal penalties.[7]

11.9 Prior to the introduction of Part 9.4B of the *Corporations Law*, contraventions of statutory duties owed by corporate officers only attracted criminal penalties (fines or imprisonment) and private civil remedies (compensation for loss and damage resulting from the contravention).

> The problem was that the enforcement measures divided into two distinct groups, with bi-polar purposes. Criminal sanctions, reflecting their traditional paradigm, meant to punish. Civil remedies sought to compensate. The middle ground between them was not regulated.[8]

11.10 The introduction of civil penalties into the *Corporations Law* (now the *Corporations Act 2001*(Cth)) went some way to filling this 'regulatory gap'. One senior ASIC officer has observed that both civil penalties and criminal liability are necessary because:

- There is a need to have a range of sanctions to properly enforce the directors' duties embodied in the civil penalty provisions to ensure that the law relating to the enforcement of those duties is, and is seen to be, just.

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5 A Fels, 'Jail Would Hurt More Than Fines', *The Canberra Times*, 5 July 2001, 11.

6 Australian Competition & Consumer Commission, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P1.pdf www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P2.pdf www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P3.pdf>, 13 August 2002, para 2.5.2. In this case, the basis for differentiating the penalty would be unusual as it would include an element considering the size of offender not just the conduct: L Castle and S Writer, 'More Than a Little Wary: Applying the Criminal Law to Competition Regulation in Australia' (2002) 10(1) *Competition and Consumer Law Journal* 1, 17.

7 Australian Broadcasting Authority, *Submission CAP 23*, 14 October 2002.

8 H Bird, 'The Problematic Nature of Civil Penalties in the Corporations Law' (1996) 14 *Company and Securities Law Journal* 405, 409–410.

- There is also a need to have a range of sanctions to enforce the civil penalty provisions to allow the Australian Securities Commission (the ASC[9]) the scope to effectively regulate those aspects of directors' duties.
- Criminal sanctions for a contravention of a civil penalty provision are not available unless the conduct is genuinely criminal in nature.
- Criminal sanctions, and not civil actions, should be imposed for fraudulent contraventions of civil penalty provisions.
- Non-criminal sanctions should be imposed for non-fraudulent contraventions of civil penalty provisions.
- Disqualification is not an appropriate sanction for all non-fraudulent contraventions of a civil penalty provision.
- Pecuniary civil penalties are an appropriate and necessary sanction for a non-fraudulent contravention of a civil penalty provision.
- The court has ample scope to ensure that a proportionate sanction can be given in the circumstances of every contravention.[10]

Risks associated with multiple penalties

11.11 There are a number of risks associated with legislation providing a variety of responses for the same conduct. A major issue considered in this chapter is the protection against double jeopardy. Although this protection has been developed in the context of criminal law, rationales for the rule against double jeopardy are relevant to non-criminal regulatory penalties and assist in identifying principles relevant to multiple penalties for regulatory contraventions.

11.12 Without adequate safeguards, multiple penalties for the same conduct could result in a variety of punishments imposed upon the regulated that would be both oppressive and unfair.[11] Rationales for the rule against double jeopardy in Australian jurisprudence include:

- fairness and the prevention of oppression;[12]
- that a person should not be twice punished for what is substantially the same act;[13]
- finality;[14] and

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9 Now the Australian Securities and Investments Commission (ASIC).

10 M Gething, 'Do We Really Need Criminal and Civil Penalties for Contraventions of Directors Duties?' (1996) 24 *Australian Business Law Review* 375, 376.

11 *Davern v Messel* (1984) 155 CLR 21, 68. See also *R v Tait* where it was ruled that 'it would be unjust to a defendant to expose him to double jeopardy because of an error affecting his sentence' if the Crown's appeal against sentence is on a new basis: *R v Tait and Bartley* (1979) 46 FLR 386, 389; and *Bunning v Cross* (1978) 52 ALJR 561.

12 *Australian Securities and Investments Commission v Hosken* (1999) 153 FLR 372.

13 *R v Hoar* (1981) 148 CLR 32, 38.

- prevention of vexation caused by multiple prosecutions.[15]

11.13 Multiple proceedings delay finality and create extra cost for the regulated, the regulator, the legal system and the public. To allow a regulator to make repeated attempts to punish an individual or corporation for an alleged offence would also be oppressive. Further, courts have noted the legal policy that any issue of fact or law in dispute between the parties should not be determined in judicial proceedings more than once.[16]

11.14 Where civil penalty liability and criminal liability exist for the same conduct, there is also a risk that evidence or information given in one proceeding could be used in a subsequent proceeding where that information would ordinarily be excluded. The use of information given in administrative review proceedings to bring criminal charges has also been raised as a concern.[17]

11.15 Multiple penalties can also raise operational problems. These issues generally surround the decision to elect a certain path — criminal, civil or administrative. Where there is a choice between civil, criminal or administrative penalties, the investigative path will differ if a decision is made early to pursue a civil or administrative penalty, rather than a criminal remedy. ASIC submitted that if the decision is made too late it can be detrimental to the proper planning of an investigation and the effective and efficient use of investigatory resources. ASIC stated there are cases where it is forced to make an election at the particular stage of an investigation as, for example, some investigatory techniques that are open to ASIC can only be used in a criminal investigation.[18]

11.16 The prospect of attracting liability for both criminal and civil penalties for the same conduct can undermine the role of both criminal and civil penalties in the regulatory structure. Joe Longo, former National Director of Enforcement of ASIC, stated:

> Civil penalties are controversial because of a concern that they in effect allow the criminal justice system to be bypassed, when serious commercial or corporate misconduct belongs there.[19]

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14 *Cachia v Isaacs* [1985] 3 NSWLR 366, 386.

15 *Pearce v The Queen* (1998) 194 CLR 610, 636–637: '[T]he expression of a principle confined to the prevention of double punishment for the same crime would be too narrow. It would conform neither with the statements of the applicable principle in national law, nor in international law. By those statements of law a person is entitled to protection not only from the risk of double punishment (*puniri*) but also from vexation (*vexari*) by repeated or multiple prosecution and trial' (Kirby J).

16 *Cachia v Isaacs* [1985] 3 NSWLR 366, 386.

17 Welfare Rights Centre, *Consultation*, Brisbane, 15 December 2000.

18 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002. See also ch 9.

19 J Longo in A Hepworth, 'ASIC's Use of Civil Penalties Rises', *The Australian Financial Review*, 21 January 2002, 5.

11.17 Prior to many of the CLERP reforms, this issue was raised in relation to Part 9.4B of the *Corporations Law*.[20] Helen Bird argued that the presence of both types of liability created competing rather than progressive regimes and that this undermined the enforcement pyramid model.[21] Vivien Goldwasser has also criticised the bifurcated approach and called for cumulative civil and criminal remedies; a hierarchy by which criminal fines would be higher than civil pecuniary penalties to provide an additional deterrent; and placing of management disqualification at the top of the sanction hierarchy, making it unavailable in civil proceedings.[22]

What is the same or similar 'conduct'?

11.18 In criminal law 'conduct' primarily relates to the physical elements of an offence, or what has been known as the *actus reus*. Section 3.1 of the *Criminal Code* provides that an offence consists of physical elements and fault elements.[23] Section 4.1 of the Code states that a physical element of an offence may be:

- conduct; or
- a circumstance in which conduct occurs; or
- a result of conduct.

'Conduct' is defined as an act, an omission to perform an act or a state of affairs.[24]

11.19 Common law and statutory double punishment protections diverge on whether the conduct has to be 'the same', or 'substantially similar'. However, 'conduct' again relates to the physical elements of the offence or contravention. For example, legislative protections under the *Corporations Act* and *Environment Protection Biodiversity Conservation Act 1999* (Cth) (EPBC Act), apply if conduct constituting a contravention or offence is 'substantially the same' as conduct constituting a subsequent offence or contravention.

11.20 The rule against double jeopardy in criminal law prevents a person being prosecuted for an offence when that person has previously been prosecuted for 'substantially the same' offence. It was noted by the majority in *Pearce v The Queen*:

> [W]hen it is said that it is enough if the offences are 'substantially' the same, this should not be understood as inviting departure from an analysis of, and comparison between, the elements of the two offences under consideration.[25]

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20 H Bird, 'The Problematic Nature of Civil Penalties in the Corporations Law' (1996) 14 *Company and Securities Law Journal* 405.

21 Ibid, 411.

22 V Goldwasser, 'CLERP 6 — Implications and Ramifications for the Regulation of Australian Financial Markets' (1999) 17(4) 206, 212.

23 However, the law that creates the offence may provide that there is no fault element for one or more physical elements: *Criminal Code*, s 3.1(2).

24 Ibid, s 4.1(2)

25 *Pearce v The Queen* (1998) 194 CLR 610, 617.

11.21 As noted above, consideration of whether protection is required against multiple penalties for 'the same' or 'substantially similar' conduct will require analysis of, and comparison between, the physical elements of the offence or contravention. In the context of criminal law, the majority of the High Court of Australia in *Pearce v The Queen* stated:

> The identification of a single act as common to two offences may not always be as straightforward … It should be approached as a matter of common sense, not as a matter of semantics.[26]

Unclear relationship between civil and criminal penalties

11.22 One threshold issue is the need for clarity of the relationship between criminal liability and civil penalties.

11.23 Prior to many of the CLERP reforms, the relationship between criminal liability and civil penalties was not clearly drawn under the *Corporations Law*. For example, s 232 of the *Corporations Law*, concerning the duties and liability of a director (and in particular s 232(2), concerning honesty), was the subject of criticism for blurring the issue of liability and failing to state a mental element for contraventions attracting civil penalties.[27] A 1999 report on the effectiveness of the civil penalty sanctions under the *Corporations Law* observed:

> There is no guidance as to the relationship between the different liability forms, except for s 1317FA which requires an additional mental component to be provided before a criminal sanction can be imposed. What is unclear is whether that mental component is in addition to, or in substitution for, any mental component required to prove a contravention of the civil penalty provision itself.[28]

11.24 A contravention of s 232(2) required evidence of a director's lack of honesty. Section 1317FA required evidence of a contravention by a director coupled with 'intentional dishonesty' before the contravention became a criminal offence. This lack of guidance as to how civil penalties and criminal penalties were related caused one ASIC staff member to observe:

> I believe there are too many conceptual difficulties with [the civil penalty/criminal penalty linkage] in terms of how you actually put it to the court.[29]

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26 Ibid, 623.

27 H Bird, 'The Problematic Nature of Civil Penalties in the Corporations Law' (1996) 14 *Company and Securities Law Journal* 405, 414.

28 G Gilligan, H Bird and I Ramsay, *Regulating Directors' Duties — How Effective are the Civil Penalty Sanctions in the Australian Corporations Law?* (1999), Centre for Corporate Law and Securities Regulation, Melbourne, 51.

29 Cited in ibid, 51.

11.25 A lack of clarity may lead a regulator's officers to under-utilise the penalty provisions. Under the pre-CLERP *Corporations Law*, some ASIC staff reported that they were hesitant to use civil penalty provisions:

> [T]he uncertainty of what the directors' duties provisions actually mean has sort of flowed into our uncertainty about running a civil penalty case as well … We have had some problems in working out what section 1317FA does say and mean.[30]

Models of liability

11.26 DP 65 discussed the four major models of liability under federal legislation that ground the relationship between criminal liability and civil and administrative penalties in respect of the same conduct:

- Parallel criminal liability and civil penalties for the same conduct, such as under the *Corporations Act*, the EPBC Act and the *Commonwealth Authorities and Companies Act 1997* (Cth).
- Separate schemes of civil penalties and criminal liability, for example, under the TPA, Parts IV and VC.[31]
- Administrative penalties that arise automatically by operation of legislation, for example, under s 206B of the *Corporations Act*.
- Parallel criminal liability and quasi-penalties, such as the removal of benefits under social security legislation, or licence suspension and cancellation.

Parallel criminal liability and civil penalties

11.27 In some federal legislation, criminal liability and liability for a civil penalty attach to the same conduct. Under this model criminal liability is generally distinguished from civil penalty liability: criminal or 'offence' provisions generally require proof to a criminal standard of physical elements and certain fault elements (usually intention or recklessness). Civil penalty provisions may require proof of the same physical elements to a civil standard. However, they often do not require proof of any fault elements. This model of liability is becoming common. Examples appear in the *Corporations Act*, the EPBC Act and the *Commonwealth Authorities and Companies Act*.

11.28 Under s 181(1) of the *Corporations Act*, directors must discharge their duties 'in good faith in the best interests of the corporation' and 'for a proper purpose'. The subsection expresses the conduct in terms of physical elements alone and provides for

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30 Cited in ibid, 51.

31 Customs prosecutions, which adopt aspects of criminal and civil procedure, are a unique model and discussed separately in ch 13.

a civil penalty for a *contravention*.[32] If a court is satisfied that a person has contravened the provision, it must make a 'declaration of contravention'[33] and determine the penalty, which can be as much as $200,000. However, s 184(1) states that directors commit an *offence* if they are reckless or intentionally dishonest, and fail to exercise their powers and discharge their duties in good faith in the best interests of the corporation or for a proper purpose.

11.29 Similarly, the EPBC Act provides that a person must not take an action that has or will have a significant impact on a listed migratory species (s 20(1)(a)). Contravention attracts a maximum civil penalty of 5000 penalty units for an individual or 50,000 penalty units for a body corporate. Section 20A(1) of the same Act provides that a person is guilty of an *offence* if they take an action which will result in a significant impact on a listed migratory species. The conduct is the same as that in s 20(1)(a); but the offence is a criminal one. The additional fault elements are determined by reference to the default elements under Chapter 2 of the *Criminal Code*.

11.30 However, not all civil penalty provisions leave out an element of fault. Some market misconduct provisions in Chapter 7 of the *Corporations Act*[34] specify a mental element as part of both the civil contravention and the criminal offence. Chapter 7 states that the fault elements specified in the *Criminal Code* are applied to the criminal offences under these provisions.

11.31 Issues about the use of fault in distinguishing civil and criminal penalty provisions are discussed further in chapter 4.

Double jeopardy issues

11.32 One concern raised by criminal and civil penalties for the same conduct is that regulators could choose to impose both on an offender. This may offend the rule against double jeopardy or could at least constitute unfair treatment.

Crimes Act

11.33 Section 4C of the *Crimes Act 1914* (Cth) affords some protection against double jeopardy where an act or omission constitutes an offence under two or more laws of the Commonwealth or under both a law of the Commonwealth and at common law. The reference to 'an offence' in this provision is significant. The ALRC's review of Commonwealth legislation reveals that, when legislation refers to 'an offence', it generally refers to criminal liability and does not extend to liability for a civil or adminis-

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32 It should be noted that, unlike civil penalty provisions under the *Trade Practices Act 1974* (Cth), which only require proof of the contravention, civil penalty provisions under the *Corporations Act 2001* (Cth) also require proof of some kind of material prejudice: *Corporations Act 2001* (Cth), s 1317G.

33 *Corporations Act 2001* (Cth), s 1317E(1).

34 For example, s 1043A.

trative penalty.[35] Therefore, it is unlikely that the protection afforded under s 4C would extend to civil penalties. This accords with the current common law relating to double jeopardy.

Common law

11.34 Historically the common law has also provided some protection against double jeopardy.[36] This protection has applied to crime, and is generally based on the principle that a person should be protected against multiple punishments for the same conduct. In *Pearce v The Queen*, Kirby J set out the relief that has been afforded in respect of criminal trials at successive stages of the process:

- practices adopted by prosecutors;[37]
- by the plea of autrefois acquit or autrefois convict;[38]
- by a plea in bar, not strictly autrefois acquit or autrefois convict;[39]
- by the adoption of various practices in the conduct of criminal trials designed to reduce the risks of double jeopardy;[40]
- by the exercise of a judicial discretion to prevent an abuse of process;[41]
- by courts ensuring that, in sentencing, double punishment for what is essentially the same conduct is avoided.[42]

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35 For example, the Constitution refers to 'an offence' only in terms of the criminal process or criminal liability: *Commonwealth of Australia Constitution Act 1900* (Imp), s 44, 80 and 120. Further, both the *Trade Practices Act* and the *Corporations Act* distinguish between 'a contravention', which attracts a civil penalty, and 'an offence' which relates to criminal liability. See also *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 483.

36 The principle that a person should be protected against multiple punishments for the one act has almost universal support. See, for example, the *International Covenant on Civil and Political Rights*, 6 ILM 368, (entered into force on 13 November 1980), Article 14(7); *European Convention on Human Rights and Fundamental Freedoms*, ETS No 5, (entered into force on 3 September 1953) Article 4, Protocol 7(1).

37 Kirby J outlines some of the common law principles that impact on practices adopted by prosecutors in *Pearce v The Queen* (1998) 194 CLR 610, 637–638.

38 The common law has historically based double jeopardy rulings for subsequent criminal proceedings on the pleas of *autrefois convict* (the person has previously been tried for and convicted of the same offence) and *autrefois acquit* (the person has previously been tried for and acquitted of the same offence). Both apply only to two or more consecutive criminal proceedings. See for example *Peterson v The Queen* (1982) 69 CCC (2d) 385, 390; *Davern v Messel* (1984) 155 CLR 21, 30; *Broome v Chenoweth* (1946) 73 CLR 583. See *Pearce v The Queen* (1998) 194 CLR 610, 646–649 (Kirby J).

39 See for example, *R v O'Loughlin* [1971] 1 SASR 219, 256. However, it has been suggested that in Australian and English law a concept of a defence wider than or having a separate existence from the pleas of *autrefois* is problematic: *Pearce v The Queen* (1998) 194 CLR 610, 646–649 (Kirby J).

40 Kirby J sets out a number of protective rules at trial in *Pearce v The Queen* (1998) 194 CLR 610, 647–648.

41 As outlined in *Connelly v Director of Public Prosecutions (UK)* [1964] AC 1254, 1301–2. See also *Rogers v The Queen* (1994) 181 CLR 251, 256.

42 'Of course, at the sentencing stage of the criminal process it is too late to prevent vexation by a second or double prosecution. But it may present the opportunity to avoid double punishment … Leaving aside the consideration of punishment inherent in recording a second conviction, it remains the judicial duty to im-

11.35 In *Pearce v The Queen*, the majority set out a rationale for the principle, citing Black J in *Green v United States*:

> The State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[43]

11.36 In *R v Hoar*, Gibbs CJ, Mason, Aickin and Brennan JJ stated that there is 'a practice if not a rule of law, that a person should not be twice punished for what is substantially the same act'.[44]

11.37 These rationales appear no less applicable to parallel civil penalty and criminal liability (or multiple civil penalty liability) for the same conduct. It seems to follow that, if one of the rationales and aims of double jeopardy is to protect against double punishment, and if civil penalties are, at least to some extent, punitive in nature, double jeopardy protection should be extended to subsequent civil penalty proceedings for the same conduct. In the absence of any common law to this effect, this will require statutory intervention.

11.38 To date Australian courts have not extended common law double jeopardy protection to civil penalties.[45] This could be for a number of reasons including:

- Australian regulators have limited resources to conduct court proceedings and so rarely take multiple actions in respect of the same conduct;
- the current legislative protections are adequate to protect against double punishment; or
- the operations of the Director of Public Prosecutions (DPP) ensure that the issue rarely arises.

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pose a sentence apt for each particular offence proved; but to do so in a way that avoids double punishment and takes account of any specific circumstances of aggravation reflected in the elements of the separate offences upon which the accused has been convicted': *Pearce v The Queen* (1998) 194 CLR 610, 649–650.

43 *Green v United States* 355 US 184 (1985), 187–188, cited in *Pearce v The Queen* (1998) 194 CLR 610, 614.

44 *R v Hoar* (1981) 148 CLR 32, 38.

45 There has been some debate overseas as to whether a civil penalty can be regarded as a 'punishment' for the purposes of double jeopardy; see *United States v Halper* 490 US 435 (1989) and *Hudson v United States* 522 US 93 (1997).

Multiple proceedings: bars to proceedings

11.39 As discussed above, when legislation provides for parallel criminal liability and civil penalties for the same conduct there is the prospect that the state could make repeated attempts to punish an individual for an alleged contravention or offence. These multiple proceedings could have the effect of subjecting a person to unnecessary embarrassment, expense and ordeal. Parallel criminal liability and civil penalties also increase the chance that an innocent person may be found to have committed an offence or contravention. Another issue is that multiple proceedings can delay finality and therefore increase the cost to the state and the person accused.

11.40 In order to alleviate some of these concerns, most federal legislation that contains parallel criminal liability and civil penalties for the same conduct provide a number of statutory bars to proceedings. These bars to proceedings often serve to direct regulators and the DPP when electing criminal or civil liability. It has been reported by one ASIC officer that

> you choose the path you want to go down early on. Obviously circumstances change, so you always have the discretion, but as a general principle, I don't think it's appropriate to take fairly substantial action against someone and if you fail, then take other different substantial action against them, possibly 4–5 years after their misconduct.[46]

Criminal proceedings after civil proceedings

11.41 Most federal legislation that provides for both criminal penalties and civil penalties for the same, or similar, conduct, allows criminal proceedings to be taken after civil proceedings, regardless of the outcome of the civil case.[47] For example, s 1317P of the *Corporations Act* now states that criminal proceedings may be started against a person for conduct that is substantially the same as conduct constituting a contravention of a civil penalty provision regardless of whether:

- a declaration of contravention has been made against the person;
- a pecuniary penalty order has been made against the person;
- a compensation order has been made against the person; or

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46 G Gilligan, H Bird and I Ramsay, *Regulating Directors' Duties — How Effective are the Civil Penalty Sanctions in the Australian Corporations Law?* (1999), Centre for Corporate Law and Securities Regulation, Melbourne, 51.

47 Provision is now made for staying civil proceedings, and bars on the use of information and evidence given in civil proceedings in subsequent criminal proceedings. These provisions are discussed below at para 11.78–11.81. Prior to the CLERP reforms, s 1317FB of the *Corporations Law* (now repealed) provided that criminal proceedings could not be commenced if an application for a civil penalty order had been made in relation to a particular contravention. This was intended to act as a bar on evidence obtained in the course of bringing civil proceedings being used in criminal proceedings. However, the result was a disincentive to take civil action as it precluded a change of path should more evidence of criminal behaviour come to light. By contrast, s 203 of the *Superannuation Industry (Supervision) Act1993* (Cth) provides for a similar bar to the former s 1317B of the *Corporations Law*. This bar is necessary under that legislation as there is no specific protection against the use of evidence in criminal proceedings after civil penalty proceedings.

- the person has been disqualified from managing a corporation under Part 2D.6.

11.42 Similar provisions are contained in s 486C of the EPBC Act and Schedule 2 of the *Commonwealth Authorities and Companies Act*.

11.43 This provision appears to give more flexibility to regulators than the former s 1317B and does not prevent truly criminal behaviour being punished by the criminal law. It also allows civil penalties such as injunctions, as well as administrative orders such as disqualification, to stop offending behaviour quickly without precluding later action for criminal penalties. However, s 1317P does not bring finality — a person who is the subject of civil penalty proceedings can later be subject to criminal proceedings for the same conduct.

Statutory bar to civil penalty proceedings after conviction

11.44 Where there is provision for both criminal and civil penalties for the same conduct, legislation generally provides for a bar against civil penalty proceedings for a contravention following conviction for an offence constituted by conduct that is substantially the same. This is currently the case under the *Corporations Act*,[48] the EPBC Act[49] and the *Commonwealth Authorities and Companies Act*.[50]

11.45 Section 1317M of the *Corporations Act* states that a court must not make a declaration of contravention or a pecuniary penalty order against a person for a contravention if the person has been convicted of an offence constituted by conduct that is substantially the same as the conduct constituting the contravention. This provision ensures finality of liability for the same conduct. However, this provision will only apply where there has been a successful conviction.

11.46 Section 1317M appears to maintain some flexibility for the regulator and DPP to pursue the appropriate penalty. For example, the section does not bar a regulator from commencing civil penalty proceedings if the criminal proceeding fails. Furthermore, there is no impediment to the making of a disqualification order on the application of the regulator if a declaration of contravention is made before the criminal conviction. Nor is there anything to stop a court making a compensation order in proceedings taken before or after the criminal proceedings.[51]

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48 *Corporations Act*, s 1317M.

49 *Environment Protection and Biodiversity Conservation Act*, s 486A.

50 *Commonwealth Authorities and Companies Act*, Sch 2 Item 9.

51 A criminal court no longer has the general power to order compensation when it finds a person guilty of an offence related to a civil penalty provision (see repealed s 1317HB) except in the case of insolvent trading by a director: *Corporations Act*, s 588K.

Overlapping criminal and civil proceedings

11.47 Most federal legislation that provides for criminal liability and civil penalties for the same conduct now also provides that civil penalty proceedings will be stayed if criminal proceedings have commenced. For example, s 1317N of the *Corporations Act* provides that proceedings for a declaration of contravention or pecuniary penalty are stayed if:

- criminal proceedings are started or have already been started against the person; and
- the offence is constituted by conduct that is substantially the same as the conduct alleged to constitute the civil penalty contravention.

11.48 If the person is convicted of an offence, the civil penalty proceedings are dismissed. However, if the person is not convicted of an offence, the proceedings for the declaration or order may be resumed.[52]

11.49 Section 1317N appears to allow a regulator the flexibility to pursue the appropriate penalty for the prohibited conduct. Importantly, it does not require the regulator to commit itself to a particular investigative or enforcement path too early. It provides limited protection against double punishment by preventing a civil pecuniary penalty order if a person has been convicted of an offence. Further, the problems raised by evidence given in civil proceedings being used in criminal proceedings are also guarded against to some extent.

11.50 It should be noted that s 1331 of the *Corporations Act* provides that no civil proceedings under the Act are to be stayed merely because the proceeding discloses, or arises out of, the commission of an offence; a stay will only be granted once proceedings in respect of the offence have been commenced.

11.51 Section 1317N does not preclude private civil claims being commenced. However, this does not prevent a court from staying common law or statutory civil proceedings either outright or beyond a certain pre-trial stage until related outstanding criminal proceedings are completed.[53]

Consultations and submissions

11.52 ASIC submitted that it is easy to overstate the risk of double jeopardy arising from parallel civil liability and criminal liability. Although the *Corporations Act* does not specifically exclude the use of both penalties for the same conduct, ASIC states that it would be most unusual that there would be sufficient regulatory impact to warrant pursuit of both remedies, particularly in light of the fact that regulators have a fi-

52 Similar protections are provided under Sch 2 of the *Commonwealth Authorities and Companies Act* and s 486B of the *Environment Protection and Biodiversity Conservation Act*.

53 Butterworths, *Australian Corporations Law* (Looseleaf) Butterworths, para 13.2.0085.

nite amount of resources and are subject to scrutiny from the courts, Parliament and the public.[54]

11.53 ASIC believes it is easy to underplay the role of courts in protecting a defendant against oppression and unfairness. In cases where ASIC has obtained a civil penalty order and then commenced a prosecution, the court has been allowed to take into account the civil penalty order in sentencing.[55] Further, in any criminal prosecution, the rules of evidence and the restriction on using evidence raised in the civil proceeding[56] will also protect a defendant.

11.54 DP 65 proposed that, when the same physical elements can attract both civil liability and criminal liability, legislation must draw a clear distinction between the two, and clearly state the mental and physical elements for both the contravention and the offence.[57] This model would closely follow that operating under the *Corporations Act* and the EPBC Act.

11.55 ASIC agreed that in most cases it is possible and appropriate that there be some sort of distinguishing factor between civil penalty liability and criminal liability, which would generally be a fault element. However, as with the Part 7 market manipulations provisions identified above,[58] there is not always an easy distinction that can be drawn between a particular physical or mental element. ASIC does not believe this should preclude both paths being available. Rather ASIC would support the DP 65 proposal that a clear stipulation of all mental elements and physical elements be included for each civil contravention and criminal offence. ASIC notes that express statement of elements might also avoid the additional complexity through application of the *Criminal Code.*

11.56 The ATO, whilst noting that taxation legislation does not employ civil penalties, supported the proposal to clarify the distinction between civil and criminal penalties and their mental and physical elements.[59]

11.57 DP 65 also proposed that, where legislation allows for criminal penalties and civil penalties for the same conduct, civil penalty proceedings must be stayed if criminal proceedings commence or already have commenced; no civil penalty proceedings may be taken against a person if they have been convicted of an offence on the basis of

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54 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.
55 Ibid. By virtue of s 16A(1) of the *Crimes Act 1914* (Cth).
56 Under the *Corporations Law*, s 1317Q.
57 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Proposal 8–1.
58 See para 11.30.
59 Australian Taxation Office, *Submission CAP 16*, 17 September 2002.

the same conduct, although, if not convicted, the civil penalty proceedings may be resumed.[60]

11.58 ASIC supported the proposal, insofar as it referred to proceedings for a declaration of contravention (as available under the *Corporations Act*) or pecuniary penalty orders. ASIC would not support the application of the proposal to the seeking of compensation or disqualification orders which do not seek a declaration of contravention.[61] These proceedings are seen as civil remedies that should be available prior to the conclusion of penalty proceedings to redress loss caused by the alleged conduct. ASIC argues that courts would also have a general discretion to stay civil proceedings for compensation orders where there are concurrent criminal proceedings, if desirable. ASIC also notes that affected third parties may seek compensation orders and considers that their rights should not be fettered by other proceedings taken by the regulator.[62]

11.59 A similar point was raised with the ALRC in relation to preservation orders pending finalisation of a criminal prosecution.[63]

11.60 The ATO supported the proposal provided that the principles of natural justice are upheld and 'double jeopardy' is avoided. It noted that the taxation legislation (which does not employ civil penalties) provides that administrative penalties are remitted once a prosecution is commenced in response to non-compliance with a requirement.[64]

11.61 Environment Australia noted that the EPBC Act already makes the clear distinction sought in the proposal. Fault elements are determined through reference to the default fault elements in the *Criminal Code*. The EPBC Act also follows the model of protection against double punishment set out in the proposal. [65]

11.62 The Attorney-General's Department supported these proposals. It noted that there would be specific circumstances where a range of penalties will be desirable. It cited the approach taken with the parallel civil and criminal penalties under the EPBC Act as a model for how civil and criminal penalties can work together, whilst providing protection against double jeopardy and dual use of evidence.[66]

11.63 Professor Michael Adams agreed that civil penalty proceedings should be stayed in deference to criminal proceedings, and should be neither started nor resumed

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60 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Proposal 8–2.
61 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.
62 Ibid.
63 Advisory Committee members, *Advisory Committee meeting*, 17 October 2002.
64 *Taxation Administration Act 1953*, s 8ZE. Australian Taxation Office, *Submission CAP 16*, 17 September 2002.
65 Environment Australia, *Submission CAP 26*, 24 October 2002.
66 Attorney-General's Department, *Submission CAP 14*, 9 September 2002.

if there is a successful conviction. He further agreed that an unsuccessful criminal prosecution should not preclude the commencement of civil proceedings.[67]

11.64 Alternatively, the Victorian Bar argued that the proposals would not protect against the unfairness of multiple proceedings, other than in a very limited sense. 'Double jeopardy' is only precluded where a person is found guilty of a criminal offence first — under the proposal, if the prosecution fails, a civil action can then be commenced. The Victorian Bar argued that an agency needs to make an election whether to pursue criminal or civil penalty proceedings and should not 'have a second bite at the cherry'.[68]

Conclusion

11.65 The ALRC finds value in maintaining provisions in legislation which allow for a choice of criminal or civil proceedings for the same conduct. Such flexibility is an important feature of regulation and allows a regulator the ability to tailor appropriate penalties to breaches.

11.66 The concerns of the Victorian Bar in allowing civil proceedings to follow unsuccessful criminal proceedings are noted. However, the ALRC believes that the desirability of allowing regulators flexibility outweighs these concerns. The proposed safeguards are sufficient to avoid undue oppression on defendants.

11.67 However, the option for parallel or sequential proceedings for the same physical element requires the development of clear principles governing the choice.[69] Legislation must be drafted in such a way that the elements of each offence are clearly stated, especially where different mental elements will govern the civil and criminal provisions.

11.68 The ALRC agrees with ASIC's position regarding compensation and disqualification orders. These orders serve an important role in allowing a regulator to act immediately to protect or compensate the public and should not inhibit, or be inhibited by, rules protecting against double punishment. As noted in chapter 2, these orders are not considered 'punishment' by the courts but are protective or redistributive in nature.

Use of information and evidence

Investigation powers

11.69 Commonwealth regulators have ever-widening investigative powers.[70] The prospect of multiple proceedings for the same conduct raise a number of issues in rela-

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67 M Adams, *Submission CAP 12*, 5 September 2002.
68 The Victorian Bar, *Submission CAP 22*, 14 October 2002.
69 See also discussion in ch 9 and 10.
70 See discussion in ch 19.

tion to whether or not information gathered during investigations should be admissible in both civil and criminal proceedings in relation to the same conduct.

11.70 On one hand, regulators should be given sufficient investigatory powers and the authority to use information obtained as a result in order to enforce the law. Further, it would be inefficient to require one set of investigations when pursuing criminal penalties proceedings and a further one for civil penalty proceedings. On the other hand, there should be some restriction on the use of information gathered by a regulator, especially where that information or evidence has been obtained by compulsory process where privilege against providing it has been removed or modified by statute, or obtained in legal proceedings involving the person who was the source of the evidence. To allow the same information in relation to the same conduct to be used more than once in proceedings could raise issues of double jeopardy and procedural unfairness.

11.71 The use of investigatory powers by regulators generally is beyond the scope of this Inquiry. However, the use of information so obtained is within the present Terms of Reference.

Use of evidence in more than one proceeding

11.72 Allowing evidence given in one proceeding to be used in subsequent proceedings in relation to the same conduct raises substantive issues of fairness, including the potential increase in the likelihood of double punishment and vexation caused by multiple prosecutions.

11.73 In the context of criminal law, the principles outlined by *autrefois convict*, *autrefois acquit*, and abuse of process — and in civil law, the principles of *res judicata*, issue estoppel, estoppel by omission and abuse of process — are available to prevent evidence given in one proceeding being used in subsequent proceedings. These principles are as much rules of evidence as they are substantive principles related to double punishment.[71] Furthermore, the privilege against self-incrimination, use immunity and derivative use immunity could also be effective in limiting the use of information to the one proceeding. For a more detailed discussion on the privilege against self-incrimination and use immunity see chapter 18.

11.74 In addition to double punishment concerns, where the same conduct attracts both civil penalty liability and criminal liability, the use of evidence in more than one proceeding blurs the important distinctions between the criminal and civil process. Importantly, the criminal standard of proof requires the prosecution to establish its case 'beyond reasonable doubt' whereas civil penalty proceedings are characterised by a variable standard of proof at or above the balance of probabilities.

11.75 Further, evidence collected in a civil penalty proceeding may be subject to less protection than the criminal process. The civil process utilises discovery and interroga-

71 Butterworths, *Cross on Evidence* (Looseleaf) Butterworths, para 5240.

tories in order to disclose relevant information and seek admissions of factual material. Criminal procedure, on the other hand, applies procedural protections to investigation and prosecution, and protections such as the privilege against self-incrimination. The accused is not required to specify its defence, discover documents or answer interrogatories before trial. To allow evidence given in civil penalty proceedings to be used without control in subsequent criminal proceedings would be unjust.

11.76 ASIC has made the point that the collection of evidence outside court for civil penalty proceedings is not subject to any less protection than the collection of evidence in criminal proceedings. With some exceptions, such as the use of evidence collected under a search warrant, the powers for the collection of evidence by ASIC are the same in criminal and civil penalty proceedings.[72]

11.77 ASIC has stressed the practical difficulties that are placed on an investigatory agency when it has obtained information as part of its investigation but can only use that information in certain specific types of enforcement action such as criminal prosecutions.

> In some circumstances this may necessitate parallel investigations into the same or similar conduct, to ensure, for instance, that the 'civil team' is effectively quarantined from any evidence which can only be used for criminal proceedings.[73]

Legislative protection

11.78 Many of the issues raised above are addressed in legislation. Where the same conduct can attract both criminal liability and a civil penalty, the statute will usually restrict the use of evidence given in civil penalty proceedings in later criminal proceedings. For example, s 1317Q of the *Corporations Act* provides that evidence of information given or of documents produced by an individual is not admissible in criminal proceedings against the individual if:

- the individual previously gave the evidence or produced the documents in proceedings for a pecuniary penalty order against the individual for a contravention of a civil penalty provision (whether or not the order was made); and
- the conduct alleged to constitute the offence is substantially the same as the conduct that was claimed to constitute the contravention.[74]

11.79 This does not apply to a criminal proceeding in respect of the falsity of the evidence given by the individual in the proceedings for the pecuniary penalty order.

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72 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.
73 Ibid.
74 The same protection is included in s 486D of the *Environment Protection and Biodiversity Conservation Act* and Schedule 2 of the *Commonwealth Authorities and Companies Act*.

There is also no equivalent provision to protect against evidence given in proceedings for a disqualification order, a compensation order or a declaration of contravention.

11.80 Some have stated that s 1317Q is problematic.[75] As noted above, there is no bar in the *Corporations Act* to criminal proceedings following a civil penalty proceeding. However, once evidence has been given by a person in proceedings for a civil penalty order against that person, the evidence is forever inadmissible in criminal proceedings against the same person.

> Problems will arise in determining whether evidence sought to be adduced in the subsequent criminal proceedings is the very evidence given in the earlier proceedings for a pecuniary penalty order. This will disadvantage the prosecution. Conversely, there is no prohibition on 'derivative use' and so the prosecution will not be prevented from adducing evidence flowing from a chain of inquiry started by the evidence in the proceedings for a pecuniary penalty order, and in this respect the accused will be disadvantaged.[76]

11.81 In many respects, these criticisms highlight the benefits of the provision. It would seem fair that evidence obtained by discovery and proved to a civil standard in a civil proceeding cannot be used in a subsequent criminal proceeding in relation to the same conduct. It is also desirable that regulators, with their wide range of investigatory powers, should take care when gathering and using evidence. The operation of s 1317Q means that when a regulator commences civil penalty proceedings it will have to be mindful of how it obtains and uses evidence so as not to preclude or undermine a later criminal proceeding.

11.82 On the other hand, it seems desirable that regulators should be able to adduce evidence flowing from a chain of inquiry started by evidence given in civil penalty proceedings. To prevent 'derivative use' would mean that in most cases commencing criminal proceedings would be frustrated. Therefore, if it became apparent during the course of civil proceedings that the conduct was worse than originally thought and criminal in nature, the criminal conduct could not be punished accordingly.

11.83 DP 65 proposed that legislation that provides for parallel criminal liability and civil penalty liability for substantially the same conduct should also provide that evidence of information given or documents produced by an individual is not admissible in criminal proceedings against the individual:

- if the individual gave the evidence or produced the documents in civil proceedings; and
- the conduct alleged to constitute the offence is the same or substantially the same as the conduct alleged to constitute the contraventions.[77]

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75 Butterworths, *Australian Corporations Law* (Looseleaf) Butterworths, para 3.420.
76 Ibid, para 3.420.
77 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Proposal 8–3.

Consultations and submissions

11.84 Environment Australia noted that these protections were in line with the provisions under the EPBC Act. [78]

11.85 ASIC was supportive of the proposal, but again sought to distinguish proceedings for a civil pecuniary penalty from proceeding for a compensation order or disqualification order. Sections 1317P and 1317Q of the *Corporations Act* were intended to enable ASIC to commence civil penalty proceedings without the risk of precluding subsequent criminal action where that becomes appropriate, while seeking to prevent unfairness to a defendant subject to both civil penalty proceedings and subsequent criminal prosecution. Given the protective nature of these remedies, ASIC believes that it is not necessary to limit the availability of such remedies or use of such remedies by further limiting the use of information given or documents produced in such proceedings.[79] ASIC noted that, if the proposal was only intended to cover civil penalty proceedings, then it was consistent with the current position under the *Corporations Act*.

11.86 The ATO has raised concerns, similar to its concerns regarding privilege (see chapters 18 and 19) — that all federal investigations are not the same, and one solution regarding federal investigative powers would not necessarily fit all situations.[80]

Conclusion

11.87 In line with Recommendation 18–3, the ALRC does not believe a distinction should be drawn in this case between evidence given in civil pecuniary penalty cases and evidence given in civil proceedings seeking other types of remedies. The ALRC therefore supports the original wording of Proposal 8–3 in DP 65.

Are parallel proceedings an appropriate alternative?

11.88 Before the CLERP reforms, s 1317GF and 1317GG of the *Corporations Law* provided that, on a hearing of a proceeding for an indictment or a summary conviction, if the mental elements of an offence were not made out, a jury or a court could make an alternative finding that the person was not guilty of an offence, but guilty of a contravention to which a civil penalty applied. These sections have been repealed.[81]

11.89 Under the current statutory bar provisions, if the regulator wishes to impose a civil penalty after an unsuccessful criminal proceeding, it is required to commence fresh proceedings. This not only requires greater expenditure on the part of the regulator, but also the person subject to the proceedings. Further, because the mechanism re-

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78 *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 486D.
79 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.
80 Australian Taxation Office, *Submission CAP 16*, 17 September 2002.
81 Although similar provisions remain under the *Superannuation Industry (Supervision) Act 1993* (Cth).

lates to criminal proceedings followed by a possible civil penalty contravention order, the issues raised in relation to evidence may not arise.

11.90 In DP 65 the ALRC asked if the law should permit courts, either generally or in specific cases, to make an alternative finding that a person is not guilty of an offence but liable for a civil penalty (in relation to which there is no mental element) if the physical elements of both the offence and the contravention are proved but the mental elements of the offence are not.

Consultations and submissions

11.91 ASIC supported the move away from this model in the CLERP reforms on the basis that the old provisions which allowed an alternate finding contributed to the blurring of the distinction between civil penalty proceedings and criminal proceedings.

11.92 ASIC also noted the problems with juries understanding the provisions. The availability of a lesser or alternative verdict may deter juries from making a finding of criminal liability. There is scope for confusion where juries must grasp both criminal and civil standards and procedures in considering the evidence. Alternative verdicts also posed procedural problem for prosecutors as to how the indictment should be framed and when the jury should be informed of the possibility of an alternative verdict.[82] There are also difficulties in determining how to address and to sum up to juries. These could present real procedural (and fairness) issues if evidence were admissible on the criminal charge but not in civil penalty proceedings or vice versa.

11.93 In contrast, the Victorian Bar was supportive of this model, as it would protect the accused from the burden of multiple proceedings. The Victorian Bar was also of the view that such a model would not result in more criminal proceedings being brought as agencies would still have sound policy reasons for deciding to bring civil penalty proceedings.[83]

11.94 Other regulators (who did not have these types of provisions available) saw some merit in allowing alternative findings on the grounds of efficiency.[84] A further submission argued that to allow courts to substitute findings where the necessary mental elements for the criminal offence are unproved would expedite the judicial process and reduce multiplicity of proceedings. It was felt this should apply to all federal provisions containing 'tandem liability'.[85]

Conclusion

11.95 The ALRC considers on balance that, despite the apparent benefits and efficiencies of offering only one set of proceedings, this model promotes confusion and

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82 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.
83 The Victorian Bar, *Submission CAP 22*, 14 October 2002.
84 Australian Taxation Office, *Submission CAP 16*, 17 September 2002; Environment Australia, *Submission CAP 26*, 24 October 2002.
85 M Adams, *Submission CAP 12*, 5 September 2002.

procedural problems for prosecutors and courts. In this Report, the ALRC's approach has been to reject a blurring of the civil and criminal paradigms, and to seek to re-establish their boundaries in clear, legislative form. A model such as that under the old *Corporations Law* does not sit well with the approach.[86] As such, the ALRC would not advocate that regulators adopt these types of penalty provisions.

Separate schemes of criminal liability and civil penalty liability

11.96 Unlike some provisions in the *Corporations Act* where the conduct leading to a civil penalty can also give rise to criminal liability, conduct that contravenes civil penalty provisions under some legislation, such as the TPA, cannot generally give rise to criminal liability.[87]

11.97 Contravention of Part IV (restrictive trade practices) can only lead to civil, and not criminal penalties. Until recently, criminal penalties attached to contravention of Part V of the TPA (consumer protection).[88] In December 2001, Part VC was inserted into the Act, establishing a separate criminal consumer protection regime within the Act and giving effect to the *Criminal Code*.[89] Neither Part V or VC contain civil penalty provisions.

11.98 Where legislation creates a clear distinction between conduct that attracts criminal liability and conduct that attracts civil penalty liability, many of the issues associated with parallel criminal and civil penalty liability are not present, particularly in relation to use of information and evidence.

Double punishment

11.99 As noted above, the double jeopardy protections under the *Crimes Act* and the common law do not extend to civil and administrative penalties. However, where multiple civil penalties can attach to the same conduct, some protection against double punishment is required otherwise, the subject of the penalties could receive disproportionate punishment for the wrongdoing.

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86 As noted above, the *Superannuation Industry (Supervision) Act 1993* (Cth) retains this model. The Inquiry did not receive any submissions on the use of those provisions.

87 *Trade Practices Act 1974* (Cth), s 78. Some duplication of liability for similar conduct has occurred with the introduction of the GST–monitoring powers under the Act. Misrepresentation of the effect of the GST can now attract strict criminal liability under s 75AZC (false or misleading representations) or civil penalty liability under s 75AYA (prohibition on misrepresenting the effect of the New Tax System changes). An individual could also bring an action seeking damages under Pt V (s 53). However, s 76B provides some protection similar to that under the *Corporations Act 2001*, *Environment Protection and Biodiversity Conservation Act* and *Commonwealth Authorities and Companies Act 1997*.

88 Private compensatory actions also applied.

89 Part VC was introduced with the commencement of the *Treasury Legislation Amendment (Application of Criminal Code) Act (No 1) 2001* (Cth) on 15 December 2001.

11.100 It is conceivable that multiple civil penalties could be imposed for the same conduct under, for example, different provisions of Part IV of the TPA. This prohibited conduct can attract pecuniary penalties as large as $10 million for corporations. Therefore, some protection against double punishment for the same conduct is provided under s 76(3) of the Act.[90] The onus of proving that s 76(3) applies rests with the respondent.[91] The subsection provides that:

> If conduct constitutes a contravention of two or more provisions of Part IV, a proceeding may be instituted under this Act against a person in relation to the contravention of any one or more of the provisions but a person is not liable to more than one pecuniary penalty under this section in respect of the same conduct.[92]

11.101 In DP 65, the ALRC proposed that this approach be adopted in all legislation where multiple civil penalties can attach to the same conduct.[93]

Consultations and submissions

11.102 The ATO stated that provided that there was clarity in the idea of 'the same or substantially the same conduct', it would not have a problem with this proposal.[94] Environment Australia noted that this proposed protection was already present in the EPBC Act.[95]

11.103 ASIC noted that the *Corporations Act* does not have a similar provision. However, when a penalty is calculated under the Act, the court has a discretion as to quantum, and has ruled that the penalty should be no greater than to achieve the purpose of personal deterrence and deterrence to the public against a repetition of the conduct.[96] If the ALRC's proposals were to be adopted, ASIC has noted it would be appropriate to increase the maximum penalty payable under the Act, to allow the court to make pecuniary penalty orders that reflect the seriousness of the conduct.[97]

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90 In *Australian Competition and Consumer Commission v George Weston Foods Ltd* (2000) ATPR ¶41–763, the ACCC was unsuccessful in arguing that conduct in which the respondent had attempted to involve two retailers in price fixing amounted to separate contraventions. In *Trade Practices Commission v Simpson Pope Ltd* (1980) 30 ALR 544, Franki J said: '[D]ifferent acts of a supplier, each of which is a contravention of s 48 because it falls within one or more of the categories of acts set out in s 96(3), which take place at different times and in relation to three different customers, are not to be regarded as "the same conduct" within s 76(3). The words "the same conduct" in s 76(3) must be more limited in scope than the words "any similar conduct" which appear at the end of s 76(1)'.

91 *Ducret v Colourshot Pty Ltd* (1981) 35 ALR 503.

92 Similar protection is afforded under s 481(4) of the *Environment Protection and Biodiversity Conservation Act* and s 570(5) and (6) of the *Telecommunications Act 1997* (Cth).

93 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Proposal 8–4.

94 Australian Taxation Office, *Submission CAP 16*, 17 September 2002.

95 Environment Australia, *Submission CAP 26*, 24 October 2002.

96 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002 citing Santow J in *Re HIH Insurance; ASIC v Adler* (2002) 42 ACSR 80, 114–116.

97 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.

Conclusion

11.104 The principle against double punishment is important. It is both unfair and counter to stated principles of law in some contexts to overly divide up conduct or subject a person to multiple civil penalties for the same conduct.

11.105 As noted above, there is potential in a number of pieces of federal regulation for multiple civil penalties to attach to the same conduct. The ALRC would not wish to limit an action being brought under each of the relevant sections of the Act. However, where there is the availability of penalties as high as those available under the TPA and the EPBC Act, the provisions currently found in those Acts which guard against excessive, overly punitive pecuniary penalties are appropriate. Under this approach findings of multiple civil breaches are not precluded, allowing the 'deterrence factor' of a public finding of liability to still be present. A finding of contravention may also have a flow on effect in allowing third parties to seek compensation. What is precluded under this approach is 'double punishment' for the same conduct, so that only one penalty is applied. In essence, this is the same as the 'totality principle' which courts have regard to in sentencing. The totality principle seeks to ensure that an overall penalty is appropriate and not excessive in relation to the totality of the conduct. The totality principle is discussed further in chapter 30.

11.106 In DP 65, the ALRC also asked whether legislation was required to prevent double punishment arising from civil penalties for the same conduct under different statutory instruments.[98] No responses received indicated that this was an issue.

Criminal liability and administrative penalties

Administrative penalties

11.107 In some circumstances, additional penalties or adverse consequences arise automatically upon conviction for a criminal offence. For example, s 206B of the *Corporations Act* provides for automatic disqualification from managing a corporation if a person has been convicted of an offence against the Act or an offence that involves dishonesty or the making of certain types of decisions affecting a corporation.

11.108 Issues concerning the use of information or evidence do not arise here as evidence of the relevant conviction is enough to trigger the subsequent disqualification, which is a true administrative penalty.

11.109 Further, as noted above, the double jeopardy protections under s 4C of the *Crimes Act* and the common law only relate to criminal offences, and not to administrative penalties. Given the constitutional constraint on non-judicial officers imposing

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98 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Question 8–3.

penalties, it is not surprising that administrative penalties have rarely been considered as punishment for the purposes of double jeopardy in Australia.[99] When parties to litigation have raised the issue, it has been quickly dismissed[100] or the 'protective and managerial purpose of the legislation' has been held to exclude the operation of the protection.[101]

11.110 However, it could be thought that the above example constitutes double punishment. This is answered by treating disqualification under the *Corporations Act*, and similar actions under other legislation, as not having the purpose of retribution but protecting the corporation and the public.[102]

Quasi-penalties

Social security

11.111 In some legislation, the imposition of a quasi-penalty may be followed by a criminal prosecution. For example, under the *Social Security (Administration) Act 1999* (Cth), a failure to notify the Department of a matter could result in an administrative breach rate reduction period pursuant to s 67 of the *Social Security (Administration) Act* and s 558 of the *Social Security Act 1991* (Cth). In addition, if on investigation it is found that payment of a benefit continued to be made because of a fraud, the recipient could face criminal liability under s 215–217 of the *Social Security (Administration) Act.*

11.112 Can the withdrawal of a benefit pursuant to s 67 of the *Social Security (Administration) Act* and s 558 of the *Social Security Act* be considered a punishment? As noted in chapter 3, it is sometimes argued that the suspension or reduction of social security benefits as a result of breaches of conditions is a matter of eligibility rather than punishment. However, the suspension of benefits in many circumstances is clearly viewed as a form of punishment,[103] and as distinct from non-eligibility for benefits as a result of gaining increased income.

11.113 However, double jeopardy issues do not arise here. Failure to notify leading to an administrative breach, and conduct leading to an offence under s 215 or 216 of the *Social Security (Administration) Act*, constitute separate conduct. Under s 558 of the *Social Security Act* an administrative breach can be imposed for a failure to do certain

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99 See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

100 The issue was only very briefly dealt with in *White v Minister for Immigration and Multicultural Affairs* [1999] FCA 1433. No reasons were given for stating that double jeopardy had no application in circumstances relied upon in that case other than it was a well developed concept in criminal law.

101 See, for example, *Evans v Strachan* (1999) 167 ALR 159.

102 Banning orders are imposed to protect the investing public and public confidence in the securities industry rather than to penalise the person who is banned: *Kippe v Australian Securities Commission* (1995) 14 ACLC 128.

103 For example, see Australian Council of Social Service, *Breaching the Safety Net: The Harsh Impact of Social Security Penalties*, ACOSS Info 305 (2001), Australian Council of Social Service.

actions[104] whereas criminal liability under s 216 of the *Social Security (Administration) Act*, for example, requires a positive act — the use of impersonation or fraudulent device to obtain a benefit.

11.114 In general, social security legislation does not have double punishment protections. However, some protection is provided from multiple quasi-penalties by s 630BD of the *Social Security (Administration) Act*:

> If, but for this section, an event would result in an activity test penalty period and an administrative breach rate reduction period both applying to a person under this Act, only the provision imposing the activity test penalty period is to apply to the person.

11.115 However, the social security jurisdiction does raise issues in relation to the use of evidence given in administrative proceedings in a subsequent criminal proceeding. The Welfare Rights Centre has told the ALRC that it has to be careful when advising people to seek review of an administrative penalty at the Social Security Appeals Tribunal where the evidence or admissions may be used against them in a later prosecution.[105]

11.116 A number of decisions have stated that administrative proceedings should not be commenced, or else stayed, when a criminal prosecution is pending or has commenced.[106] Anecdotal information provided to the ALRC suggests that the AAT has acceded to this course on a number of occasions. One of the policy reasons for this is that administrative proceedings may force people to make self-incriminating admissions as well as reveal their defence, which they would not ordinarily have to do in criminal proceedings.

Licensing

11.117 The majority of circumstances in which quasi-penalties are imposed do not involve general restrictions of liberty, but prevent a person from doing specific activities through the cancellation, suspension or variation of a licence.[107] The justification and purpose for the action are normally a form of protection of the public and not retributive. Where the regulator aims to protect public safety (for example, CASA) or protect

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104 For example, attend the Department, undergo a medical examination, provide a tax file number, or provide information.

105 Welfare Rights Centre, *Consultation*, Brisbane, 15 December 2000.

106 See *Lee v Naismith* (1989) 45 ACrimR 271; *Edelston v Richmond* (1987) 1 NSWLR 51; *Herron v McGregor* (1986) 6 NSWLR 246; *Re Levy: Ex parte Incorporated Law Institute of NSW* (1887) 8 LR (NSW) 347. There has been much debate as to whether the private civil law principle of res judicata applies in AAT proceedings: A Hall, 'Res Judicata and the Administrative Appeals Tribunal' (1994) 22 *Australian Journal of Administrative Law* 22.

107 Across Commonwealth legislation, undertaking licensed activities without obtaining a licence almost invariably leads to criminal sanctions. The amount of the fine varies considerably between licensing regimes, with a maximum fine of $2.2 million in broadcasting and telecommunications and as little as $2000 and $10,000 in health insurance and navigation respectively. Breaches of licence conditions may also result in fines.

the market from fraudulent or incompetent operators (for example, ASIC), it may need to act quickly to prevent or mitigate damage.

11.118 At times, the same or similar conduct can give rise to both criminal liability and quasi-penalties for breaches of a licence condition. For example, under s 139 of the *Broadcasting Services Act 1992* (Cth), it is an offence for a licensee to breach certain conditions of a commercial television broadcasting licence, a commercial radio broadcasting, subscription television broadcasting or a community broadcasting licence.[108]

11.119 In addition, s 143 of the *Broadcasting Services Act* provides that the ABA may suspend or cancel a commercial television broadcasting licence, commercial radio broadcasting, subscription television broadcasting or a community broadcasting licence if the licensee breaches a condition of the licence. This provision does not limit the conditions which have to be breached, and presumably would include the same conditions as outlined under s 139.

11.120 Here again, the traditional double jeopardy protections would not apply as the regulator's decision to cancel a licence is made through an administrative and not a criminal process. Further, the purpose of the cancellation or suspension can be characterised as protective rather than punitive.

11.121 In many cases it is logical or desirable that, when a licensee is convicted of a criminal offence in relation to a licence condition, certain action would be taken in relation to the licence. However, the imposition of a large criminal fine in addition to the cancellation or suspension of a licence could be seen as unduly severe punishment. If this is to occur, it is arguable that the suspension or cancellation should be taken into account when setting the criminal penalty, especially if the suspension or disqualification is automatic or non-discretionary.

Consultations and submissions

11.122 DP 65 asked if there was adequate protection against the use of evidence given in administrative proceedings in subsequent criminal or civil penalty proceedings, in the same way that evidence given in a civil penalty proceeding is prohibited from use in a subsequent criminal proceeding.[109] For example under the *Corporations Act* there is no provision to protect against evidence being given in proceedings for a disqualification order, and compensation order or a declaration of contravention being used in later proceedings.

11.123 ASIC's view is that the legislation it administers provides protection against the inappropriate use of evidence given in administrative hearings. Administrative hearings that are conducted under Part 3, Division 6 of the ASIC Act 'may be adjourned when there is a real risk that justice will be interfered with if the administrative hearing proceeds'. ASIC further notes that there are a number of cases which provide

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108 The fault elements of the offence provision are determined by reference to the default elements under Chapter 2 of the *Criminal Code*.

109 See discussion earlier at 11.72.

guidance in relation to when to adjourn administrative hearings.[110] Accordingly there are some procedural protections in relation to administrative hearings to prevent injustice to a person also subject to criminal proceedings or civil penalty proceedings. The privilege against self-incrimination may also prevent the use of information given in administrative hearings being used in civil or criminal penalty proceedings.

11.124 No other submissions made a comment specifically on this issue[111] and the ALRC therefore does not make a recommendation.

Operational issues

Elections

11.125 The ALRC has been told that, when there is a choice among criminal, civil and administrative penalties, it can be difficult to determine at what point a certain path should be elected.[112]

11.126 The ALRC's research has revealed that among the most important factors dictating an agency's approach to enforcement are its workload and resources. Often a combination of factors will be decisive — for example, a disproportion between effort, time, money and results will discourage enforcement.[113] ASIC noted its overriding principles to be the need to choose the most appropriate response to the relevant contravention and the need to gain the greatest regulatory impact from any enforcement action. Factors which ASIC nominates as potentially being considered are:

- The conduct and its seriousness: does the conduct amount to an offence? Are there indications of dishonesty as distinct from inadvertence or plain incompetence?
- The likely evidence and elements of the offence. Is there sufficient admissible evidence to sustain a prosecution?[114] Are the key witnesses likely to be available? Might these witnesses themselves be defendants? Are indemnities required?
- The prevalence of the conduct and the need for early deterrence in the market place. Is the prevalence such that a quick response is essential? Is broad general deterrence essential or is the contravention unlikely to recur?

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110 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002 citing *Australian Securities Commission v Kavanagh* (1994) 13 ACSR 573, *McMahon v Gould* (1982) 7 ACLR 202 and *Phillipine Airlines v Goldair (Aust) Pty Ltd* [1990] VR 385.

111 The ATO referred to their comments on privilege; see ch 18 and 19.

112 Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 20 February 2001.

113 R Tomasic and B Pentony, 'The Prosecution of Insider Trading: Obstacles to Enforcement' (1989) 22 *Australian & New Zealand Journal of Criminology* 65, 73.

114 ASIC notes this does not mean, however, that civil penalties will be simply used to avoid having to prove a matter to the criminal standard.

- The economic and social harm inflicted on victims.
- The availability of assets to satisfy civil penalties and judgements for compensation.
- The need for a speedy response. Criminal investigations and prosecutions almost invariably take longer. Criminal proceedings do not have the benefits of more expeditious impact that are available with many civil proceedings.[115]

11.127 Crucial factors impacting on the choice of proceedings include the strength of the evidence of a breach and the likelihood of enforcement success.[116] Considerations of the public interest, policy concerns, the influence of personalities, cultural and institutional attitudes, and the judicial interpretation or the lack of precedent may also be important. Regulators operating in a field of regulation that attracts a high level of public interest may be subject to a greater degree of political and public pressure in their enforcement decisions.[117]

Prosecution Policy of the Commonwealth

11.128 The presence of a central criminal enforcement agency may assist avoidance of double punishment issues. The Commonwealth DPP is responsible for pursuing criminal prosecutions to enforce federal criminal law.[118] Regulators refer suspected criminal breaches to the DPP, which then decides whether to pursue criminal charges according to the *Prosecution Policy of the Commonwealth* (Prosecution Policy).[119] For further discussion of the Prosecution Policy, see chapter 9.

Arrangements with the DPP

11.129 Many regulators have administrative arrangements with the DPP including ASIC, the ATO, Customs and Centrelink. Each of these arrangements outlines the relationship between the regulator and the DPP from the 'starting process' through to litigation. For example, the *Guidelines for the Working Arrangement Between the Office and the ASC for the Investigation and Prosecution of Serious Corporate Wrongdoing* outlines in detail a close relationship between the two offices. There is liaison at various stages of the process.

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115 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.

116 Measured, for example, as the likely prospect of criminal conviction or a civil or administrative penalty being imposed, or more broadly as the likelihood of preventing on-going breaches or securing future compliance.

117 A Ashworth, *The Criminal Process — An Evaluative Study* (2nd ed, 1998) Oxford University Press, 145. The performance of CASA in relation to airline safety issues in 2001 is an example of intense public scrutiny affecting regulatory approaches. Another example is the role of APRA in relation to the insolvency of HIH, Australia's second largest general insurer, in mid-2001.

118 Regulatory agencies typically lack independent authority to pursue criminal prosecutions, although the ATO has powers to prosecute certain summary offences.

119 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*, Commonwealth Director of Public Prosecutions, <www.cdpp.gov.au/cdpp/>, 16 November 2001.

11.130 In respect of each matter in which there is both civil and criminal litigation, ASIC will also nominate an ASIC lawyer as the liaison officer who will ensure that the DPP is kept aware of the process and developments in civil litigation. These arrangements not only result in a coordinated approach to enforcement, they may also act as some protection of the regulated from double punishment.

11.131 Most regulators now have memorandums of understanding (MOUs) with other agencies, both nationally and internationally.[120]

Conclusion

11.132 In chapter 9, the ALRC recommends that regulators who administer legislation under which criminal penalties may be imposed should, together with the DPP, develop and publish a Memorandum of Understanding that addresses, amongst other things, parallel and subsequent criminal and non-criminal enforcement arising from the same or substantially the same conduct.[121]

11.133 Guidelines should also be developed where legislation provides for a choice between criminal liability and civil and administrative penalties. Regulators should develop and publish guidelines to seek to avoid double punishment concerns and evidence issues raised by multiple proceedings. The transparency of these guidelines would not only foster certainty and consistency across agency practice but would also notify the regulated community as to how they will be dealt with when multiple liability arises.[122]

11.134 In its submission, ASIC saw merit in this proposal, to provide certainty for regulators, co-regulators and the regulated. It noted, however, that some aspects of regulators' enforcement policies must remain confidential in the interests of the administration of justice.[123]

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120 For example, in relation to the work of the ACCC, there is a 'Mutual Antitrust Enforcement Assistance' agreement between the Australian and the US governments. ASIC has an MOU with the Monetary Authority of Singapore allowing for information exchange and investigative assistance in securities and futures matters. In addition, in 1996, the Heads of Commonwealth Operational Law Enforcement Agencies, which include major Australian regulators, adopted *Overarching Principles for Selecting Cases for Investigation and Administrative, Civil and Criminal Sanctions*. The Principles are inter-agency guidelines that outline the case selection, referral, prosecution, compliance and enforcement strategies of the various agencies, seeking to promote a cooperative and consistent approach to penalty decisions across regulators. These strategies are not public and their impact on penalty decisions is not clear.

121 Recommendation 9–1.

122 The US Environmental Protection Agency (EPA) has a *Parallel Proceedings Policy* that sets out a number of principles and procedures that take account of double punishment concerns, the use of information and evidence, as well as confidentiality and procedural fairness considerations. See 'Revised EPA Guidance for Parallel Proceedings', US Environmental Protection Agency, <http://es.epa.gov/oeca/osre/890621-1.html>, 4 March 2002.

123 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.

11.135 Professor Michael Adams also agreed that guidelines should be published to assist in clarifying the law. He cited the provisions of the *Corporations Act* that contain 'tandem liability' as an example where clarification is needed. However, he submitted that there should be one set of guidelines applicable across the federal sphere, applicable to all regulated parties. The ALRC considers that adoption of guidelines along the lines outlined in Recommendations 6–2 to 6–4, 9–1 and 10–1 will go some way to promoting the desired consistency.

Recommendations

Recommendation 11–1. When the same physical elements can attract both a civil penalty and criminal liability, the physical and fault elements of both the contravention attracting a civil penalty and the criminal offence should be clearly distinguished in the legislation.

Recommendation 11–2. Legislation that provides for exposure to parallel criminal proceedings and civil penalty proceedings for the same or substantially the same conduct should also provide that:

(a) civil penalty proceedings against a person must be stayed if criminal proceedings are commenced, or have already been commenced, against that person for a criminal offence constituted by conduct that is the same or substantially the same as the conduct alleged to constitute the civil penalty contravention;

(b) no, or no further, civil penalty proceedings may be taken against a person if that person has been convicted of a criminal offence constituted by conduct that is the same or substantially the same as the conduct alleged to constitute the civil penalty contravention; and

(c) if the person is not convicted of that criminal offence, the civil penalty proceedings may be resumed.

This Recommendation is not intended restrict the ability of a regulator to seek compensation orders, disqualification orders or preservation orders.

Recommendation 11–3. Legislation that provides for criminal proceedings and civil penalty proceedings for the same or substantially the same conduct should also provide that evidence of information given or documents produced by a person is not admissible in criminal proceedings against the person if the person gave the evidence or produced the documents in civil penalty proceedings.

Recommendation 11–4. Where conduct constitutes a contravention of two or more provisions of legislation that would attract a civil penalty, a person should not be liable for more than one civil penalty in respect of the same or substantially the same conduct.

Recommendation 11–5. Regulators should develop and publish guidelines in accordance with Recommendations 6–2 to 6–4, 9–1 and 10–1 in relation to criminal and civil penalty proceedings for the same or substantially the same conduct that address issues of

(a) choice of proceedings,

(b) double punishment, and

(c) limits on the use of evidence.

12. Infringement Notices

Contents

Introduction

12.1 The Terms of Reference require the ALRC to report on any limitations that apply or should apply to the use of State and Territory infringement notice enforcement procedures. This chapter considers the nature of infringement notice schemes, their use at State, Territory and federal level, whether infringement notice schemes provide a useful and practical alternative to conventional enforcement mechanisms for less serious regulatory breaches, and whether model legislation should be developed for general use at federal level.

12.2 The use of State and Territory enforcement schemes as a mechanism for recovery of penalties imposed for contraventions of federal laws is considered in chapter 31. It is important to maintain the distinction between the use of administrative methods for the recovery of penalties imposed by a court and infringement notice schemes used as an administrative process aimed at keeping the enforcement of lesser criminal offences and non-criminal contraventions out of the court system. This chapter considers the latter.

12.3 The Terms of Reference also direct the ALRC to consider recommendations made by the ALRC in its reports, ALRC 57 *Multiculturalism and the Law*[1] and ALRC 60 *Customs and Excise*,[2] in which the ALRC recommended adoption of an in-

1 Australian Law Reform Commission, *Multiculturalism and the Law*, ALRC 57 (1992), Australian Law Reform Commission, Sydney.

2 Australian Law Reform Commission, *Customs and Excise*, ALRC 60 (1992), Australian Law Reform Commission, Sydney.

fringement notice scheme for minor breaches of quarantine laws and for home distilling offences[3] and proposed a model infringement notice scheme.[4]

Infringement notice schemes

12.4 An infringement notice (sometimes called a penalty notice) is a notice authorised by statute setting out particulars of an alleged offence. It gives the person to whom the notice is issued the option of either paying the penalty set out in the notice to expiate the offence or electing to have the matter dealt with by a court. The notice also specifies the time and method for payment and the consequences if the person to whom the notice is issued fails to respond to the notice either by making payment or electing to contest the alleged offence.

12.5 Infringement notices 'are traditionally issued for offences of a more regulatory rather than criminal nature, such as parking offences'.[5] Infringement notices are generally issued only in respect of criminal offences, not non-criminal contraventions.[6] The policy behind these schemes has been described thus:

> It would seem clear that the intention of Parliament, in enacting these provisions, was to provide a system for the expeditious collection of monetary penalties arising with respect to minor offences, such as routine traffic offences. The procedure contemplates a saving of court time and resources by using modern technology to enforce such payments electronically.[7]

12.6 Infringement notices are a coercive penalty as the person to whom the notice is issued is offered the opportunity to 'make the problem go away' by paying the amount specified in the infringement notice, which is usually significantly less than the penalty which might be imposed by a court for the alleged offence. Infringement notice schemes typically set penalties at 20% or less of the maximum fine. The attraction for the person issued with the infringement notice is that it is generally quick, easy and inexpensive to pay the amount specified in the notice without question. Not paying the amount specified in the notice and contesting the offence is made less attractive by the prospect of a heavier penalty if a court determines the matter, in addition to the cost and inconvenience of the proceedings themselves. Infringement notices are also attractive for regulators as they allow offences to be officially 'noticed' and penalised without the need to prove any of the elements of the offence to the relevant standard. They provide a mechanism to encourage compliance by ensuring that the risk of detection of

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3 See Australian Law Reform Commission, *Multiculturalism and the Law*, ALRC 57 (1992), Australian Law Reform Commission, Sydney, para 9.16–9.28.

4 See Australian Law Reform Commission, *Customs and Excise*, ALRC 60 (1992), Australian Law Reform Commission, Sydney, Part 33 of the draft bill contained in Vol 1.

5 New South Wales Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996), New South Wales Law Reform Commission, Sydney, para 3.1.

6 Although a proposal has been made that they be used for alleged contraventions of the civil penalty continuous disclosure provisions in the *Corporations Act*: Treasury, *CLERP 9: Corporate Disclosure — Strengthening the financial reporting framework* , <www.treasury.gov.au/contentitem.asp?pageId=&ContentID=403>, 18 September 2002.

7 *Brian William Mcquade v Marion City Council* (1998) 100 ACrimR 203, 206, discussing the *Expiation of Offences Act 1996* (SA).

non-compliance is real.[8] Infringement notices are also attractive for the criminal justice system as a whole because:

> [The use of infringement notices] provides relief from the high number of prosecutions that would otherwise have to be conducted to enforce the law relating to summary offences and it reduces the costs of criminal justice.[9]

12.7 In its report ALRC 57, the ALRC described infringement notices as 'a diversionary tool' designed 'to divert offenders in minor cases away from the criminal courts'.[10] This results in an 'opt-in' criminal process where the criminal burden of proof will only need to be met by the prosecution if the person to whom the notice is issued elects to contest the offence in court. An infringement notice could, therefore, be described as an offer of alternative penalty made by a regulator to an alleged offender to settle the matter without resort to conventional enforcement mechanisms. Considered in this way, an infringement notice is not a true penalty at all as it is not a sentencing order made by a court subsequent to a binding determination of liability, but is simply a process for the expedient handling of low-level offences.

12.8 In proposing an infringement notice scheme for certain quarantine and home distilling offences, the ALRC noted that 'a criminal prosecution for even a minor offence is costly and cumbersome and, for the accused person may have consequences out of all proportion to the offence'.[11] The advantages of infringement notices were considered by the ALRC to include that they provide a less harsh and discriminatory way of dealing with minor offences, particularly those committed by people who may not understand the Australian legal system or realise that they have committed an offence and may be especially traumatised by a criminal prosecution and conviction. Other advantages noted in ALRC 60 included speed and reduced expense; elimination of delay in courts; proportionality between the seriousness of the offence, the enforcement procedure and the penalty; and that the offences to be dealt with by way of infringement notice are those in which a high proportion of defendants plead guilty.[12]

12.9 The New South Wales Law Reform Commission identified the advantages of infringement notice schemes this way:

> 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.[13]

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8 See ch 25 for a discussion of the role of detection risk in optimal penalty theory.

9 R Fox, 'Infringement Notices: Time for Reform' (1995) 50 *Trends and Issues in Criminal Justice* 1, 4.

10 Australian Law Reform Commission, *Multiculturalism and the Law*, ALRC 57 (1992), Australian Law Reform Commission, Sydney, para 9.8.

11 Ibid, para 9.2.

12 Australian Law Reform Commission, *Customs and Excise*, ALRC 60 (1992), Australian Law Reform Commission, Sydney, Vol III, 309–310.

13 New South Wales Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996), New South Wales Law Reform Commission, Sydney, para 10.20.

12.10 Disadvantages previously noted by the ALRC include the lack of court scrutiny; the risk that innocent people will pay the amount specified in the infringement notice to avoid 'the expense of contesting proceedings';[14] the possibility of discriminatory enforcement against vulnerable members of the community; and the possibility of 'net-widening' — that is, automatic issue of an infringement notice in circumstances which would otherwise have been dealt with by a caution or warning.

12.11 The New South Wales Law Reform Commission identified the same disadvantages as the ALRC and some additional disadvantages,[15] including the failure to consider the circumstances of individual cases; dispensing with the traditional criminal law requirement of *mens rea*; reversing the onus of proof; and diminishing the moral content of particular offences. In its report on the *Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, the Senate Standing Committee for the Scrutiny of Bills noted that

> strict liability offences should be designed to avoid the likelihood that those affected, particularly by the issue of an infringement notice, will pay the lower penalty simply because it is easy and convenient to do so, rather than spend the money and time to pursue what might be a legitimate defence; any agency which encouraged this tendency would be acting improperly.[16]

12.12 Both Dr Mirko Bagaric and Professor Richard Fox have noted the potential of infringement notice schemes to 'trivialise crime'[17] by diminishing the moral and social stigma of breaking the law. Fox is also critical of the 'one size fits all' approach to justice of infringement notice schemes, arguing that there is a risk of injustice in individual cases.[18] Bagaric notes the possibility of a 'reduction in the quality of criminal justice due to fewer people having their day in court'.[19] He is also critical of the criminalisation of the type of offences that commonly attract an infringement notice, as they 'do not seek to protect any recognisable right'.[20] However, this criticism seems to be more directed at the status of the offence itself rather than the infringement notice procedures which appear to have been applied to existing low-level criminal offences without any thought having been given to whether the offences should in fact remain criminal.

12.13 Infringement notice procedures are used to deal with large volumes of low-level criminal offences. Using a truncated procedure for dealing with criminal offences (which are usually subject to rigorous procedural protections) raises concerns about ac-

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14 Australian Law Reform Commission, *Customs and Excise*, ALRC 60 (1992), Australian Law Reform Commission, Sydney, Vol III, 309. This point was raised by the Victorian Bar in its submission to the Inquiry: The Victorian Bar, *Submission CAP 22*, 14 October 2002.

15 New South Wales Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996), New South Wales Law Reform Commission, Sydney, para 10.21.

16 Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002), AGPS, 286.

17 M Bagaric, 'Instant Justice? The Desirability of Expanding the Range of Criminal Offences Dealt With on the Spot' (1998) 24 *Monash University Law Review* 231, 234.

18 R Fox, 'Infringement Notices: Time for Reform' (1995) 50 *Trends and Issues in Criminal Justice* 1, 5.

19 M Bagaric, 'Instant Justice? The Desirability of Expanding the Range of Criminal Offences Dealt With on the Spot' (1998) 24 *Monash University Law Review* 231, 234.

20 M Bagaric, 'The "Civil-isation" of the Criminal Law' (2001) 25(4) *Criminal Law Journal* 184, 190.

cess to, and the quality of, justice. Bagaric argues that 'the level of procedural protection accorded to defendants should be directly commensurate with the seriousness of the offence'.[21] Fox considers 'the risk that persons who believe themselves innocent will nevertheless settle allegations by paying up because of the pressure of convenience, discounted penalties, threat of costs and the limited availability of legal aid for defended summary matters' to be a significant disadvantage of infringement notice schemes.[22] Infringement notice schemes may be seen as an attempt to convince people to voluntarily forego the procedural protections of the criminal process in the interests of allowing the state to collect fines more efficiently.

12.14 Infringement notice schemes rely on the use of computerised systems to increase the efficiency of processing notices. The ability to pay by credit card over the internet has attractions for both the person to whom the notice is issued and the state as it can make payment of the amount specified in the notice the easiest option. Failure to pay the amount specified in an infringement notice often results, at State and Territory level, in an alternative penalty such as suspension or cancellation of a driving licence or motor vehicle registration.

> Most enforcement actions will be achieved through efficient computerised transactions which will allow the system to speedily manage the majority of defaulters. The suspension of a driver's licence or vehicle licence is an effective enforcement strategy because for most people a licence is essential for mobility.[23]

Use at state and territory level

12.15 The Terms of Reference for this Inquiry require the ALRC to report specifically on State and Territory infringement notice schemes such as the SETONS ('Self-enforcing ticketable offence notice system') procedure in Queensland,[24] the PERIN ('Procedure for enforcement and registration of infringement notices') procedure in Victoria[25] and the SEINS ('Self-enforcing infringement notice system') procedure in New South Wales.[26] Infringement notice schemes also operate in the Northern Territory,[27] South Australia,[28] Western Australia[29] and, to a lesser extent, Tasmania.[30] In the

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21 M Bagaric, 'Instant Justice? The Desirability of Expanding the Range of Criminal Offences Dealt With on the Spot' (1998) 24 *Monash University Law Review* 231, 241.

22 R Fox, 'Infringement Notices: Time for Reform' (1995) 50 *Trends and Issues in Criminal Justice* 1, 5.

23 'Fines, Penalties and Infringement Notices Enforcement Act 1994' (1996) 22 *Commonwealth Law Bulletin* 650.

24 The procedure is set out in Part 3 of the *State Penalties Enforcement Act 1999* (Qld). The current scheme, which commenced on 27 November 2000, is more commonly known as the SPER ('State Penalties Enforcement Registry') system. The acronym SETONS is not used to describe the current procedure.

25 The procedure is set out in Schedule 7 to the *Magistrates' Court Act 1989* (Vic). The PERIN Court is established as a division of the Magistrates' Court.

26 SEINS was in effect from 1984 to 1998 under Part 4B of the *Justices Act 1902* (NSW). It was repealed in by the *Fines Act 1996* (NSW) which commenced on 27 January 1998. Part 3 of the *Fines Act 1996* (NSW) sets out the current procedure for enforcement of penalty notices in New South Wales. The acronym SEINS is not used to describe the current procedure.

27 See *Fines and Penalties (Recovery) Act 2002* (NT), part 2.

28 See *Expiation of Offences Act 1996* (SA), s 6 and 13.

29 See *Fines Penalties and Infringement Notices Enforcement Act 1994* (WA).

30 In Tasmania, infringement notices may be issued under several different Acts, including the *Traffic Act 1925* (Tas), the *Local Government Act 1993* (Tas) and the *Environmental Management and Pollution*

Australian Capital Territory, infringement notices may also be issued administratively but, unlike other Australian jurisdictions, enforcement of infringement notices relies on traditional court processes. The State and Territory schemes considered in this chapter all share the common characteristic that both the imposition of the penalty and its enforcement and recovery largely involve only administrative processes.

Outline of procedures

12.16 Generally, these infringement notice schemes permit penalties to be registered with a specially constituted agency or magistrates' court and enforced by that entity without any requirement that a court make findings on the person's liability for the penalty. The SPER, PERIN and New South Wales penalty notice systems are built around summary offences with set financial penalties. The range of penalties dealt with under these systems is broad, although the majority of matters concern traffic offences. These schemes are widely used.[31]

12.17 The basic form of the procedures in all three jurisdictions is as follows.

- An authorised person issues an infringement notice giving details of the alleged offence and the amount specified in the notice as payable. These notices include the information that the person to whom the notice is issued is entitled to have his or her liability for the penalty determined by a court. If they do not elect to contest liability, the penalty notice itself gives rise to an enforceable liability. However, the issue of the notice or payment of the penalty is not generally equivalent to conviction for the offence.

- If the person to whom the notice is issued fails to pay the full amount within the required time, a reminder notice (or 'courtesy letter') providing further time for payment is served.

- If the person to whom the notice is issued fails to pay the amount specified in the notice and does not elect to have the matter heard by a court before the further time limit expires, the penalty is registered with the registrar of the PERIN Court under the Victorian scheme.[32] In Queensland, the penalty is registered

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Control Act 1994 (Tas). The Fines Enforcement Unit of Justice Tasmania administers payment of most infringement notices.

31 In 2000–01, the New South Wales State Debt Recovery Office collected more than $90 million in fines, penalties and enforcement costs: Attorney-General's Department (NSW), *Annual Report 2000–2001* (2001), Attorney-General's Department of New South Wales, Sydney, 61. In 2000–01, 661,234 cases were initiated under the PERIN system in the Magistrates' Court of Victoria: Magistrates' Court of Victoria, *Annual Report: 1 July 2000–30 June 2001*, The Council of Magistrates, <www.magistratescourt.vic.gov.au/>, 29 October 2002. In 2001–02, 468,00 matters were lodged with the SPER registry in Queensland: Department of Justice and Attorney-General (Queensland), *Annual Report 2001–2002*, Department of Justice and Attorney-General (Queensland), <www.justice.qld.gov.au/dept/corpinfo.htm>, 20 November 2002, 142. SETONS was replaced by SPER with effect from 27 November 2000, when the substantive provisions of the *State Penalties Enforcement Act 1999* (Qld) commenced. At the time of writing, the 2001–02 annual reports of the New South Wales State Debt Recovery Office and the Magistrates' Court of Victoria were not available.

32 *Magistrates' Court Act 1989* (Vic), s 99 and sch 7, cl 4.

with SPER.[33] In New South Wales, an application for an enforcement order may be made to the State Debt Recovery Office.[34]

- In Victoria, the registrar of the PERIN Court, makes an order, enforceable as a court order, that the person pay the amount specified in the notice and an additional enforcement fee provided for under the legislation, and stating the consequences if they fail to do so.[35] In Queensland, the registrar of SPER,[36] and in New South Wales, the State Debt Recovery Office,[37] issues an enforcement order giving the person a further 28 days to pay the amount specified in the notice and setting out the consequences if they fail to do so.

- In none of these schemes is a court required to consider the case, find the person guilty, record a conviction or impose a sentence.

12.18 Critics of infringement notice schemes argue that 'voluntary' acceptance of the notice is illusory as the disparity between the amount payable under the notice and the potential penalty which could be imposed if the matter is dealt with by a court removes any true election by the alleged offender. The threat of harsh treatment operates as a form of duress, convincing innocent people to pay to avoid the time, expense and trauma of contesting liability for the offence in court.

Use at federal level

Constitutional limits

12.19 In the federal sphere in Australia, constitutional considerations prevent non-judicial officers from considering, deciding on and imposing penalties. In this context non-judicial officers can only perform purely administrative tasks; they simply put into effect a process of issuing penalty notices that is triggered automatically by a particular set of facts. For this reason, it is critical to determine whether the amount payable under an infringement notice is truly to be regarded as a penalty, as under the Constitution only a court may exercise judicial power. Given the restriction placed on the imposition of administrative penalties by the Constitution, a breach is dealt with administratively where the regulator imposes, without discretion, a penalty that arises automatically wherever the regulator identifies the set of facts or circumstances that give rise to a breach. The penalty is predetermined by law; all the regulator does is to document the breach and the penalty. For this reason, federal schemes do not have a 'fallback' penalty that will be imposed if the person fails to pay the amount specified in the infringement notice (such as licence suspension or cancellation commonly used in State and Territory schemes).

33 *State Penalties Enforcement Act 1999* (Qld), s 33.
34 *Fines Act 1996* (NSW), s 40–41.
35 *Magistrates' Court Act 1989* (Vic), sch 7, cl 5.
36 *State Penalties Enforcement Act 1999* (Qld), s 38.
37 *Fines Act 1996* (NSW), s 42.

Schemes in use at federal level

12.20 Infringement notice schemes are becoming increasingly a part of the Commonwealth regulatory framework. The ALRC's legislation mapping exercise identified more than 15 pieces of Commonwealth legislation that have provision for the issue of infringement (or penalty) notices[38] (and since publication of DP 65, a major new scheme has been announced as part of the CLERP 9 proposals).[39] Examples in legislation looked at by the ALRC include:

1. Section 1313 of the *Corporations Act 2001* (Cth) that provides for a penalty notice procedure for less serious breaches of the Act. Where ASIC has reason to believe that a person has committed a 'prescribed offence',[40] it may issue that person with a notice alleging that an offence has been committed, the particulars of it and that, if the person pays the amount specified in the notice[41] and (where applicable) rectifies an omission within 21 days of the issue of the notice, ASIC will not take further action. A major new scheme for enforcement of continuous disclosure obligations in the *Corporations Act* was announced in October 2002.[42]

2. Section 497 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) allows persons alleged to have committed an offence against the regulations to pay a penalty to the Commonwealth as an alternative to prosecution. The section sets the maximum for an infringement notice penalty at one-fifth of the maximum penalty that could be imposed by a court as a penalty for the offence. The types of offences for which an infringement notice may be issued carry penalties from three to 50 penalty units and include matters such as littering or dumping waste, various speeding and parking offences, unauthor-

38 Including the *Air Navigation (Fuel Spillage) Regulations 1999* (Cth); *Air Navigation Regulations 1947* (Cth)*; Airports (Building Control) Regulations 1996* (Cth)*; Airports (Control of On-Airport Activities) Regulations 1997* (Cth)*; Airports (Environment Protection) Regulations 1997* (Cth)*; Civil Aviation Regulations 1988* (Cth)*; Corporations Regulations 2001* (Cth)*; Customs Act 1901* (Cth); *Defence Force Discipline Act 1982* (Cth); *Education Services for Overseas Students Regulations 2001* (Cth); *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth); *Excise Act 1901* (Cth); *Financial Sector (Collection of Data) Act 2001* (Cth); *Fisheries Management Regulations 1992* (Cth)*; Interstate Road Transport Regulations 1986* (Cth); *Migration Regulations 1994* (Cth); *Quarantine Regulations 2000* (Cth); *Radiocommunications Regulations 1993* (Cth); *Road Transport Reform (Dangerous Goods) Act 1995* (Cth); *Road Transport Reform (Heavy Vehicles Registration) Act 1997* (Cth); *Road Transport Reform (Dangerous Goods) Regulations 1997* (Cth); *Sydney Airport Demand Management Act 1997* (Cth); *Tradex Scheme Act 1999* (Cth).

39 Treasury, *CLERP 9: Corporate Disclosure — Strengthening the financial reporting framework*, <www.treasury.gov.au/contentitem.asp?pageId=&ContentID=403>, 18 September 2002.

40 A 'prescribed offence' is an offence prescribed in the regulations for which the penalty does not include imprisonment and the pecuniary penalty does not exceed $1000: *Corporations Act 2001* (Cth), s 1369 or an offence against a provision mentioned in Schedule 3 to the Act, to which a penalty of 5 penalty units applies: *Corporations Regulations 2001* (Cth), reg 9.4.01.

41 The current penalty for an individual is 1.25 penalty units and for a body corporate 6.25 penalty units: *Corporations Regulations 2001* (Cth), reg 9.4.02.

42 Treasury, *CLERP 9: Corporate Disclosure — Strengthening the financial reporting framework*, <www.treasury.gov.au/contentitem.asp?pageId=&ContentID=403>, 18 September 2002. See discussion at para 12.32.

ised camping and unauthorised use of roads and walking tracks. All offences are strict liability offences.

3. The *Fisheries Management Regulations 1992* (Cth) set up an administrative infringement notice system[43] allowing a notice carrying a monetary penalty of 2 penalty units ($220) to be issued in relation to specified offences.[44] If criminal proceedings are taken under the *Fisheries Management Act* the maximum penalties for the relevant offences include six months' imprisonment[45] and a maximum fine of 500 penalty units.[46]

4. A similar infringement notice scheme is set up in the *Migration Regulations 1994* (Cth),[47] which provides that, as an alternative to prosecution in relation to some provisions of the *Migration Act 1958* (Cth), an authorised officer can serve an infringement notice setting out the alleged offence and the amount specified in the notice as payable. Under s 137, conviction can lead to a penalty of $5000; the amount specified in the infringement notice ranges from $250 to $1000.[48] For breaches of s 229 and 230, criminal fines are up to $10,000. The infringement notice penalties are $3000 for natural persons and $5000 for a body corporate.[49] Offences against s 137 and 230 are strict liability offences. An offence against s 229 is an absolute liability offence.

5. The infringement notice scheme established by the *Radiocommunications Regulations 1993* (Cth)[50] covers much of the conduct which is subject to the criminal offence provisions in the *Radiocommunications Act 1992* (Cth). The ACA may issue an administrative infringement notice providing for monetary penalties of two or three penalty units ($220 or $330) for individuals and 10 or 15 penalty units ($1,100 or $1,650) for bodies corporate.[51] The difference between the maximum infringement notice and equivalent criminal penalties is significant. For example, under the infringement notice scheme, the maximum penalty for an individual who knowingly causes interference with radiocommunications is $330. In court proceedings for the same offence, the offender may receive a term of imprisonment of up to one year.[52]

12.21 Under federal schemes, failure to pay in accordance with the infringement notice simply permits the regulator to initiate action in respect of the primary offence. Effectively, then, at federal level infringement notices act as a temporary bar to proceedings by the regulator, which may be translated into a permanent bar at the election of the person to whom the notice is issued (that is, by paying the amount specified

43 *Fisheries Management Regulations 1992* (Cth), reg 38–46.
44 Offences against s 42, 93 or 95 of the *Fisheries Management Act 1991* (Cth).
45 Ibid, s 93 (failure to provide information about the receipt of fish).
46 Ibid, s 95 (unauthorised commercial fishing).
47 *Migration Regulations 1994* (Cth), reg 5.21–5.31.
48 Ibid, reg 5.20.
49 Ibid, reg 5.20.
50 *Radiocommunications Regulations 1993* (Cth), reg 23–31.
51 For an offence 'of a minor nature' against s 315 of the *Radiocommunications Act 1992* (Cth).
52 Ibid, s 197.

in the infringement notice). It may be argued, therefore, that the amount payable under the infringement notice is not a penalty itself but is better characterised as an offer of settlement made by the regulator in respect of prospective proceedings — an offer which the person to whom the notice is issued is under no compulsion to accept and which the regulator is under no compulsion to make. In this way, an infringement notice scheme might be regarded as a form of negotiated or agreed penalty.

Recent schemes and proposals

Customs administrative penalties infringement notice scheme

12.22 A major new scheme was introduced into the *Customs Act 1901* (Cth) by the *Customs Legislation Amendment and repeal (International Trade Modernisation) Act 2001* (Cth) (ITM Act). Parts of the scheme commenced in July 2002. Under the new scheme, an infringement notice may be issued by the Australian Customs Service (ACS) for some strict liability offences.[53] The ITM Act introduced a three-tiered approach to offences under the *Customs Act*. The third tier which will attract the lowest penalty (20% or one-fifth of what a court could impose if the matter were prosecuted) is where an infringement notice is issued in lieu of prosecution for a strict liability offence. The second tier is for strict liability offences which will be prosecuted in court if it is not considered appropriate to issue an infringement notice or the person to whom the notice is issued does not pay an amount specified in the infringement notice. The first tier, is offences for which fault must be proved. The ACS may elect to enforce these by a Customs prosecution under s 234 of the *Customs Act*.[54]

Customs infringement notice requirements

12.23 Under the new scheme, infringement notices can only be served for the strict liability offences set out in s 243X of the *Customs Act*.[55] Section 243Y provides that the CEO of the ACS must have reasonable grounds to believe that a strict liability offence has been committed before serving an infringement notice. A decision on whether or not to serve an infringement notice will be made with reference to specific guidelines[56] (see discussion below). Only one infringement notice may be served for each alleged offence.[57] Issue of an infringement notice is not mandatory, the CEO has discretion not to serve an infringement notice where an offence is detected, if he or she

53 Australian Customs Service, *Introduction to the Trade Modernisation Legislation*, Commonwealth of Australia, <www.customs.gov.au/cmr/cmr_leg/leg_ov.htm>, 18 January 2002, 9. Section 243X of the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* (Cth) outlines the specific sections to which the infringement notice scheme applies. A number of proposed offences subject to the strict liability regime were removed in amendments made to the Bill by the Senate.

54 See discussion of Customs prosecutions in ch 13.

55 That is, offences under *Customs Act 1901* (Cth), s 33(2), (3) or (6), 64(13), 64AA(10), 64AAB(7), 64AAC(6), 64AB(10), 64ABAA(9), 71G(1), 74(6), 99(3), 102A(4), 113(1), 114B(7), 114E(1), 114F(2), 115(1), 116(2), 117AA(1), (2), (3) or (4), 117A(1), 118(1), 119(3), 243T(1), 243U(1) or 243V(1). Section 243X was inserted by the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* (Cth) and commenced, in part, on 1 July 2002.

56 *Customs Act 1901* (Cth), s 243XA.

57 Ibid, s 243ZC.

considers that no action is warranted or a warning alone is sufficient.[58] A notice must generally be served within one year from the date of the alleged offence.[59]

12.24 Section 243Z sets out the matters that must be included in an infringement notice, including details of the alleged offence. The notice must also state that, if the person does not wish the matter to be heard by a court, the amount specified should be paid to the CEO of the ACS within 28 days after the date of service of the notice. Further, the person must be informed that they may apply in writing to the CEO for withdrawal of the notice. The CEO may also withdraw the notice without the person making representations.[60]

12.25 If the amount specified in the infringement notice is paid and, in the case of unpaid duty, the correct duty is paid before the end of the 28 day period, the liability of the person to whom the notice is issued is discharged and he or she is not considered to have been convicted of an offence. No further action may be taken to prosecute.[61] Where the amount specified is not paid, the CEO may institute a Customs prosecution for the strict liability offence. Failing to pay the amount specified in the infringement notice does not create a debt due to the Commonwealth (as was the case under the previous system).[62]

Guidelines for the issue of infringement notices

12.26 Section 243XA requires the CEO of the ACS to make and publish guidelines concerning the issue of infringement notices.[63] The CEO or delegate must have regard to the guidelines in determining whether or not to issue an infringement notice. However, the Guidelines will serve as a guide only; they will not override the CEO's discretion.[64] The guidelines were first issued in draft form in February 2002 and comments sought from interested persons. Revised guidelines were made on 24 June 2002[65] and came into effect on 1 July 2002 when some of the infringement notice scheme offence provisions commenced.

12.27 The guidelines state that:

> The guidelines are intended to assist the relevant decision-maker in exercising the discretion to use these powers by setting out relevant considerations to take into account.
>
> While the guidelines must be considered, they are only for guidance. They do not give directions as to whether an infringement notice should or should not be served in any

58 Ibid, s 243ZD. Alternatively, the CEO may elect not to issue an infringement notice and instead immediately commence an action to enforce the strict liability offence.
59 Ibid, s 243Y. Section 243Y(3) extends this period to 4 years for certain offences.
60 Ibid, s 243ZA.
61 Ibid, s 243ZB.
62 Australian Customs Service, *Introduction to the Trade Modernisation Legislation*, Commonwealth of Australia, <www.customs.gov.au/cmr/cmr_leg/leg_ov.htm>, 18 January 2002, 96.
63 *Customs Act 1901* (Cth), s 243XA.
64 Australian Customs Service, *Introduction to the Trade Modernisation Legislation*, Commonwealth of Australia, <www.customs.gov.au/cmr/cmr_leg/leg_ov.htm>, 18 January 2002, 94.
65 Australian Customs Service, *Guidelines for Serving Infringement Notices, Customs Act 1901 Part XIII – Division 5*, 1 June 2002.

particular circumstance. That is a matter for the decision-maker to decide on the facts of each case.[66]

12.28 The guidelines include guidance as to the delegation of authority to issue an infringement notice, and training of delegates; relevant considerations when exercising discretion whether to issue a notice; what information will be included in the notice;[67] and the amount specified as payable in the notice.[68]

Review of the decision to issue an infringement notice

12.29 The decision to issue an infringement notice is not open to external merits review. Instead, the options available to a person served with an infringement are to pay the amount specified in the notice, try to convince the relevant decision maker to withdraw the notice (which will involve a limited form of internal review),[69] or refuse to pay the amount specified in the notice and defend the matter in court. The regulated community has criticised the regime for not allowing an appeal mechanism.[70] It has been claimed that the absence of review of the decision to issue an infringement notice leaves too much to the discretion of the decision maker and removes one area of jurisdictional challenge for people involved in the industry.[71]

12.30 In response, the ACS has asserted that the operation of the infringement notice scheme does not lend itself to external merits review because a person issued with an infringement notice can approach the CEO to withdraw the notice and, if it is withdrawn, there will be no decision to review; a person issued with an infringement notice has the option to pay or not to pay the amount specified in the notice — there is no compulsion to pay at that time and therefore no decision imposing a penalty to be reviewed; payment of the amount specified in the infringement notice prevents further proceedings being taken, and non-payment shifts the onus back to the ACS to decide whether to prosecute. The ACS state that there is therefore no 'final decision' made by a decision maker that could be reviewed by the AAT.[72]

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66 Ibid, Part 1.1

67 The form of the notice is set out in Appendix C: Ibid.

68 A table showing the amount payable under an infringement notice for each offence type is set out in Appendix D: Ibid.

69 The matters to which the decision maker may have regard when considering whether to withdraw an infringement notice are specified in *Customs Act 1901* (Cth), s 243ZA(3). Further guidance is provided in the guidelines: Australian Customs Service, *Guidelines for Serving Infringement Notices, Customs Act 1901 Part XIII – Division 5*, 1 June 2002, Part 6.

70 Customs Brokers and Forwarders Council of Australia, 'Transcript of Evidence' in Senate Legal and Constitutional Legislation Committee (ed), *Inquiry into the Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2001, Import Processing Charges Bill 2000, and the Customs Depot Licensing Charges Amendment Bill 2000* (2001) , 21. See also JJ Lawson Customs & Freight Brokers, *Submission CAP 9*, 29 August 2002; Customs Brokers & Forwarders Council of Australia Inc, *Submission CAP 17*, 16 September 2002.

71 Customs Brokers and Forwarders Council of Australia, 'Transcript of Evidence' in Senate Legal and Constitutional Legislation Committee (ed), *Inquiry into the Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2001, Import Processing Charges Bill 2000, and the Customs Depot Licensing Charges Amendment Bill 2000* (2001) 35.

72 Senate Legal and Constitutional Legislation Committee, *Inquiry into the Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2001, Import Processing Charges Bill 2000, and the*

12.31 The ALRC accepts that the decision to issue an infringement notice is not a decision to impose a penalty, as it is not a final or operative determination of substantive rights. For this reason, the ALRC concludes that the exclusion of external merits review of the decision to issue an infringement notice is acceptable:[73] see Recommendation 22–2.

Corporations Act continuous disclosure infringement notice scheme

12.32 In the recently announced CLERP 9 proposals,[74] an infringement notice scheme has been suggested for contraventions comprising inadequate disclosure of materially price sensitive information by listed entities.[75] The proposed infringement notice scheme 'would enable an entity to bring the process to an end after its administrative phase by paying ASIC a financial penalty fixed by statute'.[76] The features of the proposed scheme include that:

- A hearing would be held by ASIC in order for ASIC to form a view as to whether there had been a breach of the continuous disclosure requirements in the *Corporations Act*. The entity would have the right to make submissions to ASIC at the hearing;
- If ASIC formed the view that there had been a breach, ASIC could issue an infringement notice specifying 'that the breach may be addressed through payment of a fixed financial penalty set out by statute';[77]
- Payment of the amount specified in the infringement notice would act as a bar to proceedings being instituted by ASIC, but would not be treated as an admission of liability;
- If the amount specified in the infringement notice is not paid, ASIC would be able to commence proceedings to enforce the alleged contravention; and
- In the court proceedings, if the court determined that a contravention had occurred, it 'would be permitted to impose a financial penalty not less than the penalty set out in the ASIC infringement notice'.[78] The court would not be able to make a pecuniary penalty order; if a contravention were found, its only option would be to accept the penalty specified in the infringement notice and order its payment.

Customs Depot Licensing Charges Amendment Bill 2000 (2001), Commonwealth of Australia, para 1.40–1.41.

73 See further discussion of this point in ch 22.

74 Treasury, *CLERP 9: Corporate Disclosure — Strengthening the financial reporting framework*, <www.treasury.gov.au/contentitem.asp?pageId=&ContentID=403>, 18 September 2002.

75 Members of the Advisory Committee expressed the view that the scheme was unnecessary as existing powers to seek injunctions allowed sufficient flexibility: Advisory Committee members, *Advisory Committee meeting*, 17 October 2002.

76 Treasury, *CLERP 9: Corporate Disclosure — Strengthening the financial reporting framework*, <www.treasury.gov.au/contentitem.asp?pageId=&ContentID=403>, 18 September 2002, 147.

77 Ibid, 148.

78 Ibid, 149.

12.33 The scheme proposed is not wholly consistent with other infringement notice schemes. In other schemes, no hearing is held prior to the issue of an infringement notice, but a notice may be issued if the regulator has 'reasonable grounds to believe' that the alleged offence has been committed. In no other infringement notice scheme is the court's discretion as to penalty (if the alleged offence is prosecuted) limited in the manner proposed in the CLERP 9 scheme.[79]

12.34 In support of the proposal it is stated that:

> This process would supplement existing criminal and civil court procedures. It would remedy a significant gap in the current enforcement framework by facilitating the imposition of a financial penalty in relation to relatively minor contraventions of the regime that would not otherwise be pursued through the courts and in relation to which ASIC considers a relatively small financial penalty would be justified. The capacity to issue an infringement notice would also allow ASIC to signal its views concerning appropriate disclosure practices to listed entities more effectively than through court action alone.[80]

12.35 The ALRC considers that the proposed infringement notice scheme has several problems and does not recommend that it be used as a model for other infringement notice schemes. In particular, the ALRC is concerned at the proposed restriction on the court's discretion to fix the quantum of penalty if a finding of contravention is made. Asking the court to confirm an amount set by a regulator would appear to raise Chapter III issues.[81] The ALRC's preferred model is that the infringement notice be used as an administrative mechanism to deal with a matter, but if the amount specified in the infringement notice is not paid by the person to whom the notice has been issued, then the matter be treated in the same way as any other alleged offence or contravention, that is, proceedings may be instituted by the regulator to enforce the contravention in the normal way and those proceedings would follow the usual court procedure. The ALRC is also not convinced that alleged contraventions of continuous disclosure provisions are appropriate contraventions to be dealt with by way of an infringement notice as they involve subjective judgments as to the materiality of information and are, therefore, contraventions involving a 'state of mind' element.

12.36 An additional difficulty with the scheme is the stated proposed size of the penalty. CLERP 9 proposes raising the maximum penalty for a corporation in breach of the continuous disclosure requirements to $1 million. An amount under an infringement notice scheme must be a fixed sum; typically, it is not more than one-fifth of the maximum penalty which can be imposed by a court for the breach, and the ALRC endorses this approach. In the proposed scheme, this would entail an amount specified as payable in the infringement notice of up to $200,000, potentially more than a court would impose if the matter proceeded to a hearing. The CLERP 9 proposal said in relation to the penalty:

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79 See for example *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth), reg 14.14 and *Fisheries Management Regulations 1992* (Cth), reg 45 which specifically negate this proposition.

80 Treasury, *CLERP 9: Corporate Disclosure — Strengthening the financial reporting framework*, <www.treasury.gov.au/contentitem.asp?pageId=&ContentID=403>, 18 September 2002, 149.

81 On this point see Recommendation 12–8(o).

> It would remedy a significant gap in the current enforcement framework by facilitating the imposition of a financial penalty in relation to relatively minor contraventions of the regime that would not otherwise be pursued through the courts and in relation to which ASIC considers a relatively small financial penalty would be justified.[82]

12.37 In a consultation with the ALRC, officers of ASIC indicated that the likely penalty might be 'tens of thousands of dollars'.[83] See discussion of the amount that might be specified as payable in an infringement notice at para 12.43.

12.38 ASIC officers also indicated they would use publicity in conjunction with infringement notices.[84] This raises additional issues because it is generally regarded that payment of an infringement notice is not an admission of liability. This point is discussed at para 12.75 to 12.78.

Use of private contractors

12.39 The Terms of Reference for this Inquiry require the ALRC to consider what limitations, if any, should exist on the use of persons other than officers or members of government departments and agencies (for example, employees of private contractors) to issue infringement notices or other process for the payment of administrative penalties. The use of private contractors, and the issues it raises for the accountability of penalty decision-making, has been considered in detail in the context of quasi-penalties in chapter 22. The ALRC is not aware of the use of private contractors to serve infringement notices in any federal schemes (although it does note that in some schemes notices may be served on behalf of the Commonwealth by authorised State or Territory officers).[85] Under State and Territory schemes, notices may generally be served by 'authorised officers' which might include persons other than government employees, for example council parking inspectors. It is known that some councils in New South Wales have 'outsourced' parking meter and patrol services to private contractors.

12.40 The ALRC sees no legal impediment to the use of private contractors to issue infringement notices provided that the safeguards outlined in Recommendation 22–3 to 22–6 are followed.

Offences and contraventions suitable for infringement notice schemes

12.41 As noted above, infringement notices are routinely used at both State and Territory and federal level to deal with minor criminal offences. One example often referred to is a parking offence. The features of the offences for which an infringement notice may be issued most commonly are that the offences:

- Are low-level offences attracting relatively low monetary penalties which means that the amount specified as payable in an infringement notice (if calculated as a

82 Treasury, *CLERP 9: Corporate Disclosure — Strengthening the financial reporting framework*, <www.treasury.gov.au/contentitem.asp?pageId=&ContentID=403>, 18 September 2002, para 8.5.5.

83 Australian Securities & Investments Commission, *Consultation*, Sydney, 5 September 2002.

84 Ibid.

85 See for example, *Fisheries Management Act 1991* (Cth), s 83 (definition of 'officer'); *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 393 (definition of 'ranger').

percentage of the maximum penalty that a court could impose for the offence) will not be a substantial amount;[86]

- Are high-volume offences meaning that they occur frequently and if enforced through the courts would add considerably to the court's workload and involve significant resources of the regulator to investigate and prepare cases, resources which might be better used encouraging compliance by the regulated community rather than enforcing numerous small instances of non-compliance. The high volume and low amount payable might be said to justify foregoing some of the procedural safeguards inherent in the criminal process in the interests of efficiency;

- Do not involve any significant forensic enquiry or subjective elements such as state of mind or fault. The offence is usually based on the occurrence of an event or the existence of a set of circumstances as a matter of fact; for example, camping in an unauthorised area.[87]

12.42 In the ALRC's opinion, in the criminal sphere, infringement notice schemes are only suitable to deal with high-volume, low penalty criminal offences of strict or absolute liability. On this point the ALRC notes with approval the recommendation made by the Senate Standing Committee for the Scrutiny of Bills in its report on the *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* that 'infringement notices should used only for strict liability offences'.[88] The ALRC also notes with approval the recommendation that 'strict liability offences should be applied only where the penalty does not include imprisonment and where there is a cap on monetary penalties; the general Commonwealth criteria of 60 penalty units ($6600 for an individual and $33,000 for a body corporate) appears to be a reasonable maximum'.[89]

12.43 One method to discourage the use of infringement notices for matters which are serious enough as to warrant court action, either because of the need to secure a high penalty as deterrence, or the need to provide greater procedural protections for the alleged offender, would be to cap the maximum amount that could be specified as payable in an infringement notice. This would appear to be particularly suited to infringement notices applying to non-criminal contraventions where the maximum penalty specified in the legislation may be substantial and the conduct which might constitute a contravention range from low-level, one-off and isolated occurrences to high-level, organised, systematic and ongoing non-compliance. In this circumstance it is difficult to propose a maximum amount payable in an infringement notice by reference to the maximum penalty that a court could impose, as the result might be that the amount

86 The highest amount identified by the ALRC in a federal infringement notice scheme is $5000 for a body corporate under s 299 and 230 of the *Migration Act*.

87 *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth), reg 12.28.

88 Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002), AGPS, 285.

89 Ibid, 284.

specified as payable in the infringement notice far exceeds the likely penalty that a court would impose.

12.44 Courts take into consideration a range of factors when setting penalties. Infringement notice schemes adopt a 'one size fits all' approach that is only acceptable when the result is that the amount payable is less than the expected penalty that a court would impose. Regulators should not be in a position to use an infringement notice to attempt to secure a higher penalty than would likely be imposed by a court if successful action were taken. There must be some trade-off for relieving the regulator of the burden of proving its allegations in court; a lesser penalty appears to be an appropriate trade-off. Equally there needs to be some disincentive to the inappropriate use of infringement notices for matters which are serious enough as to warrant being dealt with by a court, rather than an administrative process.

12.45 The type of non-criminal contraventions that the ALRC considers might appropriately be dealt with by way of an infringement notice schemes include requirements to provide information to the regulator within a specified period or in a specified form.[90] The ALRC notes in this regard the comments of the Australian Broadcasting Authority that infringement notice schemes might be appropriate in the context where there is a failure to provide notification or information to the regulator and this failure 'potentially reduces the [regulator's] effectiveness in performing its regulatory functions'.[91] The ALRC would qualify this view, however, to exclude any provision of information that required a subjective assessment to be made, for example, as to the materiality of the information. Infringement notices would only be appropriate where the information required to be provided was purely factual and was within the knowledge of the person required to provide it.

12.46 The ALRC acknowledges that specifying the amount payable in an infringement notice by reference to the maximum penalty that a court could impose is only useful where that amount is not substantial and where there is some certainty as to the amount that a court would likely impose. Whilst these two conditions appear to be satisfied in relation to low-level criminal offences, the same cannot be said for non-criminal contraventions. The ALRC's research has shown that maximum penalties for non-criminal contraventions are generally significantly higher than for comparable criminal offences and there is substantial jurisprudence, particularly in relation to market offences, that shows that courts rarely, if ever, impose the maximum penalty. For these reasons, the ALRC considers that the amount specified as payable in an infringement notice should not be more than 12 penalty units for both infringement notices issued in response to alleged criminal offences and for those issued in response to alleged non-criminal contraventions. See the discussion below at para 12.61.

90 See for example *Financial Sector (Collection of Data) Act 2001* (Cth), s 9(6) and 13(9).
91 Australian Broadcasting Authority, *Submission CAP 23*, 14 October 2002, 10.

Proposals for model legislation

12.47 There have been several suggestions for the development of a model infringement notice scheme. In 1992, the ALRC proposed model legislation to provide for the issue of infringement notices for certain customs and excise offences.[92] The ALRC considered the possible use of an infringement notice scheme 'as an alternative to prosecution … for conduct that amounts to a minor breach of the relevant law' in its report ALRC 57 on multiculturalism.[93] The ALRC recommended introduction of a scheme to apply to minor quarantine and home distilling offences. This scheme did not include any additional sanctions (such as licence suspensions, which are commonly included in State and Territory schemes); if the person failed to pay the amount specified in the notice, the matter would be prosecuted in the normal way. In its report on the use of administrative penalties in Customs and excise matters (ALRC 61),[94] the ALRC recommended that an administrative penalty scheme utilising infringement notices be introduced to apply to minor offences relating to self-assessment of import and excise duty. The ALRC proposed draft legislation[95] and recommended that penalties imposed under the scheme should be subject to internal review and subsequent review by the AAT.

12.48 In 1995, in his book, *Criminal Justice on the Spot: Infringement Penalties in Victoria*,[96] Fox suggested the development of uniform legislation to apply nationally across federal, State and Territory jurisdictions.[97] The features of Fox's model scheme were outlined at para 12.62 of DP 65. Most of the features of the ALRC's proposed customs and excise infringement notice scheme and Fox's proposed scheme were included in the model legislation proposed by the ALRC in DP 65.[98] The ALRC considers that consistency across federal infringement notice schemes is desirable and recommends development of a model federal scheme to be considered for use whenever it is desired that an alleged offence or contravention be dealt with by way of an infringement notice.

Preliminary view

12.49 In DP 65, the ALRC proposed that:

> **Proposal 12–1.** The design and use of infringement notice schemes in federal regulatory law should follow a model scheme that should incorporate the following features:

92 See Australian Law Reform Commission, *Customs and Excise*, ALRC 60 (1992), Australian Law Reform Commission, Sydney, Part 33 of the draft bill contained in Vol 1.

93 Australian Law Reform Commission, *Multiculturalism and the Law*, ALRC 57 (1992), Australian Law Reform Commission, Sydney, para 9.17.

94 Australian Law Reform Commission, *Administrative Penalties in Customs and Excise*, ALRC 61 (1992), Australian Law Reform Commission, Sydney.

95 Ibid, Appendix A.

96 R Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria* (1995) Australian Institute of Criminology, Canberra.

97 R Fox, 'Infringement Notices: Time for Reform' (1995) 50 *Trends and Issues in Criminal Justice* 1, 5–6.

98 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Proposal 12–1, para 12.64.

(a) The model scheme should apply only to strict or absolute liability offences or contraventions of a 'less serious nature' — the meaning of 'less serious nature' would need to be defined by legislation;

(b) The amount payable under an infringement notice should not exceed 20% of the maximum penalty which might be imposed if the matter is dealt with by a court — an alternative would be to specify a set penalty in the legislation;

(c) Before an infringement notice may be issued, the regulator must have 'reasonable grounds to believe' that the alleged offence or contravention has been committed;

(d) Guidelines on the use of infringement notices by the regulator should be published in the form of a disallowable instrument to permit parliamentary scrutiny;

(e) Only one notice should be issued for each alleged offence or contravention — if the conduct might amount to several different offences or contraventions, the regulator must choose which offence or contravention it will base the infringement notice on;

(f) The regulator should have the discretion to give a warning (and not a formal caution or reprimand) rather than issue an infringement notice;

(g) The regulator should have the discretion to initiate proceedings rather than issue an infringement notice;

(h) There should be a 12 month time limit after the occurrence of the alleged offence or contravention within which an infringement notice may be issued;

(i) The rights of the alleged offender should be clearly set out in the infringement notice in plain English. These should include, in particular, the right to elect to contest liability in court, the right to apply for withdrawal of the notice, and the effect of payment. The payment should act as a bar to proceedings being instituted for prosecution of the alleged offence or contravention;

(j) The payment of an amount by a person under an infringement notice should not be taken for any purpose to be an admission by that person of any liability for the alleged commission of the offence or contravention;

(k) The consequence of failing to pay an amount set out in an infringement notice should be prosecution for the alleged offence or contravention and not an alternative or substitute penalty such as licence suspension or cancellation;

(l) The alleged offender should have the right to seek to have the infringement notice withdrawn by presenting material to the issuing authority demonstrating that the factual basis on which the notice was issued was erroneous; and

(m) The payment of an amount by a person under an infringement notice should prevent any record of the alleged offence or contravention being kept by the regulator.

12.50 Use of infringement notices to deal with continuing offences raises some difficulties as it is not clear at what point the notice should be issued or what the effect of

payment of a notice would be in respect of liability for the continuing offence.[99] If infringement notices are to be used for this type of offence, it may be necessary to specify a range of trigger points for issue of a notice, so that the regulator has several opportunities to issue a notice in order to penalise a continuing failure by the regulated entity to comply with its obligations. In DP 65, the ALRC asked whether it was appropriate for infringement notice schemes to seek to deal with 'continuing offences' and, if so, how they should be structured.[100] The ALRC also asked whether the features of a model scheme outlined in Proposal 12–1 should be promulgated in legislative guidelines, in the *Criminal Code*, in a regulatory contraventions code or in some other way.[101]

Consultations and submissions

12.51 The ALRC received numerous submissions that commented specifically on the use of infringement notice schemes.[102] In formulating its recommendations in this area the ALRC has considered these submissions (and comments made in consultations) in detail. The ALRC also considered existing infringement notice schemes. In addition, since the publication of DP 65, the Senate Standing Committee for the Scrutiny of Bills published its report on the *Application of Absolute and Strict Liability Offences in Commonwealth Legislation*.[103] That report included consideration of the use of infringement notice schemes in relation to strict liability offences. The ALRC has been assisted by the Senate Committee's commentary and recommendation on the use of infringement notice schemes.

On the use of infringement notices generally

12.52 The use of infringement notices as a way to deal with offences and contraventions was supported in several submissions.[104] The ATO stated that infringement notices 'provide the flexibility to deal with certain offences by offering an immediate, cost and time efficient alternative to prosecution'.[105] ASIC also commented on the utility of infringement notices to achieve a 'fast, flexible outcome … by providing for an

99 Sections 1313 and 1314 of the *Corporations Act 2001* (Cth) specify a procedure to deal with continuing obligations. The provisions are not easy to follow and suggest that infringement notice schemes are not ideal for continuing offences. Section 243Z of the *Customs Act 1901* (Cth) also deals with the effect of issue of an infringement notice on a continuing obligation to pay customs duty by specifying that the obligation to pay duty continues despite payment of the amount specified in the infringement notice.

100 Question 12–1.

101 Question 12–2.

102 Australian Broadcasting Authority, *Submission CAP 23*, 14 October 2002; Australian Customs Service, *Submission CAP 25*, 23 October 2002; Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002; Australian Taxation Office, *Submission CAP 16*, 17 September 2002; Customs Brokers & Forwarders Council of Australia Inc, *Submission CAP 17*, 16 September 2002; Environment Australia, *Submission CAP 26*, 24 October 2002; A Hudson, *Submission CAP 19*, 8 October 2002; JJ Lawson Customs & Freight Brokers, *Submission CAP 9*, 29 August 2002.

103 Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002), AGPS.

104 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002; Australian Taxation Office, *Submission CAP 16*, 17 September 2002; Australian Broadcasting Authority, *Submission CAP 23*, 14 October 2002; Australian Customs Service, *Submission CAP 25*, 23 October 2002.

105 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.145.

immediate consequence that is a timely and appropriate reaction'.[106] The ACS commented that infringement notices provided 'an option for responding to non-compliant behaviour which is intended to have a compliance focus rather than one based on punishment'.[107] One submission noted that infringement notice schemes might be appropriate in the context where there is a failure to provide notification or information to the regulator and this failure 'potentially reduces the [regulator's] effectiveness in performing its regulatory functions'.[108]

12.53 One submission expressed strong opposition to any expansion of the use of infringement notice schemes, stating that 'it needs to be recognised that a system of infringement notices is inherently problematic and raises serious public policy concerns'.[109]

> The Bar has serious concerns about the proposal to establish an infringement system for a potentially vast range of federal civil and administrative penalties, and to place that powerfully coercive system in the hands of persons who are not officers of the court or police officers.[110]

12.54 The main arguments against the use of infringement notices included that issue of an infringement notice 'reflects a presumption of guilt'[111] and that there was significant pressure to pay the amount specified in the infringement notice 'rather than incur the costs of defending the matter and risking a very much higher penalty'.[112] The submission was also critical of the level of accountability for the issue of infringement notices, especially in schemes where notices could be issued by persons other than officers of the court or police. It noted:

> Given the range of persons who may issue such notices, and fact that they will not be limited to officers of the court and police officers, the Bar views the proposal as one not having appropriate safeguards in place to prevent abuse. The proposals in chapter 10 are designed to ensure accountability. The difficulty is the lack of appropriate objective criteria for the issuing of notices against which the decisions in question are to be assessed.
>
> The vice of an infringement notice system is that persons will suffer penalty in circumstances where, if the authority were required to prove the elements of the offence, it would be unable to do so. [113]

On the proposed model scheme

12.55 General support for the ALRC's proposed model infringement notice scheme was expressed in a number of submissions and consultations.[114] One submission ar-

106 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 41.
107 Australian Customs Service, *Submission CAP 25*, 23 October 2002, 1–2.
108 Australian Broadcasting Authority, *Submission CAP 23*, 14 October 2002, 10.
109 The Victorian Bar, *Submission CAP 22*, 14 October 2002, 10.
110 Ibid, 11.
111 Ibid, 10.
112 Ibid, 13.
113 Ibid, 13.
114 M Adams, *Submission CAP 12*, 5 September 2002; Australian Taxation Office, *Submission CAP 16*, 17 September 2002; Customs Brokers & Forwarders Council of Australia Inc, *Submission CAP 17*, 16 Sep-

gued, however, against having a sole model on the basis that whilst the model proposed by the ALRC was appropriate for low-level offences, there may be a role for a different model where offences proposed to be dealt with using an infringement notice scheme were more serious.[115] In another consultation, the lack of external review of the decision to issue an infringement notice was raised as a concern.[116]

12.56 Specific comments were received on several aspects of the proposed model scheme.

Proposal 12–1(a) The model scheme should apply only to strict or absolute liability offences or contraventions of a 'less serious nature' — the meaning of 'less serious nature' would need to be defined by legislation.

12.57 In DP 65, the ALRC noted that the use of infringement notice schemes to deal with minor criminal offences is growing at State, Territory and federal level. Typically the offences dealt with by infringement notice schemes involve strict or absolute liability. The schemes reviewed by the ALRC apply only to criminal offences but there seems to be no reason why non-criminal contraventions could not be dealt with using an infringement notice scheme. In this regard, the ALRC notes that the proposed CLERP 9 scheme applies to contraventions for which a civil penalty may be imposed.[117]

12.58 One submission noted that the present customs infringement notice scheme 'applies beyond offences which are of a "less serious nature" and also applies to offences where significant intellectual and commercial judgement is required'.[118] Another expressed concern 'at the number and range of offences that might be brought into an infringement notice scheme' and commented specifically on social security and tax penalties as penalties with a 'history of unfounded claims'.[119] That submission also criticised the term 'of a less serious nature' as being 'unacceptably vague'.[120] ASIC commented that it is seeking the power to issue infringement notices for failure to comply with the continuous disclosure provisions in the *Corporations Act*, and that such contraventions were not of a "less serious nature".[121]

12.59 The ALRC also notes the comments by the Senate Committee that

> strict liability offences should be applied only where the penalty does not include imprisonment and where there is a cap on monetary penalties; the general Common-

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tember 2002; A Hudson, *Submission CAP 19*, 8 October 2002; A Hudson, *Consultation*, Melbourne, 4 September 2002.

115 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.

116 A Hudson, *Consultation*, Melbourne, 4 September 2002. See also ch 22 and Recommendation 22–2.

117 Treasury, *CLERP 9: Corporate Disclosure — Strengthening the financial reporting framework*, <www.treasury.gov.au/contentitem.asp?pageId=&ContentID=403>, 18 September 2002.

118 A Hudson, *Submission CAP 19*, 8 October 2002, 3.

119 The Victorian Bar, *Submission CAP 22*, 14 October 2002, 12.

120 Ibid, 15.

121 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 41.

> wealth criteria of 60 penalty units ($6,600 for an individual and $33,000 for a body corporate) appears to be a reasonable maximum.[122]

12.60 The ALRC acknowledges the difficulty in defining when a contravention will be of 'a less serious nature' and the proposed expansion of the use of infringement notices into civil penalty schemes. Whilst the ALRC notes the objections made in some submissions and consultations[123] to the use of strict and absolute liability offences in particular regulatory contexts, it is outside the scope of this Inquiry to comment on those issues. However, the ALRC considers that, because of the coercive potential of an infringement notice and the absence of any requirement that the regulator have evidence sufficient to support a finding of guilt or liability before a notice may be issued, it is appropriate that infringement notice schemes only be used for offences and contraventions which do not require proof of a fault element and accordingly the ALRC recommends that in criminal schemes, an infringement notice scheme should be an option for offences of strict or absolute liability only, and in civil penalty schemes, an infringement notice scheme should not apply to a contravention in which the proof of a fault element or state of mind is required. See Recommendations 12–1 and 12–2. This view is consistent with the Attorney-General's Department guidelines that:

- Infringement notices are acceptable for:
  - relatively minor offences;
  - offences with a high volume of contraventions;
  - where a penalty must be imposed immediately to be effective;
  - where only strict or absolute liability offences are involved;
  - where the physical elements of an offence are clear cut.[124]

12.61 The issue whether the amount specified as payable in an infringement notice should be subject to a cap was considered above at para 12.46, in this regard the ALRC considers that the amount specified as payable in an infringement notice should not exceed 12 penalty units. This is consistent with the cap on penalties for strict liability offences of 60 penalty units recommended by the Senate Committee.[125] The ALRC considers that this cap should apply both to infringement notice notices issued for alleged criminal offences and non-criminal contraventions.

12.62 Elsewhere in this Report, the ALRC has acknowledged that the maximum monetary penalties for non-criminal contraventions may be, and often are, higher than the maximum fines for criminal offences for substantially the same conduct, and has accepted that the intangible penalty of the stigma of a criminal conviction justifies this difference. The same context does not apply to infringement notice schemes. As the proposed alternatives to issuing an infringement notice include instituting action to en-

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122 Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002), AGPS, 284.

123 Customs Brokers & Forwarders Council of Australia Inc, *Submission CAP 17*, 16 September 2002; A Hudson, *Submission CAP 19*, 8 October 2002; JJ Lawson Customs & Freight Brokers, *Submission CAP 9*, 29 August 2002; Custom Brokers and Forwarders Association, *Consultation*, Brisbane, 29 August 2002; A Hudson, *Consultation*, Melbourne, 4 September 2002.

124 Cited in Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002), AGPS, 260.

125 Ibid, 284.

force the alleged offence or contravention and as the standard of proof required in civil proceedings is lower than the criminal standard, the ALRC sees no reason why infringement notices issued in response to alleged non-criminal contraventions should specify an amount payable that is greater than the amount specified as payable in an infringement notice issued in response to an alleged criminal offence. The lesser standard of proof required in civil proceedings has been argued to make enforcement easier, so there is not the same difficulty in the regulator being required to prove the elements of the contravention in court as applies to criminal offences.

Proposal 12–1(c) Before an infringement notice may be issued, the regulator must have 'reasonable grounds to believe' that the alleged offence or contravention has been committed.

12.63 One submission commented on this proposal, noting that

> the ACS Guidelines for Serving Infringement Notices state that a penalty notice may be issued where the decision maker has reasonable grounds to believe that all the elements of an offence are present and no exception applies.
>
> This is in fact a lower standard than applies if the matter is defended in court, whereby the ACS must establish as a fact that all the elements of an offence are present.
>
> So because the ACS has a different interpretation of the law or has a different opinion of the facts, and because it can apply a lesser standard of proof than would be required to be met in a court of law, the ACS gives to itself the ability to issue Infringement Notices, even though it may not have the evidence to prosecute a matter through the courts. This leaves an importer or person who lodged the Customs Entry with 2 options pay the penalty and have the problem go away or refuse to pay the penalty and thus challenge the ACS to take you to court.[126]

12.64 The Advisory Committee expressed concern at the ease with which a regulator might be able to demonstrate that they had 'reasonable grounds to believe'.[127] The issue of what action will be taken if the amount specified as payable in an infringement notice is discussed further in relation to proposal 12–1(k) below.

Proposal 12–1(d) Guidelines on the use of infringement notices by the regulator should be published in the form of a disallowable instrument to permit parliamentary scrutiny.

12.65 One submission commented that although 'a number of comments and recommendations by the various industry bodies' had been taken into account in the revised guidelines issued by the ACS, 'the Guidelines are still some way from a form which I consider to be "ideal"'.[128] Despite this criticism, the ALRC supports the development and use of guidelines as an important mechanism to ensure consistent and transparent exercise of discretion and has recommended the use of guidelines in other parts of this Report.

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126 JJ Lawson Customs & Freight Brokers, *Submission CAP 9*, 29 August 2002.
127 Advisory Committee members, *Advisory Committee meeting*, 17 October 2002.
128 A Hudson, *Submission CAP 19*, 8 October 2002, 3.

12.66 The ALRC considers that guidelines provide an additional safeguard to the consistent exercise of the discretion to issue an infringement notice and accordingly recommends that guidelines should be developed and published on how the regulator will exercise its discretion to issue infringement notices. See Recommendation 12–8(f). However, the ALRC does not consider that guidelines must necessarily be in the form of a disallowable instrument and instead recommends that, if they are made informally, they be made in accordance with Recommendations 6–2 to 6–4, 9–1 and 10–1.

12.67 On this issue the ALRC notes the Senate Committee's recommendation that 'every scheme of strict liability should be administered through detailed, binding guidelines which should be agreed between the relevant agency and industry and tabled in both Houses; breach of the guidelines by an agency should preclude prosecution of those affected by the breach'.[129] The ALRC does not disagree with this recommendation but considers that as infringement notice schemes are a mechanism to deal with an offence of strict liability, it would not be necessary, if the Senate's recommendation for detailed, binding guidelines for such offences is adopted, to have a second set of guidelines made as a disallowable instrument as to how infringement notices apply to such offences. As it could not be guaranteed that passage through parliament of two sets of guidelines would be concurrent, the potential for inconsistency between the two sets of guidelines arises which may result in unnecessary uncertainty as to how the infringement notice scheme would apply. The ALRC also notes the comment made in one submission that requiring guidelines to be made in the form of a disallowable instrument 'may be excessive'.[130]

Proposal 12–1(e) Only one notice should be issued for each alleged offence or contravention — if the conduct might amount to several different offences or contraventions, the regulator must choose which offence or contravention it will base the infringement notice on.

12.68 One submission noted that under the EPBC Act 'there is currently no legislative restriction on the number of infringement notices that may be issued where conduct amounts to several different offences — in practical terms, however, the proposal does not appear unreasonable'.[131] The ALRC considers that proposal 12–1(e) provides a legitimate restriction on the issue of an infringement notice. If more than one notice can be issued in respect of the same conduct there is a very real possibility that the person to whom the notices have been issued will make payments in response to each notice and, in effect, be penalised more than once for the same conduct. This offends against the principle of double jeopardy.[132]

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129 Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002), AGPS, 288.

130 Environment Australia, *Submission CAP 26*, 24 October 2002, 8.

131 Ibid. The ALRC also notes that in several existing schemes more than one notice may be issued: for example *Fisheries Management Regulations 1992* (Cth), reg 43.

132 See discussion of double jeopardy in ch 11.

Proposal 12–1(f) The regulator should have the discretion to give a warning rather than issue an infringement notice.

12.69 It was noted that the ability to give a warning rather than issue an infringement notice was a useful way to encourage compliance.[133] The ALRC agrees that the option not to issue an infringement notice and to issue a warning instead or respond in another way is important. It is not intended that the issue of an infringement notice be mandatory; the ALRC sees value in a regulator having discretion to pursue a range of enforcement options and accordingly recommends that the options for the regulator should include the commencement of action to seek a criminal or civil penalty; the issue of an infringement notice; a formal caution; an informal warning; and taking no action. See Recommendation 12–8(a).

Proposal 12–1(h) There should be a 12 month time limit after the occurrence of the alleged offence or contravention within which an infringement notice may be issued.

12.70 This proposal was specifically endorsed by one submission, which noted that the customs infringement notice scheme allows, in some circumstances, an infringement notice to be issued as long as four years after an offence has been committed:

> To apply an Infringement Notice as regards an event which may of occurred four (4) years before is clearly not about the receipt of information in an appropriate, timely and quality manner but more about punishment.[134]

12.71 Another submission also commented on the possibility of an infringement notice being issued up to four years after the alleged offending conduct took place and endorsed

> the comments of Dr Wollaston, the first Federal Comptroller General of Customs in his 1904 text ('Customs Law and Regulation') where he stated:
>
> 'It would be unjust on an importer if the Customs claimed from him, for instance, years after he sold the goods'.[135]

12.72 The public policy underpinning the use of infringement notice schemes includes that they provide a timely and cost-effective alternative to court proceedings. The ALRC also notes that two submissions specifically commented on the utility of infringement notices as a 'fast' and 'immediate' enforcement option.[136] The ALRC considers that, bearing in mind the other options available to a regulator to respond to an offence or contravention (see Recommendation 12–8(a)), there is no reason why a 12 month time limit would be unreasonable and therefore recommends that the issue of

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133 M Adams, *Submission CAP 12*, 5 September 2002, Australian Taxation Office, *Consultation*, Sydney, 17 September 2002.

134 Customs Brokers & Forwarders Council of Australia Inc, *Submission CAP 17*, 16 September 2002, para 11.5.

135 A Hudson, *Submission CAP 19*, 8 October 2002.

136 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002; Australian Taxation Office, *Submission CAP 16*, 17 September 2002.

an infringement notice be subject to a 12 month time limit after the occurrence of the alleged offence or contravention. See Recommendation 12–8(h).

Proposal 12–1(i) The rights of the alleged offender should be clearly set out in the infringement notice in plain English. These should include, in particular, the right to elect to contest liability in court, the right to apply for withdrawal of the notice, and the effect of payment. The payment should act as a bar to proceedings being instituted for prosecution of the alleged offence or contravention.

12.73 In one consultation, it was noted that the form of infringement notice proposed to be used in the *Customs Act* scheme would include the information specified in Proposal 12–1(i).[137] To ensure that the precedent set by the form of infringement notice adopted for use in the *Customs Act* scheme continues to be followed, and that the recipient of an infringement notice continues to be adequately informed about the effect of the notice and their rights in relation to it, the ALRC recommends that an infringement notice specifies, at a minimum, the matters set out in Recommendation 12–9. This Recommendation is consistent with the views of the Senate Committee which concluded 'the use of infringement notices should include safeguards for those affected, including detailed prescription of the form of a notice; the form itself should indicate all of the safeguards to which it is subject'.[138]

Proposal 12–1(j) The payment of an amount by a person under an infringement notice should not be taken for any purpose to be an admission by that person of any liability for the alleged commission of the offence or contravention.

12.74 This proposal was specifically supported in one consultation,[139] in which it was noted that this principle was paramount as people would pay the amount specified in the infringement notice in order to dispose of the matter, regardless of whether the person was guilty or not.[140] A related concern was that as payment did not amount to an admission of guilt, it would not be appropriate for records to be kept on the number of infringement notices issued to a person.

12.75 It was also expressly supported in another submission, where it was noted that:

> I believe that this is contrary to many of the provisions of the [Customs Act] Guidelines and the Infringement Notice Scheme where the fact of the issue and payment of an Infringement Notice is taken into account in determinations as to the issue of future Infringement Notices or withdrawal of Infringement Notices.[141]

12.76 The submission also expressed concern about the interaction between the infringement notice scheme and the licensing scheme applicable to participants in the customs and trade industry. It was noted that 'continued compliance with the law' is a

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137 Custom Brokers and Forwarders Association, *Consultation*, Brisbane, 29 August 2002.

138 Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002), AGPS, 288.

139 Custom Brokers and Forwarders Association, *Consultation*, Brisbane, 29 August 2002.

140 The Advisory Committee noted the enormous commercial imperative to pay an infringement notice: Advisory Committee members, *Advisory Committee meeting*, 17 October 2002.

141 A Hudson, *Submission CAP 19*, 8 October 2002, 4.

factor relevant to licensing.[142] The submission stated that the ACS had expressed the view that the issue of an infringement notice 'represents its view that a Licensed Customs Brokers is non-compliant and deserving censure'.[143]

12.77 Taking into account the support expressed for Proposal 12–1(j) and in the absence of any disagreement with that proposal, the ALRC recommends that the payment of an amount by a person under an infringement notice, including payment by instalments, should not be taken for any purpose to be an admission by that person of any liability for the alleged commission of the alleged offence or contravention. See Recommendation 12–8(d).

Proposal 12–1(k) The consequence of failing to pay an amount set out in an infringement notice should be action to enforce the alleged offence or contravention and not an alternative or substitute penalty such as licence suspension or cancellation.

12.78 Responses to this specific proposal were varied. One submission stated that 'failure to comply with infringement notices must be met with an effective penalty that will add credence to the enforceability of the model scheme'.[144] In another submission it was noted that the prospect of automatic prosecution if the amount specified in the infringement notice is not paid, creates pressure to pay 'even where parties may believe there is no offence' because of a fear of the costs of the prosecution.[145]

12.79 The ACS stated that 'Customs will only serve an infringement notice where it is prepared to prosecute the original offence should the penalty in the notice not be paid'.[146] The ACS also noted that:

> The deterrent effect of the infringement notice scheme as a compliance tool could be undermined if Customs cannot be committed to fitting prosecution of offences when penalties in infringement notices are not paid.[147]

12.80 The ATO noted two circumstances in which prosecution may not be the appropriate consequence of failure to pay the amount specified in an infringement notice. The first specifically stated that, in schemes such as excise, licence suspension or cancellation might be 'a more appropriate course of action'.[148]

12.81 The ATO's second point related to schemes where penalties might be imposed in 'bulk' using an automated process such as happens with the general interest charge ('GIC').

> With 'bulk' penalties, such as GIC, prosecution is not a preferable avenue when the infringement notice amount has not been paid. GIC is imposed in very large numbers

142 Ibid, 4.
143 Ibid, 4.
144 M Adams, *Submission CAP 12*, 5 September 2002, 6.
145 A Hudson, *Submission CAP 19*, 8 October 2002, 5. This point was also made by The Victorian Bar, *Submission CAP 22*, 14 October 2002.
146 Australian Customs Service, *Submission CAP 25*, 23 October 2002, 2.
147 Ibid, 4.
148 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.147–2.148.

> and this could result in a very large number of presentations for minor amounts of GIC. Alternatives other than prosecution for non payment of an infringement notice, should be available for such 'bulk' penalties.[149]

12.82 ASIC noted that prosecution may not be the only alternative, that if infringement notices were available for non-criminal matters, the outcome might be a civil court determination that a contravention had occurred.[150] The ALRC acknowledges this point; Proposal 12–1(k) in DP 65 referred to this possibility.

12.83 Fallback penalties are not currently available in federal infringement notice schemes. However, the constitutional barriers to their use could be overcome if the fallback penalty was specified in the legislation under which the offence or contravention triggering the infringement notice arises (that is, if the fallback penalty was itself a true administrative penalty). There seems to be no reason, in principle, why an infringement notice penalty should only be a monetary penalty (as is currently the case at federal level). However, the ALRC is not convinced that a 'fallback' penalty should be available, particularly if that penalty is not related to the alleged breach of the law (for example, suspension of a driving licence for an offence unrelated to driving).[151]

12.84 The ACS stated that:

> While there is no express link between serving an infringement notice and the licensing of persons who communicate import and export information to Customs or who perform other Customs functions, Customs considers the fact that sectors of the Customs client industry are licensed increases their obligation to 'get it right'. … it is appropriate that the ongoing performance of any person who holds themselves out as proficient in communicating information to Customs should be monitored.[152]

12.85 The Senate Committee expressed the need for caution in the use of strict liability in relation to decisions about the variation, cancellation or non-renewal of a licence. The Committee noted that

> licence holders who hold a licence on condition that they comply with an act may be prejudiced by the inappropriate use of strict liability to vary, suspend, cancel or not renew their licence; processes in relation to licences should be conducted in a transparent manner with adverse decisions subject to external independent merits review.[153]

12.86 The ALRC agrees with this principle and does not consider that failure to pay an amount specified in an infringement notice, of itself, should be sufficient justification for a regulator to suspend, cancel or otherwise restrict or place conditions on a licence. Licences issued at federal level generally relate to permission to undertake an activity, which might comprise the sole livelihood of the licensed person. There are

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149 Ibid, para 2.147–2.148. The ATO did not suggest what the alternatives might be.

150 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.

151 The ALRC notes that the Queensland infringement notice scheme only permits suspension or cancellation of a licence for a 'vehicle-related' offence: *State Penalties Enforcement Act 1999* (Qld), s 104.

152 Australian Customs Service, *Submission CAP 25*, 23 October 2002, 2.

153 Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002), AGPS, 287.

well-established processes for the issue and renewal of licences (including rights for the regulator to suspend, vary or cancel a licence in certain circumstances and rights for the person affected to be heard and to seek review of an adverse decision). Those processes are the appropriate forums to deal with licensing issues. The ALRC does not consider it appropriate for those processes to be undermined or avoided by permitting infringement notice schemes to be used as a 'back-door' process to restrict licensing rights.

12.87 For the reason that the regulator is not required to have evidence sufficient to support a finding of guilt or liability before an infringement notice may be issued, it is appropriate that if the person to whom the notice is issued elects not to pay the amount specified in the infringement notice, that failure should not be taken for any purpose to be an admission by that person of any liability for the alleged commission of the offence or contravention (see Recommendation 12–8(d)), and the regulator should, if it elects to take any further action, be required to commence court proceedings to enforce the underlying offence or contravention and, thereby, be required to prove its allegation, rather than have the right to impose a quasi-penalty in the absence of any such proof. The ALRC therefore recommends that regulators should not have the ability to impose an alternative or substitute penalty such as licence suspension or cancellation. See Recommendation 12–8(e).

Proposal 12–1(m) The payment of an amount by a person under an infringement notice should prevent any record of the alleged offence or contravention being kept by the regulator.

12.88 The fact that payment does not amount to an admission of guilt was raised in one consultation as a reason why records on the number of infringement notices issued to a person should not be kept.[154] Two regulators argued, however, that there was a need to monitor the effort made to improve compliance, as prior non-compliance was relevant to the decision as to what action should be taken in response to non-compliance.[155] The ACS stated that 'stale' notices would cease to be relevant and expressed a preference for limited record keeping rather than no option to keep records at all.[156]

12.89 The ACS stated that 'Customs considers it important to retain records of a person's compliance and non-compliance, to ensure that any response to non-compliance is viewed in light of, among other considerations, a person's effort or attempt to comply'.[157]

12.90 One submission stated that the ACS had indicated that it would keep a record of the issue and payment or non-payment of infringement notices.[158] The submission

154 Custom Brokers and Forwarders Association, *Consultation*, Brisbane, 29 August 2002.
155 Australian Taxation Office, *Submission CAP 16*, 17 September 2002; Australian Customs Service, *Consultation*, Canberra, 4 September 2002.
156 Australian Customs Service, *Consultation*, Canberra, 4 September 2002; Australian Customs Service, *Submission CAP 25*, 23 October 2002, 2.
157 Australian Customs Service, *Submission CAP 25*, 23 October 2002, 2.
158 A Hudson, *Submission CAP 19*, 8 October 2002.

noted that the Guidelines issued by the ACS indicate that 'whether a party has "made an effort or attempted to comply with the Customs Act" ... is one of the discretionary indicators to be considered by a decision maker in making a determination as to whether to issue an infringement notice'.[159] The submission also noted that under s 243ZA(3) of the *Customs Act*, the previous issue and payment of infringement notices is also a factor relevant to the decision whether to withdraw an infringement notice.

12.91 Environment Australia submitted that

> there are reasons for maintaining records of infringement notices, the main one being that a regulator may prefer to prosecute rather than issue an infringement notice where infringement records show that the person repeatedly contravenes the Act. While payment of an infringement notice is not an admission of liability, prior notices are legitimate indicators of non-compliance since they cannot be issued without 'reasonable belief".[160]

12.92 Use of a demerits point system or an associated loss or suspension of benefits may add an element of deterrence to an infringement notice scheme.[161] However, this raises the vexed issue of whether either the issue or payment of infringement notice penalties should form part of the compliance history kept by the regulator, as payment of an amount specified in the infringement notice should not be an admission of liability and should not have the status of a conviction. Liability for the underlying offence or contravention remains untested and there is an argument that it is unjust to use the issue of an infringement notice (in effect, an unsubstantiated allegation) as a factor relevant to the compliance history of a regulated entity. On the other hand, the frequent issue of uncontested infringement notices may suggest that compliance levels could be improved, as, although the regulator is not required to prove the offence, a notice cannot generally be issued without a 'reasonable belief" that the alleged offence or contravention has been committed.

12.93 In DP 65, the ALRC noted that if a middle ground is to be found, it may be that issue of infringement notices be permitted to form part of the compliance history subject to certain limitations such as periodic deletion (as occurs with social security activity test breach histories, which are kept for two years)[162] or the use which may be made of compliance histories. The ALRC notes with some concern that, under the *Customs Act Infringement Notice Guidelines*, the previous issue of infringement notices is a relevant factor to be considered by the decision maker when deciding whether or not

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159 Ibid, 5.

160 Environment Australia, *Submission CAP 26*, 24 October 2002, 8–9.

161 Introduction of a demerits points system to apply to 'minor breaches of the regulations' was announced as part of proposed reforms to the powers of the Civil Aviation Safety Authority: The Hon John Anderson MP, *Media Release A140/2002: CASA Reform*, <www.ministers.dotars.gov.au/ja/releases/2002/november/A140_2002.htm>, 18 November 2002. At present, an infringement notice may be issued for an offence under the regulations: *Civil Aviation Regulations 1988* (Cth), reg 296B.

162 *Social Security Act 1991* (Cth), s 624, 625, 626, 628, 629, 630 and 630AA in relation to Newstart allowances. The two year activity test breach history period also applies to Austudy payments and youth allowances.

to issue an infringement notice.[163] The issue of notices is no more than an allegation, which is never tested unless the person to whom the notice is issued chooses to defend the matter in court.

12.94 The ALRC acknowledges the validity of the competing interests of regulators and the regulated community in relation to this issue and recommends a compromise as an attempt to balance these interests, which would allow a record of the issue of an infringement notice or payment or non-payment of the amount specified in an infringement notice to form part of the formal compliance history maintained by the regulator about the person to whom the infringement notice was issued, provided that this record:

(a) expressly note that the issue of an infringement notice constitutes no more than an allegation of a breach and that payment does not constitute an admission for any purpose;

(b) be reviewed periodically and stale information expunged (eg, two years after the date of issue of the infringement notice);[164] and

(c) be subject to the *Freedom of Information Act 1982* (Cth) (ie, able to be corrected by the person). See Recommendation 12–5.

12.95 This recommendation is made subject to Recommendation 12–6, which provides the purposes for which records of the issue, payment or non-payment of an infringement notice notice may be kept by a regulator and reported by a regulator. The ALRC considers that any public reporting of infringement notice activities should only be done on an aggregate (eg, how many notices were issued during a specified period) or anonymous basis (eg, that a notice was issued to an unidentified person). In this context, Recommendation 12–7 (discussed below at para 12.102) is also important as it prohibits a regulator from making a public announcement about the issue of an infringement notice to, or the payment or non-payment of the amount specified in an infringement notice by, an *identified* or *identifiable* person.

12.96 Whilst these restrictions on public announcements and public reporting may seem contrary to recommendations made elsewhere in this Report endorsing the principle of transparency of the activities of regulators, it must be noted that unlike enforceable undertakings (which generally include an admission of liability) or notices about penalties imposed by courts, the issue of an infringement notice is an allegation only, not an authoritative statement as to liability. In these circumstances, maintaining a public register of infringement notices issued would be unfairly prejudicial to persons

163 Australian Customs Service, *Guidelines for Serving Infringement Notices, Customs Act 1901 Part XIII – Division 5*, 1 June 2002, Part 3.3.2.

164 The ALRC has nominated two years as an example of the appropriate period without stating that this is the *only* appropriate period; it may vary depending on the nature of particular schemes. This is the period used in relation to 'breach histories' under social security law. The ALRC considered whether the period specified in the spent convictions scheme in the *Crimes Act 1914* (Cth) would be appropriate but rejected it on the basis that the period was too long (generally ten years) and that issue of an infringement notice was not comparable to conviction for an offence and, in fact, in the ALRC's view should not be treated as an admission of liability for any purpose. See Recommendation 12–8(d).

to whom notices have been issued and, for this reason, the principle of transparency must give way to the principle of fairness for the alleged offender.

12.97 It should also be stressed that the ALRC's recommendation is limited to records kept as a 'compliance history' of the person to whom the notice is issued and is not meant to prevent the keeping of *any* record of the issue, payment or non-payment of the infringement notice. Use of the term 'compliance history' is meant to refer to records kept for the purpose of the enforcement activities of the regulator that are accessible to, and used by, staff of the regulator when deciding what enforcement action to take in response to suspected non-compliance.

12.98 The ATO also raised a concern that Proposal 12–1(m) would prevent any record being kept of the issue of an infringement notice and that this may impede compliance with general Commonwealth policy that a record should be kept of all actions taken as part of an investigation such as the Commonwealth Fraud Investigation Model Procedures.[165] This is a valid concern and was an unintended consequence of Proposal 12–1(m). The ALRC also notes that agencies may have obligations to keep records for the purpose of complying with statutory obligations such as those arising under the *Archives Act 1983* (Cth). To address these issues the ALRC recommends that a regulator be permitted to keep a record of the issue of an infringement notice and payment or non-payment of the amount specified in an infringement notice for the purpose of recording, monitoring and reporting on the enforcement activities undertaken by the regulator. The ALRC also recommends that any public reporting on the use of infringement notices should only be done on an aggregate or anonymous basis.[166] See Recommendation 12–6.

Consistent exercise of discretion

12.99 There was concern that different enforcement officers might exercise discretion differently when issuing infringement notices.[167] The Customs Brokers and Forwarders Council noted that:

> As regards the … Infringement Notice Guidelines this position is not supported as it is seen as placing discretion in the hands of administrators whose consistency in the application of the process may be compromised or diminished.[168]

12.100 Consistently with recommendations made in other parts of this Report and with the ALRC's stated preference for transparency in the activities of regulators, the ALRC recommends that guidelines should be developed and published on how the regulator will exercise its discretion to issue an infringement notice.[169] As an additional safeguard to ensure consistent exercise of discretion, the ALRC has earlier in this Re-

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165 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.149.

166 This form of reporting was supported by members of the Advisory Committee: Advisory Committee members, *Advisory Committee meeting*, 17 October 2002.

167 Custom Brokers and Forwarders Association, *Consultation*, Brisbane, 29 August 2002; National Farmers' Federation, *Consultation*, Canberra, 4 September 2002; Customs Brokers & Forwarders Council of Australia Inc, *Submission CAP 17*, 16 September 2002.

168 Customs Brokers & Forwarders Council of Australia Inc, *Submission CAP 17*, 16 September 2002.

169 See Recommendation 12–8(f).

port recommended that training be provided to staff who will make decisions on the basis of guidelines to ensure that they are familiar with the legislation and the guidelines. See Recommendation 6–6. This recommendation would apply to guidelines about the issue, correction or withdrawal of an infringement notice. In this regard the ALRC notes that delegates under the *Customs Act* scheme receive such training[170] and the recommendation made by the Senate Committee that 'agencies should ensure that enforcement guidelines [for strict liability offences] are detailed and unambiguous and accompanied by adequate training'.[171]

Option to pay by instalments

12.101 In one consultation, it was suggested to the ALRC that there should be an option to request that the amount specified in an infringement notice be paid by instalments.[172] Payment by instalment is often an option for court-imposed penalties. The *Customs Act* infringement notice scheme provides an opportunity to request an extended time for payment,[173] and that this was also a feature of the ALRC's proposed model legislation in ALRC 60.[174] Several existing schemes in use at federal level provide for payment by instalments.[175] The ALRC considers that it is appropriate to provide the option for flexibility in the timing and manner of payment of the amount specified in an infringement notice. The ALRC is conscious of the potential for misuse, however, of these options and proposes that they be subject to the safeguards that the person may request an extension of the time for payment or the option to pay by instalments only:

- in cases of financial hardship;
- if the amount payable under an infringement notice is more than two penalty units; and
- if agreement to pay the amount specified in the infringement notice has the effect of making the unpaid portion of that amount a debt due to the Commonwealth. See Recommendation 12–8(m).

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170 Australian Customs Service, *Infringement Notice Guidelines: June 2002*, <www.customs.gov.au>, 15 August 2002, 4.

171 Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002), AGPS, 288. The importance of staff training to ensure the consistent exercise of discretion was also highlighted in the Commonwealth Ombudsman's report on social security breach penalties: Commonwealth Ombudsman, *Social Security Breach Penalties — Issues of Administration* (2002), Commonwealth Ombudsman.

172 National Farmers' Federation, *Consultation*, Canberra, 4 September 2002.

173 Australian Customs Service, *Guidelines for Serving Infringement Notices, Customs Act 1901 Part XIII – Division 5*, 1 June 2002, Part 5.1.

174 See Australian Law Reform Commission, *Customs and Excise*, ALRC 60 (1992), Australian Law Reform Commission, Sydney, Part 33 of the draft bill contained in Vol 1.

175 See for example *Airports (Building Control) Regulations 1996* (Cth); *Airports (Environment Protection) Regulations 1997* (Cth); *Education Services for Overseas Students Regulations 2001* (Cth); *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth).

Publicity

12.102 In two consultations the prospect of the regulator using publicity of the fact that an infringement notice had been issued as an additional or alternative penalty was raised.[176] Whilst it might be argued that publicity of the issue of an infringement notice provides an opportunity to achieve both specific and general deterrence, the ALRC does not consider that this is a legitimate aim for an infringement notice scheme as an infringement notice is not a 'penalty' and therefore the purposes for which a penalty might be imposed, and publicised, are not relevant. The ALRC considers that no public announcement should be made by a regulator about the issue of an infringement notice to, or the payment or non-payment of the amount specified in an infringement notice by, an identified or identifiable person, as the issue of an infringement notice amounts to an allegation only and is not conclusive proof that the offence or contravention has been committed. See Recommendation 12–7 and further discussion of the use of publicity by regulators in chapter 16.

Continuing offences

12.103 In DP 65, the ALRC asked:

> **Question 12–1.** Is it appropriate for infringement notice schemes to seek to deal with 'continuing offences'? If so, how should they be structured?

12.104 Specific comments directed to this question were made in three submissions.[177] One submission stated that it was inappropriate for infringement notices to be used to deal with continuing offences, without giving reasons for this view.[178] Two regulators stated that the use of infringement notices for continuing offences was appropriate.[179] It was stated that a separate notice should be issued for each alleged offence.[180] The ATO stated that 'the regulator should have the option as to whether or not to use the notice for subsequent offences'[181] and that 'if there are circumstances where repeated infringements occur then stronger action to change the behaviour of the offender must be instituted'.[182]

12.105 The ALRC sees no reason in principle why an infringement notice scheme could not be used for continuing offences or contraventions and accordingly recommends that infringement notice schemes may apply to continuing offences or contraventions. See Recommendation 12–8(n).

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176 Attorney-General's Department, *Consultation*, Canberra, 10 September 2002; Australian Securities & Investments Commission, *Consultation*, Sydney, 5 September 2002.

177 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002; Australian Taxation Office, *Submission CAP 16*, 17 September 2002; A Hudson, *Submission CAP 19*, 8 October 2002.

178 A Hudson, *Submission CAP 19*, 8 October 2002.

179 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002; Australian Taxation Office, *Submission CAP 16*, 17 September 2002.

180 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.

181 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.154.

182 Ibid, para 2.156.

Aspects of the proposed model scheme on which no submissions were received

12.106 The ALRC received no submissions on a number of aspects of the model scheme proposed in DP 65, and accordingly has assumed that they were acceptable to those who made submissions and consulted with the ALRC. These features are retained in substance in the model scheme outlined in Recommendation 12–8. See also Recommendation 12–3.

Other issues

12.107 The ALRC has made several other amendments to the proposed model scheme either because they were overlooked in Proposal 12–1 in DP 65 or because they reflect current practice in existing infringement notice schemes:

- Recommendation 12–8(a) provides that the name and address of the person to whom the notice is being issued be included in the notice.

- Recommendation 12–8(i) provides that the nature of the alleged offence or contravention should be set out clearly in the infringement notice.

- Recommendation 12–8(l) provides that, where issue of an infringement notice is based on information provided to the regulator by the person to whom the notice has been issued, the recipient of the infringement notice should have the right to request a written copy of any information considered relevant by the decision maker in making the decision to issue the infringement notice

- Recommendation 12–8(l) provides that the issue of an infringement notice does not limit the penalty that may be imposed by a court for the offence or contravention.[183]

12.108 In respect of the withdrawal of infringement notices, the ALRC has made two other recommendations. Recommendation 12–4 provides that regulators should have the power to correct or withdraw an infringement notice issued in error (and provides that a corrected notice be issued as a fresh notice so that the time period for payment would start again). This complements the right of the person to whom the notice has been issued to seek withdrawal of the infringement notice on the basis of factual errors (see Recommendation 12–8(k)). The right to seek withdrawal of a notice is limited to challenging the factual basis on which the notice has been issued and is not meant to allow for a general review of the decision to issue the notice. In chapter 22 of this Report, the ALRC has recommended that the decision to issue an infringement notice should not be open to external merits review. See Recommendation 22–2.

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183 This recommendation is consistent with most schemes in use at federal level, see for example *Airports (Building Control) Regulations 1996* (Cth); *Airports (Control of On-Airport Activities) Regulations 1997* (Cth); *Airports (Environment Protection) Regulations 1997* (Cth); *Civil Aviation Regulations 1988* (Cth); *Education Services for Overseas Students Regulations 2001* (Cth), *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth); *Interstate Road Transport Regulations 1986* (Cth); *Migration Regulations 1994* (Cth); *Quarantine Regulations 2000* (Cth); *Radiocommunications Regulations 1993* (Cth). The ALRC notes that it is inconsistent with the continuous disclosure infringement notice scheme proposed in CLERP 9. See discussion at para 12.32.

12.109 Recommendation 12–10, which provides that the officer within the regulator who considers an application for withdrawal of an infringement notice should be different from the officer who made the decision to issue the infringement notice, is consistent with recommendations made in other parts of this Report and with the current practice under the *Customs Act* infringement notice scheme.[184] The ALRC also considers that there is a need for some level of independence in any system of internal review, even in the limited circumstances of the right to seek withdrawal of an infringement notice where only the factual basis on which the notice was issued may be challenged.

Location of the model scheme

12.110 In DP 65, the ALRC also asked:

> **Question 12–2.** Should the features of a model scheme outlined in Proposal 12–1 be promulgated in legislative guidelines, in the *Criminal Code*, in a regulatory contraventions code or in some other way?

12.111 One submission noted that 'a standard or model would provide for consistency of approach',[185] and that lack of a model had been an issue in the development of the infringement notice scheme in the *Excise Act 1901* (Cth). Another submission proposed the development of 'a template for Parliamentary review of existing Infringement Notice Schemes and to ensure consistency and certainty when future Infringement Notice Schemes are adopted'.[186]

12.112 One submission opposed the inclusion of the model scheme in legislation, proposing that: 'Legislative guidelines are preferred to enable sufficient flexibility to depart from the model in appropriate circumstances'.[187] Another submission stated that there was no need to create a new statute as the model scheme should form part of the *Criminal Code Act 1995* (Cth) because:

> The *Criminal Code* must become a universal guide to criminal law in the federal sphere as much as practicable. Hence, in the interests of ensuring the accessibility and consistency of the law, any such model schemes or new legislative provisions governing criminality should be consolidated therein.[188]

12.113 As the model scheme is equally applicable to criminal and civil schemes of regulation, the ALRC considers that its inclusion as part of the *Criminal Code* is potentially confusing and might be misinterpreted as an attempt to incorporate criminal standards of responsibility into non-criminal contraventions. Consistent with recommendations made elsewhere in this Report and taking into consideration the potential use of infringement notice schemes in relation to non-criminal contraventions,

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184 Australian Customs Service, *Guidelines for Serving Infringement Notices, Customs Act 1901 Part XIII – Division 5*, 1 June 2002, Part 6.1; and the ALRC assumes with other existing schemes.
185 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.157.
186 A Hudson, *Submission CAP 19*, 8 October 2002.
187 Environment Australia, *Submission CAP 26*, 24 October 2002, 9.
188 M Adams, *Submission CAP 12*, 5 September 2002, 6.

the ALRC recommends that the model scheme be included in the Regulatory Contraventions Statute. See Recommendation 12–8.

Recommendations

Recommendation 12–1. In criminal penalty schemes, an infringement notice scheme should apply only to minor offences of strict or absolute liability.

Recommendation 12–2. In civil penalty schemes, an infringement notice scheme should apply only to minor contraventions in which no proof of a fault element or state of mind is required.

Recommendation 12–3. The payment of the amount specified in an infringement notice should act as a bar to proceedings in respect of the alleged offence or contravention.

Recommendation 12–4. In the absence of any clear, express statutory statement to the contrary, regulators should have the power to withdraw an infringement notice issued in error or to correct an infringement notice issued in error by withdrawing it and issuing a fresh notice.

Recommendation 12–5. Subject to Recommendation 12–6, if a record of the issue of an infringement notice or payment or non-payment of the amount specified in an infringement notice forms part of the formal compliance history maintained by the regulator (or any other person or agency) about the person to whom the infringement notice was issued, this record should:

(a) expressly note that the issue of an infringement notice constitutes no more than an allegation of a breach and that payment does not constitute an admission for any purpose;

(b) be reviewed periodically and stale information expunged (for example, two years after the date of issue of the infringement notice); and

(c) be subject to the *Freedom of Information Act 1982* (Cth) (ie, able to be corrected by the person).

Recommendation 12–6. A regulator may keep a record of the issue of an infringement notice and payment or non-payment of the amount specified in an infringement notice for the purpose of recording, monitoring and reporting on the enforcement activities undertaken by the regulator in compliance with any relevant Commonwealth policies or procedures (for example, the Commonwealth Fraud Investigation Model Procedures or the *Archives Act 1983* (Cth)). Any public reporting (for example, in the regulator's annual report or on its website) should be on an aggregate or anonymous basis.

Recommendation 12–7. No public announcement should be made by a regulator about the issue of an infringement notice to, or the payment or non-payment of the amount specified in an infringement notice by, an identified or identifiable person.

Recommendation 12–8. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, the design and use of infringement notice schemes in federal regulatory law should follow a model scheme that should incorporate the following features:

(a) The options for the regulator should include:

  (i) the commencement of action to seek a criminal or civil penalty;

  (ii) the issue of an infringement notice;

  (iii) a formal caution;

  (iv) an informal warning; and

  (v) no action.

(b) The amount payable under an infringement notice should not exceed a small proportion (say, one-fifth) of the maximum penalty which might be imposed if the matter is dealt with by a court, or a set penalty specified in the legislation or for which a method of calculation is specified in the legislation.

(c) Before an infringement notice may be issued, the regulator must have reasonable grounds to believe that the alleged offence or contravention has been committed.

(d) The payment of an amount by a person under an infringement notice, including payment by instalments, should not be taken for any purpose to be an admission by that person of any liability for the alleged commission of the offence or contravention.

(e) The consequence of failing to pay an amount set out in an infringement notice should be action to seek a penalty for the alleged offence or contravention and not an alternative or substitute penalty such as licence suspension or cancellation.

(f) Guidelines should be developed and published by regulators in accordance with Recommendations 6–2 to 6–4, 9–1 and 10–1 on how they will exercise their discretion to issue, withdraw and correct infringement notices.

(g) Only one notice should be issued for each alleged offence or contravention — if the conduct might amount to several different offences or contraventions, the regulator must choose which offence or contravention upon which it will base the infringement notice.

(h) There should be a 12 month time limit after the occurrence of the alleged offence or contravention within which an infringement notice may be issued.

(i) The nature of the alleged offence or contravention should be set out clearly in the infringement notice (including the section of the legislation creating the offence or contravention).

(j) The rights of the recipient of the infringement notice should be set out clearly in the infringement notice in plain English. These should include, in particular:

  (i) the right to elect to contest liability in court;

  (ii) the right to apply for withdrawal of the notice;

  (iii) the effect of payment; and

  (iv) information about what records (if any) will be kept by the regulator about the issue, payment or non-payment of the amount specified in the infringement notice.

(k) The recipient of the infringement notice should have the right to seek to have the infringement notice withdrawn by presenting material to the issuing authority demonstrating that the factual basis on which the infringement notice was issued was erroneous.

(l) Where the issue of the infringement notice is based on information provided to the regulator by any person, the person to whom the infringement notice is issued should have the right to request a written copy of any information considered relevant by the decision maker in making the decision to issue the infringement notice.

(m) If the amount payable under an infringement notice is more than two penalty units, the recipient of the infringement notice should have the right to request, on the ground of financial hardship, that the time to pay that amount be extended or that the penalty be paid by agreed instalments. Agreement to pay that amount by instalments should not be unreasonably withheld. Agreement to pay that amount by instalments should have the effect of making the unpaid portion of that amount a debt due to the Commonwealth.

(n) Infringement notice schemes may apply to continuing offences or contraventions.

(o) The issue of an infringement notice does not limit the penalty that may be imposed by a court on a person convicted of an offence or found liable for a contravention.

(p) The statements of principle contained in Recommendations 12–3 to 12–7.

Recommendation 12–9. The form of an infringement notice should be specified in delegated legislation and in the guidelines referred to in Recommendation 12–8(f). This form might be based on the *Customs Act 1901* (Cth) Infringement Notice set out in Appendix C to the Customs Act Guidelines for Serving Infringement Notices. At a minimum, an infringement notice should specify:

(a) To whom it is issued (including the name of the individual or corporation and address);

(b) By whom it is issued (including the name and work address of the delegate);

(c) A unique form of identification (such as a notice number);

(d) The date on which it is issued;

(e) The nature of the alleged offence or contravention (including the provision of the legislation that it is alleged has been contravened);

(f) When and where the offence or contravention is alleged to have been committed;

(g) The amount payable under the notice (including its relationship to the maximum fine or penalty a court could impose);

(h) The date by which payment is due;

(i) Where and how payment may be made;

(j) The effect of payment, including a statement that, if payment is made within the period specified in the notice (or any further period that is allowed):

  (i) the person's liability is taken to be discharged;

  (ii) further proceedings cannot be taken against the person for the offence or contravention;

(iii) the person is not regarded as having been convicted of the offence or found liable for the contravention; and

(iv) payment does not constitute an admission of liability for any purpose;

(k) The effect of non-payment;

(l) The right to request an extension of time to pay or to pay the amount payable under the notice by instalments (if applicable);

(m) The right to apply for withdrawal of the notice (including to whom an application for withdrawal should be made);

(n) The right to elect to contest liability in court;

(o) Information about what records (if any) will be kept by the regulator about the issue, payment or non-payment of the infringement notice;

(p) The details of any corrections (if any) to any previous infringement notice issued in respect of the same alleged contravention (if any);

(q) Contact details for further information; and

(r) Any other information appropriate in the circumstances.

Recommendation 12–10. The officer within the regulator who considers an application for withdrawal of an infringement notice should be different from the officer who made the decision to issue the infringement notice.

13. Customs Prosecutions

Contents

Introduction

13.1 The Terms of Reference for this Report require the ALRC to have regard to, *inter alia*:

> (g) the recommendations of the Australian Law Reform Commission (ALRC) in its Reports, Nos. 60 (Customs and Excise) …; and
>
> (h) the remarks of the High Court in *Comptroller of Customs v D'Aquino Bros Pty Limited* (30 September 1996) and by the New South Wales Court of Appeal in *Comptroller-General of Customs v D'Aquino Bros Pty Limited* (19 February 1996).

13.2 As DP 65 noted, the prosecution of offences under Customs and excise legislation in Australia and, in particular, confusion regarding the use of criminal and civil procedures, has been the subject of considerable comment, including a 1992 report by the ALRC.[1]

13.3 Customs and excise prosecutions take a unique form in Australian legislation, primarily due to their historical origins in English law where actions by the state to protect revenue were civil. For example, specific procedures apply uniquely to Customs prosecutions. Discovery is available from the prosecution not from the defendant. The prosecution is allowed to make averments. Averments allow a prosecutor to state

1 Australian Law Reform Commission, *Customs and Excise*, ALRC 60 (1992), Australian Law Reform Commission, Sydney.

or aver matters in the pleadings that will be 'prima facie evidence of the matters averred'. Averments are not permitted in relation to indictable offences punishable by imprisonment.[2]

13.4 Customs prosecutions are regulated by Part XIV of the *Customs Act 1901* (Cth).[3] They are distinguished from ordinary criminal offences that are also contained in the *Customs Act* by different terminology. Section 244 of the *Customs Act* provides that 'proceedings by Customs for the recovery of penalties' shall be referred to as 'Customs prosecutions'.[4] Customs and excise prosecutions for non-indictable offences that are not punishable by imprisonment are also regulated by special procedures in Part XIV.[5] Where a pecuniary sanction is called a 'fine' in the legislation, the prosecution will be by criminal proceedings. If the sanction is expressed as being for the recovery of a penalty, it will be a 'Customs prosecution' or an 'Excise prosecution'.

13.5 The very use of the word 'prosecution' for what is said to be a civil action is a source of confusion.

13.6 Section 247 of the *Customs Act* provides that Customs prosecutions in a superior or intermediate court may be conducted in accordance with the usual practice and procedure of the court in civil cases or in line with a court or judge's direction. Section 248 provides that 'the provisions of the law relating to summary proceedings in force in the State or Territory where the proceedings are instituted shall apply to all Customs prosecutions before a Court of summary jurisdiction in a State or Territory'. Therefore, Customs prosecutions for lesser amounts are heard in courts of summary jurisdiction and treated in the same way as ordinary criminal prosecutions with, counter-intuitively, greater protections than may be available to defendants exposed to higher penalties in superior courts.

13.7 There is one exception to this, which in itself highlights the need for greater consistency. In Queensland, the Court of Appeal in *CEO of Customs v Labrador Liquor Wholesale Pty Limited* held that the criminal standard of proof must apply to a Customs prosecution commenced in a Supreme Court.[6] But conversely, in *Ketchell v Wynch* the Queensland Court of Appeal held that the commencement of a matter under the *Excise Act* in the Magistrates Court pursuant to r 11 of the *Uniform Civil Procedure Rules* was appropriate.[7] This is the reverse of the situation in other jurisdictions.

13.8 Where the amount of the penalty sought in a Customs or excise prosecution exceeds the jurisdiction of the lower courts, it will be heard in the higher courts. The standard of proof in the lower courts is the criminal standard, beyond reasonable doubt;

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2 Averments are discussed further at para 13.44–13.48.

3 See also *Excise Act 1901* (Cth), Part XI.

4 See also *Excise Act 1901* (Cth), s 133. As the provisions of the *Excise Act 1901* (Cth) and the *Customs Act 1901* (Cth) are similar, references in this Report to Customs prosecutions will include excise prosecutions.

5 See also *Excise Act 1901* (Cth), Part XI.

6 *CEO of Customs v Labrador Liquor Wholesale Pty Ltd* (2001) 162 FLR 230. This case is discussed in more detail below at para 13.24–13.30.

7 *Ketchell v Wynch* [2001] QCA 391, para 17.

in the higher courts, it has been held to be the civil standard. Appeals from a hearing in a superior court are governed by the rules of civil procedure in relation to appeals. However, under s 248 of the *Customs Act*, appeals from a summary court shall be heard 'in the manner provided by the law of the State or Territory where such conviction or order is made for appeals from convictions or orders of dismissal'.

The consequences of the distinction

13.9 As discussed in DP 65, Alex Shaik has considered various procedural issues relevant to the question whether Customs or excise prosecutions are criminal or civil in nature, including:[8]

- Originating process: s 245 provides that Customs prosecutions may be originated by a complaint, information or other appropriate process, as opposed to a statement of claim, as in other civil procedures.

- Discovery is available against the prosecution but not against the defendant. However, s 214 confers a power on the Australian Customs Service (ACS) to require production of documents and to enter and search for that purpose.

- Competence to testify: s 254 states that a defendant is competent to give evidence and will be compellable.

- Standard of proof: The civil standard of proof, that is proof on the balance of probabilities, applies, subject to the *Briginshaw* standard[9] that the court must examine the evidence with great care and caution before it is satisfied that an offence has been established.[10]

- Time limits: Under s 249 the ACS must commence a prosecution within five years of the offence. Shaik argues this is considerably more lenient than time limits for a criminal prosecution.[11]

- Summary prosecution or trial by jury: s 80 of the Constitution provides a constitutional right to trial by jury on indictment for any offence against any law of the Commonwealth. This right does not apply to Customs prosecutions, but applies to other offences under the *Customs Act* that are indictable (that is, punishable by imprisonment for more than 12 months).[12]

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8 A Shaik, 'Procedures in 'Customs Prosecutions' and 'Excise Prosecutions'' (2000) 7 *Australian Journal of Administrative Law* 131, 132–134.

9 *Briginshaw v Briginshaw* (1938) 60 CLR 336.

10 *Button v Evans* [1984] 2 NSWLR 338, 353.

11 Shaik notes the *Crimes Act 1914* (Cth), s 21 provides for a one year time limit.

12 See *Li Chia Hsing v Rankin* (1978) 141 CLR 182.

Uncertainty in Customs and excise caselaw

13.10 As noted above and in DP 65, there has been considerable confusion in the cases due to the wording of the legislation. For example, s 254(2) carries an implication that imprisonment may be imposed as a result of a Customs prosecution. Some caselaw has indicated that the test of whether the provision is civil or criminal in character should not rest on the use of the words 'fine' or 'penalty' but rather the intention of the legislature.[13]

13.11 In the lower courts, Customs prosecutions have been treated as applying the same rules as ordinary criminal prosecutions without controversy (apart from the Queensland case noted above). However, the question whether criminal or civil rules of procedure apply to Customs prosecutions in superior courts remains a major point of uncertainty. In particular, questions as to rules of evidence and the application of the civil or criminal standard of proof have been considered.[14] Section 247 provides for proceedings 'in accordance with the usual practice and procedure of the Court in civil cases or in accordance with the directions of the Court or a Judge' which permits great variability in the procedure to be applied from case to case.

13.12 Historically, actions for unpaid revenue were a civil process: the King's Action for Debt.[15] However, in overall design and purpose, Customs prosecutions more closely resemble ordinary criminal prosecutions. In *Jack Brabham Holdings Pty Ltd v Minister for Industry, Technology and Commerce,* Kirby J suggested such proceedings were a type of hybrid:

> I would readily concede that for some purposes the nature of a Customs prosecutions for the recovery of a penalty may be assimilated to civil process (as s247 contemplates), however, that does not stamp on such proceedings for all purposes, the badge of a civil action.[16]

13.13 A recurring issue in the authorities is the difference between the substance and form of the proceedings. For example, should proceedings that may result in imprisonment be classified as criminal? Are there inherent qualities in an offence, such as dishonesty, that should cause them to be categorised as criminal? Matters are traditionally said to be criminal or civil by reference to their procedure rather than the substance of an offence.[17] The fact that punishment is seen as part of the purpose of the penalty has been seen as indicative of the prosecution's true nature. For example, the Supreme

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13 Australian Law Reform Commission, *Customs and Excise: Customs Prosecutions, Jurisdiction and Administrative Penalties*, DP 42 (1990), Australian Law Reform Commission, Sydney.

14 See for example, *Evans v Button* (1988) 13 NSWLR 57, *Jack Brabham Holdings Pty Ltd v Minister for Industry, Technology and Commerce* (1989) 85 ALR 640, *Comptroller-General of Customs v D'Aquino Bros Pty Ltd* (1996) 135 ALR 649.

15 Australian Law Reform Commission, *Customs and Excise: Customs Prosecutions, Jurisdiction and Administrative Penalties*, DP 42 (1990), Australian Law Reform Commission, Sydney, para 31.

16 *Jack Brabham Holdings Pty Ltd v Minister for Industry, Technology and Commerce* (1989) 85 ALR 640, 652.

17 K Mann, 'Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law' (1992) 101(5) *Yale Law Journal* 1795, 1804.

Court of Western Australia commented in *Bridal Fashions Pty Ltd v Comptroller-General of Customs* that

> proceedings of this type are rather curious in nature. They are civil in form but because they extend beyond seeking compensatory relief they are penal in substance. In some ways they may more properly be assimilated to criminal proceedings rather than civil actions.[18]

D'Aquino cases

13.14 The Terms of Reference require the ALRC to have regard to the remarks of the High Court and the NSW Court of Criminal Appeal in *Comptroller of Customs v D'Aquino Bros Pty Limited*.[19]

13.15 These cases considered whether proceedings for Customs or excise prosecutions under the *Customs Act* and the *Excise Act* are civil or criminal in nature. They concerned the difference between a 'Customs prosecution' as defined by the *Customs Act* and other prosecutions under s 33 of the Act. A unanimous decision of the Full Bench of the NSW Court of Criminal Appeal held that a 'prosecution under the *Customs Act* based on s 33(2) is not a Customs prosecution' and that the civil standard of proof applied.

13.16 Under s 33(2):

> If a person who commits an offence against subsection (1) does the act that constitutes the offence:
>
> (a) on behalf of another person of whom he is an employee; or
>
> (b) at the direction or with the consent or agreement (whether express or implied) of another person;
>
> that other person commits an offence and is punishable, on conviction, by a ***fine*** not exceeding $50,000. [Emphasis added]

13.17 Section 33(1) states:

> Except as authorized by this Act, a person shall not move, alter or interfere with goods that are subject to the control of the Customs. ***Penalty***: $50,000 [Emphasis added].

13.18 Therefore, the case turned on a distinction between a 'penalty' (the recovery of which falls under the definition of a 'Customs prosecution') and a 'fine'.[20]

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18 *Bridal Fashions Pty Ltd v Comptroller-General of Customs* (1996) 140 ALR 681, 684.

19 *Comptroller-General of Customs v D'Aquino Bros Pty Ltd* (1996) 135 ALR 649; *Comptroller-General of Customs v D'Aquino Bros Pty Ltd* [1996] 17 Leg Rep C8A.

13.19 The Comptroller-General argued that the definition of a 'Customs prosecution' should be read broadly to include proceedings for the recovery of fines. Hunt CJ at CL noted that acceptance of such an argument 'could lead to extraordinary consequences in relation to other offences for which fines and/or imprisonment are provided as punishment'.[21]

13.20 The Court made a number of comments on the quasi-criminal nature of these proceedings, and the resulting difficulty in determining the standard of proof. Hunt CJ at CL (with whom the others concurred) stated:

> The relevant enforcement procedures under both the *Customs Act* and the *Excise Act* have a long — and, at times, confused — history. Their antiquity has led to some ambiguity in their true nature. The punishment for breaches of the statutes was originally a penal debt to the Crown, for which the enforcement … was imprisonment until the debt was paid, and the procedure was by way of a quasi-civil action in the Court of Exchequer.[22]

13.21 Under the *Customs Act*, a breach of a relevant provision is called an 'offence' and said to be 'punishable on conviction by a penalty'.[23] Hunt CJ at CL went on to say that he did not accept that an offence punishable on conviction could be properly called a 'civil offence'.[24]

> [A] customs prosecution is a proceeding in relation to a criminal offence and thus of a criminal nature. The only qualification which can be suggested is that a Customs prosecution in the Supreme Court should more properly be described as a 'hybrid', although even then it was said to be still 'quasi criminal' and 'much more closely akin to criminal proceedings, properly so called, than to purely civil litigation between parties'. [25]

13.22 The Court of Criminal Appeal considered certain ambiguities in the legislation and established practice in order to make its determination. It considered the authorities regarding the standard of proof, the difference between a fine and a penalty, and the distinction between an information and a complaint. After considering previous authorities, the Court ultimately determined that in the superior courts the civil standard of proof applied.

13.23 The High Court proceedings were an application for special leave to appeal, which was denied. In dismissing the application for special leave, the High Court noted the difficulties in interpreting the sections of the *Customs Act* relating to Customs

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20 C Bali, 'The Nature of Customs Prosecutions; Civil or Criminal Standards of Proof?' (1996) 34(11) *Law Society Journal* 55, 56.

21 *Comptroller-General of Customs v D'Aquino Bros Pty Ltd* (1996) 135 ALR 649, 655.

22 Ibid, 654.

23 *Customs Act 1901* (Cth), s 5. Under s 5, where a penalty is set out or referred to at the foot of a section or subsection, it indicates that a contravention of the section or of the subsection, whether by act or omission, is an 'offence', punishable upon conviction by a penalty not greater than that set out.

24 *Comptroller-General of Customs v D'Aquino Bros Pty Ltd* (1996) 135 ALR 649, 661.

25 Ibid, 661, citing Kirby J in *Jack Brabham Holdings Pty Ltd v Minister for Industry, Technology and Commerce* (1989) 85 ALR 640, 653.

prosecutions and suggested that their inherently uncertain meaning required clarification by legislative amendment.[26]

Cases after *D'Aquino*

13.24 In *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd*,[27] Atkinson J listed the factors which she considered suggest that Customs prosecutions should be considered as criminal proceedings:

- the language of the sections, for example, use of the words 'prosecution', 'conviction' and 'offence';
- the possibility of imprisonment for failure or neglect to pay any fine or penalty imposed;
- that the proceedings are brought by a public authority;
- that the proceedings seek punishment rather than merely compensation;
- the historical origin of the proceedings as criminal process;[28]
- that offences against the public revenue are legally indistinguishable from cheating a private individual;
- that many judges have expressed doubts about the classification of the proceedings as civil proceedings: some have described the offences as hybrid;
- the undesirability of allowing prosecutions by a public authority for offences which upon a finding of guilt may lead to punishment by a fine or, in default of payment, by imprisonment to be proved according to the civil standard rather than the criminal standard.[29]

13.25 Atkinson J also listed the factors which suggest that they are civil proceedings:

- the provision in the *Customs Act* that they are to be determined according to the civil procedure of the relevant court;
- the nature of the procedure, rather than the act complained of, as the test of whether the matter is civil or not;

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26 *Comptroller-General of Customs v D'Aquino Bros Pty Ltd* [1996] 17 Leg Rep C8A.
27 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2000) 157 FLR 395.
28 Ibid, 399. Atkinson J notes that early proceedings in the Court of Exchequer for a breach of customs law were considered a 'criminal instead of civil process'.
29 Ibid, 421–422.

- the historical classification of civil proceedings in the revenue court for the recovery of money owed;
- that the defendant is not in immediate jeopardy of imprisonment for a breach of the legislation;
- that many Australian and English authorities have followed the view that the proceedings are civil.[30]

13.26 After considering the line of judicial authority on the issue, and the factors for and against the competing characterisations, Atkinson J finally concluded:

> It is surely time that parliament put this matter beyond doubt by stating whether or not the matters are civil or criminal proceedings and the appropriate burden of proof, as previously recommended by the ALRC. In the meantime, however, the overwhelming body of authority compels me to accept the view that, unless there is legislative change or a contrary decision of a higher court, the standard of proof is the civil standard.[31]

13.27 This decision was overturned on appeal by the Court of Appeal of the Supreme Court of Queensland.[32] The Court of Appeal unanimously held that the criminal standard of proof must apply in Customs and excise prosecutions, stating that it is the substantive nature of the offence that determines its treatment rather than the procedural rules set out in the *Customs Act.*

> In the absence of any clear statutory evidence to the contrary and despite the procedural effect of Section 247 and Section 133 [of the *Customs Act*], the criminal standard of proof must therefore apply, that is, the convictions must be proved by the prosecutor beyond reasonable doubt. A general procedural provision such as Section 247 of the *Customs Act* cannot, in my view, alter the requirement that essentially criminal offences, even 'hybrid' or 'quasi-criminal offences', must be proved by the prosecution beyond reasonable doubt.[33]

13.28 McMurdo P noted the inconsistency in applying the criminal standard of proof to matters heard in summary courts.

> Summary cases have been distinguished from cases like these commenced in a State District or Supreme Court on the basis that whilst the criminal standard of proof there applies, the civil standard applies to proceedings brought under Section 247 of the *Customs Act* in a State Supreme or District Court. Such a distinction seems both artificial and unjust and is not one I am lightly prepared to accept.[34]

13.29 McMurdo P went on to note that the reasoning in past cases has been largely inconclusive on this issue:

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30 Ibid, 422.
31 Ibid, 423. See discussion of ALRC 60 below at para 13.42–13.51.
32 *CEO of Customs v Labrador Liquor Wholesale Pty Ltd* (2001) 162 FLR 230.
33 Ibid, 246 (McMurdo P).
34 Ibid, 243.

> The respondent contends this Court is bound to follow the NSW Court in *Wong v Kelly* and to conclude that the standard of proof is the civil standard, in the interests of uniformity of decision in the interpretation of uniform national legislation. But the review of the authorities above demonstrates the absence of any uniform approach by intermediate appellate courts to this question. The matter has not been authoritatively determined by the High Court.[35]

13.30 The High Court granted special leave to appeal this decision on 26 June 2002.

13.31 In *Ketchell v Wynch*[36] the Queensland Court of Appeal allowed an appeal from a decision in the District Court[37] where the judge had held he did not have jurisdiction to entertain an appeal from the Magistrates Court. The original decision in the Magistrates Court was an order that two vehicles that had been used for the unlawful conveyance of tobacco leaf be condemned. The vehicles had been seized in reliance on s 116(1)(e) of the *Excise Act*.

13.32 The issue arose because, although s 137 of the *Excise Act* provides for appeals from any conviction order for condemnation', it provides that it be done 'in the manner provided by the law of the State or Territory where such conviction … is made'. Until 2000, s 39 of the *Justices Act 1886* (Qld) had been regarded as the appropriate vehicle for determination of disputes about goods forfeited under federal jurisdiction. With the passage of the *Police Powers and Responsibilities Act 2000* (Qld) the regime changed and there was an accompanying amendment to s 39 of the *Justices Act* limiting applications to goods in the custody of a 'public officer', the definition of which did not include federal police.

13.33 The question for determination was whether s 45 of the *Magistrates Courts Act 1921* (Qld) met the description in s 137 of the *Excise Act* because the *Magistrates Courts Act* concerns the jurisdiction of courts in the first tier of those exercising civil jurisdiction. The issue was whether the proceedings amounted to 'an action' for the purposes of s 45 given that they were commenced by 'application' rather than 'claim'.

13.34 The Queensland Court of Appeal found that the proceedings were properly commenced as a civil proceeding in the Magistrates Court and held that s 45 of the *Magistrates Courts Act* met the description in s 137 as 'a law of the State or Territory … for appeals from convictions or orders of dismissal'.

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35 Ibid, 245. Other recent cases continue to reflect the uncertainty in this area. For example, in *CEO of Customs v Amron* [2001] 164 FLR 209, McDonald J found that the applicable standard of proof was civil and endorsed use of the *Briginshaw* standard. His Honour based this decision on the finding of the Victorian Supreme Court in *Comptroller-General of Customs v Jayakody* (Unreported) (VIC 4657 of 1992, 1993). The Queensland Court of Appeal decision in *Labrador* was not cited.

36 *Ketchell v Wynch* [2001] QCA 391.

37 *Ketchell v Wynch* [2001] QDC 93.

Recent amendments to the *Customs Act*

13.35 The *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001* (Cth) amended the *Customs Act* in the light of the *Criminal Code Act 1995* (Cth) to harmonise offences under the *Customs Act* with the *Criminal Code* by applying the general rules in Chapter 2 of the Code to all Customs prosecutions.

13.36 An example of the impact of the *Criminal Code* is in relation to s 234 of the *Customs Act*, which contains offences of evading duty and making false and misleading statements. Section 234 now requires that a false and misleading statement must have been made intentionally. This element of intention more closely aligns with elements of criminal rather than civil prosecutions.[38]

13.37 The amendments do not, however, impact on the criminal and civil distinction or the standard of proof required to prove these offences under the *Customs Act*.[39] The Explanatory Memorandum to the Bill noted the illogical nature of present arrangements whereby lower courts deal with the matters as criminal and superior courts civilly. However, it considered that the least complex solution (in light of this Inquiry) was for the basic concepts of the Code (such as intention and the related defences) to simply be applied to all Customs prosecutions regardless of the forum in which they are held.[40] This seems to add another layer of complexity to the area.

ALRC DP 42 — Options for reform

13.38 ALRC Discussion Paper No 42 outlined a number of options for reform of Customs prosecutions to remove this uncertainty.

- The concept of a Customs prosecution could be retained, with the accompanying evidentiary and procedural provisions applying to those prosecutions clarified; or

- The concept of a Customs prosecutions could be removed so that ordinary criminal processes would apply.[41]

13.39 The major arguments for the retention of the arrangements were that:

- While the explanation for the adoption of the Customs prosecution procedure would not now justify its introduction, history may justify the retention of provisions which have been in operation over a long period.[42]

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38 See A Hudson, 'Debate on Standard of Proof in Customs Prosecutions Continues', <www.hgr.com.au/practice/fe2.html>, 4 June 2001.

39 Explanatory Memorandum to the Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2001, para 595.

40 Ibid, para 595.

41 Australian Law Reform Commission, *Customs and Excise: Customs Prosecutions, Jurisdiction and Administrative Penalties*, DP 42 (1990), Australian Law Reform Commission, Sydney, para 32.

42 Ibid, para 33.

- Customs prosecutions are of a commercial character and documentary evidence plays a significant part in their outcome, thus lending them a more civil character. Furthermore, as commercial procedures continue to be streamlined, Customs prosecutions can more easily take on these changes if the procedures which govern them are civil.[43]

13.40 Major arguments for the abolition of Customs prosecutions were that:

- Abolition would promote certainty and remove a procedure that is both very old and confusing. The civil character afforded to Customs prosecutions is essentially historical and not functional.

- The objectives of the legislation are broadly the same as those of the criminal law.

- In *Evans v Button*, Mahoney J said that 'the Court will be conscious in such a proceeding of the fact that what is involved is a breach of the public law, that the penalties in question are intended as a sanction for a breach of the public law, and that the offences in question may carry with them the opprobrium appropriate to breaches of such law'.[44]

- The special needs of Customs prosecutions (which are often akin to complex fraud prosecutions) are unsuited to civil procedures.[45] Furthermore, the application of civil procedures to such prosecutions may be substantively unfair to defendants.[46]

13.41 In its response to the Discussion Paper, the Australian Government Solicitor took the view the Customs prosecution procedure should be retained.

> The proper protection of the revenue no longer requires the continued existence of provisions for penalising those who breach revenue laws without imposing the stain of a criminal conviction. The lesser degree of criminality is seen as a necessary consequence of the lesser burden borne by the prosecution both with respect to the standard of proof (balance of probability upgraded as may be required to meet the Briginshaw requirement) and averments. The issue is also a practical one. Criminal proceedings are more complex, commonly more vigorously defended, more time consuming, more expensive and as a consequence do not have the capacity to provide the revenue with the protection that is provided for it by pecuniary penalty proceedings. As the Discussion Paper notes, pecuniary penalty proceedings continue to be available

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43 Ibid, para 33.
44 *Evans v Button* (1988) 13 NSWLR 57, 74.
45 Australian Law Reform Commission, *Customs and Excise Volume II*, ALRC 60 (1992), ALRC, Sydney, para 14.13.
46 A Shaik, 'Procedures in 'Customs Prosecutions' and 'Excise Prosecutions'' (2000) 7 *Australian Journal of Administrative Law* 131, 132.

> in respect of taxation matters and they are now at the heart of proposed changes to strengthen the provisions of the Corporations Law relating to director's duties.[47]

ALRC 60

13.42 In its final report ALRC 60, the ALRC recommended that Customs prosecutions be criminal but with allowances made within the legislation for the special problems which arise in relation to proof of fault in these proceedings and to take account of the use of averments. The recommendations sought to balance the true substance of the proceedings with the difficulty of proving the mental element in some Customs prosecutions.

13.43 The ALRC's Draft Bill provided for the common law principle of fault to apply except where an offence provision spelt out a specific fault element as an ingredient of the offence or where it was desired to modify, clarify or exclude the mental element in relation to a particular offence. [48] ALRC 60 further noted that a number of the offences where fault was excluded or modified were 'essentially regulatory' and this was reflected in the penalty, being monetary only, without provision for a prison sentence. As the Report noted, the majority of the offences would be prosecuted in courts of summary jurisdiction in accordance with the summary criminal procedures of those courts.

13.44 ALRC 60 also recommended changes to the use of averments. As noted above, under s 255 of the *Customs Act* the prosecution is allowed to make averments in the initiating process of prosecutions and they are considered prima facie evidence of the matter averred.[49] ALRC 60 found that averments are a common device in customs and excise litigation and can be found in overseas legislation. They are often used to prove formal and non-controversial matters, such as the date of arrival of a ship, the rate of exchange of foreign currency or the authority of the informant to commence prosecutions. They may also be used to introduce evidence from overseas that would be unable to be introduced otherwise.[50]

13.45 A number of qualifications are placed on the use of averments. Averments do not make evidence admissible which is otherwise inadmissible. It is also not permissible to aver assertions of guilt, irrelevant facts, opinions and interpretations of documents available in court.[51] ALRC 60 noted that courts have adopted a cautious approach to averments 'requiring them to be drawn with care and precision' and remaining 'sensitive to the possibility of injustice arising from their use'.[52]

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47 Australian Law Reform Commission, *Customs and Excise Volume II*, ALRC 60 (1992), ALRC, Sydney, para 14.12.

48 The *Criminal Code Act 1995* (Cth) would now apply here.

49 A similar provision is found under s 8ZL of the *Taxation Administration Act 1953* (Cth).

50 Australian Law Reform Commission, *Customs and Excise: Customs Prosecutions, Jurisdiction and Administrative Penalties*, DP 42 (1990), Australian Law Reform Commission, Sydney, para 45–46.

51 Ibid, para 43.

52 *Gallagher v Cendak* [1998] VR 731, 739; Australian Law Reform Commission, *Customs and Excise Volume II*, ALRC 60 (1992), ALRC, Sydney, para 12.4.

13.46 Averments are only allowed for matters of fact not intent.[53] This distinction can prove difficult for courts to determine. In the recent case of *Chief Executive Officer of Customs v Amron,*[54] considerable attention had to be given to the difference between averments of matters of fact and matters of intent.[55]

13.47 It acknowledged that averments are 'a substantial qualification to the fundamental principle that, in criminal prosecutions, the onus should lie on the prosecution.'[56] However, the ALRC recognised a need for their use in relation to some Customs prosecutions, particularly when evidence is located overseas or where the matter in the averment is non-controversial and would not cause unfairness to the defendant.

13.48 But it noted that they are open to abuse and accordingly suggested they should be subject to judicial control at the pre-trial stage so the need for them could be ascertained.[57] The ALRC supported the retention of s 255 of the *Customs Act* allowing for the use of averments by the prosecutor but with the addition of a provision for the disallowance of averments where the court considered that their use would be unjust to the defendant.[58] The ALRC further recommended the inclusion of criteria that the court could take into account:

- whether the averment relates to a matter that is merely formal and is not substantially in dispute.
- whether the prosecutor is in a position to adduce evidence and if not whether the difficulty derives from overseas or the obtaining of evidence would result in undue cost or delay.
- whether the defendant is reasonably able to obtain information or evidence about the matter and.
- what admissions the defendant has made.[59]

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53 A Shaik, 'Procedures in 'Customs Prosecutions' and 'Excise Prosecutions'' (2000) 7 *Australian Journal of Administrative Law* 131, 133. Section 13.6 of the *Criminal Code* states that a law that allows the prosecution to make an averment is not taken to allow the prosecution to aver any fault element of an offence or to make an averment in prosecuting for an offence that is directly punishable by imprisonment.

54 *CEO of Customs v Amron* [2001] 164 FLR 209.

55 For example, McDonald J found that the averment that the defendant deliberately omitted from the Customs Entry a statement that the import contained cigarettes was an averment of fact relevant to the issue as to whether the importation was made with intent to defraud. 'However, the averment that the defendant knew that the statement of facts were false cannot be relied on with respect to such charge as that averment is an averment of the mental element or state of mind of the defendant which must be proved by the plaintiff in order to establish that the defendant committed the offence': ibid, 217.

56 Australian Law Reform Commission, *Customs and Excise Volume II*, ALRC 60 (1992), ALRC, Sydney, para 12.12.

57 Ibid, para 12.11.

58 Ibid, para 12.12.

59 Ibid.

13.49 ALRC 60 emphasised the importance of procedural protections that usually apply to individuals charged with criminal offences. As with the judicial approach described above, it emphasised the rights of the individual over the aims of the regulator but, in doing so, it was recommending a criminal conviction as the trade-off for criminal procedural protections.

Developments since ALRC 60

13.50 That courts continue to debate the appropriate standard of proof and procedures for Customs and excise cases and reach differing conclusions suggests that the need for reform in this area remains. Similarly, there is little to indicate that the ALRC's original reasoning on the nature of Customs prosecutions ought to be changed.

13.51 A recent decision of the Supreme Court of Western Australia, *CEO of Customs v Tonmill Pty Ltd & Ors*,[60] whilst finding that the weight of caselaw fell on the side of the proceedings being civil, noted the seriousness of the offences:

> It is convenient when considering the appropriate penalty for the offences before me to recall the reasoning of Kitto J in *L Vogel & Son Pty Ltd v Anderson*[61] to the effect that offences of this kind are in a field in which punishments for deliberate offences must be severe. The Customs laws represent the judgment of Parliament upon an important aspect of the economic organisation of the community, and the object of the penal provisions is to make that judgment as effective as possible.[62]

Preliminary view

13.52 DP 65 foreshadowed two possible approaches to the problems raised by the hybrid nature of Customs prosecutions, the lack of clarity in the legislation and the inconsistencies between the use of criminal procedures in the lower courts and civil procedures in higher courts. The first proposal suggested that Parliament should amend the *Customs Act* (and the *Excise Act*) along the lines suggested by ALRC 60 so that indictable offences are prosecuted as other indictable offences by criminal process not civil. In the alternative, DP 65 suggested that, at minimum, the *Customs Act* (and the *Excise Act*) should be amended to include a clear legislative statement as to the form of Customs proceedings and to provide for consistency between the different levels of courts.

Consultations and submissions

13.53 Members of the legal profession strongly supported Customs and excise prosecutions being characterised as criminal.[63] They argued that characterisation of the prosecutions as criminal, rather than civil, would have a salutary effect for evidentiary,

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60 *CEO of Customs v Tonmill Pty Ltd & Ors* [2001] WASC 77.

61 *Vogel and Son Pty Limited v Anderson* (1967) 120 CLR 157, 164. This case related to a prosecution for smuggling..

62 *CEO of Customs v Tonmill Pty Ltd & Ors* [2001] WASC 77, para 26.

63 The Victorian Bar, *Submission CAP 22*, 14 October 2002; A Hudson, *Submission CAP 19*, 8 October 2002.

procedural and standard of proof issues.[64] Professor Michael Adams noted that in the interests of consistency, the appropriate standard of proof should be criminal.[65]

13.54 The ACS noted in its submission that there have been jurisdictional differences in relation to the relevant rules of evidence and the appropriate standard of proof since Federation. As one example, Queensland alone has adopted the civil standard of proof in lower courts and criminal in the higher courts. The ACS stated that it was awaiting direction from the High Court in the *Labrador Liquor* case[66] on the relevant standard of proof and which rules of evidence apply, although it conceded that the decision may not necessarily answer questions of statutory construction.

13.55 The ACS did not agree with the proposal that all Customs and Excise prosecutions be characterised as criminal. Whilst agreeing with the principle that there be greater consistency, making all Customs offences criminal in nature could harshly affect those prosecuted — for example, through the greater stigma of being found guilty for an offence which is effectively regulatory in nature.

13.56 The ACS argued that many of the strict liability breaches of important but relatively minor regulatory controls[67] could be jeopardised if the subsequent prosecutions for offences were classified as criminal. In these circumstances, prosecutions may not be undertaken for offences that are purely regulatory in nature, such as for late or inaccurate cargo reporting, or moving goods without the ACS authority, for fear that punishment on conviction might not seem to, fit the 'crimes'. Whereas no conviction is recorded where the amount stated in an infringement notice is paid, the fact that only a criminal conviction could result from a prosecution for the same offence may not be appropriate in all situations.[68]

13.57 The ACS noted the ALRC's Proposal 17–5, which cautioned against extending the criminal law in regulatory areas unless the conduct being proscribed was clearly deserving of moral censure, and Proposal 17–6, which argued that fault should not be an ingredient of non-criminal regulatory contraventions.[69] The ACS considered that criminalising Customs prosecutions would be in conflict with the intention of these proposals.

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64 A Hudson, *Submission CAP 19*, 8 October 2002.
65 M Adams, *Submission CAP 12*, 5 September 2002.
66 Special leave was granted on 26 June 2002.
67 The operation of the new Customs strict liability infringement notice regime is described in ch 12.
68 Australian Customs Service, *Submission CAP 25*, 23 October 2002.
69 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, 582.

13.58 Other major points raised by the ACS in its submission were:

- The current option of pursuing some matters under the *Customs Act* or the *Crimes Act 1914* (Cth) for more serious cases offers an opportunity to take either the 'civil' or 'criminal' path depending on the circumstances.

- Although application of the *Briginshaw* test means that effectively the standard of proof is close to the criminal standard, there would be problems with making all Customs offences criminal in nature if the *Customs Act* continues to provide that prosecution may be commenced by civil procedure, as the evidence would then need to be prepared according to the criminal rules of evidence. This would also raise a problem in relation to evidence gathered overseas.

13.59 A number of procedural matters were raised with the ALRC regarding the unique nature of Customs prosecutions. The ACS noted that it was unlikely that a court hearing a criminal prosecution would find a fact proved beyond reasonable doubt where the only evidence available was an averment.[70]

13.60 The ACS argued that, while a legislative solution in the form of addressing the interaction between s 245, 247 and 248 could be of some benefit, the complex nature of the provisions and the difficulty of getting legislative reforms through Parliament may be difficult problems to overcome.[71]

13.61 The Australian Taxation Office (ATO) was similarly opposed to excise prosecutions being characterised purely as criminal on the basis that there are already similar criminal offences for dishonesty causing a loss under the *Criminal Code*. Further, the increased burden of proof, loss of averments and other restrictions imposed by the pure criminal procedures would lessen the chances of successful prosecution.[72]

13.62 The ATO did, however, support the proposal to clarify the status of excise prosecutions and remove confusion regarding use of procedures in lower and higher courts. Whilst the ATO did acknowledge some benefits in moving to a purely criminal model and abolishing the concept of excise prosecutions altogether (bringing the *Excise Act* in line with other tax legislation), overall, it considered that there were benefits in the procedures (which the ATO describes as quasi-criminal) currently used in the civil prosecutions.

13.63 Overall the ATO considered that a wider range of sanctions in the Customs and excise area, whilst maintaining a 'hybrid' procedure would allow for more flexibility in achieving compliance.[73]

13.64 The issue of the use of federal rather than state courts was raised during consultation with the Australian Government Solicitor. While the Australian Government

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70 Australian Customs Service, *Submission CAP 25*, 23 October 2002.
71 Ibid.
72 Australian Taxation Office, *Submission CAP 16*, 17 September 2002.
73 Ibid.

Solicitor raised the issue in terms of exclusive use of federal courts,[74] the ACS saw merit in adding the Federal Court and Federal Magistrates Court to the list of courts in s 245 where actions may be brought,[75] subject to further consideration of the resource implications and the practical considerations of access.[76]

Conclusion

13.65 Despite an ongoing body of caselaw since ALRC 60, there has been no resolution of the confusion surrounding Customs and excise prosecutions. The decision of the High Court in *Labrador* may serve this purpose, however, given the complexity of the area, it may be hard for one judgment to be definitive.

13.66 In Chapter 3 of this Report, the ALRC states the overarching principle that the distinction between criminal and non-criminal (civil) penalty law and procedure is significant, should be maintained and, where necessary, reinforced. In line with that principle, the concept of a 'hybrid' as found under the *Customs Act* and the *Excise Act*, should not be retained. The ALRC concurs with the remarks made in ALRC 60 that:

> Whenever a question of procedure rises which is not dealt with directly and beyond argument by a particular rule, the tension between the true 'criminal' character of the proceedings and their civil form, creates difficulties.[77]

13.67 It is now ten years since ALRC 60 was released. During that time, as noted elsewhere in this Report, the concept of a 'civil penalty' and the perceived desirability of the inclusion of non-criminal regulatory offences in legislation has grown strongly.

13.68 The ALRC has taken note of the comments by the ACS that many of the new regulatory offences created under the Trade Modernisation reforms[78] would be unduly harsh were they to be prosecuted as a criminal offence. This comment could perhaps equally apply to a number of other offences contained within the *Customs Act*. The ALRC also notes the ACS's concern that amendment to only certain sections of the *Customs Act* may be problematic, given the complexity of the interrelationships between the provisions, and its unusual historical origins.

13.69 The ALRC does not believe there is any reason, other than historical practice, why the area of Customs and excise should not be brought into line with other legislation. The proposed Regulatory Contraventions Statute is designed to assist in harmonising principles governing the use of civil and administrative penalties, and the

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74 Australian Government Solicitor, *Consultation*, Sydney, 27 August 2002.

75 This was also a recommendation made in ALRC 60. As this is outside the Terms of Reference for the present Inquiry, no recommendation will be made on this topic. However, the earlier recommendation is affirmed.

76 Australian Customs Service, *Submission CAP 25*, 23 October 2002.

77 Australian Law Reform Commission, *Customs and Excise Volume II*, ALRC 60 (1992), ALRC, Sydney, 171.

78 Discussed in ch 12.

specifications in that statute should apply to the *Customs Act* and *Excise Act* as well. Where it is necessary to deviate from the statute, a clear and express statement in the primary legislation is sufficient.

13.70 The ALRC proposes that the concept of a 'Customs (or excise) prosecution' and the accompanying procedures be removed. All breaches in the *Customs Act* and the *Excise Act* should be classified as either criminal or civil based on the principles enunciated elsewhere in this Report. In doing so, the usual procedural and evidentiary rules associated with each classification of offence would apply.

13.71 In recommending that usual procedures apply, this Recommendation does, however, leave open the issue of averments in Customs prosecutions.

13.72 As noted above, ALRC 60 considered the issue of averments carefully. In that report, support was given to the averment process due to the specific nature of Customs and excise prosecutions — particularly the fact that many of these offences involve evidence that may be located overseas and difficult to prove. Further, it was put to that inquiry that averments are often made in reference to matters solely within the knowledge of defendants or to prove non-controversial matters, although this proposition was disputed by the legal profession.[79]

13.73 ALRC 60 expressed concern with the averment process as they are a substantial departure from the principle of the onus lying with the prosecution, and for their potential to be open to abuse.[80] However, due to the nature of the evidence in Customs matters, the report ultimately recommended that the averment process remain with the qualifications described at para 13.48.

13.74 This Inquiry shares the concerns expressed in ALRC 60. However, in the context of a major reclassification of offences, as proposed, it should be left to Parliament to debate the merits of the averment process. The ALRC therefore recommends that the legislation specify in relation to each criminal offence whether averments are to be permitted. The ALRC also endorses the recommendation made in ALRC 60 that averments may be disallowed if the court is of the view that their use would be unfair to the defendant.

13.75 Finally, in the interests of fairness and consistency, the anomaly whereby summary criminal procedures are used for minor offences but civil procedures are used in the higher court for more serious breaches, should be removed. One class of procedure, either criminal or civil, should be applied regardless of whether proceedings are brought in a summary or higher court, and irrespective of the jurisdiction within which the proceedings are brought.

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79 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, 151–152.

80 See discussion of the reversal of the onus of proof in ch 8.

Recommendations

Recommendation 13–1. The *Customs Act 1901* (Cth) and the *Excise Act 1901* (Cth) should be amended to:

(a) remove the concept of a Customs or excise prosecution;

(b) classify each relevant offence as either criminal or civil by clear legislative statement and allow the ordinary rules of procedure and evidence for that type of breach to apply; and

(c) specify in relation to each criminal offence whether averments are to be permitted.

Recommendation 13–2. As recommended in the ALRC's report, *Customs and Excise* (ALRC 60, 1992), averments may be disallowed in any proceedings by the court if it is of the view that they would be unfair to the accused.

Recommendation 13–3. The *Customs Act 1901* (Cth) and the *Excise Act 1901* (Cth) should be amended to bring about consistency in the prosecution of minor and more serious breaches so that one class of procedure, either criminal or civil, is used regardless of whether proceedings are brought in a summary or higher court, and irrespective of the jurisdiction within which the proceedings are brought.

Part D

Procedures and Protections

14. Procedural Fairness

Contents

Introduction

14.1 It is beyond argument that the principles of fairness are an important consideration in penalty arrangements.[1] To claim that a regulator's procedures are appropriate and fair is to claim a number of things.

1 Australian National Audit Office, *Administration of Tax Penalties*, Report 31 (2000), Australian Government Printing Service, Canberra, para 14. The importance of these notions as principles of public law is recognised world-wide through their embodiment, not only as a fundamental component of the common law, but also in international treaties, state constitutions, statutes and codes: The Hon Justice J Von

> A first matter that may be referred to is the quality of the processes used to make policies, rules or decisions. In evaluating these processes questions fall to be asked about their openness, transparency, and accessibility to various groupings or individuals.[2]

14.2 This chapter considers the legal doctrine of procedural fairness — the bias rule, the hearing rule and the concept of legitimate expectation. It is generally accepted that when penalties are court-imposed, the court's proceedings are governed by the principles of procedural fairness found in its procedural rules.[3] As a consequence, this Inquiry does not need to consider procedural fairness in actions seeking civil penalties as the court's procedural rules cover this.

14.3 This chapter focuses on quasi-penalties, where the court's role is absent or minimised. As discussed in chapter 2, the imposition of quasi-penalties involves the exercise of discretion by regulators, such as decisions to cancel or suspend a licence, to impose a licence condition, to ban an individual or to withhold benefits. The Recommendations in this chapter aim at securing the implementation of procedural fairness in decisions to impose quasi-penalties. Consideration is given to:

- the functions of procedural fairness;
- the costs associated with procedural fairness;
- when procedural fairness applies or should apply;
- the content of procedural fairness; and
- what interests and rights are protected.

14.4 In this Report, 'fairness' extends beyond the strict legal doctrine of procedural fairness to encompass a broader ambit of principles which have general application to all areas of regulatory conduct where discretion is exercised. Chapter 15 examines the broader elements of fairness and their applicability to regulatory discretion. Chapter 16 discusses fairness in dealings with regulators, particularly within the context of negotiations with the regulated, and the use of media and publicity by regulators.

Functions of procedural fairness

14.5 The principles of procedural fairness are founded upon fundamental ideas of fairness and the related concept of good administration.[4] Here, fairness, as articulated

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Doussa, 'Natural Justice in Federal Administrative Law' (1998) 17 *Australian Institute of Administrative Law Forum* 1, 1.

2 R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) Oxford University Press, Oxford, 314.

3 See, for example, *Dietrich v The Queen* (1992) 177 CLR 292 in relation to criminal law. The principle of the fair trial is set out in international human rights treaties. The United Nation's International Covenant on Civil and Political Rights, which binds Australia, contains in Article 14 a right to a trial by a 'fair and public hearing by a competent, independent and impartial tribunal established by law'.

4 The Hon Justice J Von Doussa, 'Natural Justice in Federal Administrative Law' (1998) 17 *Australian Institute of Administrative Law Forum* 1, 2.

in procedural rights, performs an 'instrumental role'[5] by contributing to the accuracy of the decision.

14.6 However, it is also important to consider the 'non-instrumental' justifications of procedural fairness. For example, procedural fairness can be seen as protecting human dignity by ensuring that affected individuals are made aware of the basis upon which they are being treated unfavourably, and by enabling them to participate in the decision-making process. Those who subscribe to the 'dignitarian theory' claim that procedures predominantly express independent values rather than being merely instrumental to one dominant end.[6] Professor Dennis Galligan embraces the notion that non-outcome values have a significant place in law but he perceives the non-instrumental value of the hearing and bias rules[7] as subsidiary to their instrumental role.[8]

14.7 Fairness, and a perception of fairness, serves to increase public confidence in administrators and their decisions. This in turn helps individuals to accept decisions that are adverse to their interests.

14.8 It has been argued that procedural fairness, in the context of judicial review, serves the political function of enfranchisement:

> When judicial review is sought on procedural grounds, the applicant is in fact claiming to be enfranchised, the argument advanced is not that a decision was itself unlawful, but that one has a right to participate in a certain manner in that decision.[9]

14.9 Bruce Dyer identifies two functions performed by procedural fairness. The first is the 'corrective' function of the courts in providing relief. The second is the 'educative' function of formulating principles to assist decision makers in adopting appropriate procedures in future cases, and an incentive to follow such guidelines.[10] As judicial review is only sought in respect of a minimal percentage of decisions, and as the value of the 'corrective' function of procedural fairness may be limited, Dyer argues that it is only through performance of the educative function that judicial review can have a meaningful impact on administrative action.[11]

The costs of fairness

14.10 The requirements of fairness are in many respects an expensive, time-consuming,[12] and often inefficient, aspect of a balanced regulatory system. Allowing

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5 Ibid, 2.

6 See for example J Mashaw, 'Administrative Due Process: The Quest for a Dignitarian Theory' (1981) 61 *Boston University Law Review* 885.

7 The bias and hearing rules are discussed at para 14.26–14.33 and para 14.72–14.94 below.

8 D Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (1996) Clarendon Press, Oxford, 93.

9 R MacDonald, 'Judicial Review and Procedural Fairness in Administrative Law: II' (1980) 26(1) *McGill Law Journal* 507, 513.

10 B Dyer, 'Determining the Content of Procedural Fairness' (1993) 19 *Monash University Law Review* 165, 183.

11 Ibid, 184.

12 D Pearce, 'Is There Too Much Natural Justice?' (1992) 12 *Australian Institute of Administrative Law Newsletter* 1, 6.

every affected person a right to be heard, for example, takes time, money and other resources, both concrete and intangible. Professor Dennis Pearce has observed that the requirements of a good government decision-making process are speed, finality, cheapness and accessibility.[13] He also notes that a system of decision making that guarantees ultimate correctness or accuracy in decision making is likely to run counter to these desirable essentials of the decision-making process.[14] Judges have also stated that the courts must avoid a situation where the expansion of the duty to afford procedural fairness would paralyse effective administration.[15] It has been noted that procedural safeguards are also open to abuse, leading to a less efficient regulatory regime.[16] Justice Deirdre O'Connor has stressed that a distinction must be made between the content of procedural fairness and the process which is often criticised as lengthy, costly and too legalistic.[17]

Procedural fairness: legal doctrine

Introduction

14.11 Procedural fairness refers to a legal doctrine in administrative law more commonly referred to as natural justice, with which public authorities must comply in making decisions. In this context, the term 'procedural fairness' refers to specific legal doctrines that express fundamental principles about the fair treatment of persons and the procedures needed to ensure fair treatment.

14.12 In Australia the right to 'due process' or procedural fairness is not constitutionally guaranteed. However, at the federal level the requirement that administrators observe the principle of natural justice is protected, in particular, by the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act). This Act provides for a right of review, which is one aspect of fairness. Sections 5 and 6 of the ADJR Act deal with the grounds upon which review may be sought.[18]

14.13 The basis of many of these grounds of review is the common law duty to observe procedural fairness in the exercise of a power that is liable to directly adversely affect a person's rights, interests, status or legitimate expectations.[19] The legal doctrine

13 Ibid, 17–18.

14 Ibid.

15 The Hon Justice J Von Doussa, 'Natural Justice in Federal Administrative Law' (1998) 17 *Australian Institute of Administrative Law Forum* 1, 2.

16 T Sykes, 'Battling With the Law', *The Australian Financial Review* (Sydney), 13 August 2001, 53.

17 The Hon Justice D O'Connor, 'Is There Too Much Natural Justice?' (1992) 1992(12) *AIAL Newsletter* 1, 5.

18 A succinct summary of these grounds in the context of an ADJR case was given in *Park Oh Ho v Minister for Immigration & Ethnic Affairs* (1988) 81 ALR 288, 296–97: 'A decision may be set aside … if it is shown that the decision was affected by an error of law, that is to say, some procedural defect such as a breach of the principles of natural justice, some misapprehension of the law, a failure to deal properly with the issue by reason of a failure to take into account a material consideration or the giving of weight to an immaterial consideration, some improper motive or abuse of power on the part of the decision-maker or the reaching of a decision so perverse that no reasonable decision-maker could have arrived at it'.

19 *Minister for Immigration and Multicultural Affairs, Re; Ex parte Miah* [2001] HCA 22, para 31; and *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550, 584. See also *Haoucher v Minister*

of procedural fairness has two principal limbs: decisions by public officials should be made in an unbiased manner (the bias rule) and those affected by such decisions should be given an opportunity to participate in the decisions that affect them (the hearing rule).

14.14 The hearing rule has particular relevance in the context of decisions to impose quasi-penalties because those penalties usually adversely affect a person's rights, interests or legitimate expectations.

When does procedural fairness apply?

14.15 The modern approach is to presume that procedural fairness applies, and to ask whether the terms of the legislation display a clear intention to exclude the principle.[20] In *Kioa v West*, Mason J stated:

> The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary intention.[21]

14.16 Mason J confirmed that 'only acts or decisions which directly affect the person … individually and not simply as a member of the public or a class of the public' attract the duty.[22]

14.17 In the same case Brennan J said that the presumption to observe natural justice principles

> applies to any statutory power the exercise of which is apt to affect the interests of an individual alone or apt to affect his interests in a manner which is substantially different from the manner in which its exercise is apt to affect the interests of the public.[23]

14.18 In *Minister for Immigration and Multicultural Affairs; Ex parte Miah*[24] the majority of the High Court found that the code of procedure for dealing fairly, efficiently and quickly with visa applications under the *Migration Act 1958* (Cth) did not exclude common law natural justice requirements. Such exclusion would require clear legislative intention and the majority concluded that there was no such clear intention in the *Migration Act*. Kirby J stated:

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for Immigration and Ethnic Affairs, (1990) 169 CLR 648, 652–653 and 680; *Annetts v McCann* (1990) 170 CLR 596, 598 and 607.

20 *Annetts v McCann* (1990) 170 CLR 596, 598.

21 *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550, 584.

22 Ibid, 584.

23 Ibid, 619.

24 *Minister for Immigration and Multicultural Affairs, Re; Ex parte Miah* [2001] HCA 22. On the facts of *Miah*, relief was sought for breach of the rules of natural justice under the *Constitution*, s 75(v), which provides that in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth, the High Court shall have original jurisdiction. The High Court issued orders for writs of prohibition, certiorari and mandamus against the Minister because of the failure of the Minister's delegate to give the applicant an opportunity to comment on a change of circumstances in his country of origin which were taken to undermine his claim to be a refugee.

> In the absence of the clearest possible indication to the contrary, courts will normally assume that an Australian parliament did not intend to work serious procedural injustice upon persons whose interests are adversely affected by the legislation. This is not a presumption that challenges the authority of such parliaments. It is one respectful of the assumption that, in Australia, parliaments ordinarily act justly and expect the repositories of power under legislation to do likewise.[25]

Content of procedural fairness

14.19 Professor Margaret Allars has stated that the content of procedural fairness ranges across a spectrum.[26] At one end of the spectrum procedural fairness emulates the procedures of adversarial litigation whereby affected persons are given notice that a decision will be made, and are allowed an oral hearing with a right to legal representation and to cross-examination. As one moves along the spectrum, depending on the circumstances of each case and the relevant statutory provisions, the content of procedural fairness may reduce, for example, by allowing for written submissions rather than an oral hearing, or by not providing for legal representation. Allars argues that the minimum content of procedural fairness is that notice be given to the affected person that a decision will be made.[27]

14.20 At the far end of the spectrum the minimum content of procedural fairness is 'nothingness'.[28] In Brennan J's view, the content of procedural fairness could be diminished to nil to avoid frustrating the purpose for which the power was conferred.[29] Allars has observed that Brennan J's view treats certain factors such as national security and emergency as relevant to the content of procedural fairness rather than when it is implied.[30] An alternative analysis is that in certain circumstances procedural fairness is not implied.

14.21 The question whether rights, interests, status or legitimate expectations are affected is relevant to the practical content of the duty in any particular case.[31] A range of factors will be relevant, such as the nature of the decision to be made, the range of affected interests, the extent of the interest of the person or persons affected, and the seriousness of the implications of the decision.[32] 'Flexibility' is, in effect, the

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25 *Minister for Immigration and Multicultural Affairs, Re; Ex parte Miah* [2001] HCA 22, para 183.

26 M Allars, *Introduction to Australian Administrative Law* (1990) Butterworths, Sydney, 261.

27 Ibid, 262.

28 According to Brennan J in *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550, 615–616; Deane J in *Haoucher v Minister for Immigration and Ethnic Affairs,* (1990) 169 CLR 648, 653; and the commentators Graeme Johnson and Professor David Mullan. See G Johnson, 'Natural Justice and Legitimate Expectations in Australia' (1984) 15 *Federal Law Review* 39, and D Mullan, 'Fairness: The New Natural Justice' (1975) 25 *University of Toronto Law Journal* 281.

29 *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550, 615–616.

30 M Allars, *Introduction to Australian Administrative Law* (1990) Butterworths, Sydney, 262.

31 *Minister for Immigration and Multicultural Affairs, Re; Ex parte Miah* [2001] HCA 22, para 31; *Haoucher v Minister for Immigration and Ethnic Affairs,* (1990) 169 CLR 648, 653.

32 K Yeung, 'Negotiated Compliance Strategies: The Quest for Effectiveness and the Importance of Constitutional Principles' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 8 June 2001).

fundamental principle which guides the approach of the courts in determining the content of procedural fairness.[33]

14.22 The ALRC agrees that flexibility is a key element of procedural fairness, and for this reason has avoided any recommendation to completely codify procedural fairness to the exclusion of common law natural justice principles. In this regard see discussion at para 14.48–14.56 in relation to the codification of procedural fairness requirements in the migration context.

14.23 Importantly to this Inquiry, the terms of the particular statute under which a decision is made will determine the content of the duty to afford procedural fairness.[34] Where legislation provides regulators with broad discretion to make subjective assessments in determining whether to impose a quasi-penalty, decision-making procedures may need to be clearly and extensively delineated to ensure that procedural fairness is observed.[35] In contrast, where a regulator is given no discretion as to the imposition of a penalty, as is the case with a true administrative penalty (imposed by operation of legislation), the content of procedural fairness may be either minimised or non-existent.[36]

What interests and rights are protected?

14.24 The obligation to afford procedural fairness will arise where a regulator proposes to make a decision which may adversely affect a person's rights, interests or legitimate expectations. A person's 'interests' are extremely broad.[37] They can include:

- legal rights and interests;
- non-legal interests such as status, and business, commercial or personal reputation; and
- legitimate expectations of the conferral of a benefit, including an expectation which has been created by a decision maker.

14.25 Most decisions to impose a quasi-penalty will attract procedural fairness requirements as they are decisions that adversely affect a person's rights, interests, status or legitimate expectations. These decisions could include:

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33 B Dyer, 'Determining the Content of Procedural Fairness' (1993) 19 *Monash University Law Review* 165, 165–166.

34 *Minister for Immigration and Multicultural Affairs, Re; Ex parte Miah* [2001] HCA 22, para 30; *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550, 614.

35 An example is the power of the Companies Auditors and Liquidators Disciplinary Board to cancel or suspend the registration of a person as an auditor or liquidator under *Corporations Act 2001* (Cth), s 1292. The power to impose this quasi-penalty is contingent on various assessments such as whether the person is 'fit and proper'.

36 For example, ibid, s 206B which provides for automatic disqualification from managing a corporation if a person is convicted on indictment of certain offences.

37 *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550, 582. See further *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 69 ALR 423, 440–441.

- the decision to impose a rate reduction or non-payment period of a social security benefit for an administrative or activity test breach which adversely affects a person's right to receive a benefit that he or she is otherwise eligible to receive;
- the decision to cancel, suspend or place conditions on a licence as these decisions can clearly adversely affect livelihood, career and reputation;[38] and
- the decision to disqualify a person from managing a corporation or from acting as a liquidator or auditor as this decision can also clearly affect livelihood, career and reputation.

The bias rule

14.26 As Professor Mark Aronson and Dyer note:

> One of the central tenets of our legal system is that the law be applied and executed without fear, favour or prejudice.[39]

14.27 Penalty schemes enforced by a biased decision maker could result in a general perception that a regulator is unfair and perhaps even lead to non-compliance. The High Court has recently stated that the test for bias in a judicial context in Australia is:

> Whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide.[40]

14.28 The rationale for the rule is that 'if fair-minded people reasonably apprehend or suspect that the tribunal has prejudged the case, they cannot have confidence in the decision.'[41] The bias rule is implemented to ensure impartiality of decision making in courts, tribunals and administrative authorities, and requires decision makers both to be impartial and to be seen to be impartial.

14.29 The clearest indicator of bias is a pecuniary interest. In the context of a court or statutory body, where pecuniary interest is established, bias will be presumed and

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38 Revocation of licences: *Banks v Transport Regulation Board (Vic)* (1968) 119 CLR 222; *Ackroyd v Whitehouse (Director of National Parks and Wildlife Service)* (1985) 2 NSWLR 239. Suspension of licences: *R v Liquor Commission (NT)* (1981) 8 NTR 3; *Ex parte Hinton* (198l) 8 NTR 3; *Hook v Registrar of Liquor Licences* (1980) 35 ACTR 1, 4. See also *Post Office Agents Association Ltd v Australian Postal Commission* (1988) 84 ALR 563.

39 M Aronson and B Dyer, *Judicial Review of Administrative Action* (2nd ed, 2000) LBC Information Services, Sydney, 453.

40 *Johnson v Johnson* (2000) 201 CLR 488, 492. The High Court had applied a similar test in *Livesey v The New South Wales Bar Association* (1983) 151 CLR 288 and in *Webb v R* (1994) 181 CLR 41, 47 per Mason CJ and McHugh J, and 67 per Deane J. In *Khadem v Barbour* (1995) 38 ALD 299, a decision of Hill J, and in the Full Court decision of *Kaycliff Pty Ltd v Australian Broadcasting Tribunal* (1989) 90 ALR 310, the Federal Court lent towards the 'likelihood' version of the test; ie, that a hypothetical reasonable observer might form the view that a decision maker *would* be biased. In *Gaisford v Hunt* (1996) 71 FCR 187 the Full Federal Court returned to the 'possibility' test, ignoring *Kaycliff Pty Ltd v Australian Broadcasting Tribunal* (1989) 90 ALR 310 and *Khadem v Barbour* (1995) 38 ALD 299.

41 *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248, 263.

the judge or decision maker will be disqualified.[42] Non-pecuniary bias will result in disqualification where there is reasonable suspicion or apprehension of bias.[43] This test does not require proof of actual bias.[44] The reasonable apprehension must be entertained by a 'party to the impugned proceedings, or to the general public'.[45] In either case the person entertaining the apprehension must be acting reasonably. Apprehensions which are unfair or irrational do not count.[46]

14.30 Non-pecuniary interests amounting to apprehended bias include cases where a judge also acts as the prosecutor, or where there is a past association or close relationship between the decision maker and one of the parties. Decision makers will also be disqualified if they have a strong personal interest in the case, strong personal opinions that affect their judgment of the case, or prejudge a case.

14.31 While the bias rule is strictly applied to courts, the level of impartiality required of administrative decision makers and members of tribunals is not as well established.[47] In cases where the bias rule is not strictly enforced, fairness is seen to be maintained by the application of the hearing rule, the other main element of procedural fairness.

The hearing rule

14.32 The right to be heard and other associated procedural rights are well established in criminal and civil proceedings. In the context of administrative decision-making, the common law rule that a statutory authority having power to affect the rights of a person is bound to hear her or him *before* exercising the power has been described as both fundamental and universal.[48] However,

> the legislature may displace the rule and provide for the exercise of such a power without any opportunity being afforded the affected person to oppose its exercise … Where the legislation is silent on the matter, the court may presume that the legislature has left it to the courts to prescribe and enforce the appropriate procedure to ensure natural justice.[49]

14.33 In the federal legislation surveyed by the ALRC, the right to be heard prior to the imposition of a quasi-penalty is provided for by either a formal hearing or by the making of submissions. These rights are generally reserved for severe quasi-penalties,

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42 S Hotop, *Principles of Australian Administrative Law* (6th ed, 1985) The Law Book Company Ltd, Sydney, 204.

43 E Sykes and others, *General Principles of Administrative Law* (4th ed, 1997) Butterworths, Sydney, 223. See also *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 12 CLR 545 and *Webb v R* (1994) 181 CLR 41.

44 M Aronson and B Dyer, *Judicial Review of Administrative Action* (2nd ed, 2000) LBC Information Services, Sydney, 485.

45 Ibid, 485.

46 Ibid, 485–486.

47 R Douglas and M Jones, *Administrative Law: Commentary and Materials* (2nd ed, 1996) Federation Press, Sydney, 537.

48 *Twist v Council of the Municipality of Randwick* (1976) 136 CLR 106, 110.

49 Ibid.

most commonly the removal of licences.[50] Related to the hearing rule is the rule that adverse information that is credible, relevant and significant to the decision to be made should be disclosed to the person subject to the proposed decision, and an opportunity given to deal with it.[51] Further, adverse material which is personal to the individual affected, and which has been obtained from another source, must be disclosed and an opportunity provided to respond to it.[52] In *Muin v Refugee Review Tribunal*; *Lie v Refugee Review Tribunal*[53] the High Court found that the RRT had failed to afford the applicants natural justice because they had not been given an opportunity, or at least an adequate opportunity, to prepare and present favourable material at a hearing or an adequate opportunity to respond to unfavourable material.[54] However, procedural fairness does not require an opportunity to comment on every adverse piece of information irrespective of its credibility, relevance or significance.[55]

Legitimate expectation

14.34 The concept of legitimate expectation has facilitated the extension of procedural fairness to interests falling short of legal rights. It has enabled courts to extend procedural protection to existing or prospective interests, privileges and benefits that a person has a legitimate expectation of obtaining or continuing to enjoy.[56]

14.35 As discussed by Aronson and Dyer, the concept of legitimate expectation has prompted considerable judicial and academic discussion.[57] They note several ways in which the courts have used the concept:

> It was first used as a means of expanding the presumptive application of natural justice beyond decisions affecting 'rights' and legal interests … A second purpose … is to lessen the unfairness which results from the courts' reluctance to uphold arguments of estoppel based on undertakings and representations of public officials … More recently, legitimate expectation has been used, not to impose a duty to observe procedural fairness, but rather to give that duty some specific content in the circumstances of a particular case.[58]

14.36 A past course of conduct or regular practice of government in its interaction with an individual may give rise to an expectation that the practice will continue. If the practice is sufficiently regular, fairness may demand that the public authority not de-

50 See discussion at para 14.72–14.73 below.
51 *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550, 629. See also *Muin v Refugee Review Tribunal; Lie v Refugee Review Tribunal* [2002] HCA 30.
52 *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550, 587.
53 *Muin v Refugee Review Tribunal; Lie v Refugee Review Tribunal* [2002] HCA 30.
54 Gaudron J stated that the RRT is bound to proceed in a manner that is procedurally fair. Procedural fairness requires persons who have been refused a protection visa to be given a reasonable opportunity to present a case that he or she is a refugee as defined in the Convention Relating to the Status of Refugees: and to respond to any material or information in the possession of the RRT which suggests otherwise. Ibid, para 61.
55 *Lek v Minister for Immigration, Local Government & Ethnic Affairs* (1993) 43 FCR 100, 129–130.
56 *Haoucher v Minister for Immigration and Ethnic Affairs,* (1990) 169 CLR 648, 680.
57 M Aronson and B Dyer, *Judicial Review of Administrative Action* (2nd ed, 2000) LBC Information Services, Sydney, 322.
58 Ibid, 323.

part from it without the affected individual being given an opportunity to argue for its continuance.[59]

14.37 The investigative process is one area that can raise issues of legitimate expectation. An undertaking towards the close of an investigation to foreshadow provisional views and to provide an opportunity for a hearing raises a legitimate expectation that the procedure will be followed.[60] However, in the early stages of a flexible investigative procedure without formality, there is little scope to argue that there is a legitimate expectation that a fixed course of procedure will be followed.[61]

14.38 A regulator's published, considered statement of policy or the existence of published guidelines may also create an expectation in the regulated to whom the policy is directed that the regulator will act in accordance with the operative policy.[62] However, not all policy statements and guidelines will give rise to legitimate expectations that impose procedural obligations. Only policy statements which are readily available to the public, clear, unambiguous and relatively particularised will do so.[63]

14.39 A regulator is entitled to change and abandon its policies unfettered by any previous representation or undertaking.[64] A decision to change or abandon a policy (including a policy of consultation) is a political decision which does not entail a duty to proceed fairly[65] unless, arguably, a reasonable expectation to that effect has been generated.[66] For example, once a penalty policy is abandoned, any previously held expectation that it has generated is extinguished. The question remains open whether procedural fairness must be observed before defeating a legitimate expectation by selectively applying a policy.[67]

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59 *Breen v Amalgamated Engineering Union* [1971] 2 QB 175.

60 *GTE (Aust) Pty Ltd v Brown* (1986) 14 FCR 309. In this case it was the completion of a report adverse to the applicant before the finalisation of an investigation.

61 *Merman Pty Ltd v Comptroller-General of Customs* (1988) 16 ALD 88, 96 (Lee J).

62 A policy will be operative where the relevant public authority purports to act in compliance with its provisions: The Hon Justice J Von Doussa, 'Natural Justice in Federal Administrative Law' (1998) 17 *Australian Institute of Administrative Law Forum* 1, 7.

63 Ibid, 15. See also *One.Tel Limited v Commissioner of Taxation* (2000) 101 FCR 548, 567–568, where Burchett J stated in respect of certain guidelines issued by the Commissioner of Taxation: 'It seems to me that the formality and detail with which the Guidelines are framed and the nature of their subject matter point strongly in favour of the view that they give rise to a legitimate expectation that the Commissioner will conduct himself in the manner he has so carefully set out. I do not think he could depart from the Guidelines, except in such an urgent case as might arise if there were grounds for fearing the destruction of the documents in question, without giving the person concerned an opportunity to make out a case why he should not do so. Of course, provided he does allow the requisite opportunity, it is in the nature of guidelines that they may be departed from in an individual case for sufficient reason …' See also *Khan v Minister for Immigration and Multicultural Affairs* [1999] FCA 1790, para 23 where Hill J found that a migration series instruction MSI-219 did not give rise to a legitimate expectation as it was only a 'temporary instruction' and 'not available without difficulty to the public at large.' See also *Haoucher v Minister for Immigration and Ethnic Affairs,* (1990) 169 CLR 648.

64 *Attorney-General (NSW) v Quin* (1990) 93 ALR 1.

65 *Save the Showground for Sydney Inc v Minister for Urban Affairs & Planning* (1997) 95 LGERA 33, 40–41.

66 Ibid, 53.

67 *Attorney-General (NSW) v Quin* (1990) 93 ALR 1, 24 and 60.

14.40 In Australia the concept of legitimate expectation is not directly related to the enforceability of a guideline or policy statement.[68] There has been little support in Australia for substantive fairness as a ground of review in its own right, and that appears unlikely to change.[69]

14.41 In *Deloitte Touche Tohmatsu v Deputy Federal Commissioner of Taxation*[70] Goldberg J did not decide whether the guidelines under consideration created a legitimate expectation, but did decide that the Guidelines constituted 'at the least, a relevant consideration to which … officers of the Australian Taxation Office must have regard':

> A key issue in the proceeding is the relevance of the guidelines in the manual and whether they were complied with by the respondent. It is important to understand the significance of the guidelines for they do not have the status of a legislative enactment but are rather the creation of the Commissioner and the Australian Taxation Office. It is submitted by the respondent that they do not constitute a source of rights. In my opinion, the manner in which they have been promulgated and their contents make it clear that they are, at the least, a relevant consideration to which the respondent and officers of the Australian Taxation Office must have regard and at the most (without deciding the issue) they are matter which create a legitimate expectation in taxpayers and their professional accounting advisors that they will be complied with according to their terms.[71]

The future of legitimate expectation

14.42 The High Court has recently recognised that the 'content and continued utility' of legitimate expectations may be open to question.[72] In *Muin v Refugee Review Tribunal; Lie v Refugee Review Tribunal*[73] an argument based on legitimate expectation was not entertained by the High Court. Mr Muin contended that he had a legitimate expectation of procedural fairness that was created by a Refugee Review Tribunal Practice Direction issued on 25 June 1997 which stated:

> The applicant will be given an opportunity to respond to any relevant and significant material which is or may be adverse to his or her case …
>
> In general, it will be sufficient to identify the source and provide the substance of the material. There is no legal requirement to provide the actual source document.
>
> To ensure that the applicant has an opportunity to respond to adverse material the Tribunal must be satisfied that the applicant understands the material and the way it relates to his or her case.
>
> The applicant will not normally be provided with any material which is referred to in the primary decision or is otherwise reasonably available to the applicant. The provi-

68 Ibid, 21, 39–40, 55. There is some support in England and New Zealand for the notion that the courts are able to enforce legitimate expectations (by 'substantive protection') rather than merely requiring observance of procedural requirements before such expectations are disappointed ('procedural protection').

69 M Aronson and B Dyer, *Judicial Review of Administrative Action* (2nd ed, 2000) LBC Information Services, Sydney, 332.

70 *Deloitte Touche Tohmatsu v Deputy Federal Commissioner of Taxation* (1998) 98 ATC 5192.

71 Ibid, 5207.

72 *Sanders v Snell* (1998) 196 CLR 329, 348.

73 *Muin v Refugee Review Tribunal; Lie v Refugee Review Tribunal* [2002] HCA 30.

> sion of adverse material by the Tribunal is subject also to any issue of confidentiality, privilege or public interest immunity (see also s 437–439).

14.43 Gleeson CJ noted that the plaintiff's contention in relation to the creation of a legitimate expectation and stated that it was unnecessary to enter into that area of debate as the Practice Note did not add anything to the common law requirement of procedural fairness.[74]

14.44 McHugh J rejected the legitimate expectation argument:

> The Tribunal's internal Practice Direction did not constitute a promise or representation to Mr Muin upon which he could ground a claim of legitimate expectation of procedural fairness concerning adverse material. It merely paraphrases the common law duty. The doctrine of legitimate expectation is fictitious enough without applying it to internal practice directions of the Tribunal of which Mr Muin did not know and may not have understood if he had known of their existence. His case must stand or fall on the proposition that the general principles of procedural fairness required that he be informed of the adverse matters that the Tribunal was proposing to consider.[75]

14.45 Hayne J stated that in the circumstances it was not necessary to consider what legitimate expectations the Practice Direction might engender.[76]

14.46 Aronson and Dyer are critical of the concept of legitimate expectation although they do note that one use of the concept would seem to be appropriate.

> That is where it is used to describe actual expectations or likely expectations, arising from undertakings and representations, which are treated by the courts as deserving of procedural protection. In this context we are dealing with real 'expectations' and the term 'legitimate' helps to indicate that not all expectations will receive such protection … Aside from this limited use, we think the concept of legitimate expectation is, as Brennan J argued, unnecessary and undesirable.[77]

14.47 Allars has argued that, under the threshold test adopted in *Kioa*,[78] the concept of 'interest' is now sufficiently broad to make the use of legitimate expectation unnecessary.[79] Aronson and Dyer agree.[80]

> The term 'legitimate expectation', when divorced from actual or likely expectation, has no real explanatory power. It is no more than a label to be applied once a court has concluded that procedural requirements should be imposed. When used in this fashion, the inclusion of the concept in the threshold test is a nonsense, given that the

74 Ibid, para 30.
75 Ibid, para 125.
76 Ibid, para 273.
77 M Aronson and B Dyer, *Judicial Review of Administrative Action* (2nd ed, 2000) LBC Information Services, Sydney, 335.
78 *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550.
79 M Allars, 'One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government; *Teoh's* Case and the Internationalisation of Administrative law' (1995) 17 *Sydney Law Review* 204, 222–224.
80 M Aronson and B Dyer, *Judicial Review of Administrative Action* (2nd ed, 2000) LBC Information Services, Sydney, 335.

> purpose of that test is to determine when the requirements of procedural fairness should apply.[81]

Recent developments

14.48 As stated at para 14.18 above, exclusion of common law natural justice requires clear legislative intent. The *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth) is a recent example of an Act clearly stating the intention to oust common law natural justice. The Act was assented to on 3 July 2002.

14.49 Senator Ian Campbell stated in the second reading speech:

> This bill amends the *Migration Act 1958* to provide a clear legislative statement that the 'codes of procedure' in the Act are an exhaustive statement of the requirements of the natural justice hearing rule … It was also intended that [the codes] would replace the uncertain common law requirements of the natural justice 'hearing rule' which had previously applied to decision-makers.
>
> However, last year in the *Miah* case, the High Court found that the code of procedure relating to visa applications had not clearly and expressly excluded the common law natural justice requirements. This means that even where a decision-maker has followed the code in every single respect, there could still be a breach of the common law requirements of the natural justice hearing rule.
>
> A further consequence of the High Court's decision is that there is legal uncertainty about the procedures which decision-makers are required to follow to make a lawful decision.
>
> The majority of the Court emphasised that Parliament's intention to exclude natural justice must be made unmistakably clear. It concluded that this intention was not made apparent in relation to the code of procedure for dealing with visa applications. Therefore the purpose of this bill is to make it expressly clear that particular codes in the *Migration Act* do exhaustively state the requirements of the natural justice or procedural fairness 'hearing rule.'
>
> This will have the effect that the common law requirements relating to the natural justice or procedural fairness 'hearing rule' are excluded.[82]

14.50 The Migration Legislation Amendment (Procedural Fairness) Bill 2002 was referred to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 15 May 2002. A public hearing on the bill was held in Sydney on 9 April 2002.

14.51 Two of the issues before the Committee were:

(a) whether it was possible to adequately codify the common law natural justice hearing rule; and

(b) whether there were major deficiencies in the codes of procedure when compared with the common law natural justice hearing rule.[83]

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81 Ibid, 335–336.

82 Hansard, *Second Reading Speech*, Senate, 27 June 2002, 2790–2791, Senator Campbell.

14.52 Many persons and organisations that appeared before the Senate Legal and Constitutional Committee contended that the common law natural justice hearing rule could not be codified. Angus Francis, a lecturer in law at the University of Canberra, argued that the fairness sought by the codification required flexibility and that flexibility could not be codified.[84]

14.53 Elizabeth Biok, Council Member, International Commission of Jurists, provided the Senate and Legal Constitutional Committee with an example of the need for flexibility in natural justice:

> I can give you an example of something that would not have been covered by [the Migration Legislation Amendment (Procedural Fairness) Bill 2002] but which a tribunal member realised was certainly an act of natural justice. It was a client of mine who was severely traumatised. When she went for her RRT hearing, during the hearing she appeared to be quite uninterested in what was happening. She gave poor responses and, as the hearing went on, appeared to be going to sleep. The tribunal member was aware that there were some problems, and we had a break and indicated that there were psychological problems for which there were reports. The tribunal member then ended the hearing and allowed for a further hearing in that matter when the client's psychiatrist could come and give evidence which supported her behaviour and referred it back to her experience of persecution. That was providing natural justice. That was allowing that this person had a special circumstance and it was allowing for an additional hearing … Natural justice in that situation meant that this client had to have two hearings. It is something that cannot be codified.[85]

14.54 The Law Institute of Victoria and Associate Professor Arthur Glass have argued that the codes of procedure in the *Migration Act* fall far short of a codification of the common law rules of procedural fairness.[86] Some of the codes of procedure in the *Migration Act* allow the Minister, the MRT and the RRT to act if the applicant is taken to have been given adverse information and has not provided a response within strict time limits. The Refugee and Immigration Legal Centre submitted to the Committee:

> In our experience, even where adverse information is provided to an applicant for comment, the precise nature of this process and the task confronting the applicant is not readily apparent and requires detailed information. Further, it is common for applicants to require the request to be translated or interpreted prior to being in a position to respond to an invitation. This may involve a lengthy and costly process in itself. In these circumstances, the time limit specified for comment may have expired.

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83 Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee — Provisions of the Migration Legislation Amendment (Procedural Fairness) Bill 2002* (2002), Commonwealth of Australia, 10.

84 Ibid, 10.

85 Hansard, Senate Legal and Constitutional Committee Transcripts, 9 April 2002, 37, Ms Biok.

86 For example, Associate Professor Glass pointed out that, unlike other provisions in the *Migration Act* which *require* the Minister, the Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT) to give the person affected particulars of information that would be the reason or part of the reason for a decision adverse to him or her, s 107 of the Act dealing with the cancellation of a visa for the provision of incorrect information only *empowers* the Minister to give particulars of that incorrect information: Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee — Provisions of the Migration Legislation Amendment (Procedural Fairness) Bill 2002* (2002), Commonwealth of Australia, 10.

> A decision can therefore be made on the application regardless of the failure of the applicant to meet the deadline … In such a case, the decision would be made in conformity with the code of procedure but nevertheless in denial of the rules of natural justice whereby the only adequate relief would be by way of judicial review.[87]

14.55 The Victorian Bar stated that, notwithstanding that the Bill proposed that the statutory codes of procedure would be an exhaustive statement of the natural justice hearing rule for the purposes of judicial review, there were other factors which would impinge on decision making:

> The legislative regime governing migration decisions is highly prescriptive and complex. In addition to the legislation, decision-making is also heavily influenced by governmental policy in the form of Procedures Advice Manuals, the Migration Series Instructions and Ministerial Directions. These materials fill about 25 lever arch files.[88]

14.56 The Senate Legal and Constitutional Committee recommended that the Bill be passed, stating in conclusion:

> The current Bill provides a more 'watertight' statement of the law as it was understood from 1992 (or in the case of MRT and RRT reviews, from 1999) until 3 May 2001, when the High Court handed down its decision in *Miah.* In light of this, the Committee is not convinced that the perceived inadequacies of the codes of procedure should prevent passage of the Bill, notwithstanding the broadly expressed concerns about the practice of ousting the rules of natural justice. The Committee notes that these matters continue to be the subject of ongoing public debate, by government, the judiciary and interested community members.[89]

14.57 As stated at para 14.22 above, the ALRC endorses the view that flexibility is a fundamental component of procedural fairness, and therefore it does not make any recommendations in relation to the codification of procedural fairness to the exclusion of common law principles in the federal regulatory sphere. To the contrary, the ALRC recommends a legislative restatement of the common law presumption of procedural fairness, which is addressed below.

Legislative restatement

14.58 In DP 65 the ALRC proposed a legislative restatement of the common law presumption that all entities that are subject to a regulator's decision-making power must be afforded procedural fairness in the absence of any clear, express statutory statement excluding or limiting the application of procedural fairness in particular cases.[90]

87 Ibid, 11.
88 Ibid, 12.
89 Ibid, 13.
90 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Proposal 7–1.

Consultations and submissions

14.59 This proposal received some support. Professor Warren Pengilley essentially agreed with this proposal, as well as all the other ALRC proposals in relation to procedural fairness, stating that the proposals represented a check on regulators.[91] Dr Karen Yeung strongly supported the proposal.[92]

14.60 The Administrative Appeals Tribunal (AAT) did not specifically address any of the ALRC's proposals on procedural fairness. However, it endorsed the administrative law principles of procedural fairness that underpin the AAT's powers and functions, and supported the objective outlined in DP 65 that such principles should be adhered to by all administrative decision makers.[93]

14.61 ASIC expressed the view that the proposal was expressed too broadly as the obligation to afford procedural fairness only arises where a decision is made which may adversely affect a person's rights, interests or legitimate expectations.[94] ASIC considered that it was unnecessary to have a legislative restatement. However, it stated that some specific reference in the legislation under which a regulator is authorised to make the civil and administrative penalty decision about when the obligation to afford an opportunity to be heard may arise may assist in clarifying an agency's obligations in this regard.[95] Examples of such legislative provisions are s 59 of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act)[96] and s 915C[97] and 920A(2)[98] of the *Corporations Act 2001* (Cth).

14.62 The ATO submitted that, while it supported the presumption of procedural fairness, it did not see the need to restate the common law presumption.[99] Environment Australia also expressed the view that the proposal would simply reaffirm the current legal position.[100]

14.63 The ALRC also posed the question in DP 65 whether it was appropriate for any statement excluding or limiting the application of procedural fairness to be in delegated, rather than primary, legislation.[101]

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91 W Pengilley, *Submission CAP 7*, 17 July 2002, para 4.5.1.
92 K Yeung, *Submission CAP 20*, 9 October 2002, 5.
93 Administrative Appeals Tribunal, *Submission CAP 18*, 27 September 2002.
94 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 14.
95 Ibid, 14.
96 *Australian Securities and Investments Commission Act 2001* (Cth), s 59 deals with proceedings at hearings and provides inter alia that ASIC must observe the rules of natural justice at a hearing.
97 *Corporations Act 2001* (Cth), s 915C empowers ASIC to suspend or cancel an Australian financial services licence in certain circumstances but only after giving the licensee an opportunity to appear or be represented at a private hearing before ASIC and to make submissions to ASIC on the matter.
98 Ibid, s 920A(2) empowers ASIC to make a banning order against a person in certain circumstances but only after giving the person an opportunity to appear or be represented at a private hearing before ASIC and to make submissions to ASIC on the matter.
99 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.21.
100 Environment Australia, *Submission CAP 26*, 24 October 2002.
101 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Question 7–1.

14.64 As stated above, Pengilley expressed the view that the proposals put forward by the ALRC in relation to procedural fairness were checks on regulators. He submitted that all checks and balances should be provided for in primary, rather than delegated, legislation.[102] Andrew Hudson expressed the view that any legislative restatement should be in primary legislation[103] and that it was inappropriate for statements excluding or limiting the application of procedural fairness to be in delegated legislation.[104]

14.65 Yeung commented that the right to procedural fairness is a crucial part of the broader 'right to trial', which is considered to be a fundamental human right.[105] She submitted that any attempt to limit the scope and application of procedural fairness should only be made in primary legislation.[106]

14.66 In contrast, the ATO expressed the view that any statement excluding or limiting the application of procedural fairness should be in delegated legislation rather than primary legislation to allow for more flexibility.[107]

Conclusion

14.67 The ALRC concludes that there is merit in having a legislative restatement of the common law presumption of procedural fairness, and sees no policy reason not to have it. However, having regard to the submissions, the ALRC has modified its original proposal by limiting the application of the legislative restatement to entities directly adversely affected by a regulator's decision to impose a quasi-penalty. In so far as procedural fairness issues arise in respect of a regulator's pursuit of civil or criminal penalties in court, those issues are adequately catered for by court proceedings where procedural fairness is manifested in court procedural rules. Further, as the imposition of true administrative penalties involves no decision making on the part of a regulator, the legislative restatement has no application to that class of penalties.

14.68 As will become apparent later in this chapter, the ALRC has made a number of recommendations in relation to procedural fairness and quasi-penalties that it believes should be implemented in the Regulatory Contraventions Statute. It is not the ALRC's intention that any implementation of those recommendations would codify the law of the procedural fairness in relation to the imposition of quasi-penalties to the exclusion of the common law in this area, especially given that flexibility is a main attribute of the common law presumption. A legislative restatement of the common law presumption will make it abundantly clear that the recommended provisions in the Regulatory Contraventions Statute in relation to procedural fairness are intended to operate together with the common law.

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102 W Pengilley, *Submission CAP 7*, 17 July 2002, para 4.5.2.
103 A Hudson, *Consultation*, Melbourne, 4 September 2002.
104 A Hudson, *Submission CAP 19*, 8 October 2002, 2.
105 K Yeung, *Submission CAP 20*, 9 October 2002. In this regard Yeung cited *European Convention on Human Rights and Fundamental Freedoms*, ETS No 5, (entered into force on 3 September 1953), Article 6.
106 K Yeung, *Submission CAP 20*, 9 October 2002, 5.
107 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, 25.

14.69 Affording or denying individuals procedural fairness has a significant impact on their rights (notably their rights to a fair and unbiased hearing, or their right to receive notice) and therefore potentially their liberties and livelihoods. In accordance with the *Legislation Handbook*[108] and the recommendation of the Administrative Review Council,[109] a legislative restatement, in so far as it affects individuals, should be dealt with by way of primary legislation. A legislative restatement should be implemented in the Regulatory Contraventions Statute.

14.70 In respect of the application of the legislative restatement to corporations or bodies corporate as opposed to individuals, the argument for inclusion of the legislative restatement by way of primary legislation, as opposed to delegated legislation, is not as compelling given that the consequential impact is not on an individual's rights and liberties but on a corporation's rights. However, if the primary legislation is to restate the common law presumption of procedural fairness as it applies to individuals, for the sake of certainty and clarity the ALRC recommends that the primary legislation extends the application of the presumption to bodies corporate. Legislation dealing with specific penalty or regulatory schemes can modify this expressly as the legislature sees fit.

14.71 The ALRC is also of the view, for the same reasons that a legislative restatement of the common law presumption should be implemented in primary legislation, that any attempt to modify the application of procedural fairness should also be dealt with in primary legislation. The ALRC notes that the bulk of the submissions on this point support this proposition.

Recommendation

Recommendation 14–1. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, all persons directly adversely affected by a regulator's decision to impose a quasi-penalty must be afforded procedural fairness.

The hearing rule

Right to a hearing

14.72 Very few non-judicial penalty schemes afford a right to a formal hearing before a penalty is imposed. Of necessity, they are restricted to quasi-penalties, such as license suspension or cancellation, and management disqualification. True administrative penalty schemes are prevented by the constitutional limitations on the exercise of

108 Department of Prime Minister and Cabinet, *Legislation Handbook*, Commonwealth of Australia, <www.dpmc.gov.au/pdfs/LegislationHandbookMay00.pdf>, 4 November 2002.

109 See Administrative Review Council, *Report to the Attorney-General: Rule Making by Commonwealth Agencies*, 35 (1992), AGPS, Canberra, para 2.19 and see discussion in ch 6 at para 6.48–6.62.

judicial power from including a hearing of almost any kind before the imposition of a penalty.

14.73 Many of the provisions that provide for a hearing prior to imposition of a penalty occur under the *Corporations Act 2001* (Cth); for example, in relation to the management of a corporation or the holding of an Australian financial services licence.[110] ASIC publishes a *Hearings Practice Manual* guiding the hearing process in accordance with statutory requirements.[111]

Notification of hearing

14.74 It is an elementary requirement of procedural fairness that persons who are entitled to be heard are given prior notice of the hearing.[112] The notice should provide all relevant and necessary information and give the recipient sufficient time to prepare and present his or her case effectively, arrange legal representation or obtain legal advice, and arrange to attend the hearing or make written submissions. The person should also be put on notice of the possible consequences of a failure to attend and of an adverse decision.[113]

Rights at hearing

14.75 A statutory right to a hearing would be an empty right without attendant rights at the hearing. Some federal quasi-penalty schemes provide for certain rights at oral examinations, in particular the right to have a lawyer present; the right to be represented at a hearing is, for example, available under s 920A of the *Corporations Act.* These rights can be further described in less formal publications. As noted above, hearings undertaken by ASIC are the subject of the *Hearings Practice Manual*.[114]

110 See, for example, *Corporations Act 2001* (Cth), s 206F, which requires ASIC to give notice in the prescribed form requiring a person to demonstrate why he or she should not be disqualified from managing corporations. A disqualification order may only be made after the person has been given an opportunity to be heard on the question of disqualification. See also *Corporations Act 2001* (Cth), s 920A(2).

111 See <www.asic.gov.au>. In ASIC hearings each matter is to be determined on its merits. A person may call witnesses. Written reasons are given or can be requested within 28 days. Penalties such as banning orders must be published in the *Gazette*. See *Corporations Act*, s 920(E).

112 At present, ASIC notifies people of a hearing. The notice outlines under what law and the particular provision or provisions ASIC is conducting the hearing; the purpose of the hearing and the issues that are concerning ASIC; who the person can contact if they have questions about the hearing; when and where the hearing will be held and how long ASIC estimates it will take; and what happens if the person does not respond, namely that ASIC will make a decision based on the information that it already has. ASIC will also tell the person what it intends to consider and, if there are no confidentiality issues, that the person will usually be given access to copies of material which ASIC will use when making its decision.

113 *Hart v Bookmakers Revision Committee* (1987) 9 NSWLR 713.

114 This manual sets out in detail how hearings are conducted. Some of the areas covered include notification of hearing and service of the notice; how much time the regulated will have to prepare their case; who can attend a hearing and if the hearing will be held in public or in private; oaths, affirmations, summoning a person to attend, witnesses, the applicability of the rules of evidence and adjournment; impartiality; enforceable undertakings; rights of review and written reasons.

Notification and right to make submissions

14.76 Some quasi-penalty schemes provide for notice and the making of submissions before a quasi-penalty is imposed. While not as comprehensive as a hearing, most of these provisions not only guarantee that submissions can be made, but also that they will be taken into consideration when making the quasi-penalty decision.

14.77 Most of these quasi-penalty provisions relate to licensing regimes. For example, s 39-3 of the *Aged Care Act 1997* (Cth) provides that, before revoking certification of a residential care service, the Secretary must notify the approved provider in writing that revocation is being considered and invite the approved provider to make submissions in writing to the Secretary within 28 days after receiving the notice. The notice must also inform the approved provider that, if no submission is made within that period, any revocation will take effect on the day after the last day for making submissions. In deciding whether to revoke the certification, the Secretary must consider any submissions given to the Secretary. The Secretary must notify the approved provider in writing of the decision.

14.78 Another example is s 72 of the *Telecommunications Act 1997* (Cth), which provides that the Australian Communications Authority (ACA) must not cancel a carrier licence for the carrier's failure to pay any annual charge or universal service levy, or because the holder of the carrier licence becomes a disqualified body corporate or a disqualified partnership, unless the ACA has first given the carrier a written notice setting out the proposal to cancel the licence and inviting the carrier to make a submission to the ACA on the proposal. The ACA must consider any submission that is received within the time limit specified for the notice, which must be at least 7 days.[115]

Right to notice only

Right to notice but not prior notice

14.79 There is an important distinction to be drawn between the right to notice of a penalty decision once made, and the right to notice of a decision *prior* to its taking effect. The *Social Security Act 1991* (Cth) does not provide for prior notice to be given of a decision to impose an activity test or administrative breach rate reduction or non-payment period. However, under the Act the Secretary must generally give written notice to a recipient of Youth Allowance, Austudy, or Newstart advising them of the start of an activity test breach rate reduction period, administrative breach rate reduction period or non-payment period.[116]

14.80 The rate reduction or non-payment period generally starts on the day on which the notice is given to the person.[117] Interestingly, only notices sent to Austudy recipi-

115 *Telecommunications Act 1997* (Cth), s 72(6) and (7).

116 Subject to some exceptions. See *Social Security Act 1991* (Cth), s 644AC and 557C. See generally, s 557B, 558B, 582B, 583B, 630B, 644AB and 644AC.

117 Subject to some exceptions; see ibid, s 644AC and 557C.

ents are required to also contain 'reasons why the activity test breach rate reduction period applies to the person.'[118]

14.81 The *Guide to Social Security Law* also sets out rules for applying these quasi-penalties (also known as 'breach penalties').[119] The rules state that a client subject to a 'breach penalty' must be advised of the following:

- the intention to impose a rate reduction or period of non-payment;
- the date the breach occurred and the date the 'penalty' will commence;
- the right of appeal; and
- the right of access to a review officer.

14.82 In some cases Centrelink officers may contact the recipient prior to the imposition of a 'breach penalty'. However, welfare groups have commented that the notification procedure prior to imposing a breach is rarely followed.[120] They told the ALRC that 'breach penalties' seem to be automatically imposed,[121] that no notice is given and that there is no final chance for a recipient to give an explanation or reasonable excuse.[122]

14.83 The issue of breach penalties has recently been subject to considerable review.[123] In October 2002 the Ombudsman released a report concerning the administration of social security breach penalties. The report focused on the extent to which administrative practices satisfy the requirements of social security law and reasonable standards of procedural fairness. One of the issues identified for further investigation was whether appropriate attempts had been made to contact job seekers prior to making breach decisions.[124] The Ombudsman's report stated that, having regard to the terms of the relevant legislation and the principles of procedural fairness, the issues to be investigated and decided in cases of possible breach should include:

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118 See ibid, s 582B and 583B.

119 Department of Family & Community Services, *Guide to Social Security Law*, Department of Family & Community Services, <www.facs.gov.au/guide/ssguide/3.htm>, 8 November 2001, topic 3.2.11.30.

120 Welfare Rights Centre, *Consultation*, Brisbane, 15 December 2000.

121 Note also that the Commonwealth Ombudsman has stated that investigations by his office 'suggest that activity test breaches were being applied virtually automatically when earnings had not been correctly reported. There was little evidence of any attempt to seek an explanation or to give any specific consideration to whether the under-reporting was knowingly or recklessly intended to mislead': Office of the Commonwealth Ombudsman, *Annual Report 2001–2002* (2002), Commonwealth of Australia, Canberra, 28.

122 Hanover Welfare Services, *Consultation*, Melbourne, 19 December 2000.

123 See Independent Review of Breaches and Penalties in the Social Security System, <www.breachreview.org>, 22 October 2002; Commonwealth Ombudsman, Social Security Breach Penalties — Issues of Administration (2002), Commonwealth Ombudsman; Senate Community Affairs Reference Committee, Report on Inquiry into Participation Requirements and Penalties (2002), Commonwealth of Australia, <www.aph.gov.au/senate/committee/clac.ctte/partic_req/index.htm>, 25 September 2002.

124 Commonwealth Ombudsman, *Social Security Breach Penalties — Issues of Administration* (2002), Commonwealth Ombudsman, ii.

- Whether the action or failure to comply did actually occur;
- Whether the requirement imposed on the jobseeker was reasonable in the circumstances; and
- Any reasons for the person's actions or failure to comply.[125]

14.84 The Ombudsman's report stated that the assessment of such matters would generally require discussion with the person concerned.[126] In response to the Government's announcement that Centrelink would be able to temporarily suspend payments when a jobseeker had failed to meet their obligations and could not be contacted, the Ombudsman stated that

> it is imperative that there have been reasonable attempts made to contact the person (including in writing) prior to any suspension of payments and that payment can be immediately restored, once contact is made. FaCS and Centrelink have advised that the procedures do not provide for the person to be contacted in writing prior to the suspension of payments in all cases.[127]

14.85 The Ombudsman made a number of recommendations concerning procedural fairness. His recommendation in relation to the amendment of Centrelink training material is set out at para 14.141 below. He also recommended that:

> By July 2002 FaCS should prepare and include guidance on breach decision making in its 'Guide to Social Security Law' to address the following issues:
>
> - The decision making framework provided under the legislation;
> - An explanation of the onus of proof and standard of proof applying in breach penalty decisions;
> - The matters to be addressed in relation to various types of breach decisions (with specific guidance relating to determining those matters); and
> - Procedural requirements arising from the terms of the legislation and procedural fairness principles.
>
> This guidance should be based on concepts established through AAT decisions and other relevant case law as well as accepted principles of natural justice.[128]

14.86 It was stated in one consultation that there is a problem with Job Network being able to recommend 'breach penalties' because in many cases Centrelink accepts their recommendations without affording the client procedural fairness and the opportunity to offer an explanation.[129] Additionally, it has been documented that breaches of-

125 Ibid, iii.
126 Ibid, iv.
127 Ibid, iv.
128 Ibid, xvii. The Department of Family and Community Services responded that this process was already underway but would not be able to be completed until late 2002. It said that, in reviewing the Guide, it would take the Ombudsman's recommendations into account: Commonwealth Ombudsman, *Social Security Breach Penalties — Issues of Administration* (2002), Commonwealth Ombudsman, xviii.
129 Welfare Rights Centre, *Consultation*, Brisbane, 15 December 2000.

ten occur through no fault of the benefit recipient, and rather because of some problem in the Job Network scheme.[130]

14.87 The Commonwealth Ombudsman in his 2000–01 *Annual Report* commented that breach penalties 'usually result in extreme financial hardship, and should not be imposed without due process'. The Ombudsman stated that his staff have noted that:

> Many of the agency's [Centrelink] decision makers have been imposing penalties on the basis of Job Network provider recommendations as a matter of course. These officials have not attempted to contact clients to obtain their versions of events, or to seek additional information. In many cases, it was not until Authorised Review Officer or Administrative Appeals Tribunal review processes were initiated that due consideration was given to the client's information.[131]

14.88 The Commonwealth Ombudsman in his 2001–02 *Annual Report* stated that continued monitoring by his staff and an analysis of a sample of breach penalty complaints by his specialist Social Support team indicated that the problems identified in his 2000–01 *Annual Report* have persisted, despite Centrelink's implementation of specific training and procedural initiatives.[132] He said that the experience of his office suggested that 'a significant number of breach penalties have been imposed without an adequate investigation and as a result many of those penalties may be incorrect'.[133]

14.89 This is of great concern as often a breach can result in a benefit recipient's sole source of income being reduced for a rate reduction period of 26 weeks or, after a third breach within two years, a non-payment for eight weeks.[134] For this to occur without any notification does not accord with the rules of procedural fairness. Prior notice of an intention to impose a quasi-penalty not only allows the regulated party to plan for the negative impact of the quasi-penalty but also to seek to correct any factual mistakes made by a regulator.

14.90 The *Report of the Independent Review of Breaches and Penalties in the Social Security System* (Pearce Report) identified similar issues in relation to adequate advance notification of the imposition of a penalty:

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130 Australian Council of Social Service and National Welfare Rights Network, *Doling out Punishment; The Rise and Rise of Social Security Penalties* (2000), ACOSS, Sydney.

131 The Ombudsman reported that Centrelink management has indicated that they are aware of these issues and are implementing a number of measures to improve practices and service in this area including: refresher training for all Centrelink employment services staff and a pilot program to contact customers who have incurred at least two breach penalties in the previous two years: Office of the Commonwealth Ombudsman, *Annual Report 2000–2001* (2001), Commonwealth of Australia, Canberra, 52.

132 Office of the Commonwealth Ombudsman, *Annual Report 2001–2002* (2002), Commonwealth of Australia, Canberra, 25.

133 Ibid, 27.

134 Australian Council of Social Service and National Welfare Rights Network, *Doling out Punishment; The Rise and Rise of Social Security Penalties* (2000), ACOSS, Sydney. Changes to the social security penalty system took effect on 1 July 2002 and re-classified some breaches as administrative rather than activity test breaches. For example, the failure to attend an interview without reasonable excuse is now treated as an administrative breach rather than an activity test breach. Consequently, the penalty provided for a breach of this nature has been reduced to a 16% reduction in payments for 13 weeks, as opposed to a previous 18% reduction for 26 week: Senator the Hon Amanda Vanstone, 'Breaching Rules Change to Protect the Vulnerable', *Media Release: 4 March 2002*, <www.facs.gov.au>, 4 March 2002.

> Lack of significant advance notice of penalties can cause considerable unfairness and hardship — including loss of money, reputation and credit rating — as a result of overdraft fees, rejection of credit card payments, disconnection of utility services and the need to take emergency measures to obtain basic living expenses and accommodation. In many cases, reasonable notice may enable arrangements to be made for avoiding these consequences … Another problem with inadequate notice of penalties is that it deprives the jobseeker of an opportunity to seek speedy review of the decision, preferably before it takes effect.[135]

14.91 The Pearce Report recommended that penalties should not commence until at least fourteen days after notification to the job seeker.[136] In its submission to the Senate Inquiry, the National Welfare Rights Network stated:

> The requirement of a written notice should apply to any penalty. Further, the notice should be sent out at least 14 days in advance of any penalty taking effect. Where a person on already low income support payments is to have any reduction in their payment, it is essential that they be given advance notice and thus the opportunity to rectify the matter or at least make adjustments if possible.[137]

14.92 The Government's response to the Pearce Report recommendation was:

> Preparing for Work Agreement-related breach processing requires the job seeker to be notified that they are taken to be delaying entering into an agreement before they can be breached for doing so. The person receives a notice advising them that a breach may have occurred and what the consequences may be. In general customers would receive an advice before the breach penalty commences and wherever possible they are contacted before any breach is imposed.[138]

14.93 In recently introduced changes to Newstart and Youth Allowance breach processing, the Department of Family and Community Services and Centrelink have agreed guidelines on what constitutes reasonable contact attempts. Under those guidelines, two attempts at telephone contact would be made before action was taken to suspend payments. A letter would only be sent to a person's postal address to initiate contact if the person had not provided a telephone contact.[139]

No right to a hearing or notice

14.94 Some administrative penalty schemes make no allowance for a hearing or notice for a number of reasons:

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135 *Independent Review of Breaches and Penalties in the Social Security System*, <www.breachreview.org>, 22 October 2002, para 7.20–7.22.

136 Ibid, Recommendation 26(1). See also Australian Council of Social Service, *Submission to the Senate Community Affairs References Committee Inquiry into Participation Requirements and Penalties* (2002), Australian Council of Social Service, <www.acoss.org.au>, 12 and 27.

137 National Welfare Rights Network, *Submission to the Senate Community Affairs References Committee Inquiry into Participation Requirements and Penalties* (2002), Welfare Rights Centre, Sydney, 12.

138 Secretary of the Commonwealth Department of Family and Community Services, *Submission to the Senate Community Affairs References Committee Inquiry into Participation Requirements and Penalties* (2002), Commonwealth Department of Family and Community Services, Appendix F.

139 Commonwealth Ombudsman, *Submission to the Senate Community Affairs References Committee Inquiry into Participation Requirements and Penalties* (2002), Commonwealth Ombudsman, para 28.

- Where the offence is a true administrative penalty automatically arising from a breach of the legislation, as the penalty is issued as a matter of course once the triggering circumstances occur.[140]

- Notice may be impracticable where interest charges are imposed for late payment as such charges accrue from day to day and the final amount will depend on both the original amount owing and the number of days it is late.[141]

- Action may need to be taken quickly. Section 67-1(2) of the *Aged Care Act* provides that the Secretary does not have to provide notice before imposing a quasi-penalty if he or she is satisfied that, because of the approved provider's non-compliance, there is an immediate and severe risk to the safety, health or well-being of care recipients to whom the approved provider is providing care. This provision was criticised in one of the ALRC's consultations.[142]

Preliminary view on default statement regarding prior notice

14.95 In DP 65 the ALRC proposed that:

> **Proposal 7–2.** Statute should provide by default that, in the absence of any clear, express statutory statement to the contrary, any person directly affected by a decision of a regulator should receive adequate prior notice of the regulator's intention to impose a penalty or quasi-penalty, to commence penalty proceedings, or to hold a hearing to determine whether to impose a penalty or quasi-penalty or to commence penalty proceedings.

14.96 The discussion in DP 65[143] and at para 14.94 above identifies cases where prior notice will not or may not need to be given.

Consultations and submissions

14.97 ASIC did not support the proposal as it was expressed too broadly. ASIC pointed out that the rules of procedural fairness require the giving of notice to persons directly adversely affected by a decision. To require the regulator to notify 'persons affected' would impose onerous and unjustified obligations upon it.[144]

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140 For example, financial administrative penalties found under taxation legislation. The application and the amount or method of calculation of these penalties are predetermined by legislation. For example, in relation to a failure to notify under the *Taxation Administration Act 1953* (Cth), the penalty on an amount is worked out at the rate of 8% per annum of the amount: s 8AAK.

141 For example, the General Interest Charge for failure to pay a penalty by the due date under ibid, s 8AAT.

142 The focus of these criticisms was that the provision resulted in hardship for third parties: The Victorian Bar Association, *Consultation*, Melbourne, 29 May 2001.

143 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, para 7.90.

144 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 14.

14.98 ASIC also submitted that regulators should not have to give notice in relation to the acceptance of enforceable undertakings, nor in penalty proceedings instituted in courts where initiating process fulfils the role of notice.[145]

14.99 The ATO submitted that, while it supported the general thrust of the ALRC's proposals, particularly at a philosophical level, it believed that some of the proposals, including the above proposal in relation to prior notice, needed to be tempered by practical realities.[146] The ATO stated that it would find individual prior notice for each penalty impractical to implement, without reduced levels of outcomes for Government. Given the scale of the ATO's operations, individual notice for each penalty would cause significant administrative problems and be very costly.[147] In consultation the ATO identified individual prior notice as its issue of most concern.[148]

14.100 The ATO noted that in many instances the taxation legislation itself imposes the penalty and the Commissioner's discretion in these cases is merely to remit that penalty wholly or partially where special circumstances exist. The legislation does not empower the Commissioner to make 'a decision to apply penalties'.[149] The ATO stated in its submission:

> ATO systems trigger automatic regulatory responses to deal with a wide range of non-criminal breaches. This includes the automatic imposition of 'true administrative penalties' for a range of breaches, including the failure to lodge (income tax return, Activity Statements, and GST returns) and the failure to pay outstanding debts.
>
> The regulatory response to failure to lodge and failure to pay outstanding debt is automated because of the high volume of transactions and mainly system driven transactional nature of returns, Activity Statements and payment processing.[150]

14.101 The ATO also expressed concern in relation to individual notice requirements in relation to the imposition of the General Interest Charge (GIC), which is imposed by statute primarily for the late payment of tax related liabilities. It stated:

> The GIC is imposed by the Act and notification is done in an automated manner given the volume of debts the ATO manages at any one point in time and the nature of the charge, which accrues daily. Individual prior notice of GIC each time the charge is raised would require a duplication of processes and may lead to taxpayers being subject to GIC for a longer period because of the 'prior notification' requirement. The ATO sees the value in the taxpayer understanding any amounts of GIC applied but prior notice of this charge may not be the most appropriate manner for the taxpayer to understand the application of the GIC to their particular situation.[151]

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145 Ibid, 15. This view was expressed in relation to Proposal 7–3 in DP 65 which dealt with the *contents* of a notice, but is also relevant to any recommendation made by the ALRC setting out the *circumstances* in which a notice should be issued.

146 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 11.

147 Ibid, para 2.27.

148 Australian Taxation Office, *Consultation*, Sydney, 17 September 2002.

149 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.32.

150 Ibid, para 2.33–2.34.

151 Ibid, para 2.39.

14.102 The ATO also submitted that taxpayers, through their tax agents, might not want more frequent notifications from the ATO.

> A Tax Agent often has a number of clients in similar situations. If the ATO issues a notification for each taxpayer in a similar situation the Tax Agent could feasibly receive several hundred notices advising individual clients of particular penalty issues. Tax Agents would find this quite frustrating and costly.[152]

14.103 The ATO stressed that it gives adequate prior or constructive notice 'en masse':

> The ATO gives public notice of consequences of failing to meet taxation obligations in a wide range of situations. A simple example is the media announcements surrounding the dates for lodgement of Business Activity Statements. Such announcements provide details of due date for lodgement as well as notice of penalty which may be applied for failing to lodge a Business Activity Statement by the due date.
>
> The ATO also sets out in a number of public documents consequences of non-compliance, particularly the level of penalties which will be applied and the reasons for the penalty for particular failures to meet taxation obligations.[153]

14.104 The ATO noted that the proposals in DP 65 can, and in fact are, administered on an individual basis in the audit environment:

> [N]otice can generally be given to each taxpayer prior to any penalty for shortfall being assessed.[154]

14.105 The ACCC expressed concern that the proposal would require it to provide notice to a party against whom the ACCC had decided to institute proceedings seeking the imposition of pecuniary penalties. It noted that any penalties resulting from established contraventions of the *Trade Practices Act 1974* (Cth) (TPA) are imposed by the Court and not the ACCC, and 'accordingly a respondent has an ample number of opportunities to obtain the benefit of interlocutory and trial procedures which enshrine principles of procedural fairness'.[155] The ACCC stated that it did not support the proposal for the following reasons:

- The ACCC's existing investigatory and enforcement procedures provide ample opportunity for a party under investigation to make submissions in terms of an appropriate regulatory response;
- Before it institutes proceedings, the ACCC is required by the Attorney General's *Legal Services Directions* to obtain legal advice from external advisers or the General Counsel that there are reasonable grounds for commencing those proceedings;
- Parties could employ this notice mechanism to further delay the resolution of alleged contraventions of the TPA; and significantly

152 Ibid, para 2.28.
153 Ibid, para 2.24–2.25.
154 Ibid, para 2.53.
155 Australian Competition & Consumer Commission, *Submission CAP 24*, 15 October 2002, 5.

- There is also judicial support for the view that in exercising an administrative power in aid of investigatory powers, it is for the ACCC to determine the progress and shape of an investigation.[156]

14.106 Environment Australia noted that there was no requirement under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) to give notice prior to imposing an administrative penalty such as revocation or suspension of an approval or permit. However, it said that in practice this would normally be done in the context of administrative procedural fairness. It submitted that the proposal was unsuitable for infringement notices and that there needed to be a clear categorisation of 'penalties' and 'quasi-penalties' to avoid argument about whether the requirement applied in particular circumstances.[157]

14.107 A view was expressed by an Advisory Committee member that, for practical purposes, the scope of any recommended protection be limited to persons whose number and identity were reasonably limited and ascertainable, for example, the persons against whom individual regulatory action is or should be reasonably contemplated.[158]

14.108 Dr Karen Yeung strongly agreed with the proposal.[159]

14.109 Andrew Hudson endorsed the proposal regarding the entitlement to prior notice of a regulator's intention to impose a penalty or quasi-penalty.[160] In consultation he noted that the proposal should apply to prosecutions but would not work well in relation to infringement notices. He noted that in practice prior notice of a Customs prosecution was generally, but not always, given.[161]

Conclusion

14.110 Having considered the consultations and submissions, the ALRC has concluded that it needs to modify its proposal in a number of respects.

14.111 The first point to note is that the ALRC did not intend for the proposal to apply to a decision to commence civil penalty proceedings, or indeed any court proceedings. As stated in chapter 7 of DP 65 the focus of the chapter was administrative penalties where the court's role is either minimised or absent. However, the ALRC has taken into account the concerns expressed by ASIC and the ACCC in this regard, and made it clear that its recommendation in relation to prior notice only applies where:

- a regulator forms an intention to impose a quasi-penalty; or
- makes a decision to commence proceedings preparatory to the imposition of a quasi-penalty, including any form of hearing.

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156 Ibid, 6.
157 Environment Australia, *Submission CAP 26*, 24 October 2002, 3.
158 Advisory Committee members, *Advisory Committee meeting*, 17 October 2002.
159 K Yeung, *Submission CAP 20*, 9 October 2002, 5.
160 A Hudson, *Submission CAP 19*, 8 October 2002, 2.
161 A Hudson, *Consultation*, Melbourne, 4 September 2002.

14.112 Secondly, taking into account the concerns expressed as to the breadth of persons potentially caught by the original proposal, and the comments of the Advisory Committee in this regard, the ALRC has modified the proposal so that it is clear that it only applies to:

- a person in respect of whom a regulator has formed an intention to impose a quasi-penalty; (See Recommendation 14–2 below); or
- a person in respect of whom a regulator has made a decision to commence proceedings preparatory to the possible imposition of a quasi-penalty, including any form of hearing. (See Recommendation 14–4 below.)

14.113 Finally the proposal has been amended to make it clear that the requirement to give notice can be excluded by statute in situations where urgent action is needed to prevent imminent harm to any person or property.[162]

14.114 The ALRC did not intend the proposal to apply to a decision by a regulator to accept an enforceable undertaking. As an enforceable undertaking is not imposed by a regulator and does not fall within the definition of a 'quasi-penalty', it does not fall within the parameters of the ALRC's recommendation.

14.115 The ALRC did not intend its proposal to apply to true administrative penalties. The ALRC acknowledged in DP 65 that prior notice may not need to be given where true administrative penalties are automatically triggered by legislation.[163] The ALRC also acknowledged in DP 65 that prior notice may not need to be given where notice may be impracticable, such as where interest charges are imposed for late payment. The GIC was cited as an example.[164] The concerns of the ATO regarding the giving of prior notice for true administrative penalties, and the GIC in particular, are addressed simply by the fact, that as a matter of definition, true administrative penalties do not fall within the definition of 'quasi-penalties'.[165] Clearly, as Recommendation 14–2 below refers to the regulator having 'formed an intention to impose a quasi-penalty', it simply cannot apply to true administrative penalties where the regulator has no discretion in respect of the imposition of those penalties.

14.116 The ALRC did not intend the proposal to apply to infringement notices. The concerns expressed by Hudson and Environment Australia in this regard are addressed by the fact that, as a matter of definition, infringement notices do not fall within the definition of 'quasi-penalties'. There also appears to be a mistaken idea that an infringement notice is an administrative penalty when in reality it is only a mechanism for handling an alleged offence or contravention that, if proved in court, could lead to the imposition of a criminal or civil penalty. There is in fact no penalty contained in an infringement notice, merely a specified amount of money that, if paid, extinguishes the regulator's right to proceed in court to seek a penalty.

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162 See, for example, *Aged Care Act 1997* (Cth), s 67–1(2) discussed at para 14.94 above.

163 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, para 7.90.

164 Ibid, para 7.90.

165 See discussion in ch 2 on types of penalties.

14.117 Affording or denying individuals procedural fairness has a significant impact on their rights and therefore potentially their liberties. In accordance with the *Legislation Handbook*,[166] this recommendation should be implemented by way of primary, rather than delegated, legislation.

Contents of notice

14.118 In DP 65 the ALRC proposed that:

> **Proposal 7–3.** Any notice of a regulator's intention to impose a penalty or quasi-penalty, to commence penalty proceedings, or to hold a hearing to determine whether to impose a penalty or quasi-penalty or to commence penalty proceedings should state the following matters (unless expressly excluded by statute or clearly inappropriate in the circumstances):
>
> (a) The regulator's intention to impose a penalty, to commence penalty proceedings, or to hold the hearing;
>
> (b) The effect of the penalty, if imposed;
>
> (c) The date on which the penalty will take effect, or after which proceedings will be commenced, or on which the hearing will be held;
>
> (d) The right to present submissions before the penalty is imposed or penalty proceedings are commenced, or at the hearing, accompanied by an explanation of the form the submissions should take;
>
> (e) The fact that the regulator must consider these submissions prior to making a decision to impose a penalty or to commence penalty proceedings, or at the hearing;
>
> (f) The time period within which to provide submissions and the effect if no submission is made within that period or at the hearing;
>
> (g) The right to receive written reasons of the penalty decision;
>
> (h) The right to internal review of, or appeal to an external body from, the penalty decision, and how to seek such review or appeal;
>
> (i) Contact details for further information; and
>
> (j) The right to seek legal advice or be legally represented at the hearing.

Consultations and submissions

14.119 The Victorian Bar suggested that the offence should also be specified in the notice.[167]

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166 See Department of Prime Minister and Cabinet, *Legislation Handbook*, Commonwealth of Australia, <www.dpmc.gov.au/pdfs/LegislationHandbookMay00.pdf>, 4 November 2002, and discussion in ch 6 as to when primary legislation is an appropriate method of implementation.

167 The Victorian Bar, *Consultation*, Melbourne, 4 September 2002.

14.120 ASIC submitted that, whilst the proposed notice largely mirrored ASIC's current practice with respect to its administrative hearings, the proposal was too broadly expressed. It submitted that the proposal should not apply to enforceable undertakings or to civil penalty proceedings. It said:

> What 'notice' is required will turn on the particular decision being made and the terms of the relevant legislation. For example, in the context of an administrative hearing conducted pursuant to section 51 of the ASIC Act, subsection 59(8) recognises a person's entitlement to have legal representation. However, the ASIC Act also permits the affected person to be represented by a person who is not a legal representative if ASIC has given approval.[168]

14.121 ASIC submitted that a notice of an intention to impose a penalty would be very different in nature from a notice of an intention to hold a hearing to determine whether any action should be taken. It was of the view that each regulator should be free to determine the form of any notice in light of the power being exercised and the constituency of its regulated community.[169]

14.122 The ATO supported the proposition that a taxpayer should receive sufficient information to understand the penalty which had been imposed[170] and to be informed of the avenues for review of any penalty decision. However, it found the list set out in Proposal 7–3 too prescriptive if it was intended to cover all of the types of cases where the tax law imposes a penalty. The ATO suggested that taxpayers and their agents may not want a notice containing the amount of information suggested by Proposal 7–3. It submitted that in relation to para (b) of Proposal 7–3 it would be difficult to provide details of the effect of the penalty, apart from stating the quantum amount. The ATO also pointed out that the exact amount of the GIC could not be predicted due to variations in the underlying debt and the rate.[171]

14.123 Professor Pengilley essentially agreed with Proposal 7–3[172]and Dr Karen Yeung also agreed with the proposal.[173]

14.124 The Customs Brokers & Forwarders Council of Australia Inc. (CBFCA) assumed that Proposal 7–3 applied to infringement notices and on that basis submitted that in relation to Proposal 7–3(b) there is a need for the regulator to provide appropriate information with respect to the effect of the penalty not only in terms of the amount or process available but also as to the manner and form for the maintenance of records relating to the issue of an infringement notice.[174]

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168 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 15.
169 Ibid, 15–16.
170 Note that the proposal was intended to cover the contents of a notice in relation to certain matters *before* the decision to impose a penalty had occurred. Notice of an actual decision to impose a quasi-penalty is dealt with in Recommendation 15–7.
171 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.60–2.62.
172 W Pengilley, *Submission CAP 7*, 17 July 2002.
173 K Yeung, *Submission CAP 20*, 9 October 2002, 5.
174 Customs Brokers & Forwarders Council of Australia Inc, *Submission CAP 17*, 16 September 2002.

14.125 Environment Australia submitted that Proposal 7–3 appeared reasonable, subject to its comments in relation to Proposal 7–2, (which are discussed at para 14.106 above). It suggested that

> consideration be given to developing further the matters to be advised in the context of different categories of penalties or quasi-penalties to clarify relevance and to avoid uncertainty arising from the application of the concept of "clearly inappropriate".[175]

14.126 Queries from the Advisory Committee included whether the proposal would apply to enforceable undertakings, and whether the reference to 'commencing proceedings' in the proposal referred to decisional contexts which did not involve an oral hearing. A view was expressed by an Advisory Committee member that the notice requirements may not be well adapted to proceedings or hearings which required an element of flexibility.[176]

Conclusion

14.127 Having considered the submissions in relation to both Proposal 7–2 and Proposal 7–3, the ALRC has concluded that Proposal 7–3 needed to be modified in a number of respects.

14.128 Taking into account ASIC's submission that the content of a notice of an intention to impose a penalty would be very different to a notice of a decision to hold a hearing to determine whether or not to impose a penalty, the ALRC formed the view that there was merit in splitting its original proposal in order to accommodate these different scenarios which give rise to an obligation to provide notice. Accordingly, Recommendation 14–3 deals with the contents of a notice of a regulator's intention to impose a quasi-penalty and Recommendation 14–5 deals separately with the contents of a notice of a regulator's intention to commence proceedings preparatory to the possible imposition of a quasi-penalty, including any form of hearing.

14.129 As discussed in relation to Proposal 7–2 it was not the ALRC's intention that Proposal 7–3 apply to civil penalty proceedings (or indeed any court proceedings), nor to true administrative penalties triggered by the operation of law. To make this intention clear, Recommendations 14–3 and 14–5 state that they only apply to quasi-penalties. This addresses ASIC's concern in relation to the application of the proposal to civil penalty proceedings, and the ATO's concerns as to whether the proposal was intended to cover all of the types of cases where the tax law imposes a penalty, including true administrative penalties.

14.130 In relation to ASIC's concern that Proposal 7–3 not apply to enforceable undertakings and the query of the Advisory Committee in this regard, the simple response is that, as an enforceable undertaking is not imposed by a regulator and does not fall within the definition of a 'quasi-penalty', it clearly does not fall within the parameters of the ALRC's recommendation. Similarly, the submission made by the CBFCA is inapplicable to Proposal 7–3 as infringement notices are not a type of quasi-penalty.

175 Environment Australia, *Submission CAP 26*, 24 October 2002.
176 Advisory Committee members, *Advisory Committee meeting*, 17 October 2002.

They are merely a mechanism for handling an alleged offence or contravention that, if proved in court, could lead to the imposition of a criminal or civil penalty. However, the concerns of the CBFCA have been taken into account by the ALRC in relation to its recommendations concerning the content of an infringement notice[177] and in relation to its recommendations concerning records of the issue of an infringement notice.[178]

14.131 As the category of penalties to which Recommendations 14–3 and 14–5 now apply has been restricted to quasi-penalties, the relevance of Environment Australia's comments that consideration be given to developing further the matters to be advised in the context of different categories of penalties or quasi-penalties to clarify relevance and to avoid uncertainty arising from application of the concept of 'clearly inappropriate'[179] would appear to be diminished. The inclusion of the concept of 'clearly inappropriate' in the proposal was intended to allow for the fact that certain requirements which would apply to proceedings involving an oral hearing may not be applicable to proceedings which do not allow for an oral hearing; for example, the right to be legally represented has more relevance in relation to an oral hearing than it does in relation to proceedings which only cater for written submissions.

14.132 Having considered the comments made by the Advisory Committee, the ALRC has modified the proposal to make it clear that the reference to 'commencing proceedings' preparatory to the possible imposition of a quasi-penalty includes any form of hearing. This modification is also aimed at avoiding the possible scenario of a regulator being required, in the one matter, to both issue a notice before commencing proceedings and before holding a hearing in relation to those proceedings.

14.133 Taking into account the comments of the Victorian Bar, Recommendations 14–3 and 14–5 state that the notices must include a description of the alleged offence or contravention, including the date and place of occurrence.

14.134 Having regard to the ATO's statement that in relation to para (b) of Proposal 7–3 it would be difficult to provide details of the effect of the penalty other than quantum, the ALRC has amended the proposal to cater for both pecuniary and non-pecuniary quasi-penalties. In the case of a pecuniary quasi-penalty, the notice should state the maximum amount of the quasi-penalty that may be imposed or withheld. In the case of a non-pecuniary quasi-penalty, the notice should state the effect of the quasi-penalty.

14.135 The ALRC notes ASIC's comment that the ASIC Act also permits an affected person to be represented by a person who is not a legal representative if ASIC has given its approval.[180] The ALRC has amended Proposal 7–3 to state that the notice may also include any other information appropriate in the circumstances. Accordingly

177 See Recommendation 12–9.
178 See Recommendations 12–5 and 12–6.
179 Environment Australia, *Submission CAP 26*, 24 October 2002, 3.
180 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 15.

ASIC would not be precluded from including in its notices information to the effect that ASIC may allow a person to be represented by a non-legal representative.

14.136 The ALRC has taken into account the recommendation made by the Pearce Report that a specified period of time elapse before penalties commence.[181] Accordingly, the notice of an intention to impose a quasi-penalty should specify either the date that the quasi-penalty, if imposed, will come into effect or the time period which must lapse before the quasi-penalty, if imposed, can come into effect. What is appropriate will depend on the nature of the quasi-penalty and the purpose for which it is being imposed. For example, it may be appropriate for notices advising an intention to impose quasi-penalties under social security legislation to specify a time period which must elapse prior to the penalty coming into effect. However, where the imposition of quasi-penalties is intended to prevent risks to the public or reduce public harm, it will generally be inappropriate for the notice advising of an intention to impose the quasi-penalty to specify a time period that must elapse before the quasi-penalty, if imposed, will come into effect.

14.137 The notice of an intention to impose a quasi-penalty and the notice of an intention to commence proceedings preparatory to the possible imposition of a quasi-penalty should set out rights of review and appeal in the event that a decision is made to impose a quasi-penalty, and how to seek such review or appeal. As discussed in chapter 23 there should be no right of review or appeal in relation to a decision to commence administrative proceedings to impose a quasi-penalty as such decision is not final and operative.

14.138 On balance, and in light of the amendments made by the ALRC to address some of the concerns raised in submissions and in consultation, in the interests of clarity, consistency and transparency there is considerable merit in prescribing, in a default provision, the minimum content of notices advising of an intention to impose a quasi-penalty or to commence proceedings preparatory to the imposition of a quasi-penalty. The ALRC does not agree that the notice requirements it has recommended are too prescriptive. It notes in this regard ASIC's statement that the notice proposed in DP 65 'largely mirrors ASIC's current practice with respect to its administrative hearings'.[182] In any event, it must not be overlooked that the provision recommended by the ALRC is a default provision. Accordingly, where appropriate, statute can always expressly provide for a more flexible regime. To the extent that these Recommendations reflect current practice of some regulators, they serve to reinforce their good practice and to encourage other regulators to follow suit.

181 See discussion at para 14.91 above.
182 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 15.

Recommendations

Recommendation 14–2. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, any person in respect of whom a regulator has formed an intention to impose a quasi-penalty should receive adequate prior notice of that intention. This requirement to give prior notice may be excluded by statute in situations where urgent action is needed to prevent imminent harm to any person or property.

Recommendation 14–3. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, any notice of a regulator's intention to impose a quasi-penalty should state the following matters (unless clearly inappropriate in the circumstances):

(a) To whom it is issued;

(b) By whom it is issued (including the name and work address of the delegate);

(c) The date on which it is issued;

(d) The nature of the alleged offence or contravention (including the date and place of occurrence);

(e) The regulator's intention to impose a quasi-penalty;

(f) In the case of a monetary quasi-penalty, the amount of the quasi-penalty intended to be imposed, or where applicable, the amount of the benefit intended to be withheld. In the case of a non-monetary quasi-penalty, the effect of the quasi-penalty intended to be imposed (for example, the withholding of a benefit or a restriction on a licence);

(g) The date on which the quasi-penalty (if imposed) will take effect or the time period which must expire before the quasi-penalty (if imposed) can come into effect, whichever is appropriate;

(h) The right to make submissions before the quasi-penalty is imposed, accompanied by an explanation of the form submissions should take;

(i) The right to seek legal advice in relation to the preparation of any submissions to be made;

(j) The fact that the regulator must consider these submissions prior to making a decision to impose a quasi-penalty;

(k) The time period within which to provide submissions and the effect if no submissions are provided within that period;

(l) The right to receive written notification of the quasi-penalty decision and written reasons for that decision;

(m) The rights of review and appeal, and how to seek such review or appeal;

(n) Contact details for further information; and

(o) Any other information appropriate in the circumstances.

Recommendation 14–4. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, any person in respect of whom a regulator has made a decision to commence proceedings preparatory to the possible imposition of a quasi-penalty, including any form of hearing, should receive adequate notice of that decision**.**

Recommendation 14–5. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, any notice of a regulator's intention to commence proceedings preparatory to the possible imposition of a quasi-penalty, including any form of hearing, should state the following matters (unless clearly inappropriate in the circumstances):

(a) To whom it is issued;

(b) By whom it is issued (including the name and work address of the delegate);

(c) The date it is issued;

(d) The nature of the alleged offence or contravention (including the date and place of occurrence);

(e) The regulator's intention to commence proceedings;

(f) If the contravention or offence carries a monetary quasi-penalty, the maximum amount of the quasi-penalty that may be imposed or withheld. If the contravention or offence carries a non-monetary quasi-penalty, the effect of any non-monetary quasi-penalty if imposed;

(g) The date on, or after which, proceedings will be commenced;

(h) The right to present submissions, accompanied by an explanation of the form submissions should take;

(i) The fact that the regulator must consider submissions prior to making a decision to impose a quasi-penalty;

(j) The time period within which to provide submissions and the effect if no submissions are provided within that period;

(k) The right to seek legal advice and to be legally represented;

(l) The right to receive written notification of the quasi-penalty decision and written reasons for that decision;

(m) The rights of review and appeal, and how to seek such review or appeal;

(n) Contact details for further information; and

(o) Any other information appropriate in the circumstances.

Training of regulator staff

14.139 Procedural fairness can be provided for in a number of ways, including primary legislation, delegated legislation, policy statements and guidelines, and staff training. The key characteristics of primary legislation, delegated legislation and informal guidelines are discussed in chapter 6.

14.140 Staff training and accurate staff training material have a key role in ensuring that regulators properly adhere to procedural fairness requirements. As stated by Justice von Doussa:

> There is obviously a need for government authorities to provide training sessions to decision-makers, to provide up to date agency policy manuals which reflect developments in the law, and to create a general awareness in decision-makers of the fundamental requirements of the principles of procedural fairness … if such an educative regime is observed, administrative error will tend to flow at the outer boundaries of previously articulated principles rather than from a general lack of understanding of the law.[183]

14.141 The Commonwealth Ombudsman, in his recent report on social security breach penalties, noted that an examination of Centrelink training material indicated that training notes for administrative and Centrelink initiated activity test breaches did not identify contact with the customer as a specific step in the decision-making process.[184] The training material revealed that, while the requirement to contact a person for investigation of reasons leading to breach of activity test requirements is seen as 'best practice', it is presented as optional in relation to some breach types. The Ombudsman noted that it appeared that this training could be concluded without any discussion of

183 The Hon Justice J Von Doussa, 'Natural Justice in Federal Administrative Law' (1998) 17 *Australian Institute of Administrative Law Forum* 1, 18.

184 Commonwealth Ombudsman, *Social Security Breach Penalties — Issues of Administration* (2002), Commonwealth Ombudsman, para 5.13.

the requirement for the regulator to at least attempt to contact the customer in respect of whom a penalty was to be imposed.[185] The Ombudsman recommended that:

> All [Department of Family and Community Services] and Centrelink instructions and training material relating to breaches should be amended to more clearly reinforce (as a procedural requirement) that Centrelink decision makers should contact the job-seeker in all cases as part of any breach investigation. The minimum acceptable requirements should be:
>
> - A reasonable attempt to contact the person by telephone and/or any alternative contact recorded on Centrelink records; plus
>
> - A letter requesting immediate contact to be sent to the person's last recorded postal address (the letter should outline the possible breach issue and advise that a penalty will not be imposed if the person provides a reasonable excuse); and
>
> - Allowing at least 10 days from the date of the letter before any breach decision is made.[186]

14.142 It has been observed in consultations with the ALRC that unfairness can arise because of the different approaches of individual staff of regulators. One organisation consulted by the ALRC perceived that in the area of tax administration:

- compliance with the rules of procedural fairness depends on the individual ATO officer involved;
- staff members are often not properly trained;
- there is often a high turnover of staff and yet compliance staff are expected to hit wide targets and the law they deal with is particularly difficult and complex.[187]

14.143 Even when guidelines and legislation are in place, without an understanding of how these rules operate, a regulator's officials may follow procedure inconsistently, or not at all. Dr Julia Black has noted the role to be played by statements of principles in relation to fairness. However, she states that on their own statements of principle are unlikely to have much impact. This is often, in part, because of institutional resistance to change, or even objection to the goals of the internal regulatory system.[188]

14.144 Black stresses that certainty as to what the general principles of an enforcement code actually mean in practice comes not through detailed specification but through 'shared understandings':

> [I]n determining what it is that those principles mean, an interpretive community has to be developed through dialogue between regulators and enforcers at all levels —

185 Ibid, iii.
186 Ibid, rec 7.
187 Australian Taxpayers' Association, *Consultation*, Melbourne, 27 February 2001.
188 J Black, 'Managing Discretion' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001), 26.

> from senior directors down to field level officers and back again, and between regulators, enforcers, the regulated, and other stakeholders.[189]

14.145 If a regulator's staff are properly trained in how procedural rules operate, they are more likely to comply with procedural fairness and exercise appropriate discretion in terms of what the case requires. Further, with shared understanding comes greater consistency in the exercise of a procedure.

14.146 Other decision-making tools may assist a regulator's staff to develop shared understandings of how penalty processes should operate and to comply with fairness principles. In its audit of the ATO's penalties, the Australian National Audit Office stated:

> The audit found the principles introduced by the Charter and the Compliance Model have made only limited inroads into the administration of penalties to date. The audit identified the development of on-line, rule-based, decision support tools as an area that the ATO could consider to improve this situation.[190]
>
> The audit also identified a need to provide tax officers with appropriate access to tax payer histories and with clear guidance on how to interpret these histories when determining culpability and an appropriate penalty.[191]

14.147 The ANAO recommended that the 'ATO investigates the cost-effectiveness of providing on-line, decision support tools to staff'.[192] The ATO has since designed and implemented an on-line decision support tool which is being used by staff in the Personal Tax Business Service Line for Tax Shortfall Penalty, and the GIC.[193]

14.148 Whilst the training of Centrelink staff as to the implementation of procedural fairness has been the subject of a specific recommendation by the Commonwealth Ombudsman, there is merit in requiring all regulators to provide training to staff who impose quasi-penalties in relation to the implementation of procedural fairness.

Recommendation

Recommendation 14–6. Regulators should ensure that training is provided to staff to ensure that they are familiar with the requirements to give procedural fairness in relation to persons in respect of whom a regulator has formed an intention to impose a quasi-penalty, or in respect of whom the regulator has made a decision to commence proceedings preparatory to the possible imposition of a quasi-penalty.

189 Ibid, 27.
190 Australian National Audit Office, *Administration of Tax Penalties*, Report 31 (2000), Australian Government Printing Service, Canberra, para 3.5.
191 Ibid, para 3.6
192 Ibid, para 3.11, rec 3.
193 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 3.17.

Third party issues

14.149 During the course of exercising their functions and powers, regulators will from time to time have to consider granting procedural fairness to third parties in a variety of different circumstances. For example, procedural fairness issues may arise in relation to the use and disclosure of confidential information obtained from a party under compulsion. As stated by ASIC in its *Policy Statement 103: Confidentiality and Release of Information*:

> The person affected is not always the person who provided the information. For instance, information obtained from an employee or bank may relate to the affairs of the employer or the bank's client, but not to those of the employee or bank. Alternatively another person could be the subject of comments by an examinee which could cause damage to their reputation. In this case, ASIC would consider the interests of the person affected and accord that person procedural fairness.[194]

14.150 ASIC also has a policy statement guiding how it will afford procedural fairness when exercising its discretionary powers under the *Corporations Act 2001* (Cth) to grant relief.[195] The policy statement focuses on when the hearing rule requires ASIC to consult with third parties who may be adversely affected by a decision of ASIC to grant an applicant relief under the *Corporations Act*.

14.151 ASIC considers the following in deciding its procedural fairness obligations in relation to an application for relief:

- Might any third party be directly, materially and adversely affected by the decision?
- Has the applicant given sufficient reasons for ASIC to expedite the application and or treat it as confidential?
- Do the detrimental effects of consultation on the applicant (because confidentiality would be lost or granting the relief would take too long) outweigh the potential adverse effects on third parties?[196]

14.152 The answers to these questions help ASIC to decide whether it must afford procedural fairness to third parties. They also assist in determining the content or nature of any procedural fairness.

14.153 However, the policy statements referred to above do not address affording procedural fairness to third parties in relation to any decision to impose a quasi-penalty. In fact, a survey of Commonwealth regulator websites reveals that there are

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194 Australian Securities & Investments Commission, *Policy Statement 103: Confidentiality and Release of Information*, Australian Securities & Investments Commission, <www.cpd.com.au/asic/ps/ps103.pdf>, 23 October 2001, para [PS 103.31].

195 Australian Securities & Investments Commission, *Policy Statement 92: Procedural Fairness to Third Parties*, Australian Securities & Investments Commission, <www.cpd.com.au/asic/ps/>, 20 December 2001.

196 Ibid, para [PS 92.15].

currently no published guidelines in relation to affording procedural fairness to third parties in relation to the imposition of penalties, and in particular, quasi-penalties.

14.154 The imposition of quasi-penalties on a corporation or individual can affect third parties. For example, the removal of a licence under the *Aged Care Act* will obviously affect the rights of people living in the aged care facility and their carers.[197] Administrative banning or disqualification of a director could adversely affect the corporation — its employees, board or shareholders. In broadcasting and aviation regulation, third parties affected by the imposition of quasi-penalties may include the general public.

14.155 Identifying third parties who may be directly, materially and adversely affected can be difficult.[198] As noted above, a person's interests can be extremely broad.[199] For procedural fairness obligations to third parties to arise, the regulator's decision must also be one that will affect the third party in a direct and immediate way.[200] Many decisions will not fall in this category.

14.156 In some cases the rights of third parties are considered in legislation; for example, s 67A-4 of the *Aged Care Act* allows the Secretary to delay the imposition of a quasi-penalty[201] having regard to, amongst other things, the desirability of allowing sufficient time to inform each care recipient who is likely to be affected by the imposition of the quasi-penalty, and their next of kin, about the imposition and consequences of a quasi-penalty.

Guidelines governing procedural fairness

14.157 In DP 65 the ALRC proposed that regulators should develop and publish guidelines on how principles of procedural fairness are to be extended to third parties who may be affected by their decisions, and to which third parties the principles of procedural fairness are to be extended.[202]

Consultations and submissions

14.158 Professor Warren Pengilley essentially agreed with this proposal, as providing a check on regulators[203] and Dr Karen Yeung strongly agreed with this proposal.[204]

197 The Victorian Bar Association, *Consultation*, Melbourne, 29 May 2001.
198 Australian Securities & Investments Commission, *Policy Statement 92: Procedural Fairness to Third Parties,* Australian Securities & Investments Commission, <www.cpd.com.au/asic/ps/>, 20 December 2001, para [PS 92.32].
199 *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550, 582.
200 *Salemi v MacKellar (No 2)* (1977) 137 CLR 388, 452.
201 Called a 'sanction' in the legislation.
202 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Proposal 7–5.
203 W Pengilley, *Submission CAP 7*, 17 July 2002, para 4.5.1.
204 K Yeung, *Submission CAP 20*, 9 October 2002, 5.

14.159 The CBFCA agreed with this proposal.[205] However, it noted that the Australian Customs Service Infringement Notice Guidelines are not seen by industry as falling within the parameters of the proposal.

14.160 The ATO supported the application of this proposal in relation to some penalties. It stated that there was merit in publishing guidelines in relation to civil sanctions such as injunctions, banning orders or licence revocations. It stated that the proposal should not apply to the imposition of a pecuniary penalty or to a criminal prosecution.[206]

14.161 ASIC did not support the proposal with respect to decisions to take civil and administrative penalty action. It stated that it was not clear in what way such decisions directly adversely affect the rights, interests and legitimate expectations of persons other than those against whom the action is taken.[207]

14.162 Environment Australia submitted that, while there was some merit in the proposal, the issue ultimately needed to be considered by individual agencies in the context of the relevant piece of legislation.[208]

14.163 The ABA did not specifically address the above proposal. However, it stated that as a general proposition it supported the ALRC's proposals concerning the development and publication of guidelines about various aspects of enforcement, in the interests of promoting transparency, consistency and accountability.[209] Parts of the ABA submission were relevant to third party issues. The ABA noted that administrative penalties under the *Broadcasting Services Act 1992* (Cth) included the power to suspend or cancel a licence and the power to impose a licence condition. The ABA stated that it had never exercised its power to suspend or cancel a licence.

> The reality is that, where a licensee has a significant audience so that there would be significant detriment to the community as a result of licence suspension or cancellation, it is highly unlikely that the ABA would ever exercise this power. On the other hand, in cases where the licensee is manifestly not complying with the Act and the public interest would not be adversely affected, the power to suspend or cancel is an essential tool.[210]

Conclusion

14.164 Having considered the issue further, and, in particular, having regard to the submissions made by the ABA and ASIC, the ALRC has concluded that its original proposal required substantial modification.

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205 Customs Brokers & Forwarders Council of Australia Inc, *Submission CAP 17*, 16 September 2002, para 11.4.
206 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.68.
207 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 17.
208 Environment Australia, *Submission CAP 26*, 24 October 2002.
209 Australian Broadcasting Authority, *Submission CAP 23*, 14 October 2002, 1.
210 Ibid, 3.

14.165 Firstly, the class of decisions referred to in the original proposal needed to be narrowed to capture only decisions by a regulator concerning the imposition of quasi-penalties. Where penalties are imposed by a court, the assumption is that the court's own processes will accommodate procedural fairness to third parties where the issue arises, through, for example, court rules on standing to intervene in proceedings on foot. In the ALRC's view, the appropriate response to the ATO's submission that the proposal should apply when a regulator is seeking an injunction is that the interests of third parties are adequately protected by the court's role in ascertaining whether it is appropriate on the balance of convenience to grant an injunction. In *Miller v Jackson* Cumming Bruce LJ said:

> Courts of equity will not ordinarily and without special necessity interfere by injunction where the injunction will have the effect of very materially injuring the rights of third persons not before the court.[211]

14.166 *Miller v Jackson* has been approved and applied on a number of occasions in Australian courts.[212] However, the weight to be given to third party interests varies according to the circumstances.[213]

14.167 Secondly, and perhaps more significantly, the proposal in requiring the development and publication of guidelines did not appear to accommodate the fact that the identification of third parties who may be directly, materially and adversely affected by a decision by a regulator to impose quasi-penalties is fraught with difficulties depending on which area of regulation is being considered. The removal of a licence under the *Aged Care Act* provides one of the clearest examples where the identification of affected third parties can be carried out with relative certainty. However, as the ABA's submission makes clear, suspension or cancellation of a broadcasting licence, especially a commercial broadcasting licence would impact on the community at large, as the audience is drawn from the general public. Similarly, in aviation regulation, imposition of a quasi-penalty could impact on the general public, including present and future passengers of an airline carrier. Establishing guidelines on how to afford procedural fairness to the general public is obviously problematic. Professors Peter Grabosky and John Braithwaite have noted that regulators rarely take action to remove or suspend licences.[214]

14.168 As stated above, for procedural fairness obligations to third parties to arise the regulator's decision must be one that that will affect them in a direct and immediate way.[215] Many decisions will not fall within this category, but assessing when a decision may affect a third party in a direct and immediate way may in itself be problematic.

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211 *Miller v Jackson* [1977] QB 966, 988.

212 *Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404, 419 (Thomas J, with whom Campbell CJ and Andrews SPJ agreed); *O'Keeffe Nominees Pty Limited v BP Australia Limited* [1990] ATPR ¶41–057, 51,740–51,741 (Spender J); *Gilltrap & Anor v Autopromos Pty Ltd & Anor* [1995] ATPR ¶41–395, 40,377 (Spender J). See also *Perrey v Mordiesel Co Pty Ltd* [1976] VR 569, 576 (Lush J).

213 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* HCA 30 (4 May 1998), para 66.

214 P Grabosky and J Braithwaite, *Of Manners Gentle; Enforcement Strategies of Australian Business Regulatory Agencies* (1986) Oxford University Press, Melbourne.

215 *Salemi v MacKellar (No 2)* (1977) 137 CLR 388, 452.

For example, ASIC has stated that it is not clear to it how a decision to take administrative penalty action can directly adversely affect the interests, rights and legitimate expectations of persons other than those against whom the action is to be taken. However, it may be arguable, for example, that a decision to ban a person under s 920A of the *Corporations Act* for not complying with a financial services law could directly adversely affect the reputation of the company who employed the person given that business and commercial reputation are recognised interests protected by the procedural fairness doctrine. Another problematic example is whether in an administrative hearing to determine whether a licensee's licence should be revoked or varied, the licensee's employees or creditors should be afforded procedural fairness. The latter example highlights how potentially open-ended the class of third parties affected by a decision can be.

14.169 In circumstances where an expectation has been raised that a third party is entitled as of right to an opportunity to be heard, and that expectation is not met, a regulator may face collateral challenges launched by the third party.

14.170 In light of the difficulties associated in identifying third parties who may be affected by a decision to impose a quasi-penalty, the ALRC is of the view that the submission of Environment Australia has considerable merit, in stating that the issue of procedural fairness to third parties ultimately needs to be considered by individual regulators in the context of the legislation they administer. Accordingly, the ALRC has steered away from its original proposal which required each regulator to develop and publish guidelines on the according of procedural fairness to third parties, and recommends instead that regulators consider the issue as it arises. The burden imposed by the recommendation is considerably less than would have been imposed had the ALRC adopted its original proposal. However, the recommendation should not impose any greater burden on regulators than they are arguably faced with at common law. The articulation of the recommendation by the ALRC serves the purpose of bringing the issue of procedural fairness to third parties to the fore of a regulator's consideration where appropriate.

Recommendation

Recommendation 14–7. Where regulators' decisions to impose a quasi-penalty may directly adversely affect the interests of third parties, they should consider how procedural fairness could be extended to such third parties.

15. Elements of Fairness

Contents

Introduction

15.1 Fairness extends beyond the strict legal doctrine of procedural fairness to encompass other principles relevant to procedural and substantive fairness.

15.2 This chapter further explores the procedural justice issues raised in chapter 14 by addressing the exposition of the elements of regulatory theory, and in particular the writing of Dr Toni Makkai and Professor John Braithwaite on the procedural justice principles of consistency, correctability, control, ethicality, impartiality and decision accuracy or quality. As will become evident, the distinction between procedural fairness and substantive fairness is not always clear-cut. However, adherence to procedural justice concepts can promote substantive fairness.

15.3 This chapter examines fairness issues as they arise in relation to the exercise of discretion by regulators, where acting fairly can involve a fine balance between the competing needs to deliver individualised justice and to act consistently. Chapter 16 explores fairness issues arising in dealings with regulators, specifically in the context of negotiations with the regulated and the use of publicity by regulators.

Fairness as good regulation

15.4 Procedural justice scholars emphasise the effects of the 'perceived fairness' of regulatory processes.[1] Their thesis is that looking back on the fairness of the processes one has experienced might shape future behaviour more than looking forward to expected outcomes.

> Experienced fairness matters more than expected utilities. While this claim remains controversial, there can be no doubt that subjective procedural justice has some capacity to explain *Why People Obey the Law?*[2] [emphasis in original]

15.5 A failure to include fairness in regulatory arrangements, or a failure of regulation to appear fair, can lead to threatened and actual non-compliance.[3] Dr Karen Yeung has noted that, without the confidence and support of the regulated parties and the society in which they operate, the regulatory system, in particular a penalty scheme, will inevitably fail to achieve its objectives.

> The stigmatising power of punishment for unlawful conduct is one of society's most powerful tools for encouraging compliance with the law. A penalty scheme must not be too out of step with intuitive conceptions of fairness and justice lest it fail to inculcate in those who violate the law a sense of the wrongfulness of their conduct. [4]

Elements of fairness

15.6 In their study of the perceptions of procedural justice in the Australian nursing home industry, Makkai and Braithwaite, drawing on earlier writings, identified a number of aspects of fairness: consistency, correctability, control, ethicality, impartiality, and decision accuracy or quality.[5] Many of these principles blur the distinction between procedural and substantive fairness. For example, 'consistency' and 'decision accuracy or quality' both relate to procedure, and the substance of decisions.

15.7 These six concepts are addressed below and have been used by the ALRC as a means of identifying areas in need of reform.

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1 T Makkai and J Braithwaite, 'Procedural Justice and Regulatory Compliance' (1996) 20(1) *Law and Human Behavior* 83.

2 Ibid. Both the Australian Taxation Office and the Senate Economics References Committee have noted that perceptions of fairness can influence compliance behaviour: see M Carmody, 'The Tax Reform Wave — Challenges and Opportunities' (Paper presented at IFSA 2000 Conference, Melbourne, 20 July 2000), 24) and Senate Economics References Committee, *Inquiry into the Operation of the Australian Taxation Office* (2000), Commonwealth of Australia, Canberra, ch 2.

3 For example, GST compliance. See J Gilmour, 'Taxing Times Need a Lender of Last Resort', *The Sydney Morning Herald*, 26 May 2001, 50.

4 K Yeung, *The Public Enforcement of Australian Competition Law* (2001), Australian Competition and Consumer Commission, Canberra, 46–47.

5 T Makkai and J Braithwaite, 'Procedural Justice and Regulatory Compliance' (1996) 20(1) *Law and Human Behavior* 83, 84. Yeung notes that decisions by regulators should be authorised by Parliament, and should be effective, efficient, stable, clear, flexible, responsive, accountable, transparent, procedurally fair, consistent, rational and proportionate in substance: K Yeung, *The Public Enforcement of Australian Competition Law* (2001), Australian Competition and Consumer Commission, Canberra, xi.

Consistency

15.8 Consistency leads to predictability and stability. The regulated community knows where it stands and what compliance requires.[6] There are a number of dimensions to this concept. It can relate to consistency over time, over geographical distance, amongst the regulated community, and within the regulator itself. It can also extend to consistency between different regulatory regimes. According to the ANAO in its report on the *Administration of Tax Penalties*, consistency has many facets

> including consistency between taxpayers in similar circumstances, consistency of application from year to year, and consistency with the prior experiences of taxpayers. Consistency of application is implicit in achieving fairness, equity, effectiveness, and high quality administration of penalties.[7]

15.9 Another aspect of consistency is the consistent treatment of like cases. This could apply to, for example, who is targeted for a penalty, what level or type of penalty is imposed for similar offences by different offenders, and how penalties are imposed, either by negotiation, a court or administratively. A lack of consistency in this area can lead to perceptions of unfairness.[8]

15.10 As stated by Yeung:

> Although consistency in decision-making does not necessarily guarantee that the decision will be substantively fair according to the chosen background theory of justice, nonetheless general adherence to the principle of consistency demonstrates a commitment to equality in the treatment of individuals and groups and reduces the appearance of arbitrariness.[9]

15.11 In September 1998 the International Organisation of Securities Commissions (IOSCO) formulated 30 principles of securities regulation which it stated needed to be practically implemented under relevant legal frameworks in order to achieve the basic objectives of securities regulation. One of the IOSCO principles is that a regulator should adopt clear and consistent regulatory processes.[10] The IOSCO report states:

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6 K Yeung, 'Negotiated Compliance Strategies: The Quest for Effectiveness and the Importance of Constitutional Principles' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 8 June 2001).

7 Australian National Audit Office, *Administration of Tax Penalties*, Report 31 (2000), Australian Government Printing Service, Canberra, 31.

8 Australian Taxpayers' Association, *Consultation*, Melbourne, 27 February 2001.

9 K Yeung, 'Negotiated Compliance Strategies: The Quest for Effectiveness and the Importance of Constitutional Principles' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 8 June 2001), 16.

10 International Organisation of Securities Commissions, *Objectives and Principles of Securities Regulation — A Report of the International Organisation of Securities Commissions*, <www.iosco.org/docspublic/1998-objectives.html>, 1 September 1998, 10.

> In exercising its powers and discharging its functions, the regulator should adopt processes which are consistently applied, comprehensible, transparent to the public and fair and equitable.[11]

Regulatory discretion

15.12 Discretion has been defined as the power to choose between alternative courses of action.[12] Discretion was traditionally understood as an enemy of the rule of law.[13] The rule of law was believed to represent certainty, predictability, comprehensibility, transparency, consistency and equal treatment; discretion was seen to embody arbitrariness, subjectivity, inconsistency, uncertainty, unpredictability and opacity.

15.13 Discretion is a useful tool in mitigating the rigidity and inflexibility of legal rules.[14] It enables decision makers to particularise their responses to individual or unanticipated circumstances. Discretion may also serve as a substitute for rules where prescription is inappropriate or undesirable,[15] allowing administrators to 'translate broad legal aspirations into routinely workable practices'.[16]

> Having discretion means having the freedom to choose between courses of action. Giving someone discretion is giving them that freedom.[17]

15.14 However, the presence of detailed and prescriptive rules does not necessarily mean that discretion will be absent. As Dr Julia Black notes:

> [H]ow decision makers make decisions is only partly determined by rules, be they organisational or legal rules. Organisational norms and practices, past experiences, personal relationships, the decision maker's own perceptions and attitudes will all play a part in affecting how decisions are made. Thus the presence of rules does not mean that rules will be the sole or even dominant factor influencing how discretion is exercised, and their absence does not mean the decision maker is unbound in his or her decision: bureaucratic and organisational norms will continue to operate, as will broader political and economic pressures, and moral and social norms.[18]

15.15 Statutory structuring of discretion may promote predictability, consistency and certainty, and help the regulated community to manage and evaluate risks. It also promotes the accountability of decision makers by providing clear standards for decision

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11 Ibid, 11–12.

12 M Carter, 'Prosecutorial Discretion as a Complement to Legislative Reform: The Post-CC Section 43 Scenario' in *Perspectives on Legislation: Essays from the 1999 Legal Dimensions Initiative* (1999) Law Commission of Canada, Ottawa, 14.

13 The Hon Justice B McLachlin, 'Rules and Discretion in the Governance of Canada' (1992) 56 *Saskatchewan Law Review* 167, 169.

14 M Carter, 'Prosecutorial Discretion as a Complement to Legislative Reform: The Post-CC Section 43 Scenario' in *Perspectives on Legislation: Essays from the 1999 Legal Dimensions Initiative* (1999) Law Commission of Canada, Ottawa, 15.

15 The Hon Justice B McLachlin, 'Rules and Discretion in the Governance of Canada' (1992) 56 *Saskatchewan Law Review* 167, 171.

16 R Baldwin and K Hawkins, 'Discretionary Justice: Davis Reconsidered' (1984) *Public Law* 570, 574.

17 J Black, 'Managing Discretion' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001), 2.

18 Ibid, 2.

making.[19] Statutory rules can be drafted prescriptively or very broadly, depending upon the scope of discretion desired by Parliament.[20] Prescriptive rules can confine the exercise of discretion particularly in routine cases involving similar or recurring facts. Broad rules facilitate more extensive exercise of discretion.[21] However, statutory limits on discretion can interfere with an agency's ability and willingness to respond to new challenges. The more detailed the rules, the less flexibility and freedom an agency has to determine its own response.[22]

15.16 Consistency in penalty arrangements is inextricably linked to the exercise of discretion by regulators. True administrative penalties exclude the exercise of most of these discretions, apart from the discretion to remit penalties, which is a power exercisable by regulators in certain circumstances.[23] However, regulators with powers to pursue civil penalty actions and to impose quasi-penalties regularly exercise a variety of penalty-related discretions in relation to the interpretation of legal rules, targeting decisions, the setting of enforcement priorities, choice of penalty, and decisions about granting leniency and immunity.[24]

15.17 Some areas of enforcement arguably involve 'a large core element of unavoidable discretion'.[25] Other areas require regulatory discretion in order to respond appropriately to continuously changing technical, economic and political environments,[26] or because Parliament lacks the expertise to legislate prescriptively for adequate regulation.[27] Currently, a number of Commonwealth regulators address consistency issues by using guidelines to describe and direct the operation of certain penalty-related discretions.

15.18 Attempts to limit the exercise of discretion at various stages in the penalty process by the use of prescriptive rules may function merely to displace the exercise of discretion to an earlier stage in the process, so that decision makers exercise discretion less transparently by, for example, making a decision not to investigate an alleged contravention at all. Information on the number of complaints received compared to the number pursued by selected regulators suggests that the decision to commence or pur-

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19 M Seidenfeld, 'Bending the Rules: Flexible Regulation and Constraints on Agency Discretion' (1999) 51(2) *Administrative Law Review* 429, 433.

20 The Office of Regulation Review has published guidelines for best practice in regulation making: Office of Regulation Review, *Guide to Regulation — Second Edition: December 1998*, Productivity Commission, <www.pc.gov.au/orr/reguide2/>, 16 October 2001.

21 M Seidenfeld, 'Bending the Rules: Flexible Regulation and Constraints on Agency Discretion' (1999) 51(2) *Administrative Law Review* 429, 449.

22 Ibid, 433–434.

23 See discussion on remission in ch 17.

24 See ch 17 on leniency and immunity.

25 R Baldwin and K Hawkins, 'Discretionary Justice: Davis Reconsidered' (1984) *Public Law* 570, 593.

26 M Seidenfeld, 'Bending the Rules: Flexible Regulation and Constraints on Agency Discretion' (1999) 51(2) *Administrative Law Review* 429, 431.

27 D Kingsford-Smith, 'Interpreting the Corporations Law — Purpose, Practical Reasoning and the Public Interest' (1999) 21 *Sydney Law Review* 161, 163.

sue an investigation may be an important, but often overlooked, exercise of discretion by a regulator.[28] Targeting decisions are discussed in more detail below.

Interpretation of legal rules

15.19 Interpretative discretion determines the operational meaning of statutory or policy directives, and the assumptions and values purportedly underlying such directives.[29] Subsequent discretions to target, investigate or initiate proceedings against suspected non-compliers are based on this initial interpretative discretion. It was noted in one consultation that different interpretations of the law by enforcement officers in different geographical locations can lead to inconsistency.[30] In an audit on *Management of Fraud and Incorrect Payment in Centrelink* the ANAO found that rules regarding date of effect for activity test breaches were not being consistently applied because of a lack of understanding among Centrelink staff as to what stage of the review process a breach should be imposed.[31] The ATO uses public rulings to promote consistent interpretations of tax legislation.

Targeting decisions

15.20 Discretionary decisions to target, investigate or take penalty proceedings against certain entities, or classes of entities, are influenced by many considerations. Unequal treatment or selective enforcement can result in uncertain expectations and distrust among the regulated.[32] Inconsistency in targeting decisions can also lead to perceptions of unfairness. The perception of inconsistency is, in some respects, as important as inconsistency in fact. One group consulted suggested that the regulator was inconsistent in its targeting policy leading to a perception of vindictiveness on the part of the regulator.[33] Other regulators acknowledge that inconsistency will arise in targeting due to the regulator's resource constraints. Thus, for instance, the ACCC states that 'the Commission cannot pursue all matters referred to it' and that, instead, it chooses to prioritise and select which breaches to pursue.[34]

15.21 Agencies may decide to publish their targeting and enforcement priorities in advance. For example, in *Corporate Plan and Priorities 2002–2003* the ACCC stated

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28 For example, in the period 2001-2002 ASIC received a total of 7,827 public complaints, 2.0% of which were investigated, and 2,942 complaints through statutory reports from external administrators and auditors, 0.3% of which were investigated: Australian Securities & Investments Commission, *Annual Report 2001–2002*, Australian Securities & Investments Commission, 59.

29 L Sossin, 'The Criminalization and Administration of the Homeless; Notes on the Possibilities and Limits of Bureaucratic Engagement' (1996) XXII *Review of Law & Social Change* 623, 11.

30 A Hudson, *Consultation*, Sydney, 26 February 2002.

31 Auditor-General, *Management of Fraud and Incorrect Payment in Centrelink* Audit Report No 26 (2001-2002) Australian National Audit Office, 77.

32 P Finkle and D Cameron, 'Equal Protection in Enforcement; Towards More Structured Discretion' (1989) 12(1) *Dalhousie Law Journal* 34, 35.

33 Customs Brokers Council of Australia, *Consultation*, Brisbane, 16 February 2001.

34 Australian Competition & Consumer Commission, *Making Markets Work — Directions and Priorities* (1999), ACCC Publishing Unit, Canberra, 8.

its priorities for 2002–2003.[35] Alternatively, agencies may publish enforcement priorities, benchmarks and performance indicators in their annual reports. For example, for the period 2001–2002, the ATO reported the following areas as priorities or areas of focus: aggressive tax planning;[36] reducing the marketing of and participation in mass-marketed investment schemes;[37] dealing with promoters of tax avoidance schemes;[38] risk assessments of high wealth individuals;[39] targeting the cash economy;[40] and targeting phoenix companies who accumulate debt then go into liquidation to avoid payment.[41]

15.22 Of course, there are sometimes good reasons for not providing information on targeting policy. At times the deterrent benefits of providing target forecasts will be outweighed by considerations such as the element of surprise — preventing offenders from concealing their behaviour. Target statements may not be able to foretell changes in regulated activity. Also factors that may contribute to a targeting choice may be so complex and variable that it would be impossible to meaningfully reduce those factors to an accessible policy.

Choice of response or penalty

15.23 It was noted in one consultation that there was scope for a 'routinisation' of penalties in the face of considerable inconsistency at the most fundamental level — the choice of which penalty scheme to pursue.[42] If certain responses are reserved for specific sectors of the regulated community, perceptions of unfairness can arise.

15.24 There should be consistency in the cases in which a regulator chooses to pursue a particular enforcement response over another. An agency's discretion to choose an appropriate response to a contravention depends, in part, on the variety of responses conferred on it by statute. For example, the issue of choice of proceedings arises where statute provides for parallel criminal and civil penalty proceedings. In this regard see Recommendation 11–5 in this Report, which recommends that regulators develop and publish guidelines addressing choice of proceedings. See also Recommendation 9–1, which recommends the development and publication of Memorandums of Understanding between the DPP and regulators which address parallel and subsequent criminal

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35 Which include pursuing hard core collusive activities such as price fixing, market sharing and primary boycotts; and examining mergers that increase consolidation in already concentrated industries: Australian Competition & Consumer Commission, *Corporate Plan and Priorities 2002/03*, ACCC, <www.accc.gov.au/fs-pubs.htm>, 22 November 2002, 11.

36 Commissioner of Taxation, *Annual Report 2001–2002* (2002), Australian Taxation Office, 86.

37 Ibid, 89.

38 Ibid, 91.

39 Ibid, 95.

40 Ibid, 96.

41 Ibid, 98.

42 Australian Compliance Professionals Association, *Consultation*, Brisbane, 15 February 2001.

and non-criminal enforcement action arising from the same or substantially the same conduct.

15.25 In criminal matters, the Prosecution Policy of the Commonwealth outlines the criteria governing the decision to prosecute, provides a detailed list of questions to be considered when evaluating the quality of evidence, and outlines a number of factors which must not influence the decision to prosecute.[43] For a detailed discussion of the policy see chapters 9 and 10. The ATO has also developed a detailed Prosecution Policy that states the 'principles' guiding the ATO's enforcement response,[44] although other documents are also relevant.[45]

15.26 Regulators may also create policy statements about when a particular regulatory tool or response is appropriate. For example, Part A of ASIC's *Policy Statement 69: Enforceable Undertakings* sets out when it will be appropriate for ASIC to accept an enforceable undertaking.[46] This policy statement is considered in more detail in chapter 16.

Consultations and submissions

15.27 In DP 65 the ALRC proposed that, subject to Proposals 10–1 and 10–2, regulators should develop and publish detailed guidelines describing how penalty-related discretions will be exercised.[47]

15.28 This proposal received some support. Environment Australia submitted that 'the development of guidelines would ensure greater consistency and sound decision making where discretions are involved' and that publication of such guidelines would increase transparency and accountability.[48]

15.29 Yeung supported the proposal subject to the qualification that the reference to Proposals 10–1 and 10–2 be removed.[49]

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43 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*, Commonwealth Director of Public Prosecutions, <www.cdpp.gov.au/cdpp/>, 16 November 2001.

44 Australian Taxation Office, *ATO Prosecution Policy*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/index.htm>, 9 March 2001.

45 Including the Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*, Commonwealth Director of Public Prosecutions, <www.cdpp.gov.au/cdpp/>, 16 November 2001; ATO Compliance Model; Taxpayers' Charter; DPP Tax Manual; Fraud Control Policy of the Commonwealth; Heads of Commonwealth Operational Law Enforcement Agencies, *Overarching Principles for Selecting Cases for Investigation and Administrative, Civil and Criminal Sanctions* (1996) HOCOLEA.

46 Australian Securities & Investments Commission, *Practice Note 69: Enforceable Undertakings*, Australian Securities & Investments Commission, <www.cpd.com.au/asic/pn/>, 20 December 2001.

47 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Proposal 15–1. Proposal 10–1 suggested that a regulator's decision to initiate any form of criminal, civil or administrative penalty action (or not to initiate any such action) should not be subject to any form of review. Proposal 10–2 suggested that a regulator's decision to target or investigate any entity or group of entities (or not to target or investigate any entity or group of entities) should not be subject to any form of review.

48 Environment Australia, *Submission CAP 26*, 24 October 2002, 10.

49 K Yeung, *Submission CAP 20*, 9 October 2002, 8.

15.30 The ATO supported the proposal. It noted that it had an extensive history of publishing Rulings and administrative guidelines on the discretions available in imposing and remitting penalties, including publication of Practice Statements, and the *ATO Receivables Policy*. The ATO stated that it had published guidelines addressing transitional issues whereby further remissions may be appropriate because of a new law or a new tax system. For example, *Taxation Ruling TR* 2000/9 and *Taxation Ruling TR* 2002/8 address remission issues in relation to the New Tax System in its first two years of operation.[50]

15.31 The ACCC supported the proposal[51] but stated that concerns expressed in DP 65 were addressed by the fact that the ACCC had recently released its *Cooperation Policy for Enforcement Matters*[52] and its *Draft Leniency Policy for Cartel Conduct.*[53]

15.32 ASIC did not state whether or not it supported the proposal. It stated that it was inappropriate for statements of policy to be prescriptive or binding and that decision makers could not fetter their own discretion.[54]

15.33 The ABA did not specifically address this proposal but stated that as a general proposition it supported the ALRC's proposals concerning the development and publication of guidelines about various aspects of enforcement.[55]

15.34 Professor Michael Adams opposed the proposal, submitting that to require regulators to provide guidance on a detailed level may inadvertently result in a perceived narrowing of their discretionary powers.[56]

Conclusion

15.35 Having considered the issue further, and having regard to the other recommendations made in this Report which call for the development and publication of guidelines in relation to the exercise of discretion by regulators in numerous areas,[57] the ALRC concluded that it was unnecessary to also require regulators to develop and publish guidelines describing how penalty-related discretions would be exercised. It

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50 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, 52.

51 Australian Competition & Consumer Commission, *Submission CAP 24*, 15 October 2002, 4.

52 Australian Competition & Consumer Commission, *Cooperation Policy for Enforcement Matters*, 1 July 2002.

53 Australian Competition & Consumer Commission, *Draft ACCC Leniency Policy for Cartel Conduct* (2002).

54 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 44–45.

55 Australian Broadcasting Authority, *Submission CAP 23*, 14 October 2002, 1.

56 M Adams, *Submission CAP 12*, 5 September 2002, 7.

57 Including guidelines in relation to the enforcement policy of regulators (see Recommendation 10–1); parallel criminal and civil proceedings (see Recommendation 11–5); the basis upon which regulators will negotiate and agree penalty-related settlements (see Recommendation 16–1); the use and acceptance of enforceable undertakings (see Recommendation 16–3); the exercise of discretion in relation to leniency and immunity policies (see Recommendation 17–1); and the exercise of discretion in relation to use of the media (see Recommendation 16–4).

was difficult to ascertain what matters might be covered by such guidelines that were not already the subject of other recommendations in the Report concerning the development of guidelines, apart perhaps from the discretion to target.[58] However, in light of the policy reasons discussed at para 15.22 above as to why it may be inappropriate for a regulator to provide information on targeting policy, the ALRC was not convinced that there was any merit in formulating a separate recommendation in relation to the development of guidelines concerning targeting discretions. That is not to say, however, that the ALRC has completely ignored the submissions received on its original proposal. Support for this proposal, was to some extent, taken by the ALRC to indicate support for the specific guidelines in respect of which the ALRC has made recommendations, given that those more specific guidelines cover specific areas of regulators' exercise of penalty-discretions.

Individualised justice

15.36 In some cases, rigidly structured discretion can result in consistency at the expense of individualised and proportional justice and fairness. Discretion may be a useful tool in mitigating the rigidity and inflexibility of legal rules.[59] It enables decision makers to particularise their responses to individual or unanticipated circumstances. Some of those with whom the ALRC has consulted felt that each case should be dealt with on its own as a discrete and individual matter.[60]

15.37 Tax administration provides a good example. The public expects a general degree of equal, consistent and fair treatment across all taxpayer categories so that, for example, large business taxpayers are not treated more leniently than individual income taxpayers. Equal or consistent treatment is not however an absolute value or objective in taxation administration. Different groups or categories of taxpayers must necessarily be treated differently to reflect their inherently different nature or status. The ATO is structured around groups of clients into Business Service Lines (BSLs). Each BSL is responsible for one major market segment and administers penalties applicable to its clients.[61] BSLs include Individuals Non-Business, Small Business, and Large Business and International.[62]

15.38 On the other hand, individuals or entities within similar groups or categories can expect a significantly greater degree of equal or consistent treatment, reflecting their similar situations.[63]

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58 As a power to remit a penalty is a specific form of leniency discretion, the ALRC considers that this form of discretion would be covered by its recommended guidelines in relation to the exercise of leniency.

59 M Carter, 'Prosecutorial Discretion as a Complement to Legislative Reform: The Post-CC Section 43 Scenario' in, *Perspectives on Legislation: Essays from the 1999 Legal Dimensions Initiative* (1999) Law Commission of Canada, Ottawa, 15.

60 Australian Corporate Lawyers Association, *Consultation*, Melbourne, 26 February 2001.

61 Australian National Audit Office, *Administration of Tax Penalties*, Report 31 (2000), Australian Government Printing Service, Canberra, para 12.

62 Ibid, para 13.

63 However, prima facie consistent or equal treatment of similarly situated taxpayers may be at odds with the goal of fairness where, for example, individual circumstances are not taken into account. Procedurally

Providing for individualised justice

15.39 Individualised and proportionate treatment is what most people consider to be justice.

> Because penalties for violation of the law involve the imposition of 'hard treatment' on citizens by the state, it is essential in any liberal democratic society that the limits on the scope of punishment are properly circumscribed. Democratic societies recognise the moral worth and autonomy of citizens and cannot therefore justify visiting disproportionately harsh punishment on those who break the law.[64]

15.40 The majority of administrative penalties surveyed by the ALRC allow little discretion to tailor them to the person on whom they are being imposed. Where there is little or no discretion to individualise a penalty, such as a true administrative penalty,[65] it is essential that the penalty set by legislation is proportionate to the wrongdoing or consequences of the wrongdoing, and that the penalty is used appropriately. Alternatively, there should be a mechanism to temper the effects of the penalty once imposed.

15.41 Under social security legislation, quasi-penalties (also known as breach penalties) are escalated on the basis of repeated contraventions not the culpability or intention of the recipient, individual circumstances, the relative seriousness of the breach, or the recipient's capacity to pay. Compliance is not encouraged by such an arbitrary scale of penalties. If job seekers do not meet any of their mutual obligations, their Newstart or Youth Allowance may be reduced or cancelled as a result of an activity test breach or administrative breach. In the *Guide to Social Security Law* it is noted in relation to administrative breaches that there are 'no other ways this penalty can be applied'.[66]

15.42 In relation to activity test breaches the *Guide to Social Security Law* states:

> It is NOT possible to replace a 26 week rate reduction period for an Activity test breach with a shorter non-payment period.[67]

15.43 Social security legislation requires that penalties not be imposed on a person who has a 'reasonable excuse' for not complying.[68] Procedurally, this means a person suspected of a breach should be contacted by Centrelink before the decision to impose a penalty is taken to give them an opportunity to explain the reason for not comply-

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(or objectively) equal treatment may therefore differ from substantively (or subjectively) equal treatment that takes individual circumstances into account in its evaluation of fairness.

64 K Yeung, *The Public Enforcement of Australian Competition Law* (2001), Australian Competition and Consumer Commission, Canberra, 46.

65 The power to remit a true administrative penalty allows some scope for individualisation of the penalty. See discussion of remission of penalties in ch 17.

66 Department of Family & Community Services, *Guide to Social Security Law*, Department of Family & Community Services, <www.facs.gov.au/guide/ssguide/3.htm>, 8 November 2001, topic 3.2.11.20.

67 Ibid, topic 3.2.11.10.

68 *Social Security Act 1991* (Cth), s 577C.

ing.[69] However, as discussed in chapter 14 the Commonwealth Ombudsman's recent report in relation to social security breach penalties indicates that this procedure is not always followed.[70]

15.44 Once the decision to apply a penalty is made, Centrelink officers do not have a power to remit penalties. However, the Secretary to the Department has the power to exempt claimants from, for example, requirements under an activity test, in accordance with guidelines set by the Minister.[71]

15.45 One criticism of this quasi-penalty regime is that it is 'excessive and harsh'.[72] Social security penalties are typically harsher than average fines for serious criminal offences[73] or comparable taxation offences.[74] There is also no discretion not to apply cumulative penalties for multiple activity test breaches. Cumulative penalties arguably contribute to non-compliance by recipients. For example, people forced to work as a result of a first breach for not disclosing income will be breached a second time for non-declaration of income, even though non-declaration was necessary to have enough money to support themselves.[75]

Conclusion

15.46 The ALRC has not made a specific recommendation in relation to individualised justice. However, its recommendations in chapter 14 of this Report, in relation to the requirement to give procedural fairness to persons in respect of whom a regulator has formed an intention to impose a quasi-penalty are aimed at ensuring that people are notified and heard prior to the imposition of a quasi-penalty. This process of itself facilitates the provision of individualised justice. It is impossible to reduce the resolution of the inherent tension in the need to provide both consistent and individualised treatment to a simple, mechanical technique or process. Similarly, only adherence to prin-

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69 J Moses and I Sharples, 'Breaching — History, Trends and Issues' (Paper presented at 7th National Congress on Unemployment, Sydney, 30 November–1 December 2000), 5; Sen the Hon Jocelyn Newman (then Minister for Family & Community Services) 'Breaches Not to be Taken Lightly' *Media Release: 16 November 2000,* <www.facs.gov.au/ internet/newman.nsf/v1/media.htm>, 21 February 2002.

70 Commonwealth Ombudsman, *Social Security Breach Penalties — Issues of Administration* (2002), Commonwealth Ombudsman.

71 See, for example, *Social Security Act 1991* (Cth), s 542H.

72 Australian Council of Social Service and National Welfare Rights Network, *Doling out Punishment: The Rise and Rise of Social Security Penalties* (2000), ACOSS, Sydney.

73 ACOSS notes that penalties are 'out of all proportion to the seriousness of the "offence".' For instance, a penalty of $280 to $340 is imposed for failing to reply to a letter, $630 and $1300 applies for failure to attend an interview, and penalties range from $632 to $1304 for activity test breaches. It has been argued that these penalties are 'clearly excessive and unjustifiably harsh when compared to the average fines for serious criminal offences such as assault occasioning actual bodily harm ($681), break and enter ($706), vehicle theft ($627), and driving under the influence ($546)': Ibid.

74 Professor John Braithwaite notes that in comparing penalties for undeclared income across taxation and social security regimes, social security non-declaration can effectively attract a penalty of up to 800% (over a period of rate reduction). By contrast, 50% is the maximum tax penalty, which is rarely applied and requires evidence of an intentional tax avoidance scheme: J Braithwaite, *Consultation*, Canberra, 19 February 2001.

75 Welfare Rights Centre, *Consultation*, Sydney, 6 December 2000.

ciples of fair regulation generally provide guidance. The ALRC's Recommendations in this Report are directed generally to this end.

Correctability

15.47 This is the right of the regulated party to complain about the decision after the event, whether to the regulator itself or to an external decision maker; it is the right to pursue, and the availability without prohibitive cost, of an accessible avenue of appeal or review. It is inevitable that poor or improper decisions will be made from time to time and that procedural shortcuts will be taken. However, the provision of adequate avenues of appeal and review increases the chances that these can be prevented or corrected. The ability to correct a penalty decision becomes increasingly important when there is little discretion to tailor penalties and so harsh penalties are imposed.[76] Notification of appeal rights is essential. Some regulators facilitate the correction of regulatory decisions by advising the regulated of their review rights.[77] For a more detailed discussion of appeal and review see chapters 20 and 21.

15.48 The provision of reasons is another way of providing the regulated with a proper and informed opportunity to correct decisions. In many cases this is provided for in legislation.[78] See the discussion of decision accuracy or quality later in this chapter.

Correction or revocation of penalty

15.49 Correctability should include a right to have a penalty revoked where, for example, a regulator has made a factual error when determining that an administrative penalty should be imposed. This right is dependant on the law providing or not removing the regulator's discretion to revoke the penalty. This discretion may be appropriate where mistakes can easily be made by the regulator; for example, due to the complexity of the legislation it administers.

15.50 Under s 126 of the *Social Security (Administration) Act 1999* (Cth), the Secretary can review a decision made by an officer under social security law if the Secretary is satisfied that there is sufficient reason to review the decision, irrespective of whether a review has been requested. The Secretary can vary, affirm or set aside a decision. Therefore, the Secretary, and those with appropriate delegations, could at any time revoke rate reduction or non-payment periods for activity test and administrative

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76 Australian Taxpayers' Association, *Consultation*, Melbourne, 27 February 2001.

77 The *Taxpayers' Charter* (see the ATO's website at <www.ato.gov.au>), *Practice Note 57: Notification of Rights of Review* (see ASIC's website at <www.cpd.com.au/asic/pn/>), the Department's *Guide to Social Security Law* (see FACS' website at <www.facs.gov.au/guide/ssguide/3.htm>) and *The ACA, the Law and You* (see the ACA's website at <www.aca.gov.au/publications/brochure/acalaw.pdf>) set out appeal rights.

78 *Administrative Appeals Tribunal Act 1975* (Cth), s 28 and *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 13.

breaches; for example, on the provision of further information to the regulator by the benefit recipient. The regulator should notify the person if a quasi-penalty has been withdrawn and of the effect of the withdrawal of the penalty. This is significant where the withdrawal of a quasi-penalty does not preclude a later penalty.[79]

15.51 In DP 65 the ALRC asked whether it was necessary to provide an express default statutory statement that regulators have, unless expressly excluded by statute, the power to correct or withdraw a penalty imposed in error.[80]

15.52 In considering an answer to this question it is useful to consider some general principles of administrative law. As a general rule, in the absence of some express provision to the contrary, it would appear that a decision is not 'perfected' until it is communicated to interested parties.[81] Once a decision has been made, the general rule is that, in the absence of an express or implied power to do so, a decision maker cannot revisit a decision once it has been validly made.[82] The rule is founded on the principle that, once a power has been exercised, the purpose for which it has been conferred has been fulfilled and the power has therefore been exhausted. Tribunals and courts are governed by a similar principle of *functus officio*, whereby decisions once made cannot be revisited.[83] The competing public policy interests associated with such a principle balance the certainty of decisions against the interests of justice which require a flawed decision to be corrected.[84]

15.53 The implied power to revisit a decision was explored by the Full Court of the Federal Court in *Leung v Minister for Immigration and Multicultural Affairs*.[85] Finkelstein J, with whom Beaumont J agreed, expressed the view that a decision maker was entitled to ignore an invalid decision. He stated:

> To ignore an invalid decision is not to revoke it. It is merely to recognise that which purports to be a decision does not have that character. To decide the matter again is not a reconsideration of it. It is in fact the original exercise of the power to make the decision. Hence, the rule embodied in the expression 'functus officio' has no application to such a case. Nor is there any need to find an express or an implicit power of reconsideration. Those doctrines, to the extent that they are applicable to administrative decision-making, only apply to validly made administrative decisions.[86]

15.54 Heerey J stated:

> In my opinion there is no general rule or principle of administrative law that decisions based upon a wrong factual basis may be revoked by the decision-maker — still less that such decisions do not need to be revoked and may simply be ignored. The sup-

79 A Hudson, *Consultation*, Sydney, 26 February 2002.
80 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Question 7–3.
81 *Inderjit Singh v Minister for Immigration and Multicultural Affairs* [2001] FCA 73.
82 D Watson, 'Administrative Law — Can Decision Makers Change Their Minds?' (Paper presented at Government Law Group (NSW Chapter), Sydney, 7 June 2001), 2.
83 Ibid, 3.
84 Ibid, 3.
85 *Leung v Minister for Immigration and Multicultural Affairs* (1997) 150 ALR 76.
86 Ibid, 88.

> posed general rule would necessarily extend indefinitely in time and to factual errors for which persons affected by the decision were in no way responsible. Such persons may have arranged their own affairs on the basis of the decision.[87]

15.55 The *Acts Interpretation Act 1901* (Cth) does not contain a specific provision in relation to the revocation or correction of a penalty imposed in error. It does, however, contain an analogous provision in relation to the power to revoke instruments.

> Where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws) the power shall, unless the contrary intention appears, be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.[88]

15.56 Section 33(1) of the *Acts Interpretation Act* provides that:

> Where an Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.

15.57 Dale Watson notes that the courts have tended to give s 33(1) 'fairly limited operation'.[89] For example, Branson J in *Dutton v The Republic of South Africa* expressed the view that:

> Section 33(1) does not refer to the withdrawal or cancellation of the exercise of a power.[90]

Accordingly, in Branson J's view s 33(1) would allow a decision maker to act in an applicant's favour if a change in circumstances or further information came to light, but could not be relied upon to withdraw a benefit that had already been conferred.

15.58 Watson states in relation to s 33(1):

> It may be the case that the term 'as the occasion requires' is very much dependent upon the type of power which is under consideration. If it is a power which has determined that a person has an entitlement to some benefit, then the 'occasion' may 'require' certainty and finality, despite a change in circumstance or policy. However, if a person is liable to some adverse decision, such as deportation, but by exercising a discretion it has been decided not to do so, the court may find that the power to con-

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87 Ibid, 77.

88 *Acts Interpretation Act 1901* (Cth), s 33(3). In *Australian Capital Equity Pty Ltd v Beale* (1993) 114 ALR 50, Lee J held that s 33(3) is limited in its operation to powers concerning instruments of a legislative character.

89 D Watson, 'Administrative Law — Can Decision Makers Change Their Minds?' (Paper presented at Government Law Group (NSW Chapter), Sydney, 7 June 2001), 15.

90 *Dutton v The Republic of South Africa* [1999] FCA 498.

> sider the matter has not been finally determined and the matter can be revisited from time to time.[91]

15.59 The power of a Tribunal to revisit its own decision was considered by the High Court in *Minister for Immigration and Multicultural Affairs v Bardwaj*.[92] In that case an applicant before the Immigration Review Tribunal sent a fax to the Tribunal stating that he was ill and requesting an adjournment of the hearing. The fax did not come to the attention of the Member to whom the case had been assigned. The Tribunal dealt with the matter adversely to the applicant, publishing a decision affirming the decision under review which was forwarded to the parties. The Tribunal was then made aware of the fax requesting the adjournment and acceded to a request by the applicant for a new hearing date. The Tribunal conducted a further hearing and set aside the decision under review. The Minister challenged the second decision, arguing that the Tribunal was *functus officio*. The High Court, by majority, dismissed the Minister's appeal.[93] Gleeson CJ stated that

> it was not inconsistent with the statutory scheme for the Tribunal upon becoming aware that it had not given effect to its own intention, and that it had failed to conduct a review of the delegate's decision, to give the respondent the opportunity which the statute required, which he wanted, and which the Tribunal had intended to give him. On the contrary, it was in accordance with the requirements of the Act.[94]

15.60 Gaudron and Gummow JJ expressed the view that it was neither helpful or necessary to describe erroneous administrative decisions as 'void', 'voidable', 'invalid', 'vitiated', or even as 'nullities'. Their Honours stated:

> To categorise decisions in that way tends to ignore the fact that the real issue is whether the rights and liabilities of the individual to whom the decision relates are as specified in that decision. And, perhaps more importantly, it overlooks the fact that an administrative decision has only such force and effect as is given to it by the law pursuant to which it was made.[95]

15.61 Gaudron and Gummow JJ said that a decision that involves jurisdictional error 'is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all'.[96] It followed that in such cases the duty to make a decision remained unperformed. Their Honours noted and approved the view of the Supreme Court of

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91 D Watson, 'Administrative Law — Can Decision Makers Change Their Minds?' (Paper presented at Government Law Group (NSW Chapter), Sydney, 7 June 2001), 17.

92 *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11.

93 Kirby J dissented. He stated that the power of 'revocation' purportedly exercised by the Tribunal in making the later decision was, in effect a usurpation by the Tribunal of the Federal Court's power of judicial review or the High Court's power to review the decision under the Constitution; and that 'the proposition that an apparent 'decision' of a body such as the present Tribunal could be ignored by it, or treated as a nullity, is self-evidently untenable': Ibid, para 121 and 126.

94 Ibid, para 15.

95 Ibid, para 46.

96 Ibid**,** para 51.

Canada that a decision involving jurisdictional error does not prevent the decision maker from correcting the error by making a later decision.[97]

15.62 Sweden's *Administrative Procedure Act 1986* contains provisions enabling a decision to be corrected. Section 26 of the Act provides:

> A decision that contains a manifest error in writing, calculation or any other similar oversight by the authority or someone else may be corrected by the authority which made the decision. Before a correction takes place the authority shall give the parties an opportunity to express themselves on the issue, provided that the matter concerns the exercise of public power in relation to someone and the measure is not unnecessary.

15.63 Section 27 of the Act provides:

> When an authority because of new circumstances or for some other reason finds that a decision that it has made in the first place is manifestly wrong, it shall correct the decision, provided that this can take place rapidly and simply and without detriment to any private party. This duty also applies if the decision is appealed against, unless the appellant demands that the decision shall be suspended until otherwise ordered. The duty shall not apply if the authority has sent the case-documents to a superior instance or if there are other special reasons against the authority altering the decision.

Consultations and submissions

15.64 The ALRC received limited submissions in relation to Question 7–3 in DP 65.[98]

15.65 The ATO expressed the view that it would be beneficial to have an express default statutory power to correct or withdraw a penalty imposed in error.[99]

15.66 Dr Karen Yeung submitted that such a provision may be helpful although she suspected it was not necessary.[100]

15.67 Environment Australia noted that the power to correct or withdraw a penalty already exists under the scheme under the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth); for example, Regulation 14.07.[101]

15.68 An Advisory Committee member suggested that the correction power cover all errors, regardless of whether they affect the decision's validity, and suggested that the

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97 See *Chandler v Alberta Association of Architects* [1989] 2 SCR 848.

98 Question 7–3 is set out at para 15.51 above.

99 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.72.

100 K Yeung, *Submission CAP 20*, 9 October 2002, 6.

101 Environment Australia, *Submission CAP 26*, 24 October 2002, 4. Regulation 14.07 deals with the withdrawal of an infringement notice. As discussed in ch 2, infringement notices are not themselves penalties or quasi-penalties. See ch 12 for a discussion of the withdrawal of infringement notices.

recommendation make it clear as to whether the correction power was limited to cases where the correction is in the subject's favour.[102]

Conclusion

15.69 Taking into account the submissions and comments, differing judicial interpretations as to the status of erroneous administrative decisions, the lack of a specific provision in the *Acts Interpretation Act* expressly covering the revocation or withdrawal of penalties imposed in error, and the desire for certainty and clarity in this area of the law, the ALRC has concluded that there should be a default statutory power to withdraw or correct penalties imposed in error. This should cover both true administrative penalties as well as quasi-penalties, such as banning orders or the withdrawal of benefits.

15.70 In the case of true administrative penalties a regulator should have the power to withdraw or correct a penalty imposed in error, irrespective of whether the correction is in favour of the person on whom the penalty is imposed. This position reinforces the fact that a regulator has no discretion as to the imposition of a true administrative penalty; accordingly, any error in the imposition of the penalty should be corrected so that the law is correctly applied. The procedural fairness obligation to give prior notice of an intention to impose a penalty does not arise in the context of true administrative penalties given that such penalties arise automatically by operation of law. Therefore, the regulator's power to correct an administrative penalty should not be subject to any requirement to give procedural fairness as the person on whom the corrected penalty is to be imposed will be in no worse position than they would have been had the correct penalty as determined by law been imposed.

15.71 Of course, where a correction is adverse to the regulated party, the circumstances may render it appropriate for the regulator to exercise any remission power that it has in relation to that type of penalty. Further, where, as a result of the regulator's exercise of the correction power, a regulated party is required to pay a larger amount of money than originally notified, the time for payment prescribed for the original amount might well be extended to take into account the imposition of the larger penalty, and, where appropriate, requests to pay by instalment should be accommodated. The correction power should extend to all errors, including errors that do not affect the validity of the decision including minor clerical errors.

15.72 As the imposition of quasi-penalties, unlike true administrative penalties, involves the exercise of discretion by regulators, a power to correct quasi-penalties must take principles of fairness into account. Accordingly, where the application of a correction power would directly adversely affect the person on whom the corrected quasi-penalty is to be imposed (for example a correction which would result in the imposition of a longer banning period), then, subject to some exceptions, the regulator should afford procedural fairness to that person. The person should be notified of the regulator's intention to exercise its correction power and be given a prior opportunity to be heard.

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102 Advisory Committee members, *Advisory Committee meeting*, 17 October 2002.

The requirement to give notice should not arise in relation to the correction of minor clerical errors in respect of which there is no real debate about the regulator's original intention. For example, if a regulator informed a person or their lawyer, following a hearing, that a delegate of the regulator had decided to ban the person for a period of 12 months, and that written notification of that decision had been sent to the person but the notice of decision had a typographical error stating the banning period to be 2 months, then the requirement to give the person an opportunity to be heard in relation to the regulator's intended exercise of the correction power could be dispensed with. Even if the banned person in such a position were given an opportunity to be heard, one would imagine that there would be little that they could say in favour of the correction power not being exercised.

15.73 Where the exercise of the correction power would be in favour of a regulated party, it may be appropriate for the regulator to in effect 'stay' the operation of the original penalty imposed on that party while the correction takes place. However, where the exercise of the correction power would be adverse to the regulated party, it may be unnecessary and inappropriate for any such 'stay' to occur. For example, where the correction power involves the replacement of a shorter banning period imposed in error, with a longer banning period, and the regulator is in the process of giving the affected party a right to be heard, there is no reason in principle why the incorrect decision to impose the shorter banning period should be 'stayed' as the affected party will, at the least, be subject to that banning period in any event.

15.74 Regulator staff must be made aware of the very significant difference between exercising a power to correct a quasi-penalty because of an error, and changing their decision for other reasons. The latter situation is clearly not within the ambit of the ALRC recommendation, would appear in any event to be contrary to the principle of *functus officio* (discussed at para 15.52 above), and would not necessarily fall within the scope of s 33(1) of the *Acts Interpretation Act* (discussed at para 15.56–15.58 above).

15.75 Finally, it appears a logical extension of the principle that an administrative penalty should only be imposed by an Act of Parliament[103] to conclude that any provision dealing with the withdrawal or correction of an administrative penalty should also be dealt with in primary legislation.

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103 See Department of Prime Minister and Cabinet, *Legislation Handbook*, Commonwealth of Australia, <www.dpmc.gov.au/pdfs/LegislationHandbookMay00.pdf>, 4 November 2002, 3 and discussion in ch 6 as to when primary legislation should be used as a method of implementation.

Recommendations

Recommendation 15–1. The Regulatory Contraventions Statute should provide that in the absence of any clear, express statutory statement to the contrary, regulators have the power to:

(a) withdraw an administrative penalty applied in error; and

(b) correct an administrative penalty applied in error by withdrawing any notice of that penalty and issuing a fresh notice of the correct penalty irrespective of whether the error goes to the validity of the application of the penalty or whether the correction is in favour of the person on whom the penalty was applied.

Recommendation 15–2. The Regulatory Contraventions Statute should provide that in the absence of any clear, express statutory statement to the contrary:

(a) regulators have the power to withdraw a quasi-penalty imposed in error;

(b) regulators have the power to correct a quasi-penalty imposed in error by withdrawing any notice of that quasi-penalty and issuing a fresh notice of the correct quasi-penalty irrespective of whether the error goes to the validity of the imposition of the quasi-penalty or whether the correction is in favour of the person on whom the quasi-penalty is imposed; and

(c) a person in respect of whom a regulator has formed an intention to correct a quasi-penalty imposed in error, where the correction would directly adversely affect the person on whom the quasi-penalty was previously imposed, should receive adequate prior notice of that intention. The requirement to give prior notice can be excluded by statute in situations where urgent action is needed to prevent imminent harm to any person or property or in the case of minor clerical errors where there is no confusion as to the penalty that has been imposed.

Recommendation 15–3. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, any notice of a regulator's intention to correct a quasi-penalty imposed in error, where the correction would directly adversely affect the person on whom the penalty was previously imposed, should state the following matters (unless clearly inappropriate in the circumstances):

(a) To whom it is issued;

(b) By whom it is issued (including the name and work address of the delegate);

(c) The date on which it is issued;

(d) A description of the quasi-penalty previously imposed and the date on which the quasi-penalty was previously imposed;

(e) The offence or contravention in respect of which the quasi-penalty was previously imposed (including the date and place of occurrence);

(f) A description of the error which gives rise to the intention to correct the quasi-penalty and a statement of the regulator's intention to amend the quasi-penalty because of the error;

(g) A description of the intended correction;

(h) A description of the effect of the intended correction;

(i) The right to make submissions before the quasi-penalty is corrected, accompanied by an explanation of the form submissions should take;

(j) The right to seek legal advice in relation to the preparation of any submissions to be made;

(k) The fact that the regulator must consider these submissions prior to making a decision to correct the quasi-penalty;

(l) The time period within which to provide submissions and the effect if no submissions are provided within that period;

(m) The date on which the corrected quasi-penalty (if imposed) will take effect or the time period which must expire before the corrected penalty (if imposed) can come into effect, whichever is appropriate;

(n) The right to receive written notification of the decision to correct the quasi-penalty and written reasons for that decision;

(o) The rights of review and appeal, and how to seek such review or appeal;

(p) Contact details for further information; and

(q) Any other information appropriate in the circumstances.

Recommendation 15–4. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, where a regulator withdraws an administrative penalty or quasi-penalty imposed in error it must provide written notification to the person on whom the penalty or quasi-penalty was previously imposed which states the following matters (unless clearly inappropriate in the circumstances):

(a) To whom it is issued;

(b) The date the notice is issued and by whom it is issued;

(c) A description of the penalty or quasi-penalty previously imposed and the date the penalty or quasi-penalty was previously imposed;

(d) The offence or contravention in respect of which the penalty or quasi-penalty was previously imposed (including the date and place of occurrence);

(e) The fact that the penalty or quasi-penalty has been withdrawn because of error;

(f) A description of the error or errors which gave rise to the withdrawal;

(g) The date on which the penalty or quasi-penalty was withdrawn, or the date on which the withdrawal will come into effect;

(h) The effect of the withdrawal of the penalty or quasi-penalty, including whether it precludes a later penalty or quasi-penalty in respect of the same conduct;

(i) Contact details for further information; and

(j) Any other information appropriate in the circumstances.

Recommendation 15–5. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, where a regulator corrects an administrative penalty or quasi-penalty imposed in error it must provide written notification to the person on whom the penalty or quasi-penalty was previously imposed which states the following matters (unless clearly inappropriate in the circumstances):

(a) To whom it is issued;

(b) The date the notice is issued and by whom it is issued;

(c) A description of the penalty or quasi-penalty previously imposed and the date on which the penalty or quasi-penalty was previously imposed;

(d) The offence or contravention in respect of which the penalty or quasi-penalty was previously imposed (including the date and place of occurrence);

(e) The fact that the penalty or quasi-penalty has been corrected because of error,

(f) A description of the error which gave rise to the correction;

(g) A description of the correction;

(h) The date on which the penalty or quasi-penalty was corrected; or the date on which the correction will come into effect;

(i) The effect of the correction of the penalty or quasi-penalty;

(j) In the case of a monetary penalty, the time within which payment is required;

(k) Contact details for further information; and

(l) Any other information appropriate in the circumstances.

Control

15.76 Control in this context has been variously described, but it is in essence the regulated party's right to be heard *before* the regulator's decision is made. This could be seen as particularly important in areas such as licensing (where the decision to remove or qualify a licence often has an immediate and drastic effect on the viability of the regulated enterprise)[104] and social security (where the decision has an immediate effect on the income and welfare of the recipient).

15.77 It might be less critical in areas where the impact of decisions is less immediate, time is not of the essence or there is a proper system of appeal and review. In many cases, the regulated party's right to be heard before the decision is made is protected by the requirements of procedural fairness. In some cases the right to be heard may be sat-

104 See, for example, *McKay and Tax Agents' Board of Tasmania* (1994) 28 ATR 1186 where DP Gerber stated: 'I would be failing in my duty if I were to abstain from noting that had the Board afforded Mr McKay the opportunity to be heard, this hearing might have been avoided. Any statutory authority, seized with the power to take away a person's livelihood, should be loath to exercise that power in the cavalier manner the Tax Agents Board Tasmania did on this occasion'.

isfied by the regulator's staff contacting a person to investigate the reasons for non-compliance before imposing a penalty. In other cases, the making of submissions or an administrative hearing may be required. For a more detailed discussion of the hearing rule see the discussion in chapter 14.

Ethicality

15.78 Makkai and Braithwaite rightly acknowledge the vagueness of this term and the fact that it in some ways does no more than act as a synonym of 'fairness'. However, they prefer to confine it in this context to a respect for the rights of the regulated parties.[105] A process of appeal or review can force a sense of ethicality on a reluctant regulator but the need to overcome that reluctance at great cost does nothing to generate respect or engender voluntary compliance.

15.79 One of the principles formulated by IOSCO which is relevant to ethicality is that the staff of the regulator should observe the highest professional standards including appropriate standards of confidentiality. In this regard, IOSCO stated that staff should be given clear guidance on the following matters:

- The avoidance of conflicts of interest (including the conditions under which staff may trade in securities);
- The appropriate use of information obtained in the course of the exercise of powers and the discharge of duty;
- The proper observance of confidentiality and secrecy provisions and the protection of personal data;
- The observance of procedural fairness.[106]

15.80 Of course, regulators, as public servants, are under an obligation to operate ethically.[107] Further, regulators must comply with the Commonwealth's Model Litigant Policy, which is expressed as a series of general legal principles in Legal Services Directions issued by the Commonwealth Attorney-General under the *Judiciary Act 1903* (Cth). Some regulators express their obligation to operate ethically in service charters.[108] The ACCC, for example, has a service charter that states that it will be 'objective in its dealings, valuing integrity, openness, effectiveness, efficiency, professionalism, and innovation'.[109]

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105 T Makkai and J Braithwaite, 'Procedural Justice and Regulatory Compliance' (1996) 20(1) *Law and Human Behavior* 83, 85.

106 International Organisation of Securities Commissions, *Objectives and Principles of Securities Regulation — A Report of the International Organisation of Securities Commissions*, <www.iosco.org/docs-public/1998-objectives.html>, 1 September 1998, 6.6.

107 See *Public Service Act 1999* (Cth) and the Australian Public Service Values and Code of Conduct at <www.psmpc.gov.au/media/index.html>.

108 See Centrelink's service charter on Centrelink's website at <www.centrelink.gov.au/internet/internet.nsf/about_us/customer_charter.htm> and the ABA's service charter at <www.aba.gov.au>.

109 On the ACCC's website at <www.accc.gov.au/about/fs-about.htm>.

15.81 The ATO's *Taxpayers' Charter* is a more comprehensive document.[110] It was developed in consultation with ATO staff, government agencies, the general public, tax practitioners and business and community groups. The ATO submitted:

> The Taxpayers' Charter is a key tool in building a better relationship between the ATO and the community and giving the community confidence in the ATO's operations. The Taxpayers' Charter helps set in place the relationship the ATO seeks with the community in performing its task — a relationship based on mutual trust and respect …
>
> Specific commitment and values underpinning the Taxpayers' Charter include:
>
> - Monitoring and reviewing how the Taxpayers' Charter is operating. We report annually to the Federal Parliament on this and make the information public.
> - Informing taxpayers of their rights, obligations and entitlements under the law.
> - Fair treatment of all who deal with the ATO and to the fair and professional use of our powers.
> - Treating taxpayers as individuals and recognising individual circumstances.
> - Providing high levels of service and support to taxpayers. We publish our service standards and our achievements against them.
> - Treating complaints seriously and learning from them. We report to the Federal Parliament on complaints including how well we resolve them.[111]

15.82 The ALRC's consultations indicated that the regulated community's acceptance of the *Taxpayers' Charter* is mixed. In one consultation it was observed that having a charter was worthwhile. However, it was noted that the Charter was not enforceable and that it should have been incorporated into legislation.[112] In another consultation it was stated that the Charter does not say much, iterates past practices, and does not mean much to tax avoiders.[113]

Consultations and submissions

15.83 In DP 65 the ALRC asked whether regulators should develop and publish service charters to ensure that they act ethically and respect the rights of regulated entities.[114]

15.84 Yeung submitted that:

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110 On the ATO's website at <www.ato.gov.au>.
111 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 1.19.
112 Australian Taxpayers' Association, *Consultation*, Melbourne, 27 February 2001.
113 R Krever, *Consultation*, Melbourne, 26 February 2001.
114 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Question 7–4.

> Express acknowledgement by regulators that they are obliged to act ethically would be welcome, with specific examples of what this entails. Care should be taken to avoid woolly fairly meaningless aspirational statements lacking in substance.[115]

15.85 The ATO noted in its submission that it had developed and published the *Taxpayers' Charter* and that it envisages an independent review of the *Taxpayers' Charter* at least every three years.[116] The first review was due in July 2000 but was delayed until late 2001 to allow the implementation of major changes to the tax system. NFO Donovan Research has completed the independent research component of the review of the *Taxpayers' Charter*. The ATO provided the ALRC with an extract from NFO Donovan's *Executive Summary Review of the Taxpayers' Charter*.[117] The review concluded that, notwithstanding limited exposure to the *Taxpayers' Charter*, taxpayers generally were positive towards the concept of a Charter. In this regard, there was a perception amongst some taxpayers that the ATO's service ethic had improved over the past several years and that the concept of the Charter had a positive impact on the culture of the ATO. The review noted that a minority of taxpayers were quite cynical about the *Taxpayers' Charter,* although much of the criticism was directed towards service standards rather than the principles contained in the Charter.[118]

15.86 Environment Australia supported the development of public statements of compliance policy to improve accountability and transparency. It submitted that the relationship of such policies to service charters, that normally cover a broader range of issues, depended upon the characteristics of each specific regulatory regime.[119]

Conclusion

15.87 The ALRC acknowledges the importance of regulator staff being trained in relation to the ethical issues that arise during the course of their duties. It also views the ATO's *Taxpayers' Charter* as a positive tool in enhancing the transparency and fairness of the regulatory framework within which the ATO operates. However, any requirement to develop and publish service charters is imbued with difficulty. Firstly, such a requirement would not ensure or guarantee ethical conduct by regulators and their staff. Secondly, it is difficult to prescribe any meaningful minimum content in relation to service charters, bearing in mind the arguable futility of broad aspirational mission statements. Further, in light of the other recommendations made by the ALRC in this Report in relation to the development and publication by regulators of enforcement policies and guidelines in relation to specific exercises of regulatory discretion, the significance of any mandated service charter may be diminished.

15.88 However, the ALRC's stance in making no recommendation as to the development and publication of service charters is not intended to discourage any regulator

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115 K Yeung, *Submission CAP 20*, 9 October 2002, 5.
116 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, 32.
117 NFO Donovan Research, *Executive Summary Review of the Taxpayers' Charter,* April 2002, cited in Ibid, para 2.76.
118 NFO Donovan Research, *Executive Summary Review of the Taxpayers' Charter*, April 2002, 4 cited in Ibid, para 2.76.
119 Environment Australia, *Submission CAP 26*, 24 October 2002**,** 4.

from developing and publishing such charters where regulators are of the view that such an exercise would be beneficial to the regulated community.

Impartiality

15.89 Impartiality requires the regulator to disregard all characteristics of the regulated entity and its activities except those that are objectively relevant to the issues that are the subject of the authorised regulation. As always, the determination of what is relevant is tempered by the subjective approach and experience of each regulator and its officers. In many respects impartiality is guarded by the bias rule (see discussion on bias in chapter 14).

15.90 Perceptions of partiality can also be avoided by having a system of review. In its report, *Better Decisions* the Administrative Review Council (ARC) acknowledged that internal review, by definition, cannot be completely impartial.[120] The ARC recommended that one means of lessening the likelihood of partiality was that internal review of an administrative decision be undertaken by internal review officers who are independent of the primary decision makers.[121] For a more detailed discussion of these issues see chapters 20 and 21.

15.91 Another method of encouraging impartiality in penalty processes could be a requirement of at least one tier of external review by either a court or a tribunal. See discussion in chapters 20 and 21.

Decision accuracy or quality

15.92 It could well be said that high quality decision making is not really an aspect of fairness but the objective of all regulation. A regulated community could soon weary of a well-meaning, procedurally fair system that keeps getting it wrong. As a procedural concept, it is said to be doing what is necessary to arrive at the right decision.[122] Other writers have distinguished between the concept of 'quality of outcomes' with the quality of the processes used to achieve them.[123]

15.93 In many respects this aspect of fairness equates with the common law obligation to act in accordance with the law[124] and within jurisdiction.[125]

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120 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report no 39 (1995), Commonwealth of Australia, Canberra, para 6.60.

121 Ibid, Recommendation 75.

122 T Makkai and J Braithwaite, 'Procedural Justice and Regulatory Compliance' (1996) 20(1) *Law and Human Behavior* 83, 84.

123 R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) Oxford University Press, Oxford, 314.

124 *Craig v South Australia* (1995) 184 CLR 163, 179.

125 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 180 ALR 1, 21.

15.94 A primary consideration in relation to decision accuracy and quality is who makes the penalty decision. Concerns have been expressed in consultations about the qualifications and training of regulators' officers.[126] Obviously, a regulator's officers must be properly trained and qualified as to what the law is and how it is to be applied. See section on training in chapter 14.

Statements of reasons

15.95 Regulators can improve the quality of their quasi-penalty decisions by providing statements of reasons.

15.96 There is no general common law obligation to provide reasons for decisions. However, there is a statutory obligation to provide reasons where an Act states that a person adversely affected by an administrative decision can request a statement of reasons for that decision. At present this occurs where:

- there is a right of merits review by the Administrative Appeals Tribunal;
- there is a right of judicial review by the Federal Court; or
- the legislation under which the decision is made requires the decision maker to give reasons when notifying the person affected by the decision. An example would be the *Social Security Act 1991* (Cth), s 1243(2), 1244 and 1261(3), which require reasons to be provided for a review by the Social Security Appeals Tribunal.

15.97 The benefits of statements of reasons include the following:[127]

- The practice of providing statements of reasons has the potential to improve the quality of primary decision making.[128] In particular, the possibility of disclosure of the decision-making process may encourage decision makers to reflect more carefully on their task and facilitate intra-agency quality assurance processes.[129]
- Providing statements of reasons can be seen as part of a general due process requirement. In many cases, the provision of reasons itself enables persons affected by a decision to understand why a decision was made. They may even be persuaded by the statement that the decision was justified, satisfying their sense of justice.[130]

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126 A Hudson, *Consultation*, Sydney, 26 February 2002.

127 As identified in W Martin, 'The Decision-maker's Obligation to Provide a Statement of Reasons, Facts and Evidence' (Paper presented at AIJA Tribunal's Conference, 10 September 1999).

128 For an example of a decision in which it was clear that representations had not been considered as required by the legislation, see *Chapman v Tickner* (1995) 55 FCR 316.

129 *Commonwealth of Australia v Pharmacy Guild of Australia* (1989) 91 ALR 65.

130 M Allars, *Introduction to Australian Administrative Law* (1990) Butterworths, Sydney, 129.

- Statements of reasons assist applicants in considering whether to pursue a review or appeal[131] by requiring the decision maker to explain its decision. This may help the applicant in identifying errors of law, incorrect findings of fact or in accepting the decision without challenge.

- Statements of reasons assist appellate or review tribunals and courts by exposing the basis on which the decision was made, the considerations which were taken into account, and the procedural steps taken by the decision maker.[132]

- The practice of providing statements of reasons may promote public confidence in the administrative process by disclosing the reasoning process of decision makers to the public.[133] The practice also provides the wider public, and government agencies, with examples of how the law is applied in particular fact situations.[134]

15.98 All these factors make statements of reasons important to the regulated, to review tribunals, appellate courts and to the administrative law system in general. It is, therefore, important that agency practice in providing statements of reasons is of a high standard. In any event, the production of statements of reasons is a discipline which helps improve the decision-making process itself and the regulators' own practices.

Preliminary view: reasons for decision

15.99 In DP 65, the ALRC proposed:

> **Proposal 7–4.** Unless expressly excluded by statute, the law should require regulators to provide written statements of their decisions and of the reasons for their decisions. Regulators should develop and publish guidelines for the form and timing of these decisions.

15.100 The ALRC also posed the following question:

> **Question 7–2.** Does the default requirement for regulators to provide written statements of their decisions and of the reasons for their decisions require legislative statement?

Consultations and submissions

15.101 ASIC submitted that the proposal was expressed too broadly. It said that the requirement to provide written statements of reasons should be limited to decisions which are final and operative. Decisions to commence litigation or to commence

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131 *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500, 507.
132 *Dalton v Commissioner of Taxation* (1985) 7 FCR 382.
133 *Commonwealth of Australia v Pharmacy Guild of Australia* (1989) 91 ALR 65.
134 H Katzen, 'Inadequacy of Reasons as a Ground of Appeal' (1993) 1 *Australian Journal of Administrative Law* 33, 36.

criminal, civil or administrative penalty actions should not be subject to such an obligation.[135] ASIC expressed the view that such decisions are not 'decisions' within the meaning of the *Administrative Decisions Judicial Review Act 1977* (Cth) (ADJR Act) or the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) as they are not substantive, nor final, operative and determinative of any issue of fact.[136]

15.102 ASIC considered that it was appropriate for the relevant legislation to expressly provide when a written statement of reasons is required[137] and that regard has to be had to public policy issues which exclude certain law enforcement decisions from this obligation.[138]

15.103 The ATO supported Proposal 7–4 with the exception of its application to the GIC.[139] The ATO agreed that taxpayers should be given reasons why penalties have been imposed on them. The ATO also supported the development and publication of guidelines for the form and timing of these statements, noting that it 'may add to the transparency of the process'.[140]

15.104 In answer to Question 7–2, the ATO considered it appropriate for each agency to develop its own guidelines on how it would advise clients of reasons for the application of penalties.[141]

15.105 The Customs Brokers & Forwarders Council of Australia agreed with the proposal:

> As regards any written statements of regulators for their decisions and the reasons for their decisions, it would be appropriate based upon the right of the party to obtain a Statement of Reasons in relation to any decision made under the provisions of the Administrative Decisions (Judicial Review) Act that any Infringement Notice provide the reasons/details to a level commensurate with what would be required to be provided in a Statement of Reasons.[142]

15.106 Professor Warren Pengilley essentially agreed with the ALRC's proposal[143] and Yeung strongly agreed with the ALRC's proposal. In answer to Question 7–2 she submitted:

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135 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 16.

136 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321. See also *Little River Goldfields NL v Moulds* (1991) 32 FCR 456, 462; *Giraffe World Australia Pty Ltd v Australian Competition and Consumer Commission* (1999) ATPR ¶41–669, 42,544; *Hutchins v Commissioner of Taxation* (1996) 65 FCR 269, 274, 276–277.

137 See for example, *Corporations Act 2001* (Cth), s 920F which provides that a banning order given to a person must be accompanied by a statement of reasons for the order.

138 See for example, *Administrative Decisions (Judicial Review) Act 1977* (Cth), Schedule 2(e) and (f), the provisions of which are set out at para 15.112 below.

139 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.63–2.66.

140 Ibid, para 2.63.

141 Ibid, para 2.67.

142 Customs Brokers & Forwarders Council of Australia Inc, *Submission CAP 17*, 16 September 2002, para 11.3.

143 W Pengilley, *Submission CAP 7*, 17 July 2002, para 4.5.1.

> As I understand it, under existing principles of administrative law, there is no general right to reasons for a decision. Hence legislative statement of the right to reasons is required in order to expressly affirm the existence of this right in relation to regulatory discretion.[144]

15.107 Environment Australia noted that, while the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) has a number of provisions that require administrative decisions to be notified in writing and for a statement of reasons to be provided within a specified time period, no particular form is specified. It stated that the ADJR Act might be an appropriate place for a legislative restatement and that it would be useful to have a generic set of core criteria and a standard format for statements of reasons which could form the basis for individual agency guidelines.[145]

Conclusion

15.108 Having regard to the submissions and caselaw in this area, the ALRC concludes that regulators should only be required to provide written reasons for decisions made by them which are substantive and have a quality of finality.

15.109 In *Evans v Friemann*, Fox J considered the meaning of 'decision' within the ADJR Act:

> For present purposes at least, it seems to me to amount to something of significance which is reasonably definite, which is final and conclusive for immediate purposes at least, which has manifested in some way, which emanates from an authoritative or responsible source, and which materially adversely affects another person or persons.[146]

15.110 In *Australian Broadcasting Tribunal v Bond*, Mason CJ stated that a reviewable decision under the ADJR Act

> will generally, but not always, entail a decision which is final or operative and determinative, at least in a practical sense, of the issue of fact falling for consideration. A conclusion reached as a step along the way in a course of reasoning leading to an ultimate decision would not ordinarily amount to a reviewable decision, unless the statute provided for the making of a finding or ruling on that point so that the decision, though an intermediate decision, might be accurately described as a decision under an enactment.[147]

15.111 In *Re Ricegrowers Co-Operative Mills Limited and Ronald Moore Bannerman and Trade Practices Commission*[148] Northrop J expressed the opinion that the determination of the Chairman of the Trade Practices Commission to serve a notice pursuant to s 155 of the *Trade Practices Act 1974* (Cth) on Ricegrowers, carried into effect by the

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144 K Yeung, *Submission CAP 20*, 9 October 2002, 5.
145 Environment Australia, *Submission CAP 26*, 24 October 2002, 4.
146 *Evans v Friemann* (1981) 35 ALR 428, 431.
147 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 337.
148 *Ricegrowers Co-operative Mills Ltd v Bannerman* (1981) 38 ALR 535.

service of that notice, constituted a decision within the meaning of the word in s 13 of the ADJR Act.[149] However, as the decision fell into a class of decisions set out in paragraph (f) of Schedule 2 to the Act, the appellant was not entitled under s 13 of the Act to request the Commission or the Chairman to furnish a written statement of reasons.

15.112 The ALRC agrees that certain law enforcement decisions, especially those of a preliminary nature, should not be subject to a requirement to provide written reasons. In this regard, the ALRC considers that the classes of decisions set out in paragraphs (e) and (f) of Schedule 2 to the ADJR Act, to which s 13 of the Act does not apply, should similarly be exempt from any recommendation made by the ALRC concerning the provision of written reasons.[150] Paragraphs (e) and (f) of Schedule 2 to the ADJR Act exempt the following classes of decision:

> (e) decisions relating to the administration of criminal justice, and, in particular:
>
> (i) decisions in connection with the investigation, committal for trial or prosecution of persons for any offences against a law of the Commonwealth or of a Territory;
>
> (ii) decisions in connection with the appointment of investigators or inspectors for the purposes of such investigations;
>
> (iii) decisions in connection with the issue of warrants, including search warrants, under a law of the Commonwealth or of a Territory;
>
> (iv) decisions under a law of the Commonwealth or of a Territory requiring the production of documents, the giving of information or the summoning of persons as witnesses;
>
> (v) decisions in connection with an appeal (including an application for a new trial or a proceeding to review or call in question the proceedings, decision or jurisdiction of a court or judge) arising out of the prosecutions of persons for any offences against a law of the Commonwealth or of a Territory.
>
> (f) decisions in connection with the institution or conduct of proceedings in a civil court, including decisions that relate to, or may result in, the bringing of such proceedings for the recovery of pecuniary penalties arising from contraventions of such enactments, and, in particular:
>
> (i) decisions in connection with the investigation of persons for such contraventions;
>
> (ii) decisions in connection with the appointment of investigators or inspectors for the purposes of such investigations;
>
> (iii) decisions in connection with the issue of search warrants or seizure warrants issued under Division 1 of Part XII of the Customs Act 1901 under enactments; and

149 *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 13 allows persons to obtain written reasons for decision where that decision is reviewable under the Act.

150 Note that Recommendation 22–1 proposes a slight wording change to Sch 2(f).

(iv) decisions under enactments requiring the production of documents, the giving of information or the summoning of persons as witnesses.

15.113 Whilst Schedule 2 to the ADJR Act excludes decisions relating to the administration of criminal justice and the institution of civil proceedings from the obligation to provide reasons under s 13 of the Act, it does not specifically exclude decisions relating to the commencement of administrative proceedings. The ALRC considers that a regulator's decision to commence administrative proceedings to impose a quasi-penalty should also be exempt from any requirement to provide a written statement of reasons.[151]

15.114 Some penalties arise automatically by operation of law, but the regulators have legislative power to fully or partially remit those penalties.[152] See discussion on remission of penalties and factors relevant to remissions of penalties in chapter 17. Clearly a decision not to remit a penalty, or to remit it in part only, is capable of directly adversely affecting the person in respect of whom the decision was made and is a decision which is final and determinative of issues of fact. See Recommendations 23–3 to 23–5 on the review of remission decisions.

15.115 Taking into account the submissions and the analysis above, the ALRC's original proposal needs to be:

- amended to make it clear that the decisions in respect of which regulators are required to provide written notification of decisions and written reasons for decision are decisions resulting in the imposition of a quasi-penalty; and

- extended to apply also to decisions to remit, or remit in part only, administrative penalties which arise automatically by operation of law as these decisions are final or determinative of issues of fact.

15.116 See Recommendations 15–6 and 15–8 below.

15.117 Accordingly, the formulation of the ALRC's recommendations renders it unnecessary to stipulate any exceptions as to the scope of the requirement to provide reasons in relation to:

- true administrative penalties which arise automatically by operation of law and do not entail any decision making on the part of a regulator;

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151 See Recommendation 22–1 in relation to Sch 2(f) of the ADJR Act and Recommendations 23–1 and 23–2 in relation to Sch 1 of the ADJR Act.

152 For example, penalties for failure to comply with the obligations under the new tax system are imposed under the *Taxation Administration Act 1953* (Cth), Part 4-25 of Sch 1. The Commissioner has the power to remit these penalties.

- the classes of decision specified in the ADJR Act Schedule 2, paragraphs (e) and (f); or
- decisions in connection with the institution or conduct of administrative proceedings to impose quasi-penalties;

as the last two categories fall outside the classes of decision caught by the Recommendations.

15.118 An Advisory Committee member questioned the applicability to the tax regime of the requirement to give written reasons for a decision not to remit a penalty as a decision not to remit results in the automatic imposition of the penalty.[153] The ALRC remains of the view that, as a matter of general principle, where a regulator exercises discretion in making a decision not to remit, it should be required to provide written reasons of that decision subject to statutory exclusion or modification.[154] The fact that the outcome of a decision not to remit is that the automatic penalty previously imposed remains in effect does not detract from the fact that the regulator has made a final and determinative decision following the exercise of discretion.

15.119 The obligation to provide reasons should not extend to a decision to issue an infringement notice as such a decision is not final or determinative of any issue of fact. However, as a decision to issue an infringement notice is not by definition 'a decision to impose a quasi-penalty' (or a decision in relation to remission) it falls outside the scope of the ALRC's recommendations and renders unnecessary any express exclusion from the scope of the requirement to provide reasons.

15.120 A strict time period for providing written statements of reasons should be provided for in legislation, rather than in guidelines. Under the AAT Act and the ADJR Act a decision maker must provide a written statement of reasons as soon as practicable but no later than 28 days after receiving a request.[155] This time period should also apply by default to the ALRC's recommendations concerning written reasons for a decision by a regulator. There is merit in adopting the time frames used in the ADJR Act and the AAT Act as a default provision, for the sake of consistency. Of course, it is still open for legislation governing individual regulatory schemes to provide for a shorter time frame and it also remains open for regulators to explain in individual guidelines their particular policy in relation to the timing of these statements. For example, a regulator may develop a policy in relation to decisions involving the imposition of particular penalties where it will aim to have the reasons provided well before the 28 day period.

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153 Advisory Committee members, *Advisory Committee meeting*, 17 October 2002.

154 For example, *Taxation Administration Act 1953* (Cth), s 14ZZB modifies the right under the *Administrative Appeals Tribunal Act 1975* (Cth) to seek reasons for decision.

155 *Administrative Appeals Tribunal Act 1975* (Cth), s 28(1), *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 13(2).

15.121 The ALRC notes that, if the decision is one in respect of which an application for review has been made to the AAT, the AAT has power under the AAT Act to stay the operation or implementation of a decision under review.[156]

15.122 Both the AAT Act and the ADJR Act provide a time limit within which persons are to make a request for a written statement of reasons. Where a decision was recorded in writing and set out in a document, the person must request written reasons for the decision within 28 days after the document was provided to the person.[157] This time period should also apply by default to the ALRC's recommendations concerning written reasons for decisions. See Recommendations 15–7(g) and 15–9(g) below.

15.123 The provision of written statements of decisions and of the reasons for decisions is a fundamental aspect of fairness and has significant implications for the ability of individuals to seek review of decisions and to appeal those decisions.[158] As a requirement to provide reasons has a significant impact on individual rights, the proposed default requirement requires legislative statement, and should be implemented in primary legislation.[159] See Recommendations 15–6 and 15–8 below.

15.124 The ALRC notes the submission of Environment Australia that the ADJR Act might be an appropriate place for a legislative restatement. However, the ALRC is of the view that a Regulatory Contraventions Statute of general application is the most appropriate location for all legislative restatements and default provisions relating to the imposition of civil and administrative penalties. See chapter 6 for a discussion of the Regulatory Contraventions Statute.

15.125 Another reason justifying the implementation of this recommendation by way of primary legislation is consistency. Requirements to provide reasons for decision often appear in primary legislation.[160]

15.126 An advantage of having the requirement to provide reasons implemented in primary legislation is that s 25D of the *Acts Interpretation Act 1901* (Cth) would apply. Section 25D provides that:

> Where an Act requires a tribunal, body or person making a decision to give written reasons for a decision, whether the expression 'reasons', 'grounds' or any other expression is used, the instrument giving the reasons shall also set out the findings on

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156 *Administrative Appeals Tribunal Act 1975* (Cth), s 41(2).

157 *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 13(5)(a), *Administrative Appeals Tribunal Act 1975* (Cth), s 28(1A)(a). If not notified in writing the person must request reasons within a reasonable time of the decision: *Administrative Decisions (Judicial Review) Act 1977* (Cth), s13(5)(b) and *Administrative Appeals Tribunal Act 1975* (Cth), s 28(1A)(a).

158 The benefits of statements of reasons are discussed at para 15.97 above.

159 See discussion in ch 6 as to when primary legislation should be used as a method of implementation.

160 See *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 13 and *Administrative Law Act 1978* (Vic), s 8. See also *Administrative Procedure Act 1946* (USA), s 8b and *The Tribunals and Inquiries Act 1992* (UK), s 10.

material questions of fact and refer to the evidence or other material on which those findings were based.

15.127 A question that arises is whether regulators should be under an obligation to provide written reasons for penalty decisions automatically, irrespective of a request by the person affected. It appears to the ALRC that the key issue is that persons are notified of their right to receive written reasons for decision. If they receive notification they can request the reasons, should they so choose. However, in cases where they do not choose to request written reasons for decision, the resources of the regulator that would have otherwise been directed to preparing the written statement of reasons can be channelled elsewhere.

15.128 The need to notify persons of the right to receive written reasons for decisions requires Proposal 7–3 to be amplified by stipulating the minimum content of a written notification of a decision to impose a quasi-penalty as well as the minimum content of a written notification of a decision not to remit, or remit in part only, an administrative penalty. For example, written notification of such decisions should include the notification of the right to receive reasons for the decision and a brief description of the grounds upon which the decision was based. The description of grounds is not meant to be a replication of the full reasons for decision. It may, for example, simply cite the provision in the legislation pursuant to which the quasi-penalty is imposed and state the conclusion formed by the regulator which led to the decision.

15.129 Further, having regard to the recommendation of the Pearce Report that penalties should not commence at least until fourteen days after notification to the jobseeker,[161] the notice advising of a decision to impose a quasi-penalty should specify the date on which the quasi-penalty will come into effect or the period that must expire before the quasi-penalty can come into effect. As discussed in chapter 14, what is appropriate will depend on the nature of the quasi-penalty and the purpose for which it is imposed. Where the imposition of a quasi-penalty is intended to prevent risk to the public or reduce public harm it will generally be inappropriate for the notice advising of a decision to impose a quasi-penalty to specify a time period that must elapse before the quasi-penalty will come into effect. However, it will generally be appropriate for a notice advising of a decision to withhold or reduce a payment to a person to specify a time period which must elapse before the quasi-penalty comes into effect.

15.130 Written notification of decisions to impose quasi-penalties and not to remit, or remit in part only, administrative penalties, should also provide details of the alleged offence or contravention and inform persons of their rights of appeal and review, and how to seek such appeal and review.

15.131 Clearly, a notice advising of a decision to impose a quasi-penalty should not take the form of a letter which deals with other matters. It is preferable that, if the re-

161 *Independent Review of Breaches and Penalties in the Social Security System*, <www.breachreview.org>, 22 October 2002, para 7.20–7.22.

cipient of the notice is from a non-English speaking background, the header of the notice at least, identifying the notice as a penalty notice, is in the appropriate language.

15.132 Similarly, the Pearce Report recommended that penalties should be notified in writing, with the use of words and format that clearly draw attention to their causes and consequences.[162]

15.133 The Government's response to this recommendation was:

> Adverse decisions made under the social security law are notified to customers in writing and sent to their last recorded address. These letters state the decision and the impact, if any, on the customer's ongoing payment. The letters all refer to the customer's review and appeal rights and what they need to do to exercise those rights.[163]

15.134 The Pearce Report further recommended that the notification should also provide information about specific sources of emergency relief and of advice from a welfare rights worker or other independent adviser.[164] The Government's response indicates that such customised notices would not be currently feasible.

> To be of practical use to customers the information would need to refer to locally available services and be continually updated. Contact details on local emergency relief and other community services should be available from the customer's Centrelink office.[165]

15.135 See Recommendations 15–7 and 15–9 below in relation to the contents of a written notification of decision.

Recommendations

Recommendation 15–6. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, where a regulator makes a decision to impose a quasi-penalty, it is required to:

(a) provide written notification of the decision in accordance with Recommendation 15–7; and

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162 Ibid, rec 26(2).

163 Secretary of the Commonwealth Department of Family and Community Services, *Submission to the Senate Community Affairs References Committee Inquiry into Participation Requirements and Penalties* (2002), Commonwealth Department of Family and Community Services, Appendix F.

164 *Independent Review of Breaches and Penalties in the Social Security System*, <www.breachreview.org>, 22 October 2002, rec 26(3).

(b) provide written reasons for the decision upon request, as soon as practicable, and no later than 28 days after the request was made.

Recommendation 15–7. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, written notification of a regulator's decision to impose a quasi-penalty should state the following matters (unless clearly inappropriate in the circumstances):

(a) To whom it is issued;

(b) By whom the decision was made and by whom the notice is issued;

(c) The dates on which the decision was made and the notice is issued;

(d) Details of the alleged offence or contravention;

(e) The regulator's decision to impose the quasi-penalty and a brief description of the grounds upon which the decision was based;

(f) The right to obtain written reasons for the decision upon request;

(g) That a request to obtain written reasons for the decision must be made within 28 days of receipt of the notice;

(h) The amount of any monetary quasi-penalty to be imposed and of any benefit to be withheld, and the effect of any non-monetary quasi-penalty to be imposed;

(i) The date on which the quasi-penalty will take effect or the period that must expire before the quasi-penalty can come into effect;

(j) The rights of review and appeal, and how to seek such review and appeal;

(k) Contact details for further information; and

(l) Any other information appropriate in the circumstances.

Recommendation 15–8. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, where a regulator makes a decision not to remit, or to remit in part only, an administrative penalty, it is required to:

165 Secretary of the Commonwealth Department of Family and Community Services, *Submission to the Senate Community Affairs References Committee Inquiry into Participation Requirements and Penalties* (2002), Commonwealth Department of Family and Community Services, Appendix F.

(a) provide written notification of the decision in accordance with Recommendation 15–9; and

(b) provide written reasons for the decision upon request, as soon as practicable, and no later than 28 days after the request was made**.**

Recommendation 15–9. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, written notification of a regulator's decision not to remit, or to remit in part only, an administrative penalty should state the following matters (unless clearly inappropriate in the circumstances):

(a) To whom the notice is issued;

(b) By whom the decision was made and by whom the notice is issued;

(c) The dates on which the decision was made and the notice is issued;

(d) The regulator's decision not to remit the penalty, or to remit it in part only and the extent of the remission;

(e) A brief description of the grounds upon which the decision was based;

(f) The right to receive written reasons for the decision upon request;

(g) That a request to obtain written reasons for the decision must be received within 28 days of receipt of the notice;

(h) The effect of the decision not to remit or to remit in part only;

(i) The date by which any payment must be made;

(j) The rights of review and appeal, and how to seek such review and appeal;

(k) Contact details for further information; and

(l) Any other information appropriate in the circumstances.

Guidelines for statements of reasons

15.136 In DP 65 the ALRC proposed that regulators should develop and publish guidelines for the form and timing of written statements of reasons for decisions.[166]

166 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Proposal 7–4.

The Administrative Review Council (ARC) has prepared two documents on this topic: *Practical Guidelines for Statements of Reasons*[167] (*Practical Guidelines*) and *Commentary on the Practical Guidelines for Preparing Statements of Reasons*.[168] The *Practical Guidelines* are not legally binding. They set out the ARC's view on preparing statements of reasons given the terms of the ADJR Act and the AAT Act and relevant decisions of courts and tribunals.[169] The *Commentary on the Practical Guidelines for Preparing Statements of Reasons* provides a fuller explanation of the law on reasons than is contained in the *Practical Guidelines.*

15.137 The *Practical Guidelines* addresses the following seven questions relevant to the preparation of statements of reasons by decision makers:

1) Do I have an obligation to prepare a statement of reasons?

2) Can I refuse to provide a statement of reasons?

3) What must be in my statement of reasons?

4) How and when should my statement of reasons be prepared?

5) How should I treat recommendations, reports or submissions in my statement of reasons?

6) How should I treat confidential information in my statement of reasons?

7) What happens if my statement is not adequate?

15.138 In addressing what must be in a statement of reasons the *Practical Guidelines* state that, in addition to complying with any particular requirements for statements of reasons set out in legislation, in essence a statement must:

- Set out the decision; and
- List the findings on material facts; and
- Refer to the evidence for the findings; and
- Give the reasons for the decision.[170]

15.139 The *Practical Guidelines* provide guidance as to what is required to satisfy each of the above elements of a statement.

15.140 In view of the substantive work that has been done by the ARC in this area, if the ALRC were to make a recommendation that regulators had to publish guidelines in relation to the form and timing of statements, much of the material contained in the

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167 Administrative Review Council, *Practical Guidelines for Preparing Statements of Reasons*, 1 June 2000.
168 Administrative Review Council, *Commentary on the Practical Guidelines for Preparing Statements of Reasons*, 1 June 2000.
169 Administrative Review Council, *Practical Guidelines for Preparing Statements of Reasons*, 1 June 2000, 2.
170 Ibid, 10.

ARC guidelines would be duplicated, although such a recommendation would create an opportunity for customisation of particular guidelines to suit each regulator. On balance, when preparing statements of reasons, regulators should have regard to the *Practical Guidelines* prepared by the ARC, should provide their staff with training on those *Practical Guidelines*, and be given the option of developing and publishing supplementary customised guidelines having regard to the individual requirements of the legislation they administer. See Recommendations 15–10 and 15–11 below. Environment Australia's submission that it would be useful to have a generic set of core criteria which could form the basis for individual agency guidelines is accommodated by the ALRC's recommendation which regards the *Practical Guidelines* as setting out the generic set of core criteria.

Recommendations

Recommendation 15–10. When preparing statements of reasons, regulators should have regard to the *Practical Guidelines for Preparing Statements of Reasons* and the *Commentary on the Practical Guidelines for Preparing Statements of Reasons* (Administrative Review Council, June 2000). Where appropriate, regulators may choose to supplement these Guidelines with customised guidelines addressing any requirements specific to the legislation which they administer.

Recommendation 15–11. Regulators should ensure that training is provided to staff who will be called upon to prepare statements of reasons to ensure that they are familiar with the *Practical Guidelines for Preparing Statements of Reasons* and the *Commentary on the Practical Guidelines for Preparing Statements of Reasons* (Administrative Review Council, June 2000) and any customised guidelines referred to in Recommendation 15–10.

Access

15.141 Accessibility to information was not one of the elements of procedural justice referred to by Makkai and Braithwaite, but is nevertheless a significant aspect of fairness. It is fundamental that persons have easy access to legislation, to information provided by the regulator about how a penalty scheme may operate, and, where appropriate, have access to the regulator in order to obtain that information.

15.142 Specific issues are raised by the nature of the regulated community and the presence of particular groups within it. A number of groups may require special consideration in penalty schemes; for example, people from a non-English speaking background, Aboriginal and Torres Strait Islander people, people with a disability, or young people. In some cases, people may require special treatment so that they can understand penalty notices sent to them. This may include the provision of interpreter ser-

vices for people from a non-English speaking background. In other cases people may not be able to access legislation or lack the physical or intellectual capacity to contact the regulator. Some disadvantaged groups are consistently over-represented in regulator enforcement statistics.[171]

15.143 As discussed in chapter 6, one of the recommendations in *Access to Justice: An Action Report*[172] was the need for greater access to legislation. The accessibility of primary legislation, delegated legislation, quasi-legislation and informal guidelines and information are discussed in chapter 6. In particular, recommendations are made aimed at increasing the accessibility of guidelines.[173]

15.144 At present, many regulators make guidelines and policies available on their websites. While not all sectors of a regulated community may have access to the internet,[174] regulator websites provide an ideal location for much of this information. The ALRC's research has revealed that much of this information is not currently available on regulator websites. Where it is, it is inconsistently identified and sometimes transient. Further, where the information is available on the site, it is difficult to access. Many regulator websites would benefit from having a link on the front page to information on penalties. See Recommendations 6–2 to 6–4 in relation to the development and publication of guidelines.

171 See, for example, Australian Council of Social Service and National Welfare Rights Network, *Doling out Punishment; The Rise and Rise of Social Security Penalties* (2000), ACOSS, Sydney.

172 Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (1994), Commonwealth of Australia.

173 See Recommendations 6–2 to 6–4.

174 The lack of access to the internet by rural groups was raised in consultation: National Farmers' Federation, *Consultation*, Canberra, 4 September 2002.

16. Fairness in Dealings with Regulators

Contents

Introduction

16.1 This chapter discusses fairness issues that arise in dealings with regulators, specifically in the contexts of negotiations with the regulated, and the acceptance by regulators of enforceable undertakings. The transparency, proportionality and consistency of such dealings are addressed. Adherence to fairness principles in dealings with regulators is particularly pertinent where there is a power imbalance between the respective bargaining strengths of the regulator and the regulated.

16.2 This chapter also addresses fairness issues arising from regulators' use of the media.

Negotiations with the regulated

16.3 In the context of penalties, negotiations with the regulated can take place either as a form of alternative dispute resolution, absent any court involvement, or where parties submit agreed penalties to the Court for its approval. Enforceable undertakings, which are negotiated without the necessity of court involvement, are discussed at para 16.44–16.86 below. Agreed penalties involving court approval are discussed at para 16.11–16.43 below and in chapter 30.

16.4 Resolution of disputes by informal settlement rather than by court process adopts a 'bargain' and 'negotiate' model of decision making. Its critical feature is the

achievement of agreement and consensus between disputing parties, ideally given freely and on an informed basis.

16.5 Courts,[1] regulators,[2] and lawyers[3] have each stated that negotiated outcomes are preferable to protracted litigation. Alternative dispute resolution advocates seek to emphasise its informality (implying that it is less alienating and intimidating to ordinary citizens), low cost, ease of access and speed of operation.

16.6 The public interest in the ACCC negotiating settlements has been the subject of judicial comment. In *NW Frozen Foods v Australian Competition and Consumer Commission*, Burchett and Kiefel JJ stated:

> There is an important public policy involved. When corporations acknowledge contraventions, very lengthy and complex litigation is frequently avoided, freeing the courts to deal with other matters, and investigating officers of the Australian Competition and Consumer Commission to turn to other areas of the economy that awaits their attention.[4]

16.7 However, a number of commentators have voiced some concern about the operation of negotiated penalties, particularly in terms of accountability, proportionality and procedural fairness. These 'constitutional principles' are inevitably concerned in the practice of regulatory enforcement because, ultimately, it involves the exercise of coercive power by the state in its dealings with citizens.[5] Where the state negotiates with a citizen, there appears to be an inherent institutional imbalance between their respective bargaining positions. This may be particularly true in circumstances where:

- the regulated is seeking to secure some benefit or privilege from the regulator, such as the grant of a licence to carry out the regulated activity; or
- as part of the process of enforcement, the regulated is negotiating with the regulator in relation to the regulator's response to suspected non-compliance.

16.8 In both contexts, the regulator appears to have the upper hand, with the regulated entity hoping that the regulator's discretion will be exercised in its favour.[6]

16.9 Of course, not all regulated communities are the same, and even within a community, members can differ greatly. In some areas of regulation, the regulated entities are well-resourced and sophisticated commercial parties who are not easily 'bul-

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1 See *Trade Practices Commission v Allied Mills Industries Pty Ltd (No 4)* (1981) 37 ALR 256.

2 See M Carmody, *'The Role of Settlements in Good Administration': Corporate Tax Association Speech Luncheon, 23 July 1998*, Australian Taxation Office, <www.ato.gov.au/newsroom.asp>, 1 June 2001.

3 The Victorian Bar Association, *Consultation*, Melbourne, 8 October 2001.

4 *NW Frozen Foods v Australian Competition & Consumer Commission* (1996) 71 FCR 285, 290–291.

5 K Yeung, 'Negotiated Compliance Strategies: The Quest for Effectiveness and the Importance of Constitutional Principles' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 8 June 2001).

6 R Abel, *The Politics of Informal Justice* (1982) Academic Press, Los Angeles, 271 cited in K Yeung, 'Negotiated Compliance Strategies: The Quest for Effectiveness and the Importance of Constitutional Principles' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 8 June 2001), 9.

lied' into agreement and are acutely aware of the relevant legal rules.[7] In other areas of regulation, the regulated community is not so well resourced and can be at an obvious disadvantage.[8]

16.10 In defence of these negotiated penalties, it is often stated that at any time either party can invoke the formal court process in order to determine the matter. However, the regulated person or company may face significant pressure to agree to a settlement with the regulator rather than risk a harsher penalty and significant costs for an uncertain outcome. In such circumstances, it may be difficult to characterise the resulting settlement as one based on consent.[9]

Settlement

16.11 Settlement of proceedings in court generally involves a settlement between the regulator and the defendant, which the two parties then present to the Court for its approval and conversion into formal orders. The approach of reaching agreement with a regulator upon penalty has become popular in recent years. It has the advantage of predictability, which regulated communities appreciate, and it saves both the regulator and the alleged offender the cost and uncertainty of contested litigation. These settlements are extensively used by the ACCC.[10]

16.12 However, a number of concerns have been raised in relation to this process. Finkelstein J of the Federal Court recently observed:

> One consequence of this practice is to make it more difficult for a court to determine whether the penalty which has been agreed is within the range the court would fix. Moreover, decisions which sanction agreed penalties are not a good yardstick against which to measure whether what is agreed in later cases is within the range of appropriate penalties. This is because the agreed penalty need not be the penalty that would have been imposed by the court, although the penalty was not inappropriate.[11]

16.13 The lack of transparency of negotiated settlements may also reinforce the perception that negotiated penalties are not adequately grounded in fact and legal princi-

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7 R Mnookin and L Kornhauser, 'Bargaining in the Shadow of the Law' (1979) 88 *Yale Law Journal* 950 cited in K Yeung, 'Negotiated Compliance Strategies: The Quest for Effectiveness and the Importance of Constitutional Principles' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 8 June 2001), 10.

8 For example, social security recipients or individual taxpayers.

9 K Yeung, 'Negotiated Compliance Strategies: The Quest for Effectiveness and the Importance of Constitutional Principles' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 8 June 2001).

10 Agreed penalties are also discussed in ch 30.

11 *Australian Competition and Consumer Commission v ABB Transmission & Distribution Ltd* (2001) 23 ATPR ¶41–815, 42,936.

ple.[12] It has also been suggested that in some cases negotiated penalties are relatively low.[13]

16.14 Several judgments appear to suggest that the Court is doubtful about the authenticity of the regulated entity's formal admissions in negotiated penalty cases but has nevertheless endorsed the proposed settlement in recognition that the admissions were made to enable the proceedings to be settled expeditiously.[14] It has been observed that:

> The consequent reduction in transparency and degree of accountability need not be a cause of concern, however, provided that the court conducts a genuine and effective review of penalty agreements and provides clear reasoning for approving them …[15]

16.15 In answer to concerns about negotiated settlements discussed in DP 65,[16] the ACCC stated that transparency of the negotiation process was enhanced by the fact that it had published policies on its website, namely its *Cooperation Policy for Enforcement Matters*[17] and its *Leniency Policy for Cartel Conduct*[18] which set out the factors that the ACCC will consider when reaching agreement on negotiated outcomes.[19]

16.16 The ACCC emphasised the thoroughness of its submissions as to penalty in answer to concerns about the level of material placed before the Court. It stated that a submission as to penalty will typically include the following:

(a) The formal pleadings filed by the parties;

(b) A broad outline of the alleged contraventions and relevant sections of the *Trade Practices Act 1974* (Cth);

(c) An Agreed Statement of the background facts, including a history of the corporate respondents, the extent of involvement of directors, the interlocutory history of the matter and the circumstances giving rise to the statement of agreed penalties;

(d) A statement of the relevant market and the way competition in that market has been injured by the conduct alleged;

(e) A statement as to the applicable principles as to penalty;

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12 K Yeung, *The Public Enforcement of Australian Competition Law* (2001), Australian Competition and Consumer Commission, Canberra, 92.

13 The Hon Justices Merkel, Finkelstein and Goldberg, *Consultation*, Melbourne, 21 May 2001.

14 *Australian Competition and Consumer Commission v NW Frozen Foods Pty Ltd* (1996) 141 ALR 640.

15 K Yeung, *The Public Enforcement of Australian Competition Law* (2001), Australian Competition and Consumer Commission, Canberra, 145.

16 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, para 7.150–7.169 and Proposal 7–6.

17 Australian Competition & Consumer Commission, *Cooperation Policy for Enforcement Matters*, 1 July 2002.

18 Australian Competition & Consumer Commission, *Draft ACCC Leniency Policy for Cartel Conduct* (2002).

19 Australian Competition & Consumer Commission, *Submission CAP 24*, 15 October 2002, 16.

(f) A statement about the application of those penalties to the facts of the matter before the court;

(g) A statement about the ACCC's views as to the quantum of penalty;

(h) In cases where the parties do not agree on certain matters, affidavits are filed outlining each party's submissions about the contested matters.[20]

16.17 The comprehensive nature of documentation filed in support of a joint penalty submission was the subject of the following comments by Finkelstein J in *ACCC v Foamlite (Australia) Pty Ltd*:

> The foregoing is a very brief summary, taken from the voluminous material that has been filed with the Court, of the facts that support the submission that I should impose penalties and injunctions as have been suggested by the parties.[21]

16.18 The courts have stated that they do not merely 'rubber-stamp' agreements made by parties. Spender J in *ACCC v Sundaze Pty Ltd*, while still approving the parties' agreement, stated that:

> Any agreement between the ACCC and a respondent as to the appropriate penalty, or appropriate range of penalties, is highly relevant to what the Court ought to impose by way of penalty, but in no way is the Court dictated to by any such agreement between the parties; nor is the penalty imposed by anybody other than the Court.[22]

16.19 In *ACCC v Colgate-Palmolive Pty Ltd* Weinberg J stated:

> I have reached that conclusion in the light of the extensive body of authority which holds that where the ACCC and a respondent have reached a negotiated settlement in relation to a contravention of Pt IV of the Act, and the amount proposed is, broadly speaking, within the 'permissible range' (having regard to all of the circumstances), the Court should not depart from that agreed figure.[23]

16.20 Agreed penalties are sometimes criticised for being too low.[24] In *ACCC v North West Frozen Foods*,[25] Heerey J refused to give effect to an agreement as to the imposition of a penalty upon a corporation, and instead imposed a penalty approximately 30% higher than that which had been agreed between the parties ($1.2 million compared with $900,000). On appeal, this decision was set aside with the Full Court of the Federal Court holding, in effect, that, as the penalty agreement between the parties lay within the appropriate range, there was no reason for the Court to impose a higher

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20 Ibid, 16.

21 *ACCC v Foamlite (Australia) Pty Ltd* (1998) 20 ATPR ¶41–615, 40,744 cited in Australian Competition & Consumer Commission, *Submission CAP 24*, 15 October 2002, 17.

22 *Australian Competition and Consumer Commission v Sundaze* [2000] ATPR ¶41–736, 40,539.

23 *Australian Competition and Consumer Commission v Colgate Palmolive Pty Ltd* [2002] FCA 619, para 24.

24 The Hon Justices Merkel; Finkelstein and Goldberg, *Consultation*, Melbourne, 21 May 2001.

25 *Australian Competition and Consumer Commission v NW Frozen Foods Pty Ltd* (1996) 141 ALR 640 (Heerey J).

penalty, notwithstanding that it might have done so if considering the matter in the absence of any agreement between the parties.[26]

16.21 Another concern raised by commentators is that settlement is reserved only for certain sections of the regulated community. This was of particular concern in relation to tax administration.

> Settlements have become topical recently given the portrayal of our operations in the recent *Sunday* programs. If you were to believe the imagery portrayed there, settlements are synonymous with the ATO being soft on the big end of town.[27]

16.22 The ATO rejected the proposition that settlement is reserved for certain sections of the regulated community. It stated that settlement is available to any taxpayer.[28]

> The use of appropriate settlement procedures is consistent with the good management of the tax system, overall fairness and the best use of ATO and community resources … That settlements form part of the good management of the tax system and the community's resources has long been recognised by the Courts.[29]

16.23 Mr Alan Ducret, the Queensland Regional Director of the ACCC, summarised concerns expressed by other commentators in relation to unequal bargaining power and accountability issues in the following way:

> If the ACCC comes to Court with a negotiated settlement, it must presumably feel bound to honour that agreement. … Can the Court rely upon the ACCC for independent assistance in such circumstances? If the Court is presented with negotiated penalty after negotiated penalty, can the Court really be said to have set the benchmark for penalties, or is judicial consideration of penalties being lost? Arriving at a settlement of proceedings involving pecuniary penalties could mean that consent may be coerced or may be given to avoid the detection of other contraventions and higher penalties. Settlement may sometimes be at the expense of justice.[30]

16.24 Jeffrey Hilton SC suggested that:

> It seems to me effective responsibility for deciding the appropriate quantum of penalty has shifted from the Federal Court to the ACCC. Moreover, the ACCC is currently in a position of great negotiating strength when dealing with a contravener on the quantum of penalty. The reason is that, because so few cases have been contested in the last seven or eight years, there is great uncertainty about what a Court would do

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26 *NW Frozen Foods v Australian Competition & Consumer Commission* (1996) 71 FCR 285. See also *Custom Credit Corporation Ltd (In Liquidation) v The Department of Tourism, Racing and Fair Trading* [2002] QSC 253 (Fryberg J, 12 August 2002) where the Queensland Supreme Court refused to accept an agreed penalty of $40,000 and, instead, imposed a penalty of $300,000.

27 M Carmody, *'The Role of Settlements in Good Administration': Corporate Tax Association Speech Luncheon, 23 July 1998*, Australian Taxation Office, <www.ato.gov.au/newsroom.asp>, 1 June 2001.

28 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.79.

29 M Carmody, *'The Role of Settlements in Good Administration': Corporate Tax Association Speech Luncheon, 23 July 1998*, Australian Taxation Office, <www.ato.gov.au/newsroom.asp>, 1 June 2001.

30 A Ducret, 'Courts — Their Role in Regulatory Arrangements' (Paper presented at Penalties; Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001).

> when confronted with a serious breach of the Act. Hence most litigants prefer to avoid that risk or uncertainty by reaching agreement with the ACCC.[31]

16.25 The Australian Government Solicitor (AGS) rejected the assertion that there has been a shift in responsibility from the Federal Court to the ACCC.[32] AGS stated that the Federal Court has no hesitation in telling the ACCC or other parties that there is an inadequacy in the material before it, or that an inadequate penalty amount is sought, for example, Lindgren J in *ACCC v Roche Vitamins Australia Pty Ltd*[33] sought more information prior to making his decision as to penalty.

16.26 Similarly, the ACCC rejected the proposition that responsibility for determining penalties had shifted from the Federal Court to the ACCC, stating that it was ultimately for the Court to determine whether a negotiated outcome was acceptable, not the ACCC.[34]

16.27 The ACCC submitted that the Model Litigant Policy mitigated concerns about parties being improperly pressured into settlement rather than exercising their right to trial. It stated:

> The Policy ensures that where there is not sufficient likelihood of success, proceedings will not be instituted so that there will be no occasion for a negotiated penalty.[35]

16.28 However, the ACCC states that it will not agree upon an appropriate quantum of penalty until the contravener has disclosed the full circumstances of the alleged contravention including the identities of any other parties which may have been involved in that contravention. However, by opening negotiations with a regulator, the alleged offender could effectively lose the opportunity to contest the merits of the matter at a hearing before the Court.[36] Of course, it is always open to the regulated to decide not to continue negotiations and risk its chances in a contested hearing in court. However:

- by already having disclosed its hand to the regulator, the person's forensic position is weakened;[37]

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31 J Hilton, 'Principles of Fairness and Accountability' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001), 6.

32 Australian Government Solicitor, *Consultation*, Sydney, 27 August 2002.

33 *Australian Competition & Consumer Commission v Roche Vitamins Australia Pty Ltd* (2001) ATPR ¶41–809.

34 Australian Competition & Consumer Commission, *Submission CAP 24*, 15 October 2002, 14.

35 Ibid, 16.

36 J Hilton, 'Principles of Fairness and Accountability' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001), 6.

37 The exclusion of evidence of settlement negotiations is provided for in the *Evidence Act 1995* (Cth), s 131. The admissibility, in a later court proceeding, of documents/admissions which were given in the course of settlement negotiations has been the subject of much caselaw: see, for example, *Rush & Thompkins v GLC* [1989] 1 AC 1280. The rule has recently been considered in relation to administrative decisions: see *Brown v Commissioner of Taxation* [2001] FCA 318 and *White v Overland* [2001] FCA 1835.

- the person is then faced with the uncertainty posed by court proceedings;
- the person may lose the benefit of the discount or penalty which a party cooperating with the regulator, rather than litigating with that organisation, will gain from the Court.

16.29 These consequences may not be inherently unfair. However, it has been noted that there is a distinct lack of accountability in this process. Given these concerns one commentator has stated:

> I consider the Act [TPA] should set out standards or criteria upon the basis of which these negotiations should be conducted. Further, a party should be able to place before the Court, if it wishes, evidence as to those negotiations, notwithstanding they may have failed, in an appropriate case where the matter proceeds to a hearing on the question of penalty.[38]

16.30 It has also been suggested that the procedures that apply to ordinary civil proceedings may need to be supplemented by additional safeguards to ensure that innocent respondents are not improperly pressured into accepting a penalty settlement rather than exercising their right to a hearing.[39]

Settlement guidelines

16.31 Settlement guidelines are an important way of injecting elements of certainty and transparency into the process of negotiating penalties.

16.32 In its leniency policy, the ACCC has published the factors it will consider when reaching agreement on penalties.[40] The use of leniency policies in Australia and overseas is considered in detail in chapter 17.

16.33 The ATO issued a *Code of Settlement Practice* in 1991 to provide a framework for appropriate decision making on otherwise strictly confidential, non-public settlements. The Code was revised in 1998.[41] The key objective of the revised Code was to improve the transparency of settlement arrangements within the bounds of the strict secrecy requirements the ATO necessarily operates under. Key features included a clearer statement of when settlements are and are not appropriate, including greater restrictions on so called global settlements; requirements for issues to be considered at

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38 J Hilton, 'Principles of Fairness and Accountability' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001), 6.

39 K Yeung, 'Negotiated Compliance Strategies: The Quest for Effectiveness and the Importance of Constitutional Principles' (Paper presented at Ibid, 8 June 2001), 15.

40 Including whether the company or individual has cooperated with the ACCC; whether the contravention arose out of the conduct of senior management, or at a lower level; whether the company has a corporate culture conducive to compliance; the nature and extent of the contravening conduct; whether the conduct has ceased; the amount of loss or damage caused; the circumstances in which the conduct took place; the size and power of the company; whether the contravention was deliberate; and the period over which the contravention extended: Australian Competition & Consumer Commission, *Cooperation Policy for Enforcement Matters*, 1 July 2002.

41 M Carmody, *'The Role of Settlements in Good Administration': Corporate Tax Association Speech Luncheon, 23 July 1998*, Australian Taxation Office, <www.ato.gov.au/newsroom.asp>, 1 June 2001.

appropriate senior levels under the now established escalation arrangements; requirements that a senior officer independent of the case be involved in any settlement negotiations and that, where there is disagreement between the senior officer and the case officer/leader, the matter be subject to further review by an appropriately senior officer; and clearer documentation and procedural requirements.[42] The Code lists circumstances where it would generally be appropriate and inappropriate to settle,[43] the level of personnel to be involved in settlement negotiations, the documentation required and other procedural requirements,[44] remission,[45] and mitigating factors such as the ability to pay.[46] The Code acknowledges that settlements must be capable of withstanding objective scrutiny and justifiable on the facts and circumstances of the particular case. Accordingly the settlement must be fully documented and countersigned.[47] Accountability is encouraged through the use of a register.[48]

Consultations and submissions

16.34 In DP 65 the ALRC proposed that:

> Regulators should develop and publish guidelines on the basis upon which they will negotiate and agree penalty-related settlements, subject to any relevant statutory criteria, standards or limitations.[49]

16.35 The ATO supported this proposal, stating that it added to the transparency of the regulator. The ATO noted that, in this regard, it had outlined its policy concerning settlements in the *ATO Code of Settlement Practice*, a document which was publicly available.[50]

16.36 ASIC argued that the proposal was stated too broadly, although it did not state in what respect. ASIC submitted that it was inappropriate for statements of policy to be binding or prescriptive, and that decision makers could not fetter their own discretion.[51]

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42 Ibid.

43 Australian Taxation Office, *Code of Settlement Practice in Respect of Taxation Liabilities*, Australian Taxation Office, <www.ato.gov.au/content.asp?doc=/content/Professionals/Code_Settlement.htm>, 24 May 2001, cl 3.5.1.

44 M Carmody, *'The Role of Settlements in Good Administration': Corporate Tax Association Speech Luncheon, 23 July 1998*, Australian Taxation Office, <www.ato.gov.au/newsroom.asp>, 1 June 2001.

45 Australian Taxation Office, *Code of Settlement Practice in Respect of Taxation Liabilities*, Australian Taxation Office, <www.ato.gov.au/content.asp?doc=/content/Professionals/Code_Settlement.htm>, 24 May 2001, cl 5.1.2.

46 Ibid, cl 4.1.1.

47 Ibid, cl 2.1.4.

48 Ibid, cl 2.1.5. This register is not publicly accessible.

49 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Proposal 7–6.

50 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.77–2.78.

51 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 44–45. Similar comments were made in response to Proposal 15–1 in DP 65: see discussion in ch 15 at para 15.27 and 15.32.

16.37 Andrew Hudson submitted that the proposal could be appropriate to address those matters where legislation set out a maximum penalty and consequently there was discretion as to quantum of penalty, but was not appropriate to address contraventions where the penalty was fixed by legislation.[52]

16.38 Dr Karen Yeung strongly agreed with this proposal, and recommended that the DPP or some other 'super-enforcement' body should have the responsibility for reviewing such policy statements and guidelines with a view to promoting fairness and consistency.[53]

16.39 Environment Australia submitted that while there was some merit in the proposal, the issue needed consideration by individual agencies in the context of the relevant piece of legislation.[54]

Conclusion

16.40 Having considered the submissions the ALRC remains of the view that these guidelines would be instrumental in increasing transparency and consistency. ASIC's concerns that these guidelines not be binding can be addressed by an express provision to that effect. See Recommendation 6–3(b). Concern as to the status of such guidelines is a separate issue from whether or not there is merit in preparing and publishing the guidelines in the first place.

16.41 The ALRC does not agree with the submission made by Yeung that the DPP or some other 'super-enforcement' body should have responsibility for reviewing such policy statements and guidelines. In the case of the DPP, it would appear to be outside its jurisdiction to be reviewing guidelines prepared by regulatory agencies in relation to the settlement of civil proceedings. There is no 'super-enforcement' body in the Australian regulatory sphere responsible for all regulators and based on the information made available to the ALRC during consultations and submissions there does not appear to be any need, justification or call for the creation of such a body.[55] Indeed, the concept of having a 'super-enforcement' body responsible for all federal regulators is imbued with difficulty given the diversity of regulators, the different functions they perform and the varying regulatory environments in which they operate. Individual regulators with specific expertise in their regulatory field and in civil litigation arising

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52 A Hudson, *Consultation*, Melbourne, 4 September 2002.

53 K Yeung, *Submission CAP 20*, 9 October 2002, 5.

54 Environment Australia, *Submission CAP 26*, 24 October 2002, 4.

55 Certain submissions made to the Dawson Committee call for an independent body to monitor the ACCC. See for example, Exxonmobil Australia Pty Ltd, *Submission to the Review of the Trade Practices Act 1974*, <http://tpareview.treasury.gov.au/content/subs/050_submission_exxonmobil.pdf>, 4 July 2002, and Caltex Australia Ltd, *Submission to the Review of the Trade Practices Act 1974*, <http://tpareview.treasury.gov.au/content/subs/065_submission_caltex.pdf>, 11 July 2002, 13–14, and Rec 5. Others have rejected the call for an independent body to monitor the ACCC. See for example Master Grocers Association of Victoria Ltd, *Submission to the Review of the Trade Practices Act 1974*, <http://tpareview.treasury.gov.au/content/subs/063_submission_mgavicltd.pdf>, 11July 2002, 13, and Council of Small Business Organisations of Australia Ltd, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/089_Submission_COSBOA.pdf>, 17 July 2002, 15.

from the regulatory field they administer are best placed to formulate guidelines outlining the factors that they will take into account in negotiating and agreeing penalty-related settlements. This of itself will facilitate consistency within the practices of each regulator. In any event, it should not be overlooked that ultimately in individual cases, courts have the power to reject penalty-related settlements or to request further information in relation to such settlements.

16.42 An alternative way of addressing Yeung's concerns to inject consistency across guidelines individually prepared by each regulator would be to have the guidelines made as delegated legislation so that they are subject to parliamentary scrutiny. (See discussion of the process for making delegated legislation and disallowable instruments in chapter 6). However, the ALRC is of the view that in the interests of flexibility regulators should have the option of preparing informal guidelines in the absence of a legislative requirement to do so, or in the absence of a legislative power to prepare formal guidelines.

16.43 The ALRC agrees that settlement guidelines are appropriate only in matters where legislation sets out a maximum penalty, leaving scope for penalty negotiation.

Recommendation

Recommendation 16–1. Regulators should develop and publish guidelines in accordance with Recommendations 6–2 to 6–4, 9–1 and 10–1 on the basis upon which they will negotiate and agree penalty-related settlements, subject to any relevant statutory criteria, standards or limitations.

Enforceable undertakings

When enforceable undertakings are used

16.44 Enforceable undertakings are a relatively new enforcement remedy available to the ACCC and ASIC.[56]

16.45 Section 87B(1) of the *Trade Practices Act 1974* (Cth) (TPA) provides that

> the Commission may accept a written undertaking given by a person for the purposes of this section in connection with a matter in relation to which the Commission has a power or function under this Act (other than Part X).

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56 An enforceable undertaking is a promise enforceable in court. A breach of the undertaking is not contempt of court but, once the court has ordered the person to comply, a breach is contempt (*Australian Securities and Investments Commission Act 2001* (Cth), s 93A, 93AA). Enforceable undertakings became available for ASIC in July 1998. Amendments to the *Trade Practices Act 1974* (Cth) introduced s 87B undertakings in 1993.

16.46 Section 93AA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) similarly provides that

> ASIC may accept a written undertaking given by a person in connection with a matter in relation to which ASIC has a function or power under this Act.

16.47 Section 93A(1) of the ASIC Act provides that

> ASIC may accept a written undertaking given by the responsible entity of a registered scheme in connection with a matter:
>
> (a) concerning the registered scheme; and
>
> (b) in relation to which ASIC has a power or function under the corporations legislation (other than the excluded provisions).

16.48 None of the above provisions providing regulators with authority to accept enforceable undertakings on their face exclude the possibility of an enforceable undertaking being accepted as an alternative to criminal proceedings. ASIC's Practice Note 69 states that ASIC will generally only consider accepting an enforceable undertaking when it has considered starting civil or administrative enforcement action in respect of a contravention or an alleged contravention.[57] The Practice Note states:

> ASIC may accept an enforceable undertaking instead of taking proceedings for a civil order from a Court (eg an award of damages or compensation, or an injunction) or taking administrative action (eg imposing conditions on a licence) or referring a matter to other bodies (eg to the Companies Auditors and Liquidators Disciplinary Board or Corporations & Securities Panel.)[58]

16.49 It appears from ASIC's Practice Note 69 that it does not consider the use of enforceable undertakings as an alternative to criminal proceedings although the Practice Note does not expressly state this.

16.50 The ACCC's guideline on *Section 87B of the Trade Practices Act*[59] does not make it clear whether or not the ACCC would consider the use of an enforceable undertaking as an alternative to commencing criminal proceedings. However, the following statement made in that guideline does not rule out the possibility:

> The Commission regards s 87B as an important compliance tool for use in situations where there is evidence of a breach or potential breach of the Act that might otherwise justify litigation.[60]

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57 Australian Securities & Investments Commission, *Practice Note 69: Enforceable Undertakings*, Australian Securities & Investments Commission, <www.cpd.com.au/asic/pn/>, 20 December 2001, para [PN 69.10].

58 Ibid, para [PN 69.5].

59 Australian Competition & Consumer Commission, *Section 87B of the Trade Practices Act: A Guideline on the Australian Competition and Consumer Commission's Use of Enforceable Undertakings* (1999), Australian Competition & Consumer Commission, Canberra.

60 Ibid, 1.

16.51 The reference to 'litigation' in the ACCC guideline is not stated to be limited to civil litigation. Other references in the ACCC guideline set out the factors that the ACCC will consider when deciding between 'litigation' and an 'administrative solution'[61] or between 'litigation' and an 'administrative resolution.'[62] Again, the references to 'litigation' in the ACCC guideline are not confined to civil litigation.

16.52 Guidelines prepared by regulators on the use of enforceable undertakings should make it clear whether or not enforceable undertakings will be used as an alternative to criminal proceedings. See Recommendation 16–3(a)(i) below. By analogy, certain principles in relation to the use of civil proceedings as an alternative to criminal proceedings have been articulated by regulators. In this regard clause 1.3 of the Memorandum of Understanding (MOU) between the then Australian Securities Commission and the DPP acknowledges that civil proceedings will not be used in substitution for criminal proceedings in matters of serious corporate crime. The MOU states that:

> Matters which involve offences capable of being dealt with on indictment, or which involve fraud or dishonesty, or in respect of which there is a reasonable possibility of a term of imprisonment will always be regarded as serious crime.[63]

16.53 The ACCC has stated that it will seek to resolve a matter by way of enforceable undertaking if it believes that a breach has occurred or is likely to occur. Accordingly, a s 87B undertaking could be accepted during an investigation, but not at the outset.[64]

16.54 Regulators should also state the principles governing the choice of an enforceable undertaking as a remedy when other remedies are available. For example, the ACCC has stated that one of the public interest factors that it takes into account in deciding whether to resolve a matter by accepting an enforceable undertaking as opposed to commencing proceedings, is 'whether there needs to be a clarification of the law by the courts to better inform the community at large'.[65]

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61 Ibid, 3.

62 Ibid, 4.

63 *Memorandum of Understanding Between the Australian Securities Commission and the Director of Public Prosecutions*, 22 September 1992, clause 2.6. The ALRC has been informed that the MOU is still operative.

64 Australian Competition & Consumer Commission, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P1.pdf, www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P2.pdf, www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P3.pdf>, 13 August 2002, 298.

65 Australian Competition & Consumer Commission, *Submission CAP 24*, 15 October 2002, 11.

Assessment of enforceable undertakings

16.55 From the ALRC's consultations, enforceable undertakings appear to be popular with regulators; indeed many other regulators are interested in introducing them.[66] The flexibility of undertakings has enabled ASIC and the ACCC to secure timely and cost-effective outcomes that would not be achievable by court order, offering, it is said, tangible benefits for affected parties, and the prospect of lasting improvement in market conduct by the entity involved.

> One of the benefits of enforceable undertakings is that they enable regulators to tailor their enforcement response to individual circumstances, taking personal and industry considerations into account. However, these undertakings are not a 'quick fix'. Drafting of undertakings requires considerable time and effort for both parties.[67]

16.56 The regulator must consider whether an enforceable undertaking is an appropriate outcome in the circumstances, whether it is likely to be complied with, whether it is likely to be an efficient resolution of the matter, and whether there is an acknowledgement of the breach or cause for concern.[68]

16.57 The ACCC's use of enforceable undertakings has been the subject of a review by Associate Commissioner Don Watts of the ACCC.[69] This review considered the views of parties and their advisers who had offered undertakings as well as the views of ACCC members and staff. The ACCC stated:

> The Watt report concluded that the use of s 87B undertakings was an appropriate use of the ACCC's powers to fulfil its compliance goals and enforcement objectives. In particular it noted that because s 87B undertakings provided a quicker and more cost-effective mechanism for resolution than court proceedings, it fell within the ACCC's objective of efficient and effective use of resources.
>
> The report also noted that the use of s 87B undertakings ensured that clients were not forced to incur costs which were inappropriate for the circumstances.[70]

16.58 In its submission to the Dawson Committee, the ACCC provided statistics showing that the number of enforceable undertakings accepted over the last six years

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66 M Toller, 'Scandalously Competent' (Paper presented at National Press Club Speech, 21 February 2001). In particular, the Australian Broadcasting Authority has expressed an interest in having recourse to a remedy such as an enforceable undertaking that is capable of addressing issues of future compliance: Australian Broadcasting Authority, *Submission CAP 23*, 14 October 2002. On 19 November 2002, CASA's Director of Aviation Safety stated that, as part of the government's reforms of CASA (to take effect from 1 July 2003), one of CASA's new enforcement sanctions will include enforceable voluntary undertakings: Civil Aviation Safety Authority, *Media Release: Reforms to CASA Improve Safety and Scrutiny*, <www.casa.gov.au/hotopics/media_rel/02-11-19.htm>, 19 November 2002.

67 J Longo and J Redfern, 'Summary of Papers' (Paper presented at Enforceable Undertakings Seminar, 11 April 2000).

68 These and other factors are contained in Australian Securities & Investments Commission, *Practice Note 69: Enforceable Undertakings*, Australian Securities & Investments Commission, <www.cpd.com.au/asic/pn/>, 20 December 2001.

69 D Watt, 'Evaluation of the Use of s 87B Undertakings' (1998) 13 *ACCC Journal* 7.

70 Australian Competition & Consumer Commission, *Submission CAP 24*, 15 October 2002, 11.

has been relatively constant and very small in proportion to the number of matters pursued.[71]

16.59 Undertakings are also popular with the regulated community. It was observed in one consultation that enforceable undertakings for corporations are 'a nice way' of warning and giving the regulated entity 'another chance'. It was also stated that enforceable undertakings encourage greater candour and promote compliance.[72]

16.60 As discussed above, the ACCC states that it only accepts enforceable undertakings where there is evidence of a breach that would otherwise justify litigation.[73] Yeung, in her analysis of ACCC undertakings, stated that this limitation on use is important as:

- It ensures that the Commission has legislative authority to accept the proposed undertakings.
- Because a decision by the Commission to accept undertakings is subject to judicial review pursuant to the ADJR Act,[74] whether or not evidence of a contravention of the Act exists before an undertaking is accepted would undoubtedly constitute a relevant consideration which the Commission would be expected to take into account before accepting undertakings.
- Undertakings can be enforced only by court proceedings brought at the suit of the Commission. In the absence of any evidence of a contravention of the Act before s 87B undertakings are accepted it is conceivable that a court may refuse to grant orders to enforce the undertaking, thus effectively rendering the undertaking unenforceable.

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71 Australian Competition & Consumer Commission, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P1.pdf, www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P2.pdf, www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P3.pdf>, 13 August 2002, 300. During 2001–2002, the ACCC accepted 38 enforceable undertakings under s 87B of the *Trade Practices Act 1974* (Cth): Australian Competition & Consumer Commission, *ACCC Annual Report 2001–2002*, <www.accc.gov.au/fs-pubs.htm>, 11 November 2002, 2. ASIC reported that during 2001–2002 it had accepted 33 enforceable undertakings: Australian Securities & Investments Commission, *Annual Report 2001–2002*, Australian Securities & Investments Commission, 33.

72 Australian Corporate Lawyers Association, *Consultation*, Melbourne, 26 February 2001.

73 Australian Competition & Consumer Commission, *Section 87B of the Trade Practices Act: A Guideline on the Australian Competition and Consumer Commission's Use of Enforceable Undertakings* (1999), Australian Competition & Consumer Commission, Canberra, 1.

74 In *Virgin Blue Airlines Pty Ltd v Australian Competition and Consumer Commission* (2002) 186 ALR 377, the issue of the standing of a competitor to obtain judicial review of a decision by the ACCC to accept an undertaking under *Trade Practices Act 1974* (Cth), s 87B was stood over for final determination at the hearing.

- Undertakings constrain a firm's future freedom of action in carrying on its business and impose costs on that firm. It would be unfair and improper to impose such burdens on a firm that had not engaged in conduct contravening the Act.[75]

16.61 Some writers have voiced concerns about enforceable undertakings. Frank Zumbo notes in relation to s 87B undertakings that:

> There are no statutory guidelines in relation to the exercise of the ACCC's discretion. Whilst third parties are potentially affected, there is no requirement for them to be consulted. Similarly, affected third parties do not, as in the case of authorisations, have the ability to seek a review of a s 87B undertaking. Finally, there have been suggestions that the ACCC may have 'accepted' undertakings in which it had arguably dictated the terms to the other party and, therefore, could not be said to have been acting completely at arm's length …
>
> Indeed, the absence of a formal review process and the potential exclusion of third parties gives a party every incentive to provide a s 87B undertaking in preference to going through the authorisation process. In such circumstances, there is no guarantee that the s 87B undertaking will be in the public benefit or that it will not adversely impact on third parties.[76]

16.62 Yeung has identified a number of 'constitutional values' concerns in relation to enforceable undertakings.[77] Although her observations are specifically directed to s 87B undertakings under the TPA, her concerns are equally applicable to undertakings accepted by other regulators.

- Although enforceable undertaking provisions are drafted in extremely broad terms, they are not unlimited. There may be a risk that undertakings are accepted for purposes that are not authorised by the legislative grant. Further, it is well established in Australian constitutional law that administrative power cannot lawfully be used for penal purposes. Therefore, it is important that community service undertakings should seek only to 'correct' the effects of a suspected contravention, rather than seeking to punish the suspected wrongdoer.

- The private nature of enforceable undertaking negotiations reduces the transparency of the enforcement process, and may raise questions concerning the extent to which the regulator is accountable for the exercise of its extensive enforcement powers.

- Although the legality of the regulator's decision to accept enforceable undertakings is amenable to judicial review under the *Administrative Decisions (Judicial*

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75 K Yeung, *The Public Enforcement of Australian Competition Law* (2001), Australian Competition and Consumer Commission, Canberra, 114.

76 F Zumbo, 'Section 87B Undertakings; There's No Accounting for Such Conduct!' (1997) 5 *Trade Practices Law Journal* 121, 122.

77 K Yeung, 'Negotiated Compliance Strategies: The Quest for Effectiveness and the Importance of Constitutional Principles' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 8 June 2001).

Review) Act 1997 (Cth), there is currently no mechanism for a review of their merits.

- The private nature of the process leads to the exclusion of third parties in decisions that may have a significant impact upon them.

- There have also been concerns relating to the substantive fairness of the undertakings accepted by the ACCC. There is considerable scope for inconsistency and unequal treatment arising when suspected contraventions are resolved by s 87B undertakings. Where remedial undertakings are accepted, there is a risk that the content and scope of the undertakings may be unduly onerous and disproportionate to the seriousness of the suspected contravention.

16.63 The ALRC has been told that the terms of these undertakings are often too wide and that obligations need to be reviewed in light of changes in the marketplace.[78]

16.64 The publicity attached to undertakings is a major concern to some. Although there is no adjudication as to liability, media releases issued by regulators sometimes represent that a corporation's behaviour was wrong or morally reprehensible. The ALRC has been told that for companies 'the worst penalty is bad publicity' and so companies may sign an undertaking as a way out.[79] It was suggested in one consultation that a company should remain anonymous when it enters into an enforceable undertaking.[80]

16.65 The ACCC submitted that concerns as to the transparency of undertakings were addressed by the fact that it had published guidelines explaining the ACCC's policy in relation to the acceptance of undertakings,[81] maintained a public register of undertakings and issued media releases in relation to settlement.[82] It also submitted that in utilising its powers under s 87B, it sought to balance the competing public interest in obtaining a less costly and more flexible solution with the need for transparency.[83] In its submission to the Dawson Committee the ACCC stated that

> the Commission considers whether to accept a s 87B undertaking in light of a transparent set of enforcement objectives. Just because an alleged offender offers a broad settlement does not mean that the Commission will accept it in order to get a quick result. The factors the Commission considers include whether the conduct should attract penalties, whether the alleged offender's record suggests that an administrative set-

78 Australian Compliance Professionals Association, *Consultation*, Sydney, 14 May 2001.
79 Australian Corporate Lawyers Association, *Consultation*, Melbourne, 26 February 2001.
80 Ibid.
81 Australian Competition & Consumer Commission, *Section 87B of the Trade Practices Act: A Guideline on the Australian Competition and Consumer Commission's Use of Enforceable Undertakings* (1999), Australian Competition & Consumer Commission, Canberra.
82 Australian Competition & Consumer Commission, *Submission CAP 24*, 15 October 2002, 11–12.
83 Ibid.

> tlement will be sufficient to deter it from future conduct, and whether there needs to be a clarification of the law by the courts to better inform the community at large.[84]

16.66 In its Practice Note 69 ASIC states that it will not accept confidential enforceable undertakings. In order to achieve general compliance and educate consumers it considers that enforcement outcomes *must* be published.[85] In exceptional circumstances, though, ASIC has suggested that certain information in the enforceable undertaking may be kept confidential.[86] In order to emphasise this stance, ASIC requires the promisor to acknowledge ASIC's publicity and public access policy in writing as a clause of the undertaking.[87]

16.67 In its report ALRC 68, *Compliance with the Trade Practices Act 1974,* the ALRC stated that there is a general recognition of the need for safeguards against the Trade Practices Commission [now the ACCC] using enforceable undertakings to impose conditions that are unfair or unreasonable or that would never be imposed by a court if the matter proceeded to a hearing. However, the ALRC noted:

> There is already provision for external scrutiny of completed undertakings through the public register maintained by the TPC and by the Federal Court through the enforcement procedures under s 87B(3). The terms of an undertaking may also be withdrawn or varied with the consent of the TPC. Nevertheless, in consultations with the [ALRC] the BFCI [Business Forum on Consumer Issues] suggested that before an undertaking is finalised it should be reviewed by an independent body to ensure that its terms are fair and reasonable. In the absence of any evidence that parties need additional protection or that the power has been abused, the [ALRC] is not satisfied that such scrutiny is necessary. Section 87B undertakings are entered voluntarily after negotiation and the TPC is committed to ensuring that undertakings are fair and clear and are not obtained unfairly.[88]

16.68 The ALRC remains of the view that external scrutiny of the proposed terms of an enforceable undertaking by an independent body is unnecessary. Judicial review of the decision to accept or reject an enforceable undertaking is considered in chapter 23 of this Report.

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84 Australian Competition & Consumer Commission, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P1.pdf, www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P2.pdf, www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P3.pdf>, 13 August 2002, 300.

85 Australian Securities & Investments Commission, *Practice Note 69: Enforceable Undertakings*, Australian Securities & Investments Commission, <www.cpd.com.au/asic/pn/>, 20 December 2001, para [PN 69.26].

86 Ibid, para [PN 69.27].

87 Ibid, para [PN 69.29]. The ACCC takes the same stance: see Australian Competition & Consumer Commission, *Section 87B of the Trade Practices Act: A Guideline on the Australian Competition and Consumer Commission's Use of Enforceable Undertakings* (1999), Australian Competition & Consumer Commission, Canberra, 8.

88 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), Australian Law Reform Commission, Sydney, para 11.8.

Legislative clarity in relation to use of undertakings

16.69 As discussed above Yeung expressed concerns that the acceptance of remedial undertakings carries a risk that the content and scope of such undertakings are unduly onerous and disproportionate to the alleged contravention. Similar concerns have been expressed in submissions made to the Dawson Committee on the use by the ACCC of s 87B undertakings. While these submissions relate exclusively to s 87B undertakings, there are principles expressed in the submissions which are capable of general application to other enforceable undertakings. In particular, the call for legislative clarity in relation to the operation of undertakings, which is made in some of the submissions, is capable of application to all enforceable undertakings.

16.70 The Business Council of Australia submitted to the Dawson Committee that the TPA be amended to provide greater legislative certainty in the operation of s 87B.[89] It stated that legislative guidance is needed to ensure:

(i) that any undertaking is relevant and proportionate to the contravention (or alleged or potential contravention) of the TPA;

(ii) that the ACCC takes into account public benefit outcomes, and not merely competition outcomes, when assessing a particular undertaking; and

(iii) that an undertaking should not be provided and accepted unless it could also be made by a court.[90]

16.71 The Business Council raised concerns that some undertakings appear to:

(i) bear no relationship to the contravention of the TPA;

(ii) be disproportionate to the contravention;

(iii) go beyond the scope of the TPA;

(iv) go beyond the scope of what a court could or would order;

(v) be designed to achieve social objectives other than creating a competitive environment (where the undertaking relates to competition as opposed to a consumer protection issue);

(vi) be used as a means of cost recovery for the ACCC's other activities; and

(vii) single out one class of consumers over another.[91]

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89 Business Council of Australia, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/071_Submission_BCA.pdf>, 11 July 2002.
90 Ibid, 53.
91 Ibid, 56.

16.72 The Business Council provided the following examples of undertakings which raised issues of proportionality and relevance to the alleged contraventions of the TPA.[92]

- A licensed club donated $150,000 to an alcohol reduction, prevention, education and rehabilitation program after it admitted entering into an agreement not to sell alcohol at discount prices. The club was to be informed whether the program was suitable by the ACCC on advice from the Commonwealth Department of Health and Ageing. The undertaking accompanied court orders in the matter in the form of declarations and injunctions to prevent the repetition of the contravening conduct.[93]

- The ACCC received complaints about the sales agent for a telecommunications company transferring consumers' phone service providers without their consent. A term of the undertaking given by the sales agent included that the agent would pay $60,000 to an ACCC managed public education and awareness campaign to educate consumers about rights in relation to telecommunications services. The undertaking accompanied court orders in the matter in the form of declarations and injunctions restraining similar conduct for 12 months.[94]

- A term of an undertaking offered by a telecommunications company who was involved in transferring consumers' phone service providers without the consent or the informed consent of the consumers provided that it would

  > contribute up to a maximum of $500,000 towards a public education and awareness campaign targeted at explaining consumer rights and benefits in respect of customer transfer arrangements in order to raise general public and consumer awareness of consumer' rights and carriers' responsibilities (as provided for in relevant codes and laws) concerning selling practices in relation to transfer, and selection of telecommunication services. The fund established for this purpose will be administered by the Commission in its absolute discretion ... [95]

16.73 The Business Council said:

> The undertakings which involve companies paying money or offering services that are not direct recompense to those affected by the alleged breach of the TPA, raise the question whether the ACCC is using the threat of prosecution to extract 'fines' from companies.[96]

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92 Ibid, 55.

93 *Trade Practices Act 1974 — Section 87B Undertaking given by Arnhem Club Incorporated*, <www.accc.gov.au/pubreg/pubreg.htm>, 8 May 2002.

94 *Undertaking to the Australian Competition and Consumer Commission Given Under s87B of the Trade Practices Act 1974 by Axxess Australia Pty Ltd*, <www.accc.gov.au/pubreg/pubreg.htm>, 4 April 2002.

95 *Undertaking to the Australian Competition and Consumer Commission Given Under S87B of the Trade Practices Act 1974 by One.Tel Limited*, <www.accc.gov.au/pubreg/pubreg.htm>, 9 January 2001.

96 Business Council of Australia, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/071_Submission_BCA.pdf>, 11 July 2002, 56.

16.74 Another concern raised by the Business Council was that some undertakings are open-ended, in that they operate indefinitely unless the ACCC agrees to their withdrawal.[97]

16.75 The Business Council stated that introducing legislative guidance into the TPA would ensure that both the regulated community and the ACCC have a clear understanding of the scope of undertakings that are appropriate to offer and accept under s 87B.[98] It did, however, acknowledge that the arguments against legislative amendment were that legislative guidance would limit the flexibility of s 87B making it less useful in resolving competition issues, and that it was unnecessary as the ACCC had already issued administrative guidelines. In relation to flexibility, the Business Council stated:

> Any loss of flexibility is only likely to occur in undertakings of the kind that the ACCC currently seeks or accepts and that go beyond what is necessary or appropriate to deal with the competition matter at issue.[99]

16.76 In relation to the existing administrative guidelines the Business Council stated:

> Administrative guidelines play an important role in informing and educating the public about how government agencies will apply regulation. But where legislation confers significant power on a regulator, there is a danger, that even with administrative guidance, that power will be misconstrued and misused. The examples given [by the Business Council in this submission] demonstrate that the administrative guidelines have failed to prevent that occurring.[100]

16.77 Minter Ellison Legal Group in its submission to the Dawson Committee submitted that there was a need for formal guidelines as part of a code of practice for the ACCC to have regard to when considering and accepting undertakings.[101] It submitted that compliance by the ACCC with the code of practice should be required by the TPA.[102] It said that the code of practice should require the ACCC:

> i. to publish a draft of any proposed section 87B undertaking (subject to confidential information obligations);
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> ii. to consider the interests of third parties;
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> iii. to allow a period of time for public comment before accepting an undertaking under section 87B;

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97 Ibid, 57.
98 Ibid, 60.
99 Ibid, 61.
100 Ibid, 61.
101 Minter Ellison, *Submission to the Review of the Trade Practices Act 1974*, <http://tpareview.treasury.gov.au/content/subs/048_submission_minter%20ellison.pdf>, 4 July 2002, 12.
102 Ibid, 4.

iv. to seek admissions of a breach of the TPA as part of an undertaking under s 87B only in circumstances where such an admission has substantive relevance to ensuring the party in breach does something to remedy the breach; and

v. not to seek any general requirement to comply with the TPA, and in particular provisions that have not been breached, as part of an undertaking under s 87B other than in exceptional circumstances.[103]

16.78 The ACCC stated that it could accept enforceable undertakings to 'overcome limitations on court powers to order remedies in appropriate circumstances'[104] and that accordingly 'undertakings could be accepted as part of a settlement of proceedings in addition to consent orders'.[105] In its submission to the Dawson Committee the ACCC referred to *ACCC v Z-Tek Computer Pty Ltd*[106] in which Merkel J found that it was not within the power of the Court under s 80 of the TPA to order a compliance program which went beyond the particular sections that had been contravened. In that case Merkel J said:

> If the ACCC wants to impose a general trade practices compliance program as a term of settlement it may be open to it to do so by agreement … My decision relates to that which is 'appropriate' for a Court to order under s 80 … It is not intended that the decision govern, influence or limit a trade practices compliance program which might be the subject of agreement between the ACCC and a party to a proceeding … [107]

Conclusion

16.79 The ALRC is of the view that in the interests of certainty, consistency and fairness, concerns expressed in relation to the scope of enforceable undertakings warrant legislative address. There should be clearly articulated legislative parameters guiding the scope of undertakings that are appropriate for the regulated community to offer, and for regulators to accept.

16.80 One way of addressing the concern that undertakings are being used as a de facto way of extracting monetary penalties from companies would be to have a legislative provision that states that the terms of an enforceable undertaking should not require the payment of money to a regulator other than in recompense to those affected by the alleged breach, or in payment of the regulator's costs (if these are otherwise recoverable at law).

16.81 An Advisory Committee member noted that there were instances where a regulator was unable to identify the victims of an alleged contravention, but nonetheless wished to deprive the party who had allegedly breached legislation of their ill-

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103 Ibid, 4.
104 Australian Competition & Consumer Commission, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P1.pdf, www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P2.pdf, www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P3.pdf>, 13 August 2002, 299.
105 Ibid, 299.
106 *ACCC v Z-Tek Computer Pty Ltd* (1997) ATPR ¶41–580.
107 Ibid, 44,035.

gotten gains, by requiring the payment of money towards an educative public purpose or a relevant community group.[108] To cater for such instances, some Advisory Committee members expressed the view that there should be an option for disgorged funds to be paid into a public trust. It was noted that, ultimately, if a s 87B undertaking went beyond the scope of its power, it would not be enforced by the courts.[109]

16.82 The ALRC has concerns about regulators using public purpose focussed undertakings such as education or training programs for the purpose of disgorging profits or ill-gotten gains from the person offering an undertaking. As mentioned above Yeung has stated that it is important that community service undertakings should seek only to 'correct' the effects of a suspected contravention, rather than seeking to punish the suspected wrongdoer.[110] The ALRC has no objection in principle to public purpose focussed undertakings, such as requiring participation in an education program, or requiring a regulated party to perform work or undertake prescribed activities at its own expense where that work or activity is relevant to the contravention and is an appropriate remedial response. This is clearly distinct from the acceptance of an undertaking motivated by a regulator's desire to apply the proceeds of ill-gotten gains in circumstances where it cannot identify, or easily identify, victims of the contravention. Where a regulator's purpose is to strip a party of any gains it may have made as a result of breaching the law, in the absence of the regulator being able to disburse those funds in the form of compensation to third parties, the proper forum for pursuing that purpose is the court.

16.83 One must distinguish between profits or ill-gotten gains made by a party who has contravened the law and damage suffered by third parties. There is often, but not always, a correlation between the two amounts, and in the instances of a correlation it is not always the case that the amount of profits made equals exactly the amount of damage suffered by third parties. That aside, the ALRC accepts that applying the proceeds of profits or ill-gotten gains from a party who has contravened the law to parties who have suffered damage as a result of the contravention is appropriate as a mechanism to give effect to the notion of restorative justice. However, allowing a regulator to effectively strip a party of any proceeds of 'unjust enrichment' in the absence of a court order, where those proceeds are not being distributed as compensation to those who suffered as a result of the contravention, raises concerns as to the use to which the proceeds are put. The application of the proceeds of any such disgorgement should clearly be related to the contravention and be remedial. However, difficulties arise in delineating what applications of the proceeds would be remedial and could still raise concerns that regulators were pursuing 'social engineering' remedies. In addition, depending on the conduct giving rise to the alleged breach there may be fundamental is-

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108 Advisory Committee members, *Advisory Committee meeting*, 17 October 2002.

109 Ibid.

110 K Yeung, 'Negotiated Compliance Strategies: The Quest for Effectiveness and the Importance of Constitutional Principles' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 8 June 2001).

sues in relation to the calculation of any such profits or ill-gotten gains, which would more properly fall for a court's determination rather than assessment by a regulator.

16.84 The undertakings referred to in para 16.72 above requiring payment of monies in the sums of $60,000, $150,000 and $500,000 illustrate that the sums of monies potentially the subject of such a term in an undertaking can be quite substantial. This raises the issue whether there should be an upper limit placed on the amount of money a regulator can accept in an undertaking other than for the purpose of compensation of third parties or as payment towards costs. The placement of an upper monetary limit is fraught with difficulties, not least because any stipulated upper limit would be arbitrary and incapable of addressing the varying culpability of conduct the subject of the undertaking nor the differing capacity of parties to pay; for example, an upper limit of $10,000 may be quite substantial for an individual but represent a minimal if not insignificant amount for a large corporation. Of course different upper limits could be placed for corporations and individuals. An alternative method of calculating an upper limit on the amount of money a regulator could accept in an undertaking for a public purpose benefit other than compensation of third parties would be to state that it could not exceed a proportion of the maximum penalty for that offence. However, given that the maximum penalties for corporations for Part IV offences under the TPA are $10 million, stipulating the upper limit to be 20%, 10% or even 5% of the maximum penalty, would still result in the payment of quite substantial sums of money. Accordingly, the ALRC has made no recommendation in relation to placing a limit on the amount of money that can be paid pursuant to an enforceable undertaking. It appears to the ALRC that the key issues are that the terms of an enforceable undertaking bear a direct relationship with, and are proportionate to, the alleged breach.

16.85 Certainty, transparency and fairness require that costs sought by a regulator in relation to an enforceable undertaking fall within defined parameters. The ALRC has reservations about allowing regulators a general right to recover costs as a term of an enforceable undertaking, in the absence of legislation that allows that right and specifies the items in respect of which it is permissible for a regulator to accept payment as a term of an undertaking. As discussed in chapter 33, payments of monies made by a regulated entity to a regulator may give rise to a perception of impropriety. Where the exercise of power by a regulator involves the acceptance of money from a member of the regulated community there is a particular need for transparency and accountability. In this regard see Recommendation 33–1 in this Report in relation to the recovery of costs of investigations.

16.86 The ALRC concludes that enforceable undertakings must bear a clear and direct relationship with the alleged breach, be proportionate to the alleged breach, not require the payment of money to the regulator other than in recompense to those affected by the alleged breach, or in payment of the regulator's costs (if these are otherwise recoverable at law) and not be otherwise open-ended. Its recommendation is to that effect.

Recommendation

Recommendation 16–2. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, where legislation provides a regulator with authority to accept an enforceable undertaking, the terms of an enforceable undertaking must:

(a) bear a clear or direct relationship with the alleged breach;

(b) be proportionate to the breach;

(c) not require the payment of money to the regulator other than in recompense to those affected by the alleged breach or in payment of the regulator's costs (if these are otherwise recoverable at law); and

(d) stipulate a time period within which compliance with undertakings is required and not be otherwise open-ended.

This Recommendation is not intended to prevent an enforceable undertaking requiring a regulated party to perform work or undertake prescribed activities at its expense.

Third party issues

16.87 Guidelines prepared by regulators in relation to the use of enforceable undertakings should address when and how third party interests will be taken into consideration having regard to such factors as the standing of third parties to bring an action against the party from whom the regulator is considering accepting an enforceable undertaking, and the ability of third parties to access information acquired under compulsion by the regulator. The factors to be taken into account may vary depending on whether or not, where relevant, the party offering the enforceable undertaking has agreed as a term of the enforceable undertaking to pay damages or compensation to third parties. Such a term is clearly envisaged by ASIC which states in its Practice Note 69 that it may, for example, accept an undertaking from a party that the party will:

(a) pay damages to identified parties, along with a description of the process for bringing this about; and

(b) compensate the beneficiaries of a superannuation entity for any loss suffered as a result of its misleading conduct while acting as trustee.[111]

16.88 It may be that in some cases there are inherent difficulties in identifying third parties potentially affected by the acceptance of an enforceable undertaking which renders it impracticable for the regulator to take their interests into account.[112]

16.89 ASIC's Practice Note 69 states that the party offering the enforceable undertaking must acknowledge that the undertaking does not affect the rights of other parties.[113] The following is given as an example of a standard term that will be included in every undertaking unless otherwise specifically excluded by ASIC:

> X acknowledges that this undertaking in no way derogates from the rights and remedies available to ASIC or any other person or entity arising from the conduct described in this undertaking.[114]

16.90 Similarly, the ACCC's guideline *Section 87B of the Trade Practices Act* includes the following term in its sample hypothetical undertaking:

> XYZ further acknowledges that this undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.[115]

16.91 The ACCC's guideline also contains a specific section in relation to consultation and third party interests arising from the ACCC's acceptance of a s 87B undertaking in the merger context. It states:

> In most, if not all, cases the [ACCC] will want to consult with relevant market participants before accepting a substantive s 87B undertaking. While the [ACCC] will usually have undertaken extensive consultation through its market inquiries process, this consultation may not be sufficient to address all issues relevant to a decision to accept a proposed undertaking or not. Once having formed the view that an acquisition would be or is likely to be anti-competitive, and having received the offer of undertakings, the [ACCC] will need to undertake a separate assessment of the impact of the proposed undertakings. This will almost always require further consultation with the marketplace participants …

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111 Australian Securities & Investments Commission, *Practice Note 69: Enforceable Undertakings*, Australian Securities & Investments Commission, <www.cpd.com.au/asic/pn/>, 20 December 2001, para [PN 69.17].

112 For example, it can be difficult, if not impossible, to identify all third parties who may have suffered as a result of conduct which breaches the market manipulation provisions of the *Corporations Act 2001* (Cth). Accordingly in circumstances where ASIC accepts an enforceable undertaking concerning conduct that it alleges breached the market manipulation provisions, the exercise of identifying third parties potentially affected by the acceptance of the undertaking is problematic.

113 Australian Securities & Investments Commission, *Practice Note 69: Enforceable Undertakings*, Australian Securities & Investments Commission, <www.cpd.com.au/asic/pn/>, 20 December 2001, para [PN 69.25].

114 Ibid, para [PN 69.33].

115 Australian Competition & Consumer Commission, *Section 87B of the Trade Practices Act: A Guideline on the Australian Competition and Consumer Commission's Use of Enforceable Undertakings* (1999), Australian Competition & Consumer Commission, Canberra, 20.

> The [ACCC] may also need to assess the impact on third party rights and interests. Any merger will achieve some measure of structural change in a market and, therefore, will be likely to impact on firms and consumers not parties to the transaction.[116]

16.92 In consultation, AGS stated that in its experience the ACCC did consult with third parties in relation to s 87B undertakings to assist it in assessing whether the accepting of the enforceable undertaking would 'cure the evil' to which the undertaking was directed.[117]

16.93 See Recommendation 16(3)(e) below.

Use of admissions in enforceable undertakings

16.94 An issue that arises is the potential frustration of access to compensation by third parties where a regulator accepts an enforceable undertaking rather than taking a matter to court. Section 83 of the TPA provides that, in a proceeding against a person for damages under s 82 of the TPA or for a compensation-related order under s 87(1A) of the TPA, a finding of any fact made by a court in certain proceedings is prima facie evidence of that fact and the finding may be proved by production of a document under the seal of the court from which the finding appears. The proceedings referred to include proceedings brought by the ACCC under s 77 of the TPA for the recovery of pecuniary penalties. This provision assists third party claimants in proving a contravention. As admissions in s 87B undertakings are not findings of fact made by a court, a third party would not be able to rely on s 83 of the TPA.

16.95 In DP 65 the ALRC asked whether admissions given in enforceable undertakings should be admissible in any proceedings brought by third parties.[118]

16.96 The first point to note is that according to the guidelines currently published by ASIC and the ACCC, neither regulator insists on admissions in enforceable undertakings. In some cases, they only require the person offering the undertaking to acknowledge the regulator's concerns. ASIC's Practice Note 69 provides the following example of a standard term that will be included in every enforceable undertaking unless specifically excluded by ASIC:

> X acknowledges ASIC's concerns set out in this undertaking [or X acknowledges that it has breached section Y of the (name the relevant legislation)].[119]

16.97 By way of example, in October 2002, ASIC accepted an enforceable undertaking from a licensed securities dealer regarding the sale and supply of share trading

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116 Ibid, 10–11.

117 Australian Government Solicitor, *Consultation*, Sydney, 27 August 2002.

118 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Question 7–5.

119 Australian Securities & Investments Commission, *Practice Note 69: Enforceable Undertakings*, Australian Securities & Investments Commission, <www.cpd.com.au/asic/pn/>, 20 December 2001.

software and the conditions of its licence. The party undertook not to sell or supply share and options trading computer software, not to provide training and educational services about the use of such software, and to implement measures to ensure that it was able to comply with its legal obligations as a licensee. The party acknowledged ASIC's concerns but did not consider that any of those concerns amounted to contraventions of the *Corporations Act*, *Corporations Regulations* or its licence conditions.[120]

16.98 The ACCC's guideline *Section 87B and the Trade Practices Act* states that:

> Undertakings will not be accepted if they include
>
> - a denial of liability (but companies providing undertakings will not be required to admit having breached the Act);
>
> - a statement that the undertaking is not an admission in relation to action by third parties such as employees, (but the undertaking need not make such an admission); … [121]

16.99 An undertaking accepted by the ACCC on 8 October 2002 contains the following acknowledgement:

> [Name of party] acknowledges the ACCC's concern that the rejection of the agency application in this instance is at risk of breaching section 46 of the TPA … [122]

16.100 CASA does not have the power to accept enforceable undertakings.[123] It has a section in its *Enforcement Manual*, which is expressed not to be in force which deals with enforceable undertakings. In this section CASA states that an undertaking should not be accepted if it includes a denial of liability 'although a relevant individual or organisation should not be required to admit having breached the Act or Regulations'.[124]

Consultations and submissions

16.101 The ATO noted that the Commissioner of Taxation did not have the power under taxation legislation to accept an enforceable undertaking. It submitted that com-

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120 Australian Securities & Investments Commission, *Media Release 02/381: ASIC Accepts Enforceable Undertaking from Mortgage and General Financial Services*, 17 October 2002.

121 Australian Competition & Consumer Commission, *Section 87B of the Trade Practices Act: A Guideline on the Australian Competition and Consumer Commission Use of Enforceable Undertakings*, Australian Competition & Consumer Commission, <www.accc.gov.au/pubs/Publications/Legislation/s87BTPA.pdf>, 23 October 2001, 5.

122 *Undertaking Given to the Australian Competition and Consumer Commission for the Purposes of Section 87B by Golden Casket Lottery Corporation Ltd,* <www.accc.gov.au>, 8 October 2002.

123 The Aviation Legislation Amendment Bill (No 1) 2001 (Cth), which would have given CASA power to accept an enforceable undertaking has lapsed. However, on 19 November 2002 CASA's Director of Aviation Safety stated that CASA's new enforcement sanctions (due to take effect in July 2003) will include enforceable voluntary undertakings: Civil Aviation Safety Authority, *Media Release: Reforms to CASA Improve Safety and Scrutiny*, <www.casa.gov.au/hotopics/media_rel/02-11-19.htm>, 19 November 2002.

124 Civil Aviation Safety Authority, *Enforcement Manual*, Civil Aviation Safety Authority, <www.casa.gov.au/manuals/htm/enf/enf.htm>, 18 September 2001, para 5.71. See also fn 66 above.

mon law principles regarding privacy and evidence should apply in governing the admissibility of admissions in enforceable undertakings.[125]

16.102 In consultation, Andrew Hudson expressed the view that admissions made in an undertaking should not be admissible in third party proceedings, as a consideration when deciding to offer an enforceable undertaking was that it would finalise the matter. He stated that parties may be reluctant to offer enforceable undertakings if there were consequences in relation to third parties.[126] He submitted:

> It would appear to be contrary to the intention of enforceable undertakings to seek to encourage improved behaviour by a party in accordance with the undertaking where the admission can be used in other circumstances.[127]

16.103 The AGS expressed the view that unless the admissions contained in enforceable undertakings were very specific they were unlikely to be of much use to third parties in any event.[128]

16.104 Yeung submitted that the issue of whether admissions in enforceable undertakings should be admissible in third party proceedings raised some difficult questions. She stated:

> If the giving of an enforceable undertaking were to be regarded as conclusive evidence of an admission of guilt, I suspect that firms and individuals would be much less willing to offer them. Given the private and opaque nature of the bargaining process, unlike court proceedings, I would be inclined to argue that the giving of enforceable undertakings should not constitute conclusive evidence of admission of a violation. On the same basis I would not be in favour of treating admissions in enforceable undertakings as conclusive evidence of a violation. They might, however, be properly admissible in third party proceedings, provided they are not regarded as conclusive evidence of a violation. Regulators should, as a matter of procedural fairness and ethical duty, formally inform suspects that they are NOT obliged to provide admissions in giving enforceable undertakings.[129]

Conclusion

16.105 Obviously, where a party offering an enforceable undertaking merely acknowledges the regulator's concerns in relation to an alleged contravention of the law as opposed to making an admission, the issue of the admissibility of any admission does not arise. However, where admissions are made in undertakings, the issues raised by the question of whether such admissions should be admissible in any subsequent proceedings are indeed difficult to resolve as they involve balancing the competing interests of affording fairness to the person offering the enforceable undertaking and con-

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125 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.69–2.70.
126 A Hudson, *Consultation*, Melbourne, 4 September 2002.
127 A Hudson, *Submission CAP 19*, 8 October 2002.
128 Australian Government Solicitor, *Consultation*, Sydney, 27 August 2002.
129 K Yeung, *Submission CAP 20*, 9 October 2002, 6.

sidering the interests of third parties who may be affected by the regulator's decision to accept an undertaking as opposed to commencing court proceedings. The difficulty is exacerbated by the fact that the competing interests of fairness are diametrically opposed, with the result that the optimal position of fairness for a party offering an enforceable undertaking can represent the least optimal position for third parties. Further, the circumstances surrounding the making of admissions in enforceable undertakings are varied. There will be cases where the fairness of using any such admissions may be particularly in issue due to the disparate bargaining strength between the regulator and the party offering the enforceable undertaking, especially in circumstances where the party offering the undertaking did not receive independent legal advice.

16.106 Having considered the competing interests outlined above, and submissions received, the ALRC is of the view that it is not appropriate for it to make a recommendation that admissions should either always be admissible in third party proceedings or that they should always be inadmissible in third party proceedings. It appears to the ALRC that the key issue is that regulators' policies in relation to accepting enforceable undertakings take into account when and how interests of third parties will be considered. This issue is addressed in Recommendation 16–3(e) which requires regulators to consider when and how third party interests will be taken into account. In considering whether third party rights will be prejudiced by a regulator accepting an enforceable undertaking, a relevant consideration could be the ability of third parties to access information obtained under compulsion by the regulator for use in private civil proceedings. For example, s 25 of the ASIC Act allows ASIC to give a person's lawyer a copy of a written record of an examination conducted under compulsory powers together with a copy of any related book, if the lawyer satisfies ASIC that the person is carrying on, or is contemplating in good faith, a proceeding in respect of a matter to which the examination related. Other considerations may include whether third parties will be prejudiced by the regulator not bringing civil proceedings which may lead to a finding of contravention on which third parties may rely, or which are themselves aimed at recovering damages on behalf of third parties.[130]

16.107 Putting aside the question of whether admissions made in enforceable undertakings should be admissible, it is useful to consider whether, as a matter of law, such admissions are in fact admissible. The admissibility of admissions made in enforceable undertakings, the discretion to exclude such admissions from evidence and the discretion to limit the use of such admissions are currently governed by the law of evidence. In this regard the ALRC notes the following relevant provisions of the *Evidence Act 1995* (Cth):

(a) Section 55, which provides that evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the

130 For example, the *Australian Securities and Investments Commission Act 2001* (Cth), s 50 empowers ASIC in certain circumstances to take civil proceedings in the public interest to recover damages. The *Corporations Act 2001* (Cth), s 1325(3) also empowers ASIC in certain circumstances to take proceedings on behalf of one or more third parties who have suffered loss or damage or are likely to suffer loss or damage.

assessment of the probability of the existence of a fact in issue in the proceeding.

(b) Section 56, which provides that except as otherwise provided in the *Evidence Act*, evidence which is relevant in a proceeding is admissible.

(c) Part 3.4, which governs the admissibility of admissions. Section 81(1), which falls within Part 3.4 of the Act, provides that the hearsay rule and the opinion rule do not apply to evidence of an admission.[131] In effect, the operation of the hearsay rule and the opinion rule do not render admissions inadmissible (unless s 82 or s 83 of the *Evidence Act* apply.) Section 82 (b) provides that s 81 does not prevent the application of the hearsay rule to evidence of an admission unless it is a document in which the admission is made. As an enforceable undertaking is recorded in a document, it appears that an admission made in an enforceable undertaking would not be rendered inadmissible by the operation of the hearsay rule.

(d) Section 135 which gives a court a general discretion to refuse evidence if its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party, or be misleading or confusing or cause or result in undue waste of time.

(e) Section 136 which gives a court a general discretion to limit the use to be made of evidence if there is danger that a particular use of the evidence might be unfairly prejudicial to a party or be misleading or confusing.

16.108 It appears that, whilst the operation of the above provisions could render an admission made in an enforceable undertaking admissible in third party proceedings, the Court still has a general discretion to reject evidence of the admission or to limit the use to be made of such admission. Accordingly, in circumstances where the admission into evidence of admissions made in an enforceable undertaking would be unfairly prejudicial, safeguards are in existence to protect against the admission or use of such evidence.

16.109 It is important not to overlook the fact that where third parties are considering bringing an action for damages against a party who made an admission in an enforceable undertaking, apart from proving a contravention of the law, they will still have to prove that the party's conduct caused their loss.

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131 'Admission' is defined in the Dictionary to the *Evidence Act 1995* (Cth) as a 'previous representation that is made by a person who is or becomes a party to a proceeding (including a defendant in a criminal proceeding)' and is 'adverse to the person's interest in the outcome of the proceeding'. The term 'previous representation' is defined in the Dictionary as 'a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced'.

Enforceable undertakings guidelines

16.110 As noted above, ASIC has a Practice Note on its use of enforceable undertakings and the ACCC has published a guideline *Section 87B of the Trade Practices Act*.[132] These guidelines assist in providing some transparency to the process in that they:

- set out when the regulator will accept enforceable undertakings;
- provide examples of acceptable and unacceptable terms in enforceable undertakings; and
- explain what happens if an enforceable undertaking is not complied with.

Consultations and submissions

16.111 In DP 65, Proposal 7–7 suggested that:

> When legislation provides a regulator with the authority to accept enforceable undertakings, regulators should develop and publish guidelines outlining:
>
> (a) the circumstances in which, and at what stage of an investigation or criminal or civil penalty proceedings, the regulator will accept enforceable undertakings;
>
> (b) examples of acceptable and unacceptable terms in enforceable undertakings;
>
> (c) what will happen if an enforceable undertaking is not complied with; and
>
> (d) when third party interests will be taken into consideration.

16.112 This proposal received some support. Yeung strongly agreed with the proposal.[133] The ATO also supported the proposal of publishing guidelines regarding enforceable undertakings as this added to the transparency of the regulator.[134] It noted that as the Commissioner of Taxation did not have the power to seek an enforceable undertaking it could not comment on the content of such guidelines.[135]

16.113 ASIC noted that it had published Practice Note 69 to give guidance to those who may seek to offer an undertaking. ASIC stated that it considered the publication of such guidance important as it informed those seeking to offer an undertaking of the consequences of so doing.[136]

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132 Australian Competition & Consumer Commission, *Section 87B of the Trade Practices Act: A Guideline on the Australian Competition and Consumer Commission's Use of Enforceable Undertakings* (1999), Australian Competition & Consumer Commission, Canberra; and Australian Securities & Investments Commission, *Practice Note 69: Enforceable Undertakings*, Australian Securities & Investments Commission, <www.cpd.com.au/asic/pn/>, 20 December 2001.

133 K Yeung, *Submission CAP 20*, 9 October 2002, 5.

134 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.80.

135 Ibid, para 2.81.

136 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 17.

Conclusion

16.114 Taking into account the submissions, the ALRC concludes that there is support for a recommendation that regulators develop and publish guidelines in relation to enforceable undertakings. However, the ALRC is of the view that the content of the guidelines originally proposed by it in DP 65 needs to be modified in the following way:

- The guidelines should address whether enforceable undertakings will be used as an alternative to criminal proceedings.

- The reference to 'what stage of … criminal … proceedings the regulator will accept enforceable undertakings' should be removed, as this may imply that a regulator has the power to accept an enforceable undertaking once criminal proceedings have commenced, when responsibility for the carriage of the matter has in fact passed to the DPP.

- The reference to 'civil penalty proceedings' should be replaced with 'civil enforcement proceedings taken by the regulator' to accommodate, for example, situations where the regulator may choose to accept an enforceable undertaking over the commencement or continuance of civil enforcement proceedings. Civil enforcement proceedings include civil penalty proceedings, but also encompass civil proceedings brought by a regulator that are not dependent on the seeking or obtaining of a declaration of a civil penalty provision. Examples are proceedings for injunctive relief,[137] proceedings for orders to disclose information or publish advertisements,[138] proceedings to disqualify a person for repeated contraventions of the law,[139] and civil proceedings brought by a regulator in the public interest for the recovery of damages[140] or on behalf of one or more third parties who have suffered loss or damage, or are likely to suffer loss or damage.[141]

- The guidelines should also address the circumstances in which a regulator may choose to accept an enforceable undertaking over the commencement or continuance of proceedings to impose a quasi-penalty.

- As legislation giving regulators the power to accept enforceable undertakings also provides that a person may withdraw or vary the undertaking with the consent of the regulator,[142] the guidelines should also address the circumstances in

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137 For example, proceedings to obtain orders under *Corporations Act 2001* (Cth)}, s 1323 and s 1324.
138 For example, *Corporations Act 2001* (Cth), s 1324B.
139 For example, *Corporations Act 2001* (Cth), s 206E.
140 See for example, *Australian Securities and Investments Commission Act 2001* (Cth), s 50.
141 See *Corporations Act 2001* (Cth), s 1325(2).
142 See *Australian Securities and Investments Commission Act 2001* (Cth), s 93AA(2) and 93A(2), and *Trade Practices Act 1974* (Cth), s 87B(2).

which a regulator will consider a request to vary or withdraw an enforceable undertaking.

- Where third party interests will be taken into account, the guidelines should also address how those interests will be taken into account. In assessing when third party interests should be taken into account, among the factors to be considered are the standing of third parties to bring an action against the party from whom the regulator is considering accepting an enforceable undertaking, and the ability of third parties to access information acquired under compulsion by the regulator. See section above dealing with the use of admissions made in enforceable undertakings for further discussion of third party interests.

Recommendation

Recommendation 16–3. When legislation provides a regulator with the authority to accept enforceable undertakings, regulators should develop and publish guidelines in accordance with Recommendations 6–2 to 6–4, 9–1 and 10–1 outlining:

(a) the circumstances in which the regulator will accept enforceable undertakings, including

  (i) whether they will be used as an alternative to criminal proceedings; and

  (ii) the stage of an investigation or civil enforcement proceedings or proceedings to impose a quasi-penalty that the regulator will accept enforceable undertakings;

(b) examples of acceptable and unacceptable terms in enforceable undertakings;

(c) what will happen if an enforceable undertaking is not complied with;

(d) the circumstances in which a regulator will consider a request to vary or withdraw an enforceable undertaking; and

(e) when and how third party interests will be taken into consideration, having regard to such factors as the standing of third parties to bring an action against the party from whom the regulator is considering accepting an enforceable undertaking, and the ability of third parties to access information acquired under compulsion by the regulator.

Regulators' use of the media

16.115 The role of the media in Australian federal regulation is considered in two other sections of this Report. Chapter 24 considers the ways in which the media plays a role in maintaining the integrity of government agencies and regulators generally, and thus provides an informal avenue of accountability.[143] The observations made in chapter 24 should be read in connection with the present discussion. Chapters 27 and 28 review the use of adverse publicity orders as formal sanctions imposed by courts as alternatives to monetary penalties[144] and specifically in the context of penalties for corporations.[145] The use of publicity by regulators also arises in connection with infringement notice schemes in chapter 12.[146]

16.116 In contrast, this chapter considers the use of the media by Australian federal regulators as an informal adjunct to their powers to impose or seek penalties and in pursuit of their public educational roles. This is not expressly part of the Terms of Reference for this Inquiry, but the subject has arisen during the period of the Inquiry as an issue of considerable public interest and debate, especially in relation to the Dawson Committee's Review of the *Trade Practices Act 1974* (Cth) (TPA). The Dawson Committee will no doubt comment in detail on this issue in relation to the ACCC when it reports in early 2003. However, in light of the significant public interest in this issue and the fact that it impinges on related areas that are clearly within the scope of the present Inquiry, the ALRC has looked at this topic as one aspect of regulators' penalty-related conduct. The ALRC's Recommendation in this area[147] is in keeping with many of the other Recommendations in this Report in its method of seeking to govern the conduct of all Australian federal regulators while at the same time retaining flexibility for each regulator to tailor its conduct to its particular circumstances.

16.117 It is entirely proper that regulators make public statements about their enforcement actions. This is part of their role in educating the regulated community as well as the general public, and serves to foster general deterrence and, where appropriate, the sense of public shame that is an essential part of the impact of a criminal conviction. Indeed, it is hard to see how any regulator could carry out these functions without public statements of particular enforcement actions. Although some of these objectives could be achieved in overall, depersonalised or statistical information, publicity attached to particular cases is often more potent and sometimes reflects public interest.

16.118 The educative role of regulators may be enshrined in the legislation that establishes them or the schemes that they administer. For example, the *Trade Practices Act*

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143 See para 24.21–24.48.
144 See para 27.21, 27.26, 27.35 and 27.37, and Recommendation 27–1.
145 Commencing at para 28.46.
146 See para 12.38 and 12.102, and Recommendation 12–7.
147 Recommendation 16–4.

1974 (Cth) (TPA) establishes the ACCC in s 6A, and goes on in s 28(1) to give it the following functions, amongst many others:

> (a) to make available to persons engaged in trade or commerce and other interested persons general information for their guidance with respect to the carrying out of the functions, or the exercise of the powers, of the Commission under this Act;
>
> …
>
> (d) to make available to the public general information in relation to matters affecting the interests of consumers, being matters with respect to which the Parliament has power to make laws;
>
> (e) to make known for the guidance of consumers the rights and obligations of persons under provisions of law in force in Australia that are designed to protect the interests of consumers.

16.119 In any event, public interest generally requires regulators to be seen to be carrying out their duties effectively. Where particular cases have gained public attention, there is greater pressure on the regulator concerned to be seen to be responding and taking appropriate, firm action.

16.120 The strength of feeling that emerges from some of the submissions to the Dawson Committee on the subject of the ACCC's use of publicity is testimony to the perceived importance of that regulator's use of the media and the impact that that use could have on the corporations and corporate officers whose activities are the subject of publicised investigations for court proceedings. It is possible to identify support in this for the proposition that reputation (including corporate reputation) is important and that offenders or alleged offenders will do much to avoid adverse publicity.[148] It is interesting to note that some of the most strident critics of the ACCC's use of the media are large corporations well equipped to use the media themselves and experienced in doing so. That does not, however, detract from the principle that regulators' use of the media should be appropriate, irrespective of who is discussed in their media releases.

16.121 Regulators do not and cannot determine criminal guilt or liability for civil or administrative penalties. That is for the courts in the case of criminal offences and civil contraventions, and for the operation of the law itself in the case of true administrative penalties. Where the courts are involved, regulators can only investigate and accuse. A regulator's opinion on any particular breach, or the application of the law generally, remains simply that until vindicated by a court. Their public statements should be prepared with this in mind.

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148 See, for example, The Victorian Bar Association, *Consultation*, Melbourne, 8 October 2001; The Victorian Bar Association, *Submission CAP 22*, 14 October 2002.

Regulators' publicity policies

16.122 Chapter 24 of this Report outlines the varying degree to which three prominent regulators have prepared formal policy guidelines covering their use of the media.[149] ASIC has published *Policy Statement 47: Public Comment*; the ATO deals with this subject briefly in its Prosecution Policy; and the ACCC has no formal guidelines but follows internal regulatory principles.

16.123 It is desirable that this generally unstructured approach be given some form and that guidelines be developed and published by regulators to give guidance to their staff and to the public about the use of publicity as an informal tool to secure compliance with regulatory law.

Proper use of the media

16.124 As branches of the executive government, regulators have great power and influence.[150] The mere fact that charges have been laid or non-criminal contraventions have been alleged carries weight in the public mind without any further information being made known. Alleged offenders are often constrained in the ways and extent to which they can detail their defences or denials of liability. Accordingly, regulators have a responsibility to deal fairly with both the general public and with particular alleged offenders. In relation to the ACCC, Finn J commented in *Electricity Supply Association of Australia Ltd v ACCC* that

> as the agency responsible for policing s 5 of the TP Act, it [the ACCC] can properly be expected to set the example of care in its own representations to the public.[151]

16.125 There can be no question that any public statements made by regulators to the must be accurate, fair and balanced. As remarked by Professor Warren Pengilley, they must be literally correct, convey a correct impression and tell the whole story.[152] Any information published by regulators, even if technically accurate, must not be unfairly selective, bearing in mind that the information released will be subject to editing and interpretation by people not necessarily familiar with the particular case or the law in general.

16.126 Regulators cannot entirely control the information about their activities that enters the public domain, though they can do so in relation to information that emanates from their officers. Neither can regulators control what is done with that information once in the hands of the media, though the likelihood of prominent exposure and heightened public interest should put regulators on notice that any information they re-

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149 See para 24.32–24.35.

150 See *Electricity Supply Association of Australia Ltd v ACCC* (2001) 113 FCR 230, 267 (Finn J).

151 Ibid, 266. Section 52 of the TPA prohibits corporations from engaging in misleading or deceptive conduct in trade or commerce.

152 W Pengilley, *Submission CAP 7*, 17 July 2002, Attachment A, 14.

lease will be widely distributed and discussed. With that comes a greater likelihood for error or misplaced emphasis in reporting. It is also important to consider that the media will tend to focus on the sensational rather than the mundane. This will tend to emphasise allegations over defences and convictions or findings of liability over acquittals. Dramatic news of a raid, especially if accompanied by pictures, will attract attention much more than a defendant's evidence in the later stages of a long-running case.

16.127 Those accused of breaches of the law are entitled to public recognition of the fact that allegations against them have been discontinued or charges against them have been dismissed to the same extent to which those investigations or charges were publicised. This affords them some vindication of their denial of the charges and balances the public record.

Conclusions

16.128 As is the case throughout this Inquiry, it is not the ALRC's present task to determine the propriety of the actions of the ACCC, or any other particular regulator, in this context, but to consider the scope for rules of general application to all regulators that will provide the basis for a more principled and consistent approach to the application of civil and administrative penalties. The ALRC is mindful that the various regulators' differing tasks make it counter-productive, if not impossible, to attempt to prescribe in detail the content of the rules that should be established to guide their conduct. However, statements of the principles that should be incorporated into guidelines that the regulators themselves can, and should, develop and publish can be usefully stated.

16.129 The law of defamation and contempt of court provide constraints on the publicity of penalty-related actions both before and outside court that should apply to regulators no less than to any other member of the community. It is unnecessary to detail those laws here.

16.130 Ultimately, with those constraints in mind, the essence of good practice in this area is a question of balance and some restraint. Publicity surrounding penalty actions should make it clear that the regulator's views remain no more than allegations until a court finds them proved. The alleged offender's denials of misconduct should receive fair attention as they could well be right.

16.131 This is no less the case where an infringement notice has been issued. For reasons discussed in detail in chapter 12 of this Report, an infringement notice is no more than an allegation and payment of the amount specified in it should not be tantamount to any admission of wrongdoing, especially as an infringement notice scheme in accordance with the model scheme set out in chapter 12 contains an incentive to alleged offender to pay rather than contest the allegations, irrespective of that person's actual or perceived liability. Accordingly, no publicity should be attached to the issue of infringement notices or any payment in response. Furthermore, any public comment in relation to infringement notices should make it clear that there is no finding of guilt or liability associated with either the issue of the notice or payment in response to it.

16.132 Although it will in many instances be appropriate to outline the nature of the allegations and the conduct that is said to constitute the alleged breaches, details of the evidence itself should not be disclosed.

16.133 Furthermore, as a general principle no publicity should be attached preliminary investigations, or to the execution of warrants or other exercise of regulators' coercive powers to obtain information. It is necessarily the case that, irrespective of the regulators' private views of the likely guilt of the person under investigation, the regulators' inquiries are incomplete and any comment as to liability is accordingly based on inchoate information.

16.134 More liberal constraints might apply where the alleged offender, or the media themselves, have published information that warrants correction or explanation as regulators' obligation to deal fairly must include a responsibility to ensure that published material is generally accurate.

Recommendation

Recommendation 16–4. Regulators should develop and publish guidelines in accordance with Recommendations 6–2 to 6–4, 9–1 and 10–1 on the use of publicity prior to, during and following the exercise of penalty powers, including guidelines on the reporting of court and tribunal proceedings, in accordance with the following statements of principle:

(a) These guidelines should cover the circumstances in which a regulator will comment on commenced or proposed investigations, having regard to privacy issues, confidentiality and secrecy obligations, its functions and powers, the law of defamation and the public interest.

(b) Any media release or statement in relation to an investigation should make it clear that the investigation concerns alleged breaches, and that liability or guilt is a matter for the courts.

(c) These guidelines should cover the circumstances in which a regulator will comment on commenced or pending court proceedings having regard to privacy issues, confidentiality and secrecy obligations, the need to avoid prejudicial pre-trial publicity, contempt laws, its functions and powers, the law of defamation and the public interest.

(d) Regulators should not provide details of evidence to be used in court proceedings against an alleged offender when providing information to the media.

(e) In general, where it is appropriate for the regulator to comment on court proceedings prior to their resolution, such comment should be restricted to the outcome of particular steps in the court process, and should refer to any statement made by the alleged offender denying the allegations.

(f) Unsuccessful prosecutions, civil penalty actions and other civil enforcement action taken by the regulator should also be the subject of media releases or statements by the regulator where the commencement or progress of the prosecution or the civil penalty action or the civil enforcement action has been the subject of prior publicity, and (so far as practicable) to the same degree as the earlier media releases or statements by the regulator.

(g) Regulators should not inform the media of details relating to the execution of search warrants prior to or during their execution, or relating to the exercise of any of their compulsory powers on any person prior to or during the exercise of such compulsory powers.

(h) These guidelines should cover the circumstances in which a regulator will comment following the execution of search warrants or the exercise of compulsory powers on particular persons, having regard to privacy issues, confidentiality and secrecy obligations, the need to avoid prejudicial pre-trial publicity, contempt laws, the regulator's functions and powers, the law of defamation and the public interest.

(i) No media release or statement should be issued or made in relation to the issue of an infringement notice by a regulator, its payment or non-payment. Any media release or statement, if issued contrary to this Recommendation, should make it clear that:

  (i) the issue of the infringement notice amounts to no more than an allegation by the regulator;

  (ii) payment of the amount specified in the infringement notice does not amount to an admission of any breach of the law or of any liability for any purpose;

  (iii) non-payment of the amount specified in the infringement notice should be treated as a denial of the allegations by the person to whom the notice was issued.

17. Leniency and Immunity

Contents

Introduction

17.1 Regulators exercise a variety of discretionary powers depending upon the statutory powers of the regulator and the nature of the industry or community being regulated. Discretion has been defined as the power to choose between alternative courses of action in contrast to rule-dictated decisions and may be a useful tool in mitigating the rigidity and inflexibility of legal rules.[1] It enables decision makers to particularise their responses to individual or unanticipated circumstances. Discretion may also serve as a substitute for rules where prescription is inappropriate or undesirable,[2] allowing administrators to 'translate broad legal aspirations into routinely workable practices'.[3]

17.2 Many agencies have multiple discretionary functions, such as adjudicating issues between parties; rule making, standard setting and policy formation; and exercis-

1 M Carter, 'Prosecutorial Discretion as a Complement to Legislative Reform: The Post-CC Section 43 Scenario' in, *Perspectives on Legislation: Essays from the 1999 Legal Dimensions Initiative* (1999) Law Commission of Canada, Ottawa, 14–15. See also discussion on discretion in ch 15 of this Report.

2 The Hon Justice B McLachlin, 'Rules and Discretion in the Governance of Canada' (1992) 56 *Saskatchewan Law Review* 167, 171.

3 R Baldwin and K Hawkins, 'Discretionary Justice: Davis Reconsidered' (1984) *Public Law* 570, 574.

ing expert, professional or technical judgments.[4] For this reason, many decisions must take account of a myriad of factors.[5]

17.3 This chapter is concerned with how regulators exercise discretion in relation to leniency, immunity and remissions. Regulators with power to recommend or initiate penalty proceedings can utilise a variety of concessionary arrangements to improve compliance. Such arrangements rely on the regulator's officers exercising their discretion not to enforce penalty provisions strictly by, for example, not commencing or pursuing an investigation. The discretion may be unfettered, may depend on published policy guidelines, or may be negotiated in individual cases (for example, the use of administrative settlements and enforceable undertakings by ASIC and the ACCC — discussed in chapter 16).

> Understanding how enforcement officials exercise their functions is central to an understanding of how any regulatory system operates, for as many have noted regulation is not a product of legislators or those who write regulatory rules, rather it is the product of interactions between regulators, regulatees, and the wider community interested in the regulatory project.[6]

17.4 The first section of this chapter describes the operation of immunities in federal legislation, including immunities granted by the Director of Public Prosecutions (DPP), and the purpose of such policies.[7] The second section looks at leniency policies and their use by regulators to promote compliance. Finally, the chapter looks at remission of administrative penalties and the use of the discretion to remit penalties by a number of major regulators.

Immunity

17.5 Immunity must be distinguished from leniency, which relies on discretionary judgments as to its application. Immunity is a complete exemption or freedom from legal rules or proceedings if specified conditions are met. Immunities recognised by Australian law include legal professional privilege and privilege against self-incrimination (see discussion in chapters 18 and 19). These immunities are limited to protection against giving certain evidence or producing certain documents in an investigation or proceeding. This chapter considers immunity in its broader sense — as the ability of a regulator to waive its right to take action in response to a contravention of federal legislation.

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4 Ibid, 590.

5 Ibid, 591. The use of rules and guidelines to improve the procedural and substantive fairness of penalty decisions is considered in ch 6.

6 J Black, 'Managing Discretion' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001), 3 [footnotes omitted].

7 The relationship between federal regulators and the Commonwealth Director of Public Prosecutions is discussed in more detail in ch 9.

Immunity from criminal proceedings

Immunity Discretion: DPP

17.6 The Prosecution Policy of the Commonwealth guides the exercise of discretion by the Director of Public Prosecutions.[8] Under s 9(6) of the *Director of Public Prosecutions Act 1983* (Cth) (DPP Act), the DPP has a discretionary power to grant immunity from prosecution 'if he or she considers it appropriate to do so'. The immunity is in the form of a 'use immunity' by way of an undertaking signed by the DPP that any information or disclosure given by the person is not admissible in evidence against the person in any civil or criminal proceedings in a federal court or in a court of a State or Territory, other than in perjury proceedings.[9] Use immunities are considered in more detail in chapters 11, 18 and 19.

17.7 Unlike other forms of immunity, which apply if specified legal conditions are met, 'informant immunity' is contingent on a discretionary exercise of power. The Prosecution Policy structures this statutory discretion by elaborating the 'broad considerations involved in deciding whether to give an accomplice an undertaking under either s 9(6) or s 9(6D) of the [DPP] Act in order to secure that person's testimony for the prosecution'.[10] The Prosecution Policy notes generally that 'a decision whether to call an accomplice to give evidence for the prosecution presents conflicting considerations calling for the exercise of careful judgment in the light of all the available evidence'.[11] The Prosecution Policy specifies that an immunity undertaking will only be given if certain mandatory, threshold conditions are met. Firstly, the accomplice's evidence must not be available from other sources and must be necessary to secure the conviction of the defendant. Secondly, the accomplice must be significantly less culpable than the defendant.[12]

17.8 According to the Prosecution Policy, the central issue is whether it is in the overall interests of justice that the opportunity to prosecute the accomplice should be foregone to secure that person's testimony in the prosecution of another.[13] The DPP 'should' consider a number of factors in making this judgment:

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8 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*, Commonwealth Director of Public Prosecutions, <www.cdpp.gov.au/cdpp/>, 16 November 2001.

9 *Director of Public Prosecutions Act 1983* (Cth), s 9(6D). In 2001–02, the DPP gave undertakings under s 9(6) and 9(6D) to 42 people in a total of 21 matters. Some cases involved indemnities being given to a number of witnesses, including one large fraud case where eight witnesses were indemnified: Commonwealth Director of Public Prosecutions, *Annual Report 2001–2002* (2002), Commonwealth Director of Public Prosecutions, 22.

10 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*, Commonwealth Director of Public Prosecutions, <www.cdpp.gov.au/cdpp/>, 16 November 2001, para 5.1.

11 Ibid, para 5.2.

12 Ibid, para 5.5.

13 Ibid, para 5.6.

> (a) the degree of involvement of the accomplice in the criminal activity in question compared with that of the defendant;
>
> (b) the strength of the prosecution evidence against the defendant without the evidence it is expected the accomplice can give and, if some charge or charges could be established against the defendant without the accomplice's evidence, the extent to which those charges would reflect the defendant's criminality;
>
> (c) the extent to which the prosecution's evidence is likely to be strengthened if the accomplice testifies — apart from taking into account such matters as the availability of corroborative evidence, and the weight that the arbiter of fact is likely to give to the accomplice's testimony, it will also be necessary to consider the likely effect on the prosecution case if the accomplice does not come up to proof;
>
> (d) the likelihood of the weakness in the prosecution case being strengthened other than by relying on the evidence the accomplice can give (for example, the likelihood of further investigations disclosing sufficient independent evidence to remedy the weakness);
>
> (e) whether there is or is likely to be sufficient admissible evidence to substantiate charges against the accomplice, and whether it would be in the public interest that the accomplice be prosecuted but for his or her preparedness to testify for the prosecution if given an undertaking under the [DPP] Act; and
>
> (f) whether, if the accomplice were to be prosecuted and then testify, there is a real basis for believing that his or her personal safety would be at risk while serving any term of imprisonment.[14]

17.9 The Prosecution Policy does not indicate the relative importance of each of these factors in making a decision about whether to grant immunity. This clearly leaves considerable scope for the exercise of discretion by the DPP.

17.10 The Prosecution Policy states that the terms of any agreement or undertaking between the prosecution and the accomplice 'should' (not 'must') be disclosed to the court.[15] Presumably, the court could then consider the terms of the agreement under its inherent discretion to prevent unfairness to an accused or to prevent abuse of process.

Immunity from non-criminal proceedings

17.11 The DPP's power to grant immunity relates to criminal proceedings. The ALRC's research revealed very few formal powers to grant immunity from civil proceedings. The ACCC's powers discussed below are some examples. Immunity from civil proceedings is more often granted informally by regulators making targeting decisions and decisions as to the appropriate response to a suspected contravention.[16]

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14 Ibid, para 5.6.
15 Ibid, para 5.7.
16 This may include accepting an enforceable undertaking instead of taking court action. Enforceable undertakings are discussed in ch 16.

17.12 Unlike immunity granted in accordance with formal statutory powers, a decision by the regulator not to take action in response to a suspected contravention has no formal status and does not act as a bar to proceedings. The regulator retains the right to initiate action at a later time.

Immunity discretions: ACCC

17.13 One example of a formal power to grant immunity from civil proceedings is the ACCC's power under the *Trade Practices Act 1974* (Cth) (TPA) to grant immunity from the exclusive dealing prohibitions in Part IV of the TPA and to authorise some mergers and anti-competitive conduct. Immunity from the exclusive dealing provisions of the TPA is available automatically once a person 'notifies' the ACCC of the conduct. The type of conduct that may be notified includes third line forcing[17] and other forms of exclusive dealing.

> Under the Notification process, immunity from court action for **third line forcing** is obtained automatically 14 days after lodgement of the Notification. The Commission may, however, take action (issue a draft notice) within the 14 day period after lodgement to prevent the immunity taking effect. For **full line forcing**, immunity from court action is obtained immediately upon lodgement of the Notification. The immunity gained by lodging a Notification remains in force unless, and until, the Commission issues a notice revoking immunity.[18]

17.14 Notification immunity prevents action being taken by the ACCC or a third party seeking remedies for contravention of the TPA. The ACCC may revoke a notification immunity if it is 'satisfied that the likely benefit to the public will not outweigh the likely detriment to the public' or that the 'conduct substantially lessens competition and that in all the circumstances there appears to be no countervailing public benefit'.[19] Before immunity is revoked, the ACCC must issue a draft notice and seek submissions from interested parties.

17.15 The other form of immunity power given to the ACCC is the power to authorise mergers and certain forms of anti-competitive conduct that would ordinarily contravene the TPA. Unlike notification, authorisation immunity is not automatic. The authorisation process requires the ACCC to assess whether the public benefit of the proposed merger or conduct outweighs any anti-competitive effect.[20] The ACCC issues a draft determination and seeks submissions from interested parties.

17.16 Third parties have opportunities to participate in the immunity process of the ACCC if they will be affected by the grant of any such immunity. In contrast, the

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17 Third line forcing occurs when a supplier refuses to supply goods or services unless other goods or services are acquired from a third party.

18 Australian Competition & Consumer Commission, Notifications Recently Received, <www.accc.gov.au>, 19 February 2002.

19 *Trade Practices Act 1974* (Cth), s 93.

20 Ibid, s 88.

DPP's immunity process provides no opportunity for third party participation. One explanation for this difference may be that the DPP is dealing with prosecutions for crimes rather than market regulation and usually there will not be identifiable third party interests relevantly affected, or because third party interests have not traditionally been considered in criminal procedures.

Leniency

17.17 Leniency refers to the making of discretionary judgments as to the application of the law (including whether a penalty should be imposed or action taken in respect of a contravention) by a regulator or other decision maker. Opportunities for leniency may arise expressly under statute, under published policies or guidelines of regulators, or in the way in which discretion is exercised by a regulator or other decision maker. The power to remit penalties is one form of leniency discretion and is discussed below at para 17.67.

Purposes of leniency policies

17.18 There are two main types of leniency policies — investigatory leniency policies and compliance-focussed leniency policies. Investigatory leniency policies are the most common leniency policies in use overseas and have been introduced mainly in an attempt to curb anti-competitive activities.[21] Such leniency policies are primarily investigatory tools used to encourage corporate and individual confessions relating to anti-competitive conduct. The ACCC's policy on 'Cooperation and Leniency in Enforcement'[22] and ASIC's policy statement 'No-action Letters'[23] are examples of investigatory leniency policies. These policies encourage offenders to come forward and admit their involvement in contraventions in exchange for the regulator taking no action against them or recommending to the court that any penalties be reduced.

17.19 Compliance-focussed leniency policies encourage honesty and compliance with a regulatory program by allowing regulated entities to discuss issues of compliance with the regulator. This encourages a more positive relationship between regulators and the regulated. In the case of compliance-focussed leniency policies, allowing a significant amount of discretion on the part of the regulator is often appropriate.

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21 Overseas these policies are a major tool in the attempt to curb hard core cartel activity. The OECD defines hard core cartels as 'anti-competitive agreements, anti-competitive concerted practice or anti-competitive arrangements by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce': OECD Council, *Recommendation of the Council Concerning Effective Action against Hard Core Cartels: Adopted by the Council at its 921st Session on 25 March 1998*, Organisation for Economic Cooperation and Development, <www.oecd.org/pdf/M00018000/M00018135.pdf>, 20 December 2001, 3.

22 Australian Competition & Consumer Commission, *Cooperation and Leniency in Enforcement*, Australian Competition & Consumer Commission, <www.accc.gov.au/compliance/leniency.htm>, 23 October 2001. In July 2002, the ACCC released a revised version (although the two are substantially similar) of this policy for comment: see discussion at para 17.21.

23 Australian Securities & Investments Commission, *Policy Statement 108: No-action Letters*, Australian Securities & Investments Commission, <www.cpd.com.au/asic/ps/>, 20 December 2001.

ASIC's policy statement on 'Enforcement Action Submissions'[24] is an example of a compliance-focussed leniency policy. A common outcome from a compliance-focussed process is a negotiated penalty such as an administrative settlement or enforceable undertaking.

ACCC leniency policy

17.20 In July 2002, the ACCC published two sets of draft guidelines outlining the ACCC's leniency policy with respect to individuals and corporations who cooperate in enforcement matters. The first set of guidelines, entitled *Cooperation Policy for Enforcement Matters*,[25] relates to all contraventions of either the TPA or other legislation administered by the ACCC. The second set of guidelines, entitled *Draft Leniency Policy for Cartel Conduct*,[26] relates to cartel conduct only. The Draft Policies have been released for public comment.[27]

Cooperation Policy for Enforcement Matters

17.21 This policy is of general application and outlines the ACCC's leniency policy in relation to individuals and corporations who have engaged in conduct which contravenes either the TPA or any other legislation administered by the ACCC. It is largely a refinement of the ACCC's previous draft leniency policy, initially published in 1998, and is expressed in general, 'flexible' terms, allowing the ACCC to exercise discretion on a case-by-case basis.[28]

17.22 The policy provides two levels of 'amnesty': (1) immunity from prosecution; and (2) leniency in the imposition of civil penalties. The ACCC may also make court submissions requesting penalty reductions. The focus of this policy is investigative in that it attempts to encourage offenders to confess wrongdoing and to support ACCC investigations by providing evidence of other contraventions of the TPA, particularly where the confessor is an officer of a corporation and may be able to provide evidence of the corporation's contraventions.

17.23 In the case of both individuals and corporations, leniency will not be granted if the person or corporation seeking leniency has compelled or induced another person or

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24 Australian Securities & Investments Commission, *Policy Statement 52: Enforcement Action Submissions*, Australian Securities & Investment Commission, <www.cpd.com.au/asic/ps/>, 20 December 2001.

25 Australian Competition & Consumer Commission, *Cooperation Policy for Enforcement Matters*, 1 July 2002.

26 Australian Competition & Consumer Commission, *Draft ACCC Leniency Policy for Cartel Conduct* (2002).

27 At the time of writing, the period of consultation had ended.

28 Australian Competition & Consumer Commission, *Cooperation Policy for Enforcement Matters*, 1 July 2002, 1.

corporation to engage in the wrongful conduct, or has been the initiator of the conduct.[29]

Corporate immunity

17.24 Immunity is 'most likely' to be considered appropriate for a corporation which:

- produces valuable and important evidence of a contravention which the ACCC is otherwise unaware of or in relation to which the ACCC has insufficient evidence to initiate proceedings;
- takes prompt and effective action to terminate its part in the activity upon discovery of the breach;
- provides the ACCC with full and frank disclosure and all relevant evidence and cooperates fully with the ACCC's investigation and prosecution;
- has not compelled or induced any other corporation to take part in the conduct and was not a ringleader of the activity;
- is prepared to make restitution where appropriate;
- is prepared to take immediate steps to rectify the situation and prevent it from happening again, undertakes to do so and complies with the undertaking; and
- does not have a prior record of contraventions.[30]

Individual immunity

17.25 The ACCC policy states that immunity is 'most likely' to be considered appropriate for company directors, managers, officers or employees who come to the ACCC as individuals where they:

- produce valuable and important evidence of a contravention which the ACCC is otherwise unaware of or in relation to which the ACCC has insufficient evidence to initiate proceedings;
- provide the ACCC with full and frank disclosure and all relevant evidence;
- undertake to cooperate fully with the ACCC and comply with that undertaking;

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29 Ibid, 2.

30 These criteria are similar to the criteria used by the US Department of Justice in its Amnesty Policy: US Department of Justice Anti-Trust Division, *Corporate Leniency Policy*, <www.usdoj.gov/atr/public/guidelines/guidelin.htm>, 20 December 2001. Under the US policy amnesty (ie, complete immunity) will be automatic if the corporation comes forward before an investigation of the matter has commenced.

- agree not to use the same legal representation as the firm which employs them; and

- have not compelled or induced any other person or corporation to take part in the conduct and were not a ringleader or originator of the activity.[31]

17.26 Whereas regulators in the European Union and the United States have prescriptive factors determining grants of leniency,[32] the ACCC states that it has adopted a flexible cooperation policy.[33] The policy is intended only as 'an indication of the factors the Commission will consider relevant when considering a request for leniency'.[34]

17.27 Under the ACCC policy, immunity or amnesty is not automatic. This contrasts with overseas policies such as the US Department of Justice Anti-Trust Division leniency policies[35] and the UK Office of Fair Trading's 'Whistleblowers' policy[36] that provide for complete immunity provided that the individual or corporation is the first to come forward and does so *before* an investigation has commenced.[37] In the US and the UK immunity may be granted by the responsible regulator. In Canada, the Compe-

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31 These criteria are similar to the criteria used by the US Department of Justice in its Amnesty Policy: US Department of Justice Anti-Trust Division, *Leniency Policy for Individuals*, <www.usdoj.gov/atr/public/guidelines/guidelin.htm>, 20 December 2001. Under the US policy amnesty (ie, complete immunity) will be automatic if the person comes forward before an investigation of the matter has commenced.

32 European Commission, *Notice on the Non-Imposition or Reduction of Fines in Cartel Cases: OJ C 207 — Bulletin EU 7/8 1996 — 1.3.32*, European Union, <http://europa.eu.int/comm/competition/antitrust/legislation/96c207_en.html>, 19 November 2001; US Department of Justice Anti-Trust Division, *Corporate Leniency Policy*, <www.usdoj.gov/atr/public/guidelines/guidelin.htm>, 20 December 2001 and US Department of Justice Anti-Trust Division, *Leniency Policy for Individuals*, <www.usdoj.gov/atr/public/guidelines/guidelin.htm>, 20 December 2001.

33 Australian Competition & Consumer Commission, *Cooperation Policy for Enforcement Matters*, 1 July 2002, 1.

34 A Asher, 'New Developments in Competition Policy: An Australian Perspective' (Paper presented at International Legal Challenges for the Twenty-First Century, Sydney, 26 June 2000).

35 US Department of Justice Anti-Trust Division, *Corporate Leniency Policy*, <www.usdoj.gov/atr/public/guidelines/guidelin.htm>, 20 December 2001 and US Department of Justice Anti-Trust Division, *Leniency Policy for Individuals*, <www.usdoj.gov/atr/public/guidelines/guidelin.htm>, 20 December 2001. The Canadian Competition Bureau's immunity program under the *Competition Act 1985* (RS C 1985, c 34) is modelled on the US policies: Canadian Competition Bureau, *Competition Bureau Information Bulletin; Immunity Program Under the Competition Act*, <http://strategis.ic.gc.ca/pics/ct/immunitye.pdf>, 21 March 2001.

36 UK Office of Fair Trading, *Leniency in Cartel Cases: a Guide to the Leniency Programme for Cartel Cases under the Competition Act 1998*, UK Office of Fair Trading, <www.oft.gov.uk.>, 21 March 2001.

37 The US and UK policies provide for lesser levels of amnesty (by way of reduced penalties) if information is provided after an investigation has commenced: US Department of Justice Anti-Trust Division, *Corporate Leniency Policy*, <www.usdoj.gov/atr/public/guidelines/guidelin.htm>, 20 December 2001; US Department of Justice Anti-Trust Division, *Leniency Policy for Individuals*, <www.usdoj.gov/atr/public/guidelines/guidelin.htm>, 20 December 2001; UK Office of Fair Trading, *Leniency in Cartel Cases: a Guide to the Leniency Programme for Cartel Cases under the Competition Act 1998*, UK Office of Fair Trading, <www.oft.gov.uk.>, 21 March 2001.

tition Bureau makes an immunity recommendation to the Attorney-General, who then authorises or rejects immunity in accordance with a general immunity policy.[38]

17.28 The ACCC policy does not specify a particular level of immunity or reduction in penalty.[39] Again, this contrasts with overseas policies that specify levels of penalty reductions of up to 50%[40] or a range of reductions from 10% to 75%.[41]

17.29 The 'flexibility' of the ACCC's 1998 leniency policy was criticised on the basis that it results in uncertainty and confusion about the rights of offenders who come forward with information about a breach.[42] The 2002 draft policy adopts an equally flexible tone and similar comments have been made on this basis.[43] The result is arguably to discourage people from volunteering information because they are not sure whether they will receive leniency and at what level. The lack of publicity received by the previous policy has also been a cause of concern since offenders are unlikely to come forward if they are not aware of its existence.[44]

17.30 The policy also provides that the ACCC may reach an agreement with the parties about joint submissions to be made to the court for adjudication. It is likely to produce a joint submission of this nature where it is satisfied that a party who has not been granted leniency has nonetheless cooperated with ACCC investigations in a substantial way.

17.31 When determining whether to reach an agreement as to penalties, and in determining the subject matter of such an agreement, the ACCC will take into account the following factors:

- whether the company or individual has cooperated with the Commission;
- whether the contravention arose out of the conduct of senior management, or at a lower level;

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38 Canadian Competition Bureau, *Competition Bureau Information Bulletin; Immunity Program Under the Competition Act*, <http://strategis.ic.gc.ca/pics/ct/immunitye.pdf>, 21 March 2001.

39 Under the ACCC policy, agreed penalties are submitted to the court for approval. The court is not bound to accept the agreed penalty submission: *Australian Competition and Consumer Commission v SIP Australia Pty Ltd* (1999) ATPR ¶41–702. See ch 16.

40 UK Office of Fair Trading, *Leniency in Cartel Cases: A Guide to the Leniency Programme for Cartel Cases under the Competition Act 1998*, UK Office of Fair Trading, <www.oft.gov.uk.>, 21 March 2001.

41 European Commission, *Notice on the Non-Imposition or Reduction of Fines in Cartel Cases: OJ C 207 — Bulletin EU 7/8 1996 — 1.3.32*, European Union, <http://europa.eu.int/comm/competition/antitrust/legislation/96c207_en.html>, 19 November 2001.

42 M Kind, 'Is the Watch Dog's Bark Enough to Make Whistleblowers Bite? The ACCC Leniency Policy' (2001) (March) *Law Institute Journal* 57, 58.

43 For example see D Davies, 'ACCC's Leniency Policy: What it Means for Practitioners and Clients' (Paper presented at ACCC Competition & Consumer Law Enforcement Conference, Sydney, 4 July 2002).

44 M Kind, 'Is the Watch Dog's Bark Enough to Make Whistleblowers Bite? The ACCC Leniency Policy' (2001) (March) *Law Institute Journal* 57, 58, see also M Corrigan, 'ACCC's Leniency Policy: Issues for Australian Practitioners' (Paper presented at ACCC Competition & Consumer Law Enforcement Conference, Sydney, 4 July 2002), 2. It is uncertain whether the comprehensiveness of the more recent policies will overcome these concerns.

- whether the company has a corporate culture conducive to compliance with the law;
- the nature and extent of the contravening conduct;
- whether the conduct has ceased;
- the amount of loss or damage caused;
- the circumstances in which the conduct took place;
- the size and power of the company; and
- whether the contravention was deliberate and the period over which it extended.[45]

Draft Leniency Policy for Cartel Conduct

17.32 In July 2002, the ACCC published draft leniency guidelines applicable to instances of 'hard core cartel conduct', including *per se* trade practices offences such as bid-rigging, price fixing and market sharing.

17.33 The policy is designed to target large corporations and their directors, officers and employees where they have engaged in collusive conduct affecting 'important' Australian markets.[46] However, smaller businesses or individuals that may have been involved in cartel conduct are also encouraged to take advantage of the policy. Those uncertain whether their conduct constitutes illegal collusion may approach the ACCC to present their circumstances on a hypothetical basis. Information obtained under these circumstances will be non-prejudicial and will only be used to provide the requested clarification.

17.34 The rationale for limiting this policy to cartel conduct is that such conduct is inherently secretive and therefore difficult to detect without evidence provided by direct participants.[47] The collusive nature of cartel conduct is also deemed to warrant leniency provisions, as opposed to circumstances of unilateral misconduct, where the option of leniency is thought to reduce the deterrent value of pecuniary penalties and court proceedings.

> The possibility of immunity in situations where conduct can be unilateral (for example, exclusive dealing or misuse of market power) could be counterproductive in that

45 Australian Competition & Consumer Commission, *Cooperation Policy for Enforcement Matters*, 1 July 2002, 2. Agreed penalties are also discussed in ch 16 and 30.

46 Australian Competition & Consumer Commission, *Draft ACCC Leniency Policy for Cartel Conduct* (2002), 1.

47 Ibid, 2.

> the deterrent value of court proceedings and pecuniary penalties might be lessened where the only party to the conduct may receive immunity.[48]

17.35 The policy is one of numerous measures designed to target 'hard core' cartel conduct, and was recommended by the ACCC in its submission to the Dawson Committee.[49] Other measures advocated by the ACCC include the introduction of criminal sanctions applicable to 'hard core' cartel conduct, and an increase in existing pecuniary penalties.[50]

17.36 The policy provides two levels of amnesty for individuals and corporations: (1) immunity from prosecution and (2) leniency in the imposition of civil penalties. Where a corporation is granted immunity, all employees, directors and officers of the corporation who have admitted their involvement in cartel conduct as part of the corporate admission will receive leniency in the same form as the corporation, provided they cooperate with the ACCC's investigations on a continuous basis throughout the course of the proceedings.

Corporate immunity

17.37 The ACCC will grant a corporation immunity from prosecution where the corporation is the first person to disclose the existence of an alleged cartel and the ACCC is unaware of the alleged cartel's existence.

17.38 Moreover, the ACCC will not apply for the imposition of civil penalties where:

- the corporation is the first person to apply for leniency;
- the ACCC is aware of the alleged cartel's existence; and
- the ACCC believes it has insufficient evidence to institute proceedings in relation to the alleged cartel.[51]

17.39 In order to be granted immunity from either prosecution or the imposition of civil penalties, the corporation must meet the following requirements:

- it must give full and frank disclosure on a continuous basis and provide the ACCC with all evidence in its possession or available to it which relates to the ACCC's investigation;

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48 Ibid, 4.

49 Australian Competition & Consumer Commission, *Submission to the Review of the Trade Practices Act 1974*,<www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P1.pdf, www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P2.pdf, www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P3.pdf>, 13 August 2002. The Dawson Committee is due to report by the end of January 2003.

50 Australian Competition & Consumer Commission, *Draft ACCC Leniency Policy for Cartel Conduct* (2002).

51 Ibid, 3.

- its admissions must be 'truly corporate' in nature rather than the isolated confessions of a few representatives;
- it must immediately cease its involvement in the alleged cartel;
- it must not have induced other corporations to participate in the cartel and must not have been the 'ringleader' of the cartel.[52]

Individual immunity

17.40 The ACCC will grant an individual immunity from prosecution where the individual is the first person to disclose the existence of an alleged cartel and the ACCC is unaware of the alleged cartel's existence.

17.41 Moreover, the ACCC will not seek the imposition of civil penalties where:

- the individual is the first person to apply for leniency;
- the ACCC is aware of the alleged cartel's existence; and
- the ACCC believes it has insufficient evidence to institute proceedings in relation to the alleged cartel.[53]

17.42 In order to be granted immunity from prosecution or the imposition of civil penalties, the individual must meet the following requirements:

- he or she must give full and frank disclosure on a continuous basis and provide the ACCC with all evidence in his or her possession or available to him or her which relates to the ACCC's investigation;
- he or she must immediately cease involvement in the alleged cartel; and
- he or she must not have coerced other persons to participate in the cartel.[54]

Rationale for the ACCC leniency policies

17.43 The development of an ACCC leniency policy is part of a regulatory trend towards more cooperative, less coercive forms of regulation. The ACCC has stated:

> The Commission is of the view that a leniency policy that provides clear and certain incentives to potential applicants is a valuable tool in fighting illegal cartel conduct.

52 Ibid, 3.
53 Ibid, 5.
54 Ibid, 5.

> Where the extent of the leniency to be provided is certain, persons are more likely to take advantage of such a policy and disclose potentially illegal and harmful conduct.[55]

17.44 Leniency reduces the risk of being penalised for individuals and corporations who wish to terminate unlawful conduct but feel reluctant to do so because of the possible legal consequences.[56] A major price fixing case in the vitamins market first came to the attention of the ACCC when one of the participants in the cartel came forward in exchange for leniency, albeit in the United States.[57]

17.45 Leniency is an early intervention strategy aiming to encourage offenders to come forward at the earliest opportunity. In relation to the proposed leniency policy for cartel conduct the ACCC has said:

> Significant cartels operating in Australia usually require the elements of collusion, secrecy and deception. The requisite secret cooperation between participants often enables the existence of arrangements or understandings with little documentary evidence or third party awareness. In these circumstances, the discovery of and the proof of the existence of cartels can be more difficult than other forms of corporate misconduct. There is, as such, greater justification for a leniency policy in relation to cartels so as to encourage insider information and to penetrate the cloak of secrecy. The Commission's proposed policy for cartel conduct does not offer a reward to 'good corporate citizens'. It is a compliance tool designed to deliver benefits to all Australians by identifying, stopping and deterring harmful and illegal behaviour.[58]

17.46 The ACCC acknowledges that granting leniency involves weighing up the public interest in encouraging voluntary disclosures of breaches against the public interest in pursuing offenders with the full penalty and deterrence of the law.[59] The ACCC also recognises that grants of immunity must be in the public interest and 'subject to the closest scrutiny, and must be considered on the basis of established criteria, consistent with the fair and impartial administration of the law'.[60]

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55 Australian Competition & Consumer Commission, *Submission to the Review of the Trade Practices Act 1974*,<www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P1.pdf, www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P2.pdf, www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P3.pdf>, 13 August 2002, para 10.4.6.

56 A Asher, 'New Developments in Competition Policy: An Australian Perspective' (Paper presented at International Legal Challenges for the Twenty-First Century, Sydney, 26 June 2000).

57 Australian Competition & Consumer Commission, 'ACCC to Investigate any Australian Link to Vitamins Price-Fix', *Media Release MR 70/99: 21 May 1999*, <www.accc.gov.au>, 20 December 2001. See also the subsequent court proceedings in which the ACCC and the respondents proposed agreed penalties to the court: *Australian Competition & Consumer Commission v Roche Vitamins Australia Pty Ltd* (2001) ATPR ¶41–809.

58 S Bhojani, 'Should Whistleblowing be Encouraged and Protected and Is It?' (Paper presented at Whistleblowing: Betrayal or Public Duty?, Sydney, 6 August 2002), 6.

59 A Asher, 'New Developments in Competition Policy: An Australian Perspective' (Paper presented at International Legal Challenges for the Twenty-First Century, Sydney, 26 June 2000).

60 Ibid.

Judicial consideration of the ACCC policy

17.47 The first case which considered the effect of the ACCC's 1998 leniency policy confirmed that regulatory guidelines do not bind the courts.[61] In *ACCC v SIP Australia*, Goldberg J stated:

> The Court, of course, is not bound by the policy nor is it required to take it into account in any given case. Nevertheless the matters which the policy takes into consideration are matters relevant to a determination of the appropriate penalties to impose for contraventions of Pt IV of the Act.
>
> Although the proposed penalties fall at the lower end of the range I am satisfied that it is appropriate that those penalties be imposed having particular regard to the absence of any market power held by Baker Bros, the assets of the company and its directors and the immediate and full assistance and cooperation offered to the Commission.[62]

17.48 The defendant also agreed to provide a s 87B undertaking to implement a corporate compliance program and to pay part of the ACCC's legal costs.

17.49 The Federal Court is clearly willing to depart from the ACCC's policy where it is inconsistent with the Court's determination of penalties. This highlights the uncertainty of the ACCC's leniency policy in respect of penalty discounts. There is no guarantee that the offender will receive the agreed penalty. Subsequent cases have confirmed this.

17.50 In *ACCC v Roche Vitamins Australia Pty Ltd*, the Federal Court accepted penalties agreed by the ACCC and the parties under the ACCC's leniency policy only after additional information was provided concerning the effect of the conduct on market prices.[63]

17.51 In *ACCC v Ithaca Ice Works Pty Ltd*,[64] the Full Court of the Federal Court rejected an appeal by the ACCC against the penalties imposed on parties involved in a price fixing arrangement concerning the supply of ice in Queensland. The ACCC argued that the penalties imposed on parties who had provided an 'exceptional' level of cooperation to the ACCC in investigating the conduct should not have been used as the benchmark to assess penalties against other parties who had not given the same level of cooperation.[65] The cooperation had resulted in the ACCC agreeing not to seek any penalty against one individual defendant and an agreed penalty against one corporate defendant of $25,000. The trial judge used the agreed penalty as a factor relevant to as-

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61 Regulatory guidelines are discussed in detail in ch 6.

62 *Australian Competition and Consumer Commission v SIP Australia Pty Ltd* (1999) ATPR ¶41–702.

63 *Australian Competition & Consumer Commission v Roche Vitamins Australia Pty Ltd* (2001) ATPR ¶41–809 (Goldberg J).

64 *Australian Competition & Consumer Commission v Ithaca Ice Works Pty Ltd* [2001] FCA 1716 (Wilcox, Hill and Carr JJ).

65 Ibid, para 27.

sessing the penalty to be imposed against the other parties to the price fixing arrangement.[66] The ACCC claimed that the penalties were inadequate, that the

> primary judge had given inadequate weight to the degree of cooperation which Mr Bradley and through him QIS had given in disclosing the existence of the agreement and assisting the Commission with its enquiries. As noted previously, particular emphasis was placed upon the 'exceptional' nature of that cooperation.[67]

17.52 The ACCC submitted that the penalty which should have been imposed, without the discount for cooperation, was $180,000 and that this should have been used by the judge as the benchmark for the penalties imposed on the other participants. No submissions had been made by the ACCC to the primary judge about the level of appropriate penalty in the absence of cooperation — 'rather, his Honour was given an agreed figure of $25,000 and asked to approve the imposition of a penalty in the amount of that agreed figure'.[68]

17.53 The Full Court of the Federal Court emphasised the importance of the parity principle,[69] which requires that like penalties be imposed for like offences, and held that the primary judge had not erred in taking into account the penalties imposed on those parties who had cooperated with the ACCC when determining the penalties to be imposed on the other participants.

17.54 The Court considered that the case raised several procedural issues. Because the penalties for those who had cooperated with the ACCC had been determined first, they became relevant to assessing the penalties to be imposed on the other participants. If the cases had been heard in a different sequence the Court considered that 'the Commission would most likely have ensured the imposition of a higher penalty'.[70] The Court also commented on the lack of transparency in the submissions made by the ACCC concerning the agreed penalties noting that:

> Where the Commission proposes to the Court an agreed penalty which is calculated taking into account a substantial discount from what would otherwise be considered the appropriate penalty so as to reflect a degree of cooperation, it would be desirable that the Commission disclose the process by which the discounted penalty has been arrived at. In particular, it would be of assistance to the Court, particularly where there are other proceedings pending, to hear submissions on the range of appropriate penalties and the discount which it is proposed should be allowed to take into account the level of cooperation afforded by the offender. Had that been done in the present case, the learned primary judge would have been able to form a view as to the appropriate range of penalty absent cooperation and have been in a position to calculate an appropriate discount to take into account the exceptional level of cooperation afforded by QIS. It is only in this way that a comparison could properly be made between the

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66 See *Australian Competition and Consumer Commission v Ithaca Ice Works Pty Limited* (2001) ATPR ¶41–816 (Dowsett J); also discussed in A Ducret, 'Courts — Their Role in Regulatory Arrangements' (Paper presented at Penalties; Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001).

67 *Australian Competition & Consumer Commission v Ithaca Ice Works Pty Ltd* [2001] FCA 1716, para 41.

68 Ibid, para 44.

69 See further discussion of this principle in ch 30.

70 *Australian Competition & Consumer Commission v Ithaca Ice Works Pty Ltd* [2001] FCA 1716, para 55.

> penalty payable where the offender had offered a high level of cooperation and the penalty payable where the level of cooperation was of a lesser magnitude.[71]

17.55 In *Australian Competition and Consumer Commission v Colgate Palmolive Pty Ltd*,[72] Weinberg J stated:

> I have reached that conclusion in the light of the extensive body of authority which holds that where the ACCC and a respondent have reached a negotiated settlement in relation to a contravention of Pt IV of the Act, and the amount proposed is, broadly speaking, within the 'permissible range' (having regard to all of the circumstances), the Court should not depart from that agreed figure.[73]

17.56 However, His Honour also noted that he would prefer a system where courts were able to select from a range of penalties submitted by the parties, allowing greater judicial discretion.[74]

17.57 The courts have shown support for leniency granted as part of the immunity policy. In *ACCC v Alice Car & Truck Rentals Pty Ltd*,[75] Mansfield J agreed with the ACCC 'that there is a considerable public benefit in recognising and encouraging persons with relevant information to approach and assist the applicant in enforcing the Act'.[76]

17.58 However, commentators on the *Draft Cooperation Policy for Enforcement Matters* have noted that it is in essentially the same form as the previous policy,[77] therefore, many of these criticisms and uncertainties about how courts will treat agreed penalties may remain.

17.59 The ACCC has commented to the ALRC in relation to these concerns:

> The ACCC endeavours to encourage people who may have engaged in conduct that amounts to a contravention of the TPA to come forward and disclose the conduct. On numerous occasions the ACCC has granted immunity from legal proceedings brought to it by people who have agreed to provide full and frank cooperation and disclosure to the ACCC.[78]

17.60 The ACCC submitted that, with the release of the *Draft Cooperation Policy for Enforcement Matters* and the *Draft Leniency Policy for Cartel Conduct*, many of the previous concerns have been mitigated.[79] The ACCC considers both policies spe-

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71 Ibid, para 56.
72 *Australian Competition and Consumer Commission v Colgate Palmolive Pty Ltd* [2002] FCA 619.
73 Ibid, para 24.
74 Ibid, para 35.
75 *ACCC v Alice Car & Truck Rentals Pty Ltd* (1997) ATPR ¶41–582.
76 Ibid, 44,051.
77 D Davies, 'ACCC's Leniency Policy: What it Means for Practitioners and Clients' (Paper presented at ACCC Competition & Consumer Law Enforcement Conference, Sydney, 4 July 2002), 14.
78 Australian Competition & Consumer Commission, *Submission CAP 24*, 15 October 2002.
79 Ibid.

cifically explain the circumstances it would consider in applying the policies and the procedural matters and factors taken into consideration in determining the parameters of any agreement reached. Further, the release of the *Draft Leniency Policy for Cartel Conduct* on the ACCC's website for public comment was in response to concerns about a lack of publicity being given to leniency policies.[80]

ASIC leniency policies

17.61 ASIC policies give effect to the two main approaches to leniency. Its 'No-action Letters' policy is designed to encourage offenders to admit contraventions and make submissions as to whether ASIC should exercise its enforcement powers in relation to those contraventions before ASIC has undertaken an investigation.[81] ASIC's policy on 'Enforcement Action Submissions' allows submissions to be made by the offender as to the appropriate penalty once ASIC has completed its investigation and formed a preliminary view that a contravention has occurred.[82]

PS 108: No-action letters

17.62 Under this policy, ASIC seeks submissions from 'persons who have, or may have, breached the [Corporations] Act, or may breach the Act by their future actions, but consider that ASIC should not take enforcement or other action'.[83] This policy will apply where ASIC has not yet commenced an investigation; if an investigation has been commenced, ASIC's policy on 'Enforcement Action Submissions'[84] will take precedence.

17.63 A no-action letter is not legally binding on ASIC and does not preclude third parties, such as the DPP, from taking legal action.[85] It is 'an indication as to the future regulatory action that ASIC will take'.[86]

> A no-action letter from ASIC is only a statement of its intentions on the information available to it at a particular time. Even where a no-action letter has been issued, ASIC reserves its right to take action. This is especially so if there has been incomplete disclosure at the time the application for the no-action letter was submitted.[87]

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80 Ibid.

81 Australian Securities & Investments Commission, *Policy Statement 108: No-action Letters*, Australian Securities & Investments Commission, <www.cpd.com.au/asic/ps/>, 20 December 2001.

82 Australian Securities & Investments Commission, *Policy Statement 52: Enforcement Action Submissions*, Australian Securities & Investment Commission, <www.cpd.com.au/asic/ps/>, 20 December 2001.

83 Australian Securities & Investments Commission, *Policy Statement 108: No-action Letters*, Australian Securities & Investments Commission, <www.cpd.com.au/asic/ps/>, 20 December 2001, para PS 108.2.

84 Australian Securities & Investments Commission, *Policy Statement 52: Enforcement Action Submissions*, Australian Securities & Investment Commission, <www.cpd.com.au/asic/ps/>, 20 December 2001.

85 Australian Securities & Investments Commission, *Policy Statement 108: No-action Letters*, Australian Securities & Investments Commission, <www.cpd.com.au/asic/ps/>, 20 December 2001, para PS 108.16.

86 Ibid, para PS 108.11.

87 Ibid, para PS 108.18.

> It would state that ASIC does not intend to prosecute or take other proceedings in relation to a particular breach on the basis of ASIC's understanding of the facts of the particular case.[88]

17.64 No-action letters are issued on an individual basis. If the issues raised in individual submissions apply generally and ASIC agrees with those submissions, it will 'publish that position as a practice note'.[89] Applications for no-action letters cannot be made on a 'without prejudice' basis; therefore, the person making the application risks action being initiated by ASIC as a result of the self-disclosure of the contravention.[90]

PS 52: Enforcement action submissions

17.65 This policy applies once ASIC has substantially completed an investigation and formed a view that a contravention has occurred. It allows ASIC to invite or agree to consider submissions from an alleged offender as to how ASIC should exercise its enforcement powers. The alleged offender has no general right to make submissions — 'enforcement action submissions will not be sought or considered in all investigations'.[91] An enforcement action submission will be directed towards whether ASIC should take any enforcement action and, if so, what type of action would be appropriate.

> Submissions may address either or both of why the ASC [now ASIC] should not commence any (or any particular) enforcement action and what form of enforcement action may be appropriate.[92]

17.66 Enforcement action submissions cannot be made on a 'without prejudice' basis; therefore, the person making the application risks action being initiated by ASIC as a result of any self-disclosure made in the submission.[93] Where the matter involves a

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88 Ibid, para PS 108.19.

89 Ibid, para PS 108.10. ASIC practice notes provide guidance on compliance matters: see, for example, Australian Securities & Investments Commission, *Practice Note 69: Enforceable Undertakings*, Australian Securities & Investments Commission, <www.cpd.com.au/asic/pn/>, 20 December 2001.

90 Australian Securities & Investments Commission, *Policy Statement 108: No-action Letters*, Australian Securities & Investments Commission, <www.cpd.com.au/asic/ps/>, 20 December 2001, para PS 108.24. This differs from some overseas jurisdictions such as Canada, where an application for immunity may be made as a 'hypothetical' and a provisional grant of immunity given: Canadian Competition Bureau, Competition Bureau Information Bulletin; Immunity Program Under the Competition Act, <http://strategis.ic.gc.ca/pics/ct/immunitye.pdf>, 21 March 2001. This also differs from the ACCC leniency policy, which provides that the ACCC 'is open to discussion of hypothetical scenarios in relation to involvement in conduct that contravenes legislation for which it is responsible'.

91 Australian Securities & Investments Commission, *Policy Statement 52: Enforcement Action Submissions*, Australian Securities & Investment Commission, <www.cpd.com.au/asic/ps/>, 20 December 2001, para PS 52.2.

92 Ibid, para PS 52.10.

93 Ibid, para PS 52.15.

criminal offence which might be prosecuted by the DPP, any information provided in an enforcement action submission will be made available by ASIC to the DPP.[94]

> If, following consideration of a submission on enforcement action, the ASC [now ASIC] decides not to take action against a person who has been the subject of the investigation, the ASC may advise that person in writing. Recipients of this written advice should understand that it is not intended to exonerate them nor does it preclude further action by the ASC arising out of the investigation. The letter is merely designed to reflect the fact that as of its date, the ASC does not regard enforcement action as appropriate. The ASC may choose to resume its investigation or to reconsider enforcement action at any time.[95]

Remission

17.67 This section considers the remission of administrative penalties. As discussed in chapter 2, in federal regulation true administrative penalties do not allow the regulator to set the penalty; it must arise by automatic operation of law. However, the regulator often has the power to remit the penalty in whole or in part. A power to remit a penalty is a specific form of leniency discretion.

17.68 Characterised in this way, the exercise of the power to remit looks substantially similar to the exercise of sentencing discretion by a court. Formally, however, the power to remit a penalty must be characterised as a promise not to recover a portion of a penalty. In essence, what the regulator is doing therefore, is determining, in accordance with the statutory criteria, whether there is any reason why recovery of the full penalty should not be pursued. The penalty itself stands.

17.69 Several pieces of federal legislation give regulators the power to remit administrative penalties.[96] Most remission discretions relate to taxation and communications. Taxation remissions include discretions to remit penalties for late lodgement and late payment. Communications remissions relate to late payment of licence and other fees. There was a discretion to remit penalties under the *Customs Act 1901* (Cth), but this was repealed when the *Customs Legislation Amendment and Repeal (International Trade Modernisation Act) 2001* (Cth) came into effect.[97]

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94 Ibid, para PS 52.21.

95 Ibid, para PS 52.25.

96 See for example *Aircraft Noise Levy Collection Act 1995* (Cth), s 10; *Broadcasting Services Act 1992* (Cth), s 205D; *Customs Act 1901* (Cth), s 243U; *Income Tax Assessment Act 1936* (Cth), s 221N; *Taxation Administration Act 1953* (Cth), s 8AAG, s 16–45, 45–640, 298–20, Sch 1; *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth), s 23D and 101A; *Telecommunications Act 1997* (Cth), s 73 and 468; *Tobacco Charges Assessment Act 1955* (Cth), s 29. Under social security legislation there is no power to remit penalties, but the Secretary has the power to exempt claimants from, for example, requirements under an activity test in certain circumstances: *Social Security Act 1991* (Cth), s 542. A decision that a person is or is not exempt from the requirements is open to review by the Social Security Appeals Tribunal, which, with certain exceptions, has the power to make any decision open to the Secretary (see *Social Security (Administration) Act 1999* (Cth), s 140–144).

97 The legislation commenced phased implementation on 1 July 2002.

Factors relevant to remission of penalties

17.70 The Australian Communications Authority (ACA) and the ATO use contrasting policy approaches to the remission of penalties. The ACA makes determinations that set out broad reasons for remission, but do not specify the levels of remission.[98] Determinations made by the ACA are disallowable instruments,[99] which means that they must be tabled in Parliament and are subject to disallowance by Parliament. The ATO's remission policies are published in the form of tax rulings setting out prescriptive ranges of remissions based on mitigating and aggravating factors.[100] ATO tax rulings are not disallowable instruments (and therefore not subject to scrutiny by Parliament) and are only 'administratively binding' on the ATO.[101] This means that they are not legally binding, but the ATO has stated that 'the basic administrative policy of the ATO is to stand by what is said in a Taxation Ruling and to depart from a Taxation Ruling only where there are good and substantial reasons to do so'.[102]

Australian Communications Authority

17.71 Considerations relevant to the remission of penalties by the ACA are set out in its formal determinations.[103] Penalties that may be remitted relate to late payment of fees and charges. The reasons for remission include that:

- delay was not due to an act or omission of the person and the person has taken reasonable action to mitigate the circumstances;
- delay was due to an act or omission of the person, the person has taken reasonable action to mitigate the circumstances, and it would be fair and reasonable to remit all or part of the penalty;
- it is not reasonably practicable to attempt to recover the penalty;

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98 See for example Australian Communications Authority, Telecommunications (Annual Numbering Charge – Late Payment Penalty) Determination 2000, <www.aca.gov.au>, 19 February 2002. The ACA also has discretion to remit penalties for late payment of a telecommunications carrier licence charge (*Telecommunications Act 1977* (Cth), s 73), late payment of a universal service levy (*Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth), s 23D) and late payment of a National Relay Service levy (*Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth), s 101A).

99 *Telecommunications Act 1997* (Cth), s 73(10).

100 See for example Australian Taxation Office, *TR 2000/3 Taxation Ruling — Income Tax: Remission of Penalty and General Interest Charge from RPS, PAYE and PPS Payments*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/findrul.htm>, 19 February 2002.

101 Ibid, Preamble. See also *Taxation Administration Act 1953* (Cth), Pt IVAAA, which makes it clear that public rulings set out the ways in which 'in the Commissioner's opinion' tax laws apply.

102 Australian Taxation Office, TR 92/1 Taxation Ruling — Income Tax and Fringe Benefits Tax: Public Rulings, <www.ato.gov.au>, 19 February 2002, para 23.

103 See for example Australian Communications Authority, Telecommunications (Annual Numbering Charge — Late Payment Penalty) Determination 2000, <www.aca.gov.au>, 19 February 2002, s 10.

- payment of all or part of the penalty would cause financial hardship to the person; and
- there are other circumstances that make it fair or reasonable to remit all or part of the penalty.

17.72 These reasons are broadly stated and give the ACA a wide discretion to make a decision to remit a penalty. A decision refusing remission of a penalty is subject to internal review;[104] if the applicant is not satisfied with the outcome of the review, external review by the AAT of a decision refusing to remit a penalty is available.[105] Review of remission decisions is considered in chapter 23.

Australian Taxation Office

17.73 The ATO has legislative power to fully or partially remit a number of tax penalties.[106] ATO staff have been instructed to remit penalties only 'in exceptional circumstances'[107] although remission may be exercised more freely during transitional periods.[108] It is the philosophy of the ATO to understand and forgive 'minor transgressions' in its pursuit of broad compliance rather than taking a technical and inflexible approach to the enforcement of penalties.[109]

17.74 The ATO in a consultation said the remission powers were a crucial part of the legislation.[110] It noted that, under the New Tax system, penalties were a last resort, due dates were extended and penalties remitted, and that it imposed penalties only when there was deliberate non-compliance. It instanced the use of telephone calls to follow up non-lodgement in relation to the GST.

17.75 The ATO's approach to remission of penalties and the General Interest Charge (GIC) is based on an assessment of the appropriate 'culpability penalty'. This is a

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104 *Telecommunications Act 1997* (Cth), s 555.

105 Ibid, s 562.

106 *Income Tax Assessment Act 1936* (Cth), s 221N; *Taxation Administration Act 1953* (Cth), s 8AAG, sch 1, s 16–45, 45–640, 298–20.

107 Australian National Audit Office, *Administration of Tax Penalties*, Report 31 (2000), Australian Government Printing Service, Canberra, para 1.11.

108 Senate Economics References Committee, *Inquiry into the Operation of the Australian Taxation Office* (2000), Commonwealth of Australia, Canberra, ch 3. For example, during the first two years of operation of the GST scheme, activity statement late lodgement penalties were not routinely imposed: ATO, 'Lodgement and Penalties', Letter to Tax Practitioners, 20 February 2002, <www.ato.gov.au/ content.asp?doc=/content/Professionals/20075.htm>, 27 February 2002.

109 Australian Taxation Office, *Compliance Improvement Direction Paper (Final)*, Australian Taxation Office, <www.ato.gov.au/content.asp?doc=/content/Professionals/super/smsf00.htm>, 2 January 2002. An example of this approach is the statement by the Tax Commissioner that 'this year [2001] we will waive the penalty [for late lodgement] if you don't owe any tax and we don't have to chase up your tax return': ATO, 'One Week to Go to Get Tax Returns In', Media Release 01/83: 24 October 2001, <www.ato.gov.au>, 2 January 2002.

110 Australian Taxation Office, *Consultation*, Sydney, 17 September 2002.

multi-stage process administered in accordance with detailed rules published as a tax ruling by the ATO.[111]

> Culpability penalty is the level of penalty imposed for a breach of the law that best reflects the accountability of the [person]. The culpability penalty is the sum of the typical culpability rate component, the mitigating or aggravating factors component and the repeat offence component.[112]

17.76 The culpability penalty is set by statute as 100% of the tax that should have been paid to the ATO but was not. This penalty is subject to the GIC, which accrues from the date on which payment should have been made and compounds daily.

17.77 The culpability penalty may be reduced for a number of reasons. Voluntary disclosure may result in the culpability penalty amount being reduced to 20% of the amount of tax not deducted and paid, if the disclosure was made before any ATO action was taken in relation to the liability to pay the tax, was made in writing and fully disclosed all relevant facts.[113]

17.78 The next step in assessing the typical culpability rate is to assess the level of accountability, which ranges from 0 to 60% depending on the level of care taken by the payer. Where the payer has taken reasonable care, the rate is reduced to 0%; where the payer has not taken reasonable care, the rate is reduced to 15%; where the payer has been reckless, the rate is reduced to 30% and where the payer has shown intentional disregard, the rate is reduced to 60%.

17.79 Further factors relevant to determination of the culpability penalty are:

- Mitigating circumstances which reduce the typical culpability rate by a factor of up to 25%, and include the following:
    - greater than reasonable cooperation during the examination — 10% reduction;
    - positive cooperation — 25% reduction.
- Aggravating circumstances which increase the typical culpability rate by a factor of up to 25% and include the following:
    - lack of reasonable cooperation causing delay of the examination — 10% increase;

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111 Australian Taxation Office, *TR 2000/3 Taxation Ruling — Income Tax: Remission of Penalty and General Interest Charge from RPS, PAYE and PPS Payments*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/findrul.htm>, 19 February 2002.

112 Ibid, para 6.

113 Ibid, para 50.

- deliberate false and misleading statement — 25% increase.[114]

17.80 Where a payer has been penalised for a similar offence within 36 months before the current penalty decision, a repeat offence increase of 33% applies to the culpability rate (subject to the limit that the repeat offence component cannot increase the penalty above the statutory maximum).

Remission of the GIC

17.81 Remission of the GIC is considered separately once the appropriate culpability penalty has been determined. There are three bases on which remission might be granted:[115]

- the failure to deduct was *not* caused directly or indirectly by an act or omission of the payer, and the payer has taken reasonable action to correct the cause; or
- the failure to deduct was caused directly or indirectly by an act or omission of the payer, but the payer has taken reasonable action to correct the cause *and*, in the circumstances, it is reasonable to remit all or part of the GIC; or
- other special circumstances apply *and*, in the circumstances, it is reasonable to remit all or part of the GIC.

17.82 Special circumstances that might be taken into account include the health of the payer and other factors beyond the payer's control such as fire or natural disaster where those circumstances affected the ability of the payer to make proper deductions.

17.83 A final factor taken into account in determining the rate of any remission is whether payment of the penalty and GIC 'would cause genuine financial hardship'.[116]

17.84 The broad statements of principle used by the ACA contrast with the very detailed criteria used by the ATO. It may be that the different natures of the regulatory provisions administered by the ACA and the ATO explain the very different approaches taken. The ACA regulates a small, very clearly defined community (telecommunications licence holders) with which it has on-going contact through the regular issue and review of licences. Whilst no information is available concerning the ACA's exercise of its discretion to remit penalties, it seems likely that the discretion would rarely be exercised and, if it were, that the decision to remit would be made at a high level within the ACA.

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114 Ibid, para 8.

115 *Taxation Administration Act 1953* (Cth), s 8AAG. Australian Taxation Office, *TR 2000/3 Taxation Ruling — Income Tax: Remission of Penalty and General Interest Charge from RPS, PAYE and PPS Payments*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/findrul.htm>, 19 February 2002, para 64.

116 Australian Taxation Office, *TR 2000/3 Taxation Ruling — Income Tax: Remission of Penalty and General Interest Charge from RPS, PAYE and PPS Payments*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/findrul.htm>, 19 February 2002, para 76.

17.85 In contrast, the ATO's power to remit penalties applies extremely widely to a broad, undifferentiated community (taxpayers). In 2001–02, the ATO remitted $476 million in penalties.[117] This amount suggests that the ATO assesses a large number of penalties for remission. This high volume environment explains why the ATO process is much more detailed and specific than the ACA process. Where a large number of penalties are considered, detailed criteria promote the consistent and speedy exercise of discretion, whereas broad statements of principle require greater individual interpretation and pose a greater risk of inconsistency.

Effectiveness of leniency and remission policies

17.86 None of the ACCC, ASIC, ACA and ATO leniency policies is binding. The grant of leniency or remission is discretionary and, with the exception of the ATO policy, no guarantee of the level of reduction in penalty is given. This contrasts with some overseas policies which have a high degree of certainty about both the availability of leniency (in the US and the UK, total or partial immunity is guaranteed) and the level of penalty reduction available (the European Union and UK policies specify levels of reduction).

17.87 The overseas experience provides a possible model for Australia. The OECD roundtable discussion of leniency policies in February 2000 found that, to have an effective leniency policy, clarity, certainty, and priority are 'critical, as firms may be more likely to come forward if the conditions and the likely benefits of doing so are clear'.[118] Transparency has been one of the strengths of the US leniency policies.[119] The requirements for obtaining automatic amnesty are clear and the element of regulatory discretion is removed. In contrast, the European Union leniency notice procedure currently provides no guarantee that leniency will be granted at the completion of the investigation process. Leniency is granted at the discretion of the European Commission. This lack of certainty is seen to have contributed to the lack of success of the EU leniency program.[120]

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117 Commissioner of Taxation, *Annual Report 2001–2002* (2002), Australian Taxation Office, note 20, 279. In 2000–01, the value of remissions was $239 million: Commissioner of Taxation, *Annual Report 2001–2002* (2002), Australian Taxation Office, 279. In a consultation the ATO said that after the transitional phase for the new tax system, it would be looking at half a million penalties a year for late lodgement, Australian Taxation Office, *Consultation*, Sydney, 17 September 2002.

118 OECD Committee on Competition Law and Policy, *Report on Leniency Programmes to Fight Hard Core Cartels: 27 April 2001*, OECD, <www.oecd.org/pdf/M00020000/M00020228.pdf>, 12 December 2001, 2.

119 G Spratling, 'Transparency in Enforcement Maximizes Cooperation from Antitrust Offenders' (Paper presented at Fordham Corporate Law Institute 26th Annual Conference on International Antitrust Law & Policy, New York, 15 October 1999).

120 Sir Anthony Hammond and R Penrose, *Proposed Criminalisation of Cartels in the UK: November 2001*, UK Office of Fair Trading, <www.oft.gov.uk>, 12 December 2001, para 5.6.

17.88 In general terms, an effective leniency policy is

- transparent and provides certainty to those corporations and individuals who apply for leniency;
- supported by the threat of penalties imposed by law enforcement agencies; and
- supported by active law enforcement agencies, creating an environment in which corporations and individuals 'perceive a significant risk of detection'.[121]

17.89 One commentator has noted that:

> The overriding issue seems to be that, by offering clear and certain guidelines as to when amnesty or leniency is available, and by offering clarity as to the likely range of penalties (and what is required in return), regulatory agencies in other jurisdictions have achieved impressive results.[122]

17.90 The various remission policies used by Australian regulators take several policy approaches to the exercise of discretion. There is evidence that at least the ATO's discretion to remit administrative penalties is widely used. The ALRC's research has not revealed any general criticism of the way in which these policies are being used by regulators.

17.91 As with all policies concerning the enforcement (or non-enforcement) of penalties, the ALRC believes that there is considerable merit in transparency of policies.[123]

Preliminary view

17.92 In DP 65, the ALRC proposed that regulators should develop and publish detailed guidelines describing how penalty-related discretions should be exercised.[124] A number of questions were also asked regarding the use of guidelines to exercise discretion,[125] including whether there were any areas of discretion where guidelines should not be published as a matter of policy; what form and status should guidelines take; and whether regulators should be bound to follow such guidelines?

Consultations and submissions

17.93 Submissions were generally supportive of the development of leniency policies. The major area of concern was that such policies remain as informal guidelines so that they retain flexibility and do not unduly constrain a regulator.

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121 S Hammond, *Fighting Cartels — Why and How? Lessons Common to Detecting and Deterring Cartel Activity*, US Department of Justice, <www.usdoj.gov/atr/public/speeches/6487.htm>, 12 December 2001.

122 M Corrigan, 'ACCC's Leniency Policy: Issues for Australian Practitioners' (Paper presented at ACCC Competition & Consumer Law Enforcement Conference, Sydney, 4 July 2002), 2.

123 See discussion and recommendations in ch 6.

124 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Proposal 15–1. This Proposal, and the ALRC's conclusions in relation to it, are discussed in ch 15. The issue of guidelines and the extent to which regulators must be bound by what is outlined within them is considered in greater depth in ch 6.

125 Ibid, Questions 15–1, 15–2 and 15–3.

17.94 ASIC made some general comments on the issue of penalty-related discretions. It noted that, while it has published a number of policy statements and practice notes which give guidance on aspects of enforcement and regulatory practice, these statements are intended to be indicative only and are not, nor is it appropriate for them to be, binding or prescriptive on ASIC. ASIC noted that consideration of the merits of a case is critical as the policy may, due to a change in circumstances, have become outmoded or redundant. ASIC sought to draw a distinction between an unlawful policy which creates a fetter purporting to limit the range of discretion conferred by statute, and a lawful policy which leaves a range of discretion intact while guiding the exercise of the power: 'No decision maker has the right to fetter its own discretion'.[126] On this view, it is therefore a matter for each regulator to determine what, if any, guidance is appropriate in light of such factors as the nature of the regulated community and the discretion involved.[127]

17.95 The ATO expressed support for the publishing of guidelines on the exercise of regulatory discretion.[128] The ATO noted that it has a history of publishing rulings and administrative guidelines in respect of the discretions available to it in imposing and remitting penalties, for example, Practice Statements and the *ATO Receivables Policy*.[129] As a matter of policy or principle, the ATO considers that there would be very limited circumstances where any such guidelines should not be published. Perhaps the only circumstance would be where the guidelines are not in the public interest, for example, where the publishing of the guideline would significantly prejudice the rectification of the mischief to which those guidelines relate.[130]

17.96 The ATO considers that the current binding nature of these remission policies is appropriate. In any event, ATO penalty remission decisions are subject to review under either Part IVC of the *Taxation Administration Act 1953* (Cth) or the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Regardless of the remission policies' formal status, it is also considered that published guidelines would be admissible evidence of the ATO's view on remission.[131]

17.97 The ACCC expressed general support for the proposal. However, it noted that many of the concerns expressed in relation to it leniency policies were addressed in the release of the two new draft policies (see comments at para 17.60). The ACCC also

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126 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002. See ch 6 regarding the 'fettering principle'.

127 Ibid.

128 Australian Taxation Office, *Submission CAP 16*, 17 September 2002.

129 Australian Taxation Office, *ATO Receivables Policy*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/browse.htm?toc=03:ATO%20Guidelines%20and%20Policy:ATO%20Receivables%20Policy>, 12 September 2001.

130 Australian Taxation Office, *Submission CAP 16*, 17 September 2002.

131 Ibid.

noted that, while international agencies have leniency policies in relation to cartel conduct, it administers leniency policies in respect of both cartel and unilateral conduct. [132]

17.98 Environment Australia supported the development and publishing of guidelines to provide accountability and transparency for the regulated community so that they understand how they will be treated and to support community confidence in the fairness of decisions being made.[133] In publishing guidelines, Environment Australia noted that confidentiality should be maintained and that some activities of the regulator should not be publicised to avoid regulated communities being able to undertake 'risk assessments' in relation to planned unlawful activities. It noted that guidelines should be prescriptive, but allow for consideration of additional relevant matters. Environment Australia was of the view that guidelines should be non-binding with the status of policy documents.[134]

17.99 In contrast, Professor Michael Adams argues that regulators should not be under any obligation to develop and publish detailed guidelines on the exercise of penalty-related discretions: 'such guidance should only be provided as and when it becomes necessary'. To require regulators to provide such guidance may inadvertently result in a perceived narrowing of their discretionary powers. Adams argues that such a (false) perception only serves to promote misunderstanding of the law, which in turn creates uncertainty. In line with this view of discretion, he also argues that guidelines, which represent a general attitude towards a discretionary power, should not be binding on any party.[135]

17.100 Dr Karen Yeung gave qualified support to the ALRC's proposal. She stated that such guidelines should have the status of administrative policy guidelines in general, and general administrative law principles should apply to determine the extent to which regulators ought to follow published policies.[136]

Conclusion

17.101 The transparent exercise of discretion is one way in which regulators can balance the conflicting demands of consistent but individualised justice. Good regulation requires regulators to formulate guidelines to direct their officers in the exercise of discretion. Parliament of course retains an overall power to limit or relax the limits within which these discretions and guidelines can operate.

17.102 The leniency, immunity and remission policies discussed in this chapter take a variety of policy approaches to the exercise of discretion. The ALRC's research has not revealed a significant level of criticism of the way in which these policies are being used by regulators, other than the general remarks regarding the ACCC leniency policy made at para 17.29.

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132 Australian Competition & Consumer Commission, *Submission CAP 24*, 15 October 2002.
133 Environment Australia, *Submission CAP 26*, 24 October 2002.
134 Ibid.
135 M Adams, *Submission CAP 12*, 5 September 2002.
136 K Yeung, *Submission CAP 20*, 9 October 2002.

17.103 Chapter 6 of this Report concludes that non-statutory guidelines are an appropriate form of instrument for regulators to detail how they will exercise certain discretions. Currently, as indicated above, guidelines are already present and working well in the area of leniency, immunity and remissions.

17.104 It seems essential that these guidelines be published. The second, and no less important, role of such guidelines is in guiding the public to understand how they will be treated. Indeed, in the case of a leniency policy, publishing and publicising the policy is a vital part of its effectiveness.

17.105 The ALRC therefore concludes that it is appropriate for all regulators who excise these types of discretions to develop and publish guidelines on how they will exercise their discretions. These guidelines should be produced in line with the recommendations on guidelines made in previous chapters of this report.[137]

17.106 The ALRC notes regulators' concerns that any matters which would compromise the work of the regulator or hinder the administration of justice should not be included in the guidelines (such as detailed information on certain compliance activities). To accommodate this, in cases where further guidelines on leniency, immunity or remission of penalties are needed to supplement the publicly available policy, the ALRC suggests the development of internal guidelines. These internal guidelines must not be inconsistent with publicly available guidelines or legislation. As noted elsewhere in this Report, it is also important that regulators provide training to staff who will use these guidelines to ensure that they are familiar with them and the legislation.

17.107 The status and binding nature of guidelines on the exercise of discretion may vary with the content, style and intention of the particular regulator. The ALRC would expect that such guidelines would detail the factors to be considered (or excluded from consideration) in the exercise of discretion. This might be as detailed as the ATO's formulas for the calculation of the culpability penalty.[138]

17.108 The ALRC considers that the production of policies as non-statutory instruments will allow them to have the appropriate flexibility thought necessary in the majority of submissions.

17.109 The form that such guidelines may take can vary according to the practice of each regulator, though the ALRC sees some value in there being an overall consistency in style and content so that members of the public know what to look for, where to find them and what they will contain.

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137 Recommendations 6–2 to 6–4, 9–1 and 10–1.

138 See para 17.75 above.

Recommendations

Recommendation 17–1. Regulators should develop and publish guidelines describing how discretions will be exercised in relation to leniency, immunity and remission of penalties. These guidelines should be prepared in accordance with Recommendations 6–2 to 6–4, 9–1 and 10–1.

Recommendation 17–2. Regulators who develop guidelines on leniency, immunity or remission of penalties should, where applicable, develop internal guidelines to provide guidance to staff in the exercise of their discretion. These must not be inconsistent with guidelines developed and published in accordance with Recommendation 17–1.

18. Privilege Against Self-Incrimination

Contents

Introduction

18.1 In DP 65, the ALRC looked in some depth at the legislative and common law basis for the privilege against self-incrimination.[1] The principal conclusion was that the operation of the privilege suffered from inconsistency across legislation, caselaw and regulators' practice.

The common law privilege against self-incrimination

18.2 The common law privilege against self-incrimination entitles a person to refuse to answer any question, or produce any document, if the answer or the production of the document would tend to incriminate that person.[2] Although broadly referred to as the privilege against self-incrimination, the concept encompasses three distinct privileges: a privilege against self-incrimination in criminal matters; a privilege against self-exposure to a civil or administrative penalty (including any monetary penalty which might be imposed by a court or an administrative authority, but excluding private civil proceedings for damages); and a privilege against self-exposure to the forfeiture of an existing right (which is less commonly invoked).

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1 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, ch 9.

2 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 335.

The privilege against self-incrimination under the *Evidence Act*

18.3 Section 128 of the *Evidence Act 1995* (Cth) applies where a witness objects to giving evidence that 'may tend to prove' that the witness has committed an offence under Australian or foreign law, or is liable to a civil penalty.[3] Under s 128, a witness claiming the privilege on 'reasonable grounds' is not required to give evidence unless the court finds that the 'interests of justice' so require. If the witness does give evidence, the court must give the person a certificate which grants that person both use and derivative use immunity in relation to the evidence (except in criminal proceedings in respect of the falsity of the evidence).[4] Importantly, s 128 provides a procedure for a witness to choose or be required to give self-incriminating evidence. In either case the witness receives the protection of a certificate giving use and derivative use immunity[5] in relation to that evidence. A witness who has objected to giving evidence (under s 128(1)) may elect (under s 128(2)) to give that evidence without being compelled by the court (under s 128(5)) and, in that case, the court is still obliged to give the witness a certificate.[6]

18.4 Where the court has denied a claim for privilege and after the giving of evidence the court finds that there were indeed reasonable grounds for the claim, the witness must also be given a certificate. The section does not apply to defendants in criminal proceedings who give evidence that they did, or omitted to do, an act which is a fact in issue, or that they had a state of mind the existence of which is a fact in issue. Corporations cannot claim the privilege under s 128.

Rationale for the privilege

18.5 In the leading case of *Caltex*,[7] Mason CJ and Toohey J charted the evolution of the privilege as an evidential rule to protect individuals from the adverse physical (and spiritual) consequences of self-incrimination. It arose in response to the oppressive inquisitorial techniques of the Star Chamber and ecclesiastical courts in England.[8] McHugh J went on to say that the privilege was also a curb on the power of the state since the onus was on the accuser to establish a case against the accused and no-one was bound to testify to their own guilt and incriminate themselves.[9]

18.6 There is significant disagreement between the majority and minority judgments in the leading Australian authorities addressing the modern rationale for the

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3 Clause 3 of Part 2 of the Dictionary in the *Evidence Act* defines a 'civil penalty'.

4 A certificate under s 128 applies in relation to any future action in an 'Australian court'. Under the *Evidence Act* an 'Australian court' is defined broadly to include administrative bodies such as the AAT or any proceeding before persons authorised to receive and examine evidence. Thus, a certificate could be given in criminal proceedings and be used in non-criminal proceedings in another court: Attorney-General's Department, *Submission CAP 14*, 9 September 2002.

5 Use and derivative use immunities are discussed at para 18.40.

6 Attorney-General's Department, *Submission CAP 14*, 9 September 2002.

7 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

8 Ibid, 498. See also B Marshall, 'The Penalty Privilege: Assessing its Relevance in Trade Practices Cases' (1996) 14 *Australian Bar Review* 214.

9 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 544.

privilege.[10] In *Caltex*, the minority judgment of Deane, Dawson and Gaudron JJ argued that the privilege was fundamental to maintaining the integrity of the adversarial system of justice. On this view, the privilege is more than a human right because it reflects an 'unequivocal rejection of an inquisitorial approach'.[11] Their Honours argued that the privilege is 'based upon the deep-seated belief that those who allege the commission of a crime should prove it themselves and should not be able to compel the accused to provide proof against himself'.[12]

18.7 Although Brennan J was a member of the majority in *Caltex* in relation to the non-availability of the privilege to corporations, he distinguished between the rationales for the privilege against self-incrimination and the privilege against self-exposure to a penalty. Although the latter was developed by analogy to the former, Brennan J stated that it

> owes its existence not to the law's historical protection of human dignity but to the limitation which the courts placed on the exercise of their powers to compel a defendant in an action for the recovery of a penalty to furnish against himself the evidence needed to establish his liability.[13]

18.8 The prevailing view in Australia is, however, that the privilege is based on the protection of individual human rights. The majority in *Caltex* described the privilege as 'a human right which protects personal freedom, privacy and dignity' from the power of the state.[14]

Types of evidence privileged

18.9 While the privilege against self-incrimination originally applied to testimonial evidence, it has been extended to documentary evidence.[15] However, a distinction is drawn between protecting people from testifying to their own guilt and producing existing documents that speak for themselves.[16]

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10 See for example, J Puls, 'Corporate Privilege: Do Directors Really Have a Right to Silence Since Caltex and Abbco Iceworks?' (1996) 13(5) *Environmental Planning Law Journal* 364; C Freeland, 'No Privilege Against Self-Incrimination, Says High Court' (1994) 8 *Commercial Law Association Quarterly* 10; The Law Commission (New Zealand), *The Privilege against Self-Incrimination: A Discussion Paper* (1996), The Law Commission, Wellington.

11 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 532.

12 Ibid, 532.

13 Ibid, 519.

14 Ibid, 498 quoting Murphy J in *Rochfort v Trade Practices Commission* (1982) 153 CLR 134, 150. See also *Sorby v Commonwealth* (1983) 152 CLR 281; *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96, 135.

15 See, for example, *Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd* (1999) 163 ALR 465.

16 *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96, 540; *Sorby v Commonwealth* (1983) 152 CLR 281.

18.10 Although the privilege prevents the compulsory production of documents and the giving of testimony (including an application for discovery, the answering of interrogatories or the issue of a subpoena), it is not available to prevent the compulsory, direct seizure of documents in administrative investigations. Nor does it prevent the seizure of documents pursuant to a search warrant issued under s 3E of the *Crimes Act 1914* (Cth).

Application to corporations

18.11 Until recently it was assumed that the privilege applied to corporations at common law,[17] but since the decisions in *Caltex*[18] and *Abbco Iceworks*,[19] confirmed by s 128 and 187 of the *Evidence Act*, the privilege has not been available to corporations both in and out of court. Even prior to the decision in *Caltex*, administrative agencies attempted to avoid the privilege by serving notices to produce upon company officers who were not personally exposed to criminal or penalty proceedings.[20]

18.12 According to Mason CJ and Toohey J in *Caltex*, 'the historical reasons for the creation and recognition of the privilege do not support its extension to corporations'.[21] The modern rationale for the privilege is equally inapplicable: 'modern international treatment of the privilege as a human right which protects personal freedom, privacy and human dignity is a less than convincing argument that corporations should enjoy the privilege'.[22]

Application of the privilege to company directors

18.13 Company directors may claim the privilege in their own right where the disclosure would incriminate them personally.[23] It has been argued that the legal divide between directors and corporations is artificial[24] and there may be a tactical advantage in litigation by obtaining the information from a corporation because it is under no privilege, and then using that information against the directors or, in some cases, officers deemed to be guilty if a corporation is convicted.[25]

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17 *R v Associated Northern Collieries* (1910) 11 CLR 738 and *Refrigerated Express Lines v Australian Meat and Livestock Corporation* (1979) 42 FLR 204.

18 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

19 *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96.

20 R Woellner, *The ASC's Investigative Powers — Some Practical Aspects*, 50th Anniversary Conference Australasian Law Teachers' Association: Cross Currents: Internationalism, National Identity & Law, <www.austlii.edu.au/au/special/alta/alta95/woellner1.html>, 21 November 2001.

21 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 500.

22 Ibid, 500.

23 *Upperedge Pty Ltd v Bailey* (1994) 13 ACSR 541; *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96. R Woellner, *The ASC's Investigative Powers — Some Practical Aspects*, 50th Anniversary Conference Australasian Law Teachers' Association: Cross Currents: Internationalism National Identity & Law, <www.austlii.edu.au/au/special/alta/alta95/woellner1.html>, 21 November 2001.

24 J Puls, 'Corporate Privilege: Do Directors Really Have a Right to Silence Since Caltex and Abbco Iceworks?' (1996) 13(5) *Environmental Planning Law Journal* 364, 368.

25 Ibid, 369. For examples of deeming provisions, see *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 493–496. Deeming provisions are discussed in ch 8.

18.14 According to Burchett J in *Abbco*, the argument that denying privilege to corporations denies protection to individual company officers is not correct. The privilege 'has never been, nor should it be, a shield against the use of incriminating evidence — only a right to decline to be themselves the author of their destruction by producing the evidence'.[26]

18.15 The distinction between company officers and the corporate legal entity may be problematic. Company officers compelled to incriminate the corporation may furnish information that results in subsequent actions against them personally, yet they may not be able to claim privilege personally while acting in their capacity as company officers.

Application of the privilege out of court

18.16 Historically, the privilege against self-incrimination applied only to court proceedings because of the power to compel parties and witnesses to produce documents and to answer questions. In recent decades, non-judicial tribunals, regulators and investigators have increasingly acquired powers to compel the production of information.

18.17 Until the 1980s, judicial authorities held that the privilege was excluded in non-judicial situations. More recently, the courts have held that the privilege is applicable to all situations where information may be compulsorily sought, including administrative tribunals and penalties imposed by administrative agencies with investigative powers.[27] It is now generally accepted that the privilege is available in non-curial situations, although there remains considerable dissent and it may be overridden by legislation in any event.[28]

18.18 The availability of the privilege in non-curial situations is subject only to legislative removal (abrogation) or modification.[29] As Murphy J stated, the privilege 'unless otherwise excluded … attaches to every statutory power (judicial or otherwise) to require persons to supply information'.[30] Professor Robin Woellner notes that in re-

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26 *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96, 116.

27 *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1977] 3 All ER 717; *Sorby v Commonwealth* (1983) 152 CLR 281, 292, 309 and 313; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 341 and 347.

28 *Sorby v Commonwealth* (1983) 152 CLR 281, 316, 319, 321; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 354–355; *Controlled Consultants v Corporate Affairs Commission* (1985) 156 CLR 385, 388, 395–396, 403, 406, 408 and 411; *Martin v Police Service Board* [1983] 2 VR 357, 358, 361 and 369–370; *Kempley v The King* (1944) 18 ALJR 118, 122, 123 and 125; *National Companies and Securities Commission v Sim* [1987] 2 VR 421, 425; *R v Zion* [1986] VR 609, 613; *Re Sneddon; Ex parte Grinham* (1961) 61 SR 862, 873 and 874; *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 402, 406; and 409; *Commissioner of Customs and Excise v Harz* [1967] 1 AC 760, 816; *Bingham v Bruce* [1962] 1 All ER 136, 138.

29 *Sorby v Commonwealth* (1983) 152 CLR 281.

30 Ibid, 311.

cent years 'the scope of the privilege … against self-incrimination … [has] been severely constrained by both statutory provisions and judicial decisions'.[31]

18.19 The availability of the privilege in relation to particular evidence in the investigative stage (governed by the relevant regulatory legislation or the common law) may differ from any subsequent court proceedings (governed by the *Evidence Act*, which displaces the common law). However, specific legislation can displace the general operation of the *Evidence Act* in judicial proceedings. For example, s 8(3) of the *Evidence Act* provides that the Act applies subject to the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act), which contain specific formulations of the privilege.[32]

Privilege against self-exposure to a penalty

18.20 It is apparent that some civil and administrative penalties carry consequences that are just as serious as traditional criminal punishments. The Australian common law has recognised this trend to some degree by providing that self-incrimination should protect against self-exposure to penalties and forfeitures. On the other hand, the conventional common law readiness to remove the privilege more easily in relation to non-criminal penalties may require reassessment in light of the convergence of the severity of criminal punishments and non-criminal penalties.

18.21 The courts have clearly expressed the view that the privilege against self-incrimination is an important human right. Yet the legislature must balance other public interest considerations against the protection of individual human rights.[33] In the field of regulation, one crucial public interest is securing effective compliance or prosecutions. The policy question for the legislature is to decide in what circumstances public interest considerations should overrule human rights protection, and whether the regulation of particular activities mandates different considerations.

Issues and problems

Differences in legislative approaches

18.22 In the legislation surveyed by the ALRC in DP 65, the common law privilege may be:

- expressly restated in similar or identical terms;
- impliedly retained where legislation is silent on the privilege;

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31 R Woellner, *The ASC's Investigative Powers — Some Practical Aspects*, 50th Anniversary Conference Australasian Law Teachers' Association: Cross Currents: Internationalism National Identity & Law, <www.austlii.edu.au/au/special/alta/alta95/woellner1.html>, 21 November 2001.

32 *Corporations Act 2001* (Cth), s 1316A; *Australian Securities and Investments Commission Act 2001* (Cth), s 68.

33 Although the courts necessarily make policy judgments in their reasoning, they cannot make the kinds of broad policy judgments required to remove the privilege against self-incrimination. Courts can only imply a legislative intention to remove it.

- absolutely abrogated, expressly or by implication; or
- partially abrogated or modified, expressly or by implication.

18.23 In relation to the investigative powers of federal regulators, a common approach has been to expressly abrogate or modify the privilege by statute so that individuals are not entitled to refuse to produce documents, but are permitted to subsequently assert the privilege in civil or criminal proceedings commenced after the investigation.[34] Abrogation or modification of the privilege, combined with powers to obtain information and documents, is a useful tool for regulators unable to obtain information through informal, voluntary or cooperative methods.

18.24 On the other hand, the abrogation of privilege — as a protection from the intrusive power of the state and as a human right — may have serious consequences for individuals, and the courts have made it clear that the privilege should not be removed lightly. While legislative provisions presently provide some protection for individuals subsequently involved in court proceedings, the potential for the increased use of administrative penalties suggests that existing legislative protections need further consideration.

18.25 The application of the privilege against self-incrimination was different in almost all the federal legislation examined by the ALRC. Inconsistency occurs:

- across regulatory regimes — revenue protection, licensing, border control and marketplace regulatory schemes;
- where legislation restates the privilege, in terms of:
    - the type of information protected;
    - the scope of the privilege — does it prevent disclosure of evidence that 'may', 'might', 'will' or 'would' incriminate the person;
    - whether the provision provides for privilege against self-incrimination generally or also exposure to a penalty;
- where legislation implies retention of the privilege;
- where legislation impliedly abrogates the privilege, particularly in terms of the rationale for removing the privilege;
- where legislation provides for use immunity, in terms of:

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34 B Bolton, 'Compelling Production of Documents to the ASC' (1995) *Queensland Law Society Journal* 221, 238.

- the scope of the use immunity;
- the procedure for claiming the use immunity; and

- in the application of the common law where legislation restates or excludes the privilege.

Different formulations in express restatement of the privilege

18.26 A number of federal statutes expressly restate the common law privilege in relation to specific provisions requiring the production of information. The usual method is to frame the privilege as an 'excuse' or 'reasonable excuse' from complying with a requirement to give information.[35]

18.27 Significantly, there are different formulations of the content of the privilege. Firstly, the types of information privileged from disclosure vary, with legislation most commonly referring to a privilege against answering questions or producing documents that may incriminate. Less commonly, the privilege can be claimed against a requirement to provide information generally, often in addition to, or as an alternative to, the requirement to answer questions or produce documents. An *information* privilege is broader in scope than a *documentary* or *questioning* privilege, since it extends, for example, to compulsory disclosure of certain facts under social security or companies legislation.

18.28 Secondly, different provisions refer to the privilege in terms of protecting against disclosures that 'may', 'might', 'will' or 'would' incriminate a person or expose them to a penalty.[36]

18.29 Some provisions protect only against incrimination generally, while others refer expressly to a privilege against both incrimination and exposure or liability to a penalty. It is not clear whether a provision that only refers to a privilege against incrimination excludes exposure to a penalty. Ordinarily the common law will apply to the extent that is not inconsistent with, or extinguished by, a statutory provision. The purpose or object underlying the legislation will also be relevant.[37] It may be that the

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35 *Aged Care Act 1997* (Cth), s 927(3) and 932; *Broadcasting Services Act 1992* (Cth), s 202(3); *Health Insurance Act 1973* (Cth), s 124M(2); *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 23(3) and 46PM(3); *Insurance Contracts Act 1984* (Cth), s 11C and 11D(5); *Migration Act 1958* (Cth), s 306J; *Privacy Act 1988* (Cth), s 66(3); *Telecommunications Act 1997* (Cth), s 549(4); *Telstra Corporation Act 1991* (Cth), s 8BN(3); *Trade Practices Act 1974* (Cth), s 152DF(2) and 161(2).

36 The semantic differences between these operative terms could be interpreted as establishing gradations of privilege. The significance of different statutory formulations was considered in *F v National Crime Authority* (1998) 83 FCR 99. O'Loughlin J stated that '[b]oth "may" and "might" are commonly used when referring to a possibility, or an opportunity and in that sense, they do not impose the same degree of capability as "will" and "would". Something that "may or might" happen is less likely to occur than something that "will or would" happen … A statute which grants privilege to disclosures which "might tend to incriminate" would mean that even the "lowest" possible risk of incrimination would attract the privilege, while there would be a "far greater compulsion" to apply the privilege where disclosure "will" or "would" tend to incriminate': ibid, 110.

37 *Acts Interpretation Act 1901* (Cth), s 15AA.

legislature intended to fully codify the privilege and thus by implication extinguish the wider privilege against self-exposure to a penalty. Conversely, perhaps there was no such intention or purpose, in which case the penalty privilege would survive and supplement the more limited statutory protection. Alternatively, it may be that a reference to 'incrimination' was intended to cover both branches of the privilege.

18.30 Any statutory extension of the privilege against self-exposure to a penalty would be particularly significant given the decision of *ASC v Kippe*.[38] In that case, the Full Court of the Federal Court held that the purpose of a banning order under s 829 of the *Corporations Law* was protective (of the public) and not a 'proceeding for the imposition of a penalty' despite consequences for the banned individual that were arguably as serious as a criminal charge.[39] As a result, the proceedings were treated as civil and the privilege against self-incrimination did not apply. Clearly the characterisation of regulatory enforcement as penal or non-penal may significantly affect the availability of the privilege. Yet the broader concept of a liability arguably encompasses a banning order, so that a privilege against self-exposure to a liability would have applied in this fact situation.

Implied retention of the privilege

18.31 Generally, if legislation is silent on the existence of the privilege, the common law privilege survives. There is a 'presumption' that the privilege has not been extinguished since the courts regard the privilege as fundamentally important.[40] The courts have also found that the privilege is not removed by provisions providing for the giving of evidence to take place on oath to a judicial officer in committal proceedings or summary prosecutions.[41]

18.32 It is not clear to what extent the common law privilege has survived as protection against the powers of federal regulators. An article on privilege in revenue, corporations, securities and trade practices in 1993 concluded:

> The present position is that the *Trade Practices Act* has removed the privilege except at the edges of ministerial power … in the Australian Securities Commission law the privilege has been removed … however it may still exist in areas of the Corporations Law. The privilege also appears to have been removed by taxation legislation although it is arguable that it may have survived to a limited extent in that area.[42]

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38 *Australian Securities Commission v Kippe* (1996) 67 FCR 499.

39 R Schaffer, 'When is a Penalty Not a Penalty?' (1996) 31(8) *Australian Lawyer* 7, 7.

40 *Sorby v Commonwealth* (1983) 152 CLR 281, 289.

41 Ibid, 309; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 343.

42 N Andrews, M Dirkis and B Bondfield, 'The Diminishing Role of the Privilege Against Self Incrimination in Commonwealth Legislation, or, has the Phantom Federal 'Fifth' Finally Faded?' (1993) 3(3) *Australian Journal of Corporate Law* 54, 71. See also W Pengilley, 'ACCC and Pecuniary Penalty Cases' (1999) 15(5) *Trade Practices Law Bulletin* 67.

18.33 This confusion is increased in legislation where some provisions expressly abrogate or modify the privilege in relation to the provision of information, but other provisions remain silent on the application of the privilege. Confusion may also be increased by the divergence of the privilege under the *Evidence Act* (the immunity certificate procedure) and the common law privilege, since only the latter applies to situations outside court.

Absolute removal of the privilege

18.34 Increasingly the privilege has been completely abrogated by statute in order to assist regulators and administrators with enforcement.[43] Statutes may remove the privilege expressly or by 'necessary implication'.[44] There must be clear words or a clear implication to exclude the privilege,[45] and implied abrogation requires a clear and plain intention of the legislature.[46]

18.35 The courts have taken a cautious approach to interpreting whether a statute has impliedly removed the privilege. Justice Murphy stated in *Sorby v Commonwealth*, that because the privilege 'is such an important human right, an intent to exclude or qualify the privilege will not be imputed to a legislature unless the intent is conveyed in unmistakeable language'.[47] Mason CJ required a similarly high threshold in *Hamilton v Oades*: 'the privilege is not lightly removed, and the phrase "necessary implication" imports a high degree of certainty as to legislative intention'.[48]

18.36 The courts will consider a number of factors when deciding whether the privilege has been abrogated by implication. In *Trade Practices Commission v Pyneboard*, the majority held that 'much depends on the language and character of the provision and the purpose it is designed to achieve'.[49]

18.37 The privilege may be excluded where claiming it would defeat the statutory purpose. In *Pyneboard*, the majority stated:

> If the object of imposing the obligation is to enable an authority or agency to ascertain whether an offence has been committed or a statutory provision contravened then it is reasonable to conclude that the privilege, although inherently capable of applying, has been impliedly, if not expressly, excluded by statute.[50]

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43 See, for example: J Puls, 'Corporate Privilege: Do Directors Really Have a Right to Silence Since Caltex and Abbco Iceworks?' (1996) 13(5) *Environmental Planning Law Journal* 364, M Allars, 'Reputation, Power and Fairness: A Review of the Impact of Judicial Review upon Investigative Tribunals' (1996) 24 *Federal Law Review* 235.

44 This requires a 'clear and plain intention' of Parliament: *Sorby v Commonwealth* (1983) 152 CLR 281.

45 *Re Sneddon; Ex parte Grinham* (1961) 61 SR 862, 874–875.

46 *Sorby v Commonwealth* (1983) 152 CLR 281, 311, 298, and 309; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 341. See also M Allars, 'Reputation, Power and Fairness: A Review of the Impact of Judicial Review upon Investigative Tribunals' (1996) 24 *Federal Law Review* 235, 258.

47 *Sorby v Commonwealth* (1983) 152 CLR 281, 311.

48 *Hamilton v Oades* (1989) 166 CLR 486, 495.

49 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 341.

50 Ibid, 341.

18.38 Arguably, where the obligation to answer is imposed to assist an investigator to secure information about the offence for which the privilege is claimed, an intention to abrogate the privilege may be more readily implied.[51] Under taxation laws, for example, legislation is silent on the privilege but the regulator is given broad information-gathering powers. The penalties for failing to comply with requests made under these powers impliedly remove the privilege.[52]

18.39 Even where the privilege has been expressly or impliedly removed by statute, the courts may retain a residual discretion to limit the admissibility of information obtained in subsequent court proceedings. As long as there are no express restrictions on the use that may be made of the information compulsorily obtained: 'in court proceedings, every reason of policy, comity and fairness combine to require that a court refuse to allow the answers given under such compulsion to be used in evidence'.[53] There are, however, contrary authorities on this point.[54]

Partial removal of the privilege and subsequent immunity

18.40 Sometimes statutes remove the privilege but limit the subsequent use of information. There are three types of immunity potentially available:[55]

(1) *personal immunity*: a total personal immunity from any further prosecution;

(2) *use immunity*: claimed by a person before answering questions which would tend to incriminate and preventing the answers given from being admitted into evidence against that person in subsequent proceedings (usually excepting perjury);[56] and

(3) *derivative use immunity*: extends use immunity to prevent any other evidence obtained through further inquiries based on the compulsorily disclosed material from being admissible.[57]

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51 Ibid, 341; M Allars, 'Reputation, Power and Fairness: A Review of the Impact of Judicial Review upon Investigative Tribunals' (1996) 24 *Federal Law Review* 235, 236, 282.

52 *Commissioner of Taxation v De Vonk* (1995) 61 FCR 564; *Stergis v Boucher* (1989) 20 ATR 591; *Donovan v Commissioner of Taxation* (1992) 34 FCR 355.

53 *Jackson v Gamble* [1983] 1 VR 552, 557. See also *R v McDonnell; Ex parte Attorney-General (Qld)* [1988] 2 Qd R 189, 196 and 199–200; *Saffron v Federal Commissioner of Taxation* (1992) 34 FCR 355, 364; *State Drug Crime Commission v Lahoud* (Unreported, Supreme Court of New South Wales, Greenwood M, 8 March 1991).

54 *Donovan v Commissioner of Taxation* (1992) 34 FCR 355, 364–365; *State Drug Crime Commission v Lahoud* (Unreported, Supreme Court of New South Wales, Greenwood M, 8 March 1991).

55 P Sofronoff, 'Derivative Use Immunity and the Investigation of Corporate Wrongdoing' (1994) 10 *Queensland University of Technology Law Journal* 122.

56 Use immunity can also extend to signing a record; see, for example, ASIC Act, s 68.

57 An example of an express derivative use immunity is s 243SC(1)(d) of the *Customs Act 1901* (Cth) (introduced by the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* (Cth)), which provides that a person may refuse to answer a question or produce a document if to do so would 'result in further attempts to obtain evidence that would tend to incriminate the person'.

18.41 Use immunity prevents the use of evidence gained directly and indirectly as a result of compulsion, while derivative use immunity is the 'protection afforded by the privilege in relation to further inquiries which may yield incriminating evidence'.[58] Under use immunity, a person must provide the information requested but the uses to which that information may be put, such as evidence in penalty or criminal proceedings, are restricted.[59]

Claiming use immunity

18.42 The practical procedure for claiming use immunity varies across statutes. Most commonly, it is merely stated that any incriminating evidence obtained is not admissible in evidence. Such provisions normally do not specify who is responsible (at the pre-trial administrative stage) for determining whether the disclosure of particular evidence would have a tendency to incriminate a person or make them liable to a penalty. As a result, it is not clear which administrative officers are responsible for determining such claims. These procedural ambiguities are significant because they lack the certainty of self-incrimination claim procedures in court and thus have the potential to adversely affect the rights of the regulated.

18.43 As a result of the difference between immunity provisions under the *Evidence Act* and other federal statutes, the availability or scope of immunity may differ between the investigative and court stages. For example, it has been argued that although the *Evidence Act* 'has effect subject to' the *Corporations Act* and the ASIC Act,[60] displacing the *Evidence Act* provisions on self-incrimination is

> beyond the limited scope of s 76(1)(d) of the *ASC Act*, the relevant *Evidence Act* would seem to 'resuscitate' the privileges, so that there may be situations where, because the *Evidence Act* privileges are broader than those applying at the investigative stage, the ASC may be able to obtain information through the use of its investigative powers, but be unable to give that information as evidence in court proceedings to support, for example, a criminal prosecution for breach of corporate laws.[61]

18.44 It is significant in this regard that the derivative use immunity conferred by s 128 of the *Evidence Act* is broader than the use immunity conferred by s 68 of the ASIC Act.

Preliminary view

18.45 The variance across different legislative and penalty schemes demonstrated in DP 65 revealed a need for consistency and a definitive statement of the nature and

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58 S Ansell, 'Self-Incrimination Privilege in Australia: The United States Influence' (1994) 24 *Queensland Law Society Journal* 545, 548.

59 M Allars, 'Reputation, Power and Fairness: A Review of the Impact of Judicial Review upon Investigative Tribunals' (1996) 24 *Federal Law Review* 235, 258.

60 *Evidence Act 1995* (Cth), s 8(3).

61 R Woellner, *The ASC's Investigative Powers — Some Practical Aspects*, 50th Anniversary Conference Australasian Law Teachers' Association: Cross Currents: Internationalism National Identity & Law, <www.austlii.edu.au/au/special/alta/alta95/woellner1.html>, 21 November 2001. Note that the ASC was renamed ASIC and the ASC Act was replaced by the ASIC Act.

scope of application of the privilege. This is particularly apparent when legislation *impliedly* retains or removes the privilege. The imposition of a penalty can have serious consequences. Further, the human rights justifications for the privilege also suggest that legislation should provide certainty as to how the law applies in relation to the privilege.

18.46 In DP 65, the ALRC proposed the drafting of a uniform or omnibus provision on privilege relating to federal investigative powers. It could set out the circumstances in which privilege and immunity apply in relation to all regulatory provisions compelling the disclosure of information. Such a provision would clarify the rights and obligations of regulators and regulated alike, and end the present uncertainty.[62]

18.47 The ALRC's view was that the existence and nature of the privilege against self-incrimination and the privilege against self-exposure to a non-criminal penalty should be restated in statute, but subject to any clear, express statutory statement that removes or modifies the privilege. This restatement should expressly extend to the privilege against self-exposure to a non-criminal penalty.

18.48 The ALRC also proposed that a restatement should make it clear that a body corporate cannot claim privilege in its own favour, even on behalf of an individual who might be incriminated or exposed to a penalty as a result.[63]

18.49 Further, any such restatement should provide for the default position that no evidence produced subject to a claim for privilege, when that privilege has been removed or modified by statutory statement, can be used in any proceedings against the entity producing that evidence, except in proceedings in respect of the falsity of the evidence itself. Again, this default position could be modified by clear statutory statement.[64]

Consultations and submissions

18.50 In submissions, the point was made that there is a considerable amount of caselaw which allows agencies to enjoy positions where, for example, the privilege against self-incrimination does not apply without the need for express statements in legislation.[65] It was suggested to the ALRC that it would not be easy to draft a uniform

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62 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Proposal 9–1.

63 Ibid, Proposal 9–2.

64 Ibid, Proposal 9–3.

65 For example, the ATO has submitted that caselaw has established that the access provisions of the income tax laws are not subject to the privilege against self-incrimination or the privilege against self-exposure to a non-criminal penalty in recognition of the policy that the proper administration of taxation laws outweighs any countervailing considerations: Australian Taxation Office, *Submission CAP 16*, 17 September 2002. In relation to the ACCC, see also *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 in relation to privilege against self-incrimination and *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96 in relation to privilege against self-exposure to a non-

provision on privilege due to the differences in federal investigative powers and the fact that one solution would not necessarily fit all situations.[66]

18.51 The view was also expressed that unintended consequences may arise from the adoption of a default provision requiring significant legislative amendment.[67]

18.52 In the alternative, another submission expressed strong support for a legislative statement of the privilege.[68] However, it was felt that the original DP 65 proposal to allow for the privilege to be modified by delegated legislation, rules of court or court order was inappropriate on the basis that these rights should not be able to be removed in any form less than express statement in a statute.[69] The ALRC has noted this point.[70]

18.53 A number of submissions noted that the proposal to expressly state that no privilege against self-incrimination operates in favour of corporations was a restatement of the position in a number of Acts or in clearly established caselaw.[71] This proposal was therefore, generally supported.[72] A concern was also expressed that if the privilege was available for corporations, documents would be 'warehoused' with lawyers.[73]

18.54 It was noted in one submission, however, that there is no similar provision in the *Corporations Act* making the privilege against self-exposure to a non-criminal penalty unavailable for corporations in relation to civil penalty proceedings. The view was expressed that it would be useful to insert such a provision in the *Corporations Act*.[74]

18.55 As a general comment, ASIC expressed concern regarding the potential for the proposal concerning use immunity to limit its ability to make use of information obtained during investigations.[75] In particular, ASIC would seek to prevent the inclusion of books produced under compulsion and the fact of the production of those books from the definition of 'evidence' that cannot be used in any criminal or civil penalty proceeding.[76] There is currently no use immunity for these types of evidence available under the ASIC Act and ASIC believes their inclusion would severely impede its abil-

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criminal penalty: Australian Competition & Consumer Commission, *Submission CAP 24*, 15 October 2002.

66 Australian Taxation Office, *Submission CAP 16*, 17 September 2002.

67 Ibid.

68 The Victorian Bar, *Submission CAP 22*, 14 October 2002; see also general support from K Yeung, *Submission CAP 20*, 9 October 2002.

69 The Victorian Bar, *Submission CAP 22*, 14 October 2002.

70 See ch 6.

71 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002; Australian Taxation Office, *Submission CAP 16*, 17 September 2002; Australian Competition & Consumer Commission, *Submission CAP 24*, 15 October 2002.

72 Australian Taxation Office, *Submission CAP 16*, 17 September 2002; Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002; also The Victorian Bar, *Submission CAP 22*, 14 October 2002.

73 Australian Taxation Office, *Submission CAP 16*, 17 September 2002.

74 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.

75 Ibid.

76 Ibid.

ity to gather evidence and prevent any successful prosecution of the criminal offences to which those documents relate.[77]

18.56 ASIC would also seek to limit the definition of 'civil penalty proceedings' in the proposal to those proceedings where a civil pecuniary penalty order is made. Other civil penalty orders which may be made but which do not constitute a 'penalty' include a declaration of contravention under s 1317E; a compensation order under s 1317H; and an order under s 206C disqualifying a person from managing corporations.[78]

18.57 The ATO notes its investigative powers are not used to obtain information for prosecution purposes, but information obtained under those sections may, at times, provide evidence of a criminal offence against the taxation laws. The ATO acknowledges that the model set out in Proposal 9–3 is essentially consistent with current practice.[79]

18.58 However, the ATO would prefer that issues of admissibility were determined by the courts in the particular circumstances rather than expressed in a statutory statement.

> Some evidence obtained in an administrative investigation using powers which suspend the right to claim privilege may not be admissible in some civil or criminal proceedings but this is really a question for the Court to determine. Procedures are available which enable the collection of the same evidence for criminal proceedings, perhaps through the use of search warrants, which allow for privilege claims to be made.[80]

Conclusion

18.59 The ALRC remains of the opinion that the basic rights found in the privileges discussed in this chapter should be given clear statutory imprimatur, though subject to modification in other statutory provisions.

18.60 This approach ensures that there can be no doubt that the privilege is available unless the regulator challenging the claim can point to a statutory provision supporting that challenge. The same can be said of use immunity in relation to information given under compulsion that is subject to a claim for privilege which would have been successful but for a statutory modification of the privilege. These rights are important and, as the courts make clear, should not be removed by oversight or confusion in the law.

18.61 Regulators can seek amendments to the legislation that they administer if they feel that it is necessary to be excused from the operation of the privilege, which will

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77 Ibid.
78 Ibid.
79 Australian Taxation Office, *Submission CAP 16*, 17 September 2002.
80 Ibid.

presumably be made by Parliament if it agrees that this exemption is necessary to give the regulator the power or flexibility that it requires.

18.62 The ALRC considers that unavailability of the privilege against self-incrimination to corporations is an established area of law that does not require legislative restatement.

Recommendations

Recommendation 18–1. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, the same protections for individuals afforded by the privilege against self-incrimination in criminal matters apply in relation to the imposition of a civil or administrative penalty.

Recommendation 18–2. Any legislative scheme which seeks to abrogate or modify the privilege against self-incrimination or self-exposure to a non-criminal penalty must do so by express reference to the privilege or privileges that it seeks to abrogate or modify.

Recommendation 18–3. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, no evidence given by any individual that:

(a) would have been subject to the privilege against self-incrimination or privilege against self-exposure to a non-criminal penalty which has been abrogated or modified by statute, and

(b) was the subject of a claim for privilege,

may be used in any criminal or civil penalty proceedings against that individual, except in proceedings in respect of the falsity of the evidence itself.

19. Legal Professional Privilege

Contents

Introduction

19.1 Historically, at common law, legal professional privilege protected confidential communications between a lawyer and client from compulsory production in the context of court and similar proceedings.

19.2 The rationale for the creation of the privilege is the enhancement of the administration of justice by promoting free consultation and disclosure between clients and lawyers, and assisting in the production of information in litigation.[1] On balance, this freedom is considered to outweigh the alternative benefit of having all information available to facilitate the trial process. In *Baker v Campbell*, Deane J described legal professional privilege as 'a fundamental and general principle of the common law'.[2] The protection only applies where it is intended for a proper purpose — communications made in furtherance of an offence or an action that would render a person liable for a civil penalty are not protected.[3]

19.3 Until recent changes to the law, the communication that was sought to be protected had to be made for the sole purpose of contemplated or pending litigation or for

1 *Baker v Campbell* (1983) 153 CLR 52.
2 Ibid.
3 See *Attorney General (NT) v Kearney* (1985) 158 CLR 5000, *Evidence Act 1995* (Cth), s 125.

obtaining or giving legal advice, as enunciated in *Grant v Downs*.[4] Following the enactment of s 118 and 119 of the *Evidence Act 1995* (Cth), the 'sole purpose' test was replaced with a 'dominant purpose' test.[5] Later, the High Court's decision in *Esso Australia Resources Ltd v Commissioner of Taxation*[6] overruled *Grant v Downs,* holding that the common law test for legal professional privilege was the dominant purpose test.

19.4 Prior to the decision in *Baker v Campbell*,[7] it was thought that legal professional privilege excluded non-judicial legal advice and was confined to judicial or quasi-judicial proceedings.[8] Following the majority decision in *Baker* it was established that legal professional privilege was a right generally conferred by law to protect confidential communications that fall within the privilege from disclosure.[9]

19.5 In 2001, the Full Court of the Federal Court in *ACCC v Daniels*[10] considered the circumstances in which federal regulatory statutes remove legal professional privilege. In that case it was held that a notice compelling disclosure of information to the ACCC under s 155 of the *Trade Practices Act 1974* (Cth) (TPA) could not be refused by claiming legal professional privilege.[11] This case has now been overturned by the High Court, which has held that these fundamental rights will not be abrogated without the presence of clear words to that effect. *Daniels* is discussed further at para 19.14.

19.6 In DP 65, the ALRC identified a number of areas of confusion in relation to legal professional privilege. Firstly, there are significant inconsistencies in the availability of privilege across regulatory statutes. Most federal statutes are silent on the availability of the privilege. Some statutes expressly state that the privilege applies.[12] Three statutes allow a lawyer to claim the privilege unless the client (including an official manager, administrator or liquidator) waives it.[13] Few statutes expressly remove

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4 *Grant v Downs* (1976) 135 CLR 674.

5 *Evidence Act 1995* (Cth).

6 *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49.

7 *Baker v Campbell* (1983) 153 CLR 52.

8 V Brennan, 'Investigative Powers May Impinge on Privilege' (2001) 39(6) *Law Society Journal* 52, 53.

9 Butterworths, *Cross on Evidence* (Looseleaf) Butterworths, [25250].

10 *Australian Competition & Consumer Commission v Daniels* (2001) 108 FCR 123.

11 Woolworths and Coles Myer also appealed to the High Court against notices issued by the ACCC under s 155 seeking documents claimed to be subject to legal professional privilege. Their case was considered by the High Court in conjunction with *Daniels*, and is bound by that decision.

12 For example, one statute states that privilege applies in the same way as it does to a witness in a High Court proceeding, *Broadcasting Services Act 1992* (Cth), s 200(3). Two other statutes provide that certain parts of the statute do 'not affect the law relating to legal professional privilege': *Customs Act 1901* (Cth), s 183UB and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 440.

13 *Superannuation (Resolution of Complaints) Act 1993* (Cth), s 60, *Superannuation Industry (Supervision) Act 1993* (Cth), s 288 and the *Australian Securities and Investments Commission Act 2001* (Cth). To claim privilege under these statutes, the lawyer claiming privilege must provide a 'written notice' setting out the name and address of the client and particulars to identify any document containing the communication. These statutes do not allow a client to claim legal professional privilege in relation to a requirement to give information or produce a book. If a lawyer produces a written notice to ASIC setting out particulars of documents containing privileged communications, ASIC can issue a notice directly to the client seeking production of those documents. As stated in para 19.11, ASIC relies on *Yuill's Case* to abrogate legal professional privilege under the ASIC Act.

the privilege. One express removal of privilege is in s 123 of the *Evidence Act*, which provides that privilege does not apply to information that might prove the innocence of an accused person awaiting trial.[14] The lack of uniformity in the availability of legal professional privilege also has implications for the availability of information compulsorily disclosed in subsequent criminal or civil penalty proceedings.

19.7 Finally, DP 65 briefly considered the issue of whether legal professional privilege should be available for corporations. This is considered at para 19.61.

Implied removal of the privilege

19.8 The change to the dominant purpose test effectively extended the application of legal professional privilege.[15] However, at the same time, regulatory agencies with information gathering and investigative powers have sought to abrogate the privilege in an attempt to stop its use to avoid giving information.

19.9 As noted above, few federal regulatory statutes make express mention of legal professional privilege. Where statutes are silent on privilege, it can be difficult to decide whether there is a legislative intention to remove it. Traditionally, the High Court has held that privilege is available unless a contrary statutory intention is shown by express words or necessary implication.[16] Courts are reluctant to remove the privilege by implication[17] and the intention of Parliament to do so must be 'unmistakeably clear'.[18]

> The legislature may, of course, if it sees fit to do so, cut across the doctrine of legal professional privilege on occasions when it considers that it is more important to obtain information than to preserve the privilege and no doubt the inclination to do so will be greater in administrative proceedings where the principle has not been seen to operate as it has in judicial proceedings. The legislative imposition of an obligation to disclose professional confidences to the executive is relatively recent, although of increasingly frequent occurrence. But it does not seem to me that the law should ease the way for the legislature to expand the practice nor should it disguise the fact that a principle that the law regards as fundamental is involved.[19]

19.10 The courts may also consider whether upholding privilege would impede the functions or powers of a statute.[20]

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14 The provision reverses the High Court's decision in *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121.

15 A Lo Surdo, 'A Quiet Revolution Has Been Happening in Legal Professional Privilege' (2001) 39(6) *Law Society Journal* 50, 50.

16 *Baker v Campbell* (1983) 153 CLR 52. See also *Daniels*, discussed at para 19.14.

17 Ibid; *Federal Commissioner of Taxation v Citibank Ltd* (1989) 20 FCR 403; *Allen Allen & Hemsley v Deputy Commissioner of Taxation* (1989) 20 FCR 576; *Commonwealth v Frost* (1982) 61 FLR 378.

18 *Yuill v Corporate Affairs Commission (NSW)* (1990) 20 NSWLR 386.

19 *Baker v Campbell* (1983) 153 CLR 52, 131 (Dixon J).

20 *Australian Competition & Consumer Commission v Daniels* (2001) 108 FCR 123.

19.11 In *Corporate Affairs Commission of New South Wales v Yuill*,[21] the first case to remove the privilege by implication, the High Court held that privilege was not a 'reasonable excuse' for a failure to comply with the investigation powers under the *Companies (NSW) Code*. *Yuill* is relied on by ASIC to abrogate legal professional privilege under the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act).[22] However, it has been argued that the decision in *Yuill* was heavily based on the particular facts in that case. In particular, the fact that special investigations under Pt VII of the *Companies (NSW) Code* were generated by the relevant Minister in the public interest meant that they were considered to be of special importance and would be impeded if the privilege was available.[23]

19.12 Subsequent cases have seen the courts reluctant to remove the privilege by implication. In *Re Compass Airlines*, it was held that liquidators could still effectively investigate the financial position of companies under s 597 of the *Corporations Law* even if privilege applied.[24] A series of cases involving the Commissioner of Taxation's powers to compel disclosure under s 263 and 264 of the *Income Tax Assessment Act 1936* (Cth) have held or assumed that these powers are subject to legal professional privilege.[25] By contrast, these sections have been held to remove the privilege against self-incrimination.[26]

19.13 The words of a statutory provision compelling disclosure are crucial in determining whether privilege is removed. In *Yuill*, the provision compelled disclosure unless there was a 'reasonable excuse'. The High Court interpreted this as referring 'more to physical or practical difficulties in complying' rather than to a capacity to claim privilege.[27] This decision was in line with the reasoning in *Pyneboard v TPC*[28] in relation to the privilege against self-incrimination, where it was held that the term 'is capable of complying' did not allow an individual to claim privilege in response to a s 155 notice under the TPA. 'Capability' was interpreted as physical capability. The Federal Court in *Daniels* also followed this reasoning.

Daniels v ACCC

19.14 In an important decision on whether or not privilege can be abrogated by implication, the High Court has now determined that s 155 of the TPA does not entitle the ACCC to access documents subject to a claim of legal professional privilege. *Daniels*[29] considered the circumstances in which federal regulatory statutes remove

21 *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319.
22 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.
23 D Boniface, 'Legal Professional Privilege and Disclosure Powers of Investigative Agencies' (1992) 16 *Criminal Law Journal* 320, 341.
24 *Re Compass Airlines Pty Ltd* (1992) 35 FCR 447.
25 *Federal Commissioner of Taxation v Citibank Ltd* (1989) 20 FCR 403; *Commissioner of Taxation v Coombes* (1999) 92 FCR 240.
26 *Commissioner of Taxation v De Vonk* (1995) 61 FCR 564.
27 *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 336 (Dawson J).
28 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.
29 *The Daniels Corporation International Pty Ltd v ACCC* [2002] HCA 49. *Daniels* concerned a claim of privilege in response to a request for access to documents held by the party's lawyers rather than privilege being claimed for legal advice.

considered the circumstances in which federal regulatory statutes remove privilege. It was held that a notice compelling disclosure of information to the ACCC under s 155 of the TPA could be refused by claiming legal professional privilege.

19.15 Section 155 gives the ACCC wide powers to require the production of documents, written information, and/or evidence to be given by any person who has documents or information that relate to a suspected contravention of the TPA. A person served with a s 155 notice cannot refuse to produce evidence on the basis of the privilege against self-incrimination (s155(7)), but legal professional privilege is not mentioned in the section. Section 155 requires disclosure 'to the extent that the person is capable of complying'.

The Federal Court decision

19.16 The Full Court of the Federal Court decision, in line with reasoning in *Pyneboard* and *Yuill,* was that legal professional privilege was abrogated under s 155. One issue for the Full Court was that the TPA preceded the decision in *Baker v Campbell,* and as such, did not deal with the possibility of legal professional privilege arising in the case of a s 155 notice.[30]

19.17 The Full Court held that

> a person may be capable of doing something, although entitled not to do it. A person who is called upon to disclose information, or produce a document, that is subject to legal professional privilege is able to comply with the demand, and may choose to do so, notwithstanding that he or she is entitled not to do so.[31]

19.18 The Full Court also held that allowing legal professional privilege to apply would prevent s 155 from operating as it was intended.[32] Wilcox J noted that the policy concerns that influenced the High Court's decision in *Pyneboard v TPC,*[33] a case concerning the privilege against self-incrimination, were applicable to legal professional privilege. In *Pyneboard*, Mason ACJ, Wilson and Dawson JJ stated:

> It is significant that subs(5) makes it an offence for a person to refuse or fail to comply with a notice under subs(1) "to the extent that the person is capable of complying with it" for these words in themselves are quite inconsistent with the existence of a privilege entitling the recipient of a notice to refuse to comply, whether on the ground that compliance might involve self-incrimination or otherwise. ... the comment may be made that the provision is valueless if the obligation to comply is subject to privilege. Without obtaining information, documents and evidence from those who partici-

30 V Brennan, 'Investigative Powers May Impinge on Privilege' (2001) 39(6) *Law Society Journal* 52, 53.
31 *Australian Competition & Consumer Commission v Daniels* (2001) 108 FCR 123, 137.
32 S McNicol, 'Before the High Court: Australian Competition and Consumer Commission v The Daniels Corporation International Pty Ltd and Another' (2002) 24 *Sydney Law Review* 281, 284.
33 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.

> pate in contraventions of the provisions of Pt IV of the Act, the Commission would find it virtually impossible to establish the existence of those contraventions.[34]

19.19 Similarly, in *Daniels,* Wilcox J found that the ACCC would be unable to perform its investigative functions were legal professional privilege available:

> Conduct that involves a contravention of the Act often comprises many separate acts, some of which may be effected through lawyers. Without information about contacts between the person under investigation and that person's lawyer, it may be impossible for the ACCC to see the whole picture.[35]

19.20 Moore J on the Full Federal Court noted the differences between the privilege against self-incrimination and legal professional privilege:

> Different considerations arise in relation to communications for which a claim of legal professional privilege might be made. Privileged documents, for example, may be sought by a notice under s 155 in circumstances where the documents could ultimately prove to have a limited bearing on whether or not there had been a contravention of the TPA. Documents or information resisted on the grounds of the privilege against self incrimination may be thought, in the ordinary course, to be likely to have a greater bearing on whether there had been a contravention.[36]

The High Court judgment

19.21 In November 2002, the High Court allowed Daniels' appeal, unanimously overturning the decision of the Full Court of the Federal Court. The High Court held that s 155 does not abrogate legal professional privilege, and a corporation and its solicitors may refuse to produce documents that are validly the subject of a claim for legal professional privilege.

19.22 Fundamental to the High Court's decision was the finding that legal professional privilege is 'not merely a rule of substantive law. It is an important common law right or, perhaps more accurately an important common law immunity'.[37]

19.23 The Court stated that express words were required to abrogate the privilege as it was an important common law right.

> It is now well established that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect.[38]

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34 Ibid, 343.

35 *Australian Competition & Consumer Commission v Daniels* (2001) 108 FCR 123, 137. See also S McNicol, 'Before the High Court: Australian Competition and Consumer Commission v The Daniels Corporation International Pty Ltd and Another' (2002) 24 *Sydney Law Review* 281, 284.

36 *Australian Competition & Consumer Commission v Daniels* (2001) 108 FCR 123, 146. See also S McNicol, 'Before the High Court: Australian Competition and Consumer Commission v The Daniels Corporation International Pty Ltd and Another' (2002) 24 *Sydney Law Review* 281, 291.

37 *The Daniels Corporation International Pty Ltd v ACCC* [2002] HCA 49, para 5 (Gleeson CJ, Gaudron, Gummow and Hayne J).

38 Ibid, para 5 (Gleeson CJ, Gaudron, Gummow and Hayne J).

19.24 As noted above, the decision of the Full Court of the Federal Court rested largely on the decisions in *Pyneboard* and *Yuill*. However, the High Court distinguished these cases on a number of grounds.

19.25 Firstly, *Pyneboard* was concerned with the privilege against self-exposure to a penalty. The High Court rejected the argument put forward by the ACCC that the reasoning in *Pyneboard* — that the purpose of the Act would be ineffective were privilege allowed — should be followed. The High Court noted that a communication made between a client and lawyer for the purpose of contravening the TPA would not be protected by privilege. Accordingly

> it is difficult to see that the availability of the legal professional privilege to resist compliance with a notice under s 155(1) of the Act would result in any significant impairment of the investigation of contraventions of the Act, much less in the frustration of such investigations. At least, that conclusion is far less obvious than in the case of the privilege against self-exposure to penalties.[39]

19.26 McHugh J noted that:

> Section 155 would neither become inoperative nor be rendered practically useless if a person to whom a s 155 notice was addressed could refuse to produce documents because they were protected by legal professional privilege … Only in recent times has the Commission or its predecessor claimed that legal professional privilege does not apply to documents that are the subject of a s 155 notice. The Commission's long acceptance of its earlier position supports the view that the section's object would not be frustrated by holding that it does not abolish the right to claim immunity for documents protected by legal professional privilege.[40]

19.27 Secondly, the Court noted that in *Pyneboard* little attention was paid to s 155(2). That sub-section gives the ACCC powers to enter premises and copy documents, and is similar to the search warrant provision in s 10 of the *Crimes Act 1914* (Cth)[41] considered in *Baker v Campbell*[42] and *Propend*.[43] Those cases both confirmed the view that s 10 did not authorise seizure of material to which legal professional privilege attached.[44]

19.28 In addition, it was possible to imply abrogation of the privilege against self-exposure to a penalty to ensure consistency with the express abrogation of the privilege against self-incrimination in s 155(7). However, there was no basis for an implication,

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39 Ibid, 7 (Gleeson CJ, Gaudron, Gummow and Hayne J).
40 Ibid, 11 (McHugh J).
41 Section 10 of the *Crimes Act 1914* (Cth) has been repealed.
42 *Baker v Campbell* (1983) 153 CLR 52.
43 *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.
44 *The Daniels Corporation International Pty Ltd v ACCC* [2002] HCA 49, 8 (Gleeson CJ, Gaudron, Gummow and Hayne J).

'let alone a necessary implication, that the words of the section abrogate legal professional privilege'.[45]

19.29 *Yuill* was primarily distinguished on the basis that s 295 of the *Companies (NSW) Code* was very different in purpose, history and wording to s 155. However, the majority of the High Court in *Daniels* noted that 'it may be that *Yuill* would now be decided differently'.[46]

Preliminary view

19.30 As outlined above, courts have been traditionally reluctant to remove the privilege by implication. The Full Court of the Federal Court in *Daniels* deemed it unnecessary for s 155 of the TPA to explicitly state an intent to abrogate legal professional privilege. It is sufficient that there be an inconsistency between the section and the existence of the privilege.[47] The High Court has now explicitly rejected this approach.

19.31 Confusion about the scope of legal professional privilege stems largely from the inconsistent approaches to expressly or impliedly removing privilege evident in federal statutes. The ALRC expressed a provisional view in DP 65 that the existence and nature of the three privileges discussed (being the privilege against self-incrimination, privilege against self-exposure to a non-criminal penalty and legal professional privilege) should be restated in statute, but subject to any clear, express statutory statement that removes or modifies the privilege.

19.32 Thus it was proposed that legal professional privilege be legislated, as a default position, in favour of individuals, in relation to all forms of enquiry by any regulator in or out of court unless modified by clear express statement in statute, delegated legislation or court order.[48]

19.33 This approach would be consistent with the High Court's decision in *Daniels*. Both view the privilege as a fundamental right, whilst acknowledging there may be occasions where it is necessary that a regulator be able to access documents that would otherwise be privileged. Where that is the case, it is important that the abrogation of the privilege be in clear and express terms, to avoid the present state of confusion.

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45 Ibid, 9 (Gleeson CJ, Gaudron, Gummow and Hayne J).
46 Ibid, 9 (Gleeson CJ, Gaudron, Gummow and Hayne J).
47 A Bruce, 'The Trade Practices Act 1974 (Cth) and the Demise of Legal Professional Privilege' (2002) 30 *Federal Law Review* 373, 379.
48 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Proposal 9–1.

Consultations and submissions

19.34 There was general agreement with the idea of a restatement of the default position that the privilege should be available to individuals unless there was a clear and express statement to the contrary.[49]

19.35 Support for the proposal was based on the view that governments have generally adopted regimes for coercive powers for regulatory bodies in response to individual industry concerns, leaving a lack of overall framework for these provisions. The result has been both inconsistencies between Acts and inconsistencies in powers granted within single agencies that administer a number of Acts.[50]

19.36 One submitter argued that the existence of legal professional privilege may not be appropriate as a default position. He argued that the appropriate position for abrogating the privilege may differ depending on the nature of each piece of legislation. Further, any default position may have to apply retrospectively to have the desired impact.[51] The idea of developing a specific formula for the abrogation of legal professional privilege rather than the requirement for a clear and express statement was put forward, citing the *Daniels* case as an example where the clarity of the statement was questionable.[52]

19.37 The Law Council of Australia expressed the view to the ALRC in consultations that there was not necessarily any mischief to address in relation to legal professional privilege.[53] In its submission, the Law Council of Australia also expressed serious reservations about the creation of a uniform or omnibus provision on privilege.[54]

> To attempt to set out the circumstances in which each privilege or immunity would apply for regulatory purposes would incompletely deal with the topics unless the content of the respective privileges and immunities were also statutorily defined. Codification would in itself be a vast undertaking but, the Law Council submits, an unnecessary one given the evolution and refinement of the content of the privileges and immunities through the common law processes.[55]

19.38 A number of regulators took a different position on the abrogation of the privilege. The ACCC noted that, regardless of the eventual decision of the High Court in

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49 K Yeung, *Submission CAP 20*, 9 October 2002, A Hudson, *Submission CAP 19*, 8 October 2002, Attorney-General's Department, *Submission CAP 14*, 9 September 2002; The Victorian Bar, *Submission CAP 22*, 14 October 2002. The ACCC noted that the proposal was substantially a restatement of caselaw: Australian Competition & Consumer Commission, *Submission CAP 24*, 15 October 2002.

50 Attorney-General's Department, *Submission CAP 14*, 9 September 2002.

51 W Pengilley, *Submission CAP 7*, 17 July 2002.

52 Ibid.

53 Law Council of Australia, *Consultation*, Sydney, 25 July 2002.

54 Proposal 9–1 in DP 65 dealt with legal professional privilege and the privilege against self-incrimination together. In this Report, the two privileges are the subject of separate recommendations (see ch 18).

55 Law Council of Australia, *Submission CAP 27*, 6 December 2002.

Daniels, the TPA should expressly abrogate legal professional privilege. The ACCC submitted that the object of the requirement in s 155 to produce information is to ensure the full investigation in the public interest of matters involving the possible commission of contraventions which lie peculiarly within the knowledge of persons who cannot reasonably be expected to make that knowledge available otherwise than under a statutory obligation.

19.39 The ACCC believes that various species of privilege have been employed in the past to significantly diminish its ability to efficiently and thoroughly undertake investigations into alleged contraventions of the TPA, particularly in circumstances where legal advisers are often commercial partners in a transaction alleged to raise implications in terms of the Act. In such circumstances, the ACCC considers that it is essential to have all of the evidence concerning the role played by parties to an alleged contravention of the TPA in order to determine an appropriate regulatory response. The ACCC also noted that, while legal professional privilege does not attach to communications evidencing an improper purpose (including contraventions of the TPA), it remains practically difficult for the ACCC to prove the existence of those improper purposes.[56]

19.40 ASIC would not support any recommendation that would erode its current ability to gain access to privileged information. As noted in DP 65, the ASIC Act does not contain an express statement abrogating legal professional privilege.[57] ASIC relies on the decision in *Yuill*[58] for abrogation of the privilege. Therefore, adoption of DP 65's Proposal 9–1 would require amendments to the ASIC Act to expressly state that legal professional privilege is not a reasonable excuse for failure to comply with a requirement made by ASIC under its compulsory powers and is therefore abrogated, if the status quo was to be maintained.[59]

19.41 In relation to a recent enactment on privilege, one commentator noted the problem of inconsistency, indicating that the *Customs Act 1901* (Cth) had been amended to include the privilege against self-incrimination as a defence to an obligation to answer questions or provide documents, but was silent on the privilege against self-exposure to a non-criminal penalty and legal professional privilege.[60]

19.42 The Victorian Bar noted that the original DP 65 proposal allowed for the privilege to be modified by delegated legislation, rules of court or court order. The Victorian Bar argued that it is inappropriate that rights be removed in any form less than express statement in a statute.[61] The ALRC has noted this point.[62]

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56 Australian Competition & Consumer Commission, *Submission CAP 24*, 15 October 2002.
57 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, para 9.82–85.
58 *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319.
59 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 32.
60 A Hudson, *Submission CAP 19*, 8 October 2002.
61 The Victorian Bar, *Submission CAP 22*, 14 October 2002.
62 See discussion in ch 6 para 6.51–6.54.

19.43 Finally, there was some agreement with the ALRC's concern that express removal of legal professional privilege is usually accompanied by protections restricting the use of information whereas removal of the privilege by 'necessary implication' will not be accompanied by protections. However, it was felt that any requirement that the privilege be only removed by express statement would be premature before the decision in *Daniels* was brought down.

> Hopefully, the *Daniels* case will indicate whether there are a range of provisions where the privilege has been removed by necessary implication and how these provisions might be identified. The identification of each provision and the weighing of the competing policy interests applicable to it would seem to be a necessary stage before proceeding to any statutory prohibition of the possibility of the privilege being removed by necessary implication.[63]

19.44 The decision in *Daniels*, being a broader statement of policy, has probably not achieved that aim; it was limited to a consideration of s 155 of the TPA.

Conclusion

19.45 The ALRC considers that the common law existence of legal professional privilege is an important principle in the administration of justice and worthy of legislative restatement in the proposed Regulatory Contraventions Statute.

19.46 Whilst the comments of the Law Council in relation to uniform provisions are noted, in line with the recommendations made regarding the privilege against self-incrimination[64] the ALRC considers that legislative restatement ensures that there can be no doubt that the privilege is available, unless the relevant legislation has expressly removed it. Furthermore, as noted in chapter 6, enacting general principles in the Regulatory Contraventions Statute will promote greater clarity and consistency in the operation of federal regulation.

19.47 The proposal in DP 65 stated that legal professional privilege should be legislated as a default position for individuals[65] and left open the question of whether the privilege should be available to corporations. In this Report, the ALRC does not advocate that legal professional privilege be abrogated for corporations. The ALRC prefers a default position, in keeping with the current law, that the privilege be available to both individuals and corporations subject to express abrogation. The arguments for and against abrogation of the privilege for corporations are outlined in detail at para 19.61–19.86. In this context, Recommendation 19–4 advocates that a review be undertaken of federal investigative powers and the operation of legal professional privilege with a view to providing greater certainty and consistency.

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63 Attorney-General's Department, *Submission CAP 14*, 9 September 2002.

64 See Recommendations 18–1 and 18–2.

65 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Proposal 9–1.

19.48 As has been noted elsewhere in this Report, the ALRC is mindful that there are important differences in the aims and operations of Commonwealth regulators, in particular, those concerned with criminal enforcement compared to those whose main focus is commercial regulation. It is acknowledged that commercial regulators (such as ASIC or ACCC) have particular investigatory difficulties. The ALRC acknowledges that there might be circumstances where it is appropriate that legal professional privilege not be available. It is equally clear that confusion will continue unless legislation that seeks to abrogate legal professional privilege does so by clear legislative statement rather than by implication or circumlocution. The ALRC concurs with the remarks of Kirby J in *Daniels* in this regard:

> Legal professional privilege can arise in many circumstances. It is necessary to have a single, clear rule to govern cases in which there is propounded an unstated but implied legislative abolition. As in other countries of like legal tradition, that rule in Australia is, and should be, that the privilege is not lost by statutory words of generality. If it is to be taken away, this must be done clearly. At least then the attention of the legislature will have been addressed to the seriousness of the step. It will not be possible to deprive persons, whether natural or legal, of such a fundamental right by general words or by ambiguous formulae (such as 'capable of complying') that might not be understood by readers as working such a consequence.[66]

19.49 Implementation of this recommendation would mean that some regulators such as ASIC and the ACCC will need to seek legislative amendment in order to continue to run investigations as they do presently. This would be likely to be the case for the ACCC regardless, now that the *Daniels* decision has been handed down. The ALRC believes that, given its importance, it is appropriate for Parliament to consider and debate the circumstances where legal professional privilege should not be available. As such, the ALRC proposes that the Regulatory Contraventions Statute provide that, unless modified by clear express statement in statute, legal professional privilege exists in relation to all forms of enquiry by any regulator in or out of court.

19.50 Furthermore, if legal professional privilege is to be abrogated or modified there could be no clearer expression of this intention than one specifying the privilege by name. This should be the only formula that is sufficiently clear and express to be effective. As *Daniels* demonstrates, other forms of words simply lead to confusion or open up argument.

Recommendations

Recommendation 19–1. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, legal professional privilege exists in relation to all forms of enquiry by any regulator in or out of court.

66 *The Daniels Corporation International Pty Ltd v ACCC* [2002] HCA 49, 22–23 (Kirby J).

Recommendation 19–2. Any legislative scheme which seeks to abrogate or modify legal professional privilege must do so by express reference to that privilege.

Immunity following disclosure

19.51 Federal statutes that remove the privilege against self-incrimination commonly prevent the use of information compulsorily disclosed in any subsequent criminal or civil penalty proceedings[67] (though not in private civil suits). Since few statutes expressly remove legal professional privilege, express use immunity provisions in relation to information compulsorily obtained by denying the privilege are comparatively rare. The *Life Insurance Act 1995* (Cth) protects persons compelled to disclose information by making them 'not liable to anyone else in respect of the disclosure'.[68] Section 92 of the ASIC Act similarly provides that 'a person is neither liable to a proceeding, nor subject to a liability, merely because the person has complied, or proposes to comply, with a requirement made, to purporting to have been made, under this Act.' If it were held that these disclosure provisions impliedly removed privilege, the disclosed information could not be used in any proceedings whatsoever.

19.52 However, where privilege is impliedly removed by other statutes, no use immunity is expressly conferred. The curious result is that statutes expressly removing privilege contain greater protections than statutes interpreted by the courts as impliedly removing privilege. People may be treated differently depending upon whether privilege is removed expressly or by implication, without any policy rationale for the difference in treatment.

19.53 Where privilege has been expressly or impliedly removed by statute, the courts retain a residual discretion to limit the admissibility of information obtained in subsequent court proceedings.[69] As long as there are no express restrictions on the use that may be made of the information compulsorily obtained, 'in court proceedings, every reason of policy, comity and fairness combine to require a court to refuse to allow the answers given under such compulsion to be used in evidence'.[70] There are,

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67 Except in proceedings in relation to the falsity of the evidence itself.

68 *Life Insurance Act 1995* (Cth), s 247.

69 See ch 11, para 11.72–11.83.

70 *Jackson v Gamble* [1983] 1 VR 552, 557; *R v McDonnell; Ex parte Attorney-General (Qld)* [1988] 2 Qd R 189, 196 (McPherson J), 199–200; *Saffron v Federal Commissioner of Taxation* (1992) 34 FCR 355, 364; *State Drug Crime Commission v Lahoud* (Unreported, Supreme Court of New South Wales, Greenwood M, 8 March 1991).

however, contrary authorities on this point[71] and the conferral of use immunity is discretionary rather than an enforceable legal right.

19.54 DP 65 also proposed a legislative restatement of the principle of 'use immunity' in relation to legal professional privilege (such as operates in relation to the privilege against self-incrimination under the TPA and the ASIC Act).[72] Under this proposal, subject to clear, express statements to the contrary, no evidence given by any person that would have been subject to any privilege which has been removed by statute, and was the subject of a claim for privilege, could be used in any criminal or civil proceedings against that person, except in proceedings in respect of the falsity of the evidence itself.

Consultations and submissions

19.55 Regulators expressed concerns regarding the potential for the proposals to limit any ability to make use of information obtained during investigations.[73]

19.56 The ATO noted that its investigative powers are not used to obtain information for prosecution purposes but that information obtained under those sections may, at times, provide evidence of a criminal offence against the taxation laws. The ATO acknowledged that the model of 'use immunity' as set out in Proposal 9–3 is essentially consistent with current practice.[74]

19.57 However, the ATO would prefer that issues of admissibility were determined by the courts in the particular circumstances rather than expressed in a statutory statement.

> Some evidence obtained in an administrative investigation using powers which suspend the right to claim privilege may not be admissible in some civil or criminal proceedings but this is really a question for the Court to determine. Procedures are available which enable the collection of the same evidence for criminal proceedings, perhaps through the use of search warrants, which allow for privilege claims to be made.[75]

19.58 ASIC would seek to limit the definition of 'civil penalty proceedings' in the proposal to those proceedings where a civil pecuniary penalty order is made. Other civil penalty orders which may be made but which do not constitute a 'penalty' include a declaration of contravention under s 1317F; a compensation order under s 1317H; and an order under s 206C disqualifying a person from managing corporations.[76]

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71 *Donovan v Commissioner of Taxation* (1992) 34 FCR 355, 364–365; *State Drug Crime Commission v Lahoud* (Unreported, Supreme Court of New South Wales, Greenwood M, 8 March 1991).

72 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, see Proposal 9–3.

73 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.

74 Australian Taxation Office, *Submission CAP 16*, 17 September 2002.

75 Ibid.

76 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.

Conclusion

19.59 An immunity from use of information that would have been subject to legal professional privilege if not abrogated serves as an important protection for those potentially subject to penalty proceedings.

19.60 It is noted that express abrogation would not limit the ability of persons to assert legal professional privilege at trial. Sections 117 and 118 of the *Evidence Act* preserve the privilege at trial stage. Evidence could be garnered at investigation stage but not used at trial.[77]

Recommendation

Recommendation 19–3. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, no evidence given by any person that:

(a) would have been subject to legal professional privilege which has been abrogated or modified by statute; and

(b) was the subject of a claim for privilege;

may be used in any criminal or civil penalty proceedings against that person, except in proceedings in respect of the falsity of the evidence itself.

Should legal professional privilege be available to corporations?

19.61 In DP 65, the ALRC discussed the argument put forward by a number of commentators that legal professional privilege had been expanded beyond the scope that was envisioned for it, and a brake on this scope is necessary.[78] In *Yuill* Dawson J commented that 'a claim of legal professional privilege might well hamper an investigation as much as, or more than, a claim of privilege against self-incrimination'.[79]

19.62 One way of putting this 'brake' on the scope of legal professional privilege would be to recognise the importance of the privilege, but to limit the availability to

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77 A Bruce, 'The Trade Practices Act 1974 (Cth) and the Demise of Legal Professional Privilege' (2002) 30 *Federal Law Review* 373, 383.

78 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, ch 9. See also S McNicol, 'Before the High Court: Australian Competition and Consumer Commission v The Daniels Corporation International Pty Ltd and Another' (2002) 24 *Sydney Law Review* 281, 293.

79 *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 (Dawson J).

claim it to individuals, much in the same way that only individuals are allowed to claim privilege against self-incrimination.

19.63 There are some arguments in favour of this option. It may be asserted that the complexity of modern business arrangements is such that removal of the privilege is required to facilitate the monitoring of compliance with the law. Further, many regulators are required by legislation or by the regulatory framework under which they operate to perform this function.

19.64 Alex Bruce summarises the themes in the debate as including:

- Corporate activity is complex, carried on through layers of management and principally in documentary form;
- Often the best and the only evidence about the conduct of a corporation can be obtained from that corporation. This is especially so where any 'victim' of corporate misconduct is an 'amorphous entity such as a market';
- Corporations are large and powerful and better placed to initiate and defend investigation and litigation. They can do this by being better able to conceal evidence of wrongdoing and to deploy resources to frustrate investigation and litigation; and
- If corporations can employ common law privileges to resist the production of documents concerning the truth of alleged misconduct, the public interest in detecting and punishing crime, as expressed in statutes like the TPA is likely to be diminished.[80]

19.65 ASIC considers that the difficulties of investigating misconduct in the financial and corporate sector, combined with the frequent involvement of legal advisers in the types of transactions that are investigated by ASIC, means that the current abrogation of the privilege (by virtue of the decision in *Yuill*) is justified.[81]

19.66 Conversely, some commentators have suggested that an increased judicial preparedness to remove the privilege by implication may damage, rather than enhance, compliance. Fear of compulsory disclosure may deter candid, careful, detailed, written advice being given by lawyers to their clients and increase the amount of oral advice by lawyers. Removing privilege might also deter complex advice testing the limits of the law, result in the prosecution of lawyers, and deter the development of internal corporate compliance programs.

19.67 In DP 65, the ALRC considered the question of whether effective regulation requires greater use of intrusive measures like the removal of legal professional privi-

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80 A Bruce, 'The Trade Practices Act 1974 (Cth) and the Demise of Legal Professional Privilege' (2002) 30 *Federal Law Review* 373, 387.

81 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.

lege, or whether more informal, cooperative or voluntary mechanisms – like leniency or immunity policies and discretions — would achieve better compliance outcomes.[82]

19.68 Dr Christine Parker notes that the lack of protection afforded to compliance management documents may be a disincentive to companies to improve their compliance performance. Further, whilst regulators increasingly expect to see this sort of information (for example, ASIC and the ACCC in relation to enforceable undertakings) they have been vague about committing to take 'good faith compliance efforts' into account in deciding whether to use such information against an organisation.[83]

19.69 Rather than an expansion of legal professional privilege, which could encourage secrecy about compliance practices, Parker advocates a leniency approach, whereby regulators introduce immunity policies to companies that discover, disclose and self-correct compliance breaches.[84] The Association of Compliance Professionals also supports this approach.[85]

19.70 Bruce argues that the High Court has progressively restricted the ability of corporations to assert privilege in litigation.[86] He notes that the reasoning of the High Court in *Caltex* on self-incrimination (that it was a 'human' right) could be extended by analogy to deny corporations the right to assert legal professional privilege. However, he also makes the point that the privilege against self-incrimination is based upon different policy foundations.[87]

19.71 Bruce cites *Grant v Downs*[88] as an early example where concerns have been expressed about whether the privilege is appropriately applied to corporations.

> There is, we should have thought, much to be said for the view that the existence of the privilege makes it more difficult for the opposing party to test the veracity of the party claiming the privilege by removing from the area of documents available for inspection documents which may be inconsistent with that case. To this extent the privilege is an impediment, not an inducement, to frank testimony, and it detracts from the fairness of the trial by denying a party access to relevant documents or at least subjecting him to surprise. These difficulties are magnified in cases when privilege is claimed by a corporation.[89]

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82 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, 330.

83 C Parker, 'Smoking Guns or Effective Compliance Tools: Protecting Compliance Documents via Privilege or Immunity?' (2001) 17 *Compliance News* 9, 10.

84 Ibid, 12–13.

85 See discussion at para 19.92.

86 A Bruce, 'The Trade Practices Act 1974 (Cth) and the Demise of Legal Professional Privilege' (2002) 30 *Federal Law Review* 373, 382.

87 Ibid, 382, citing *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 (Dawson J), 332.

88 *Grant v Downs* (1976) 135 CLR 674.

89 Ibid, 686.

19.72 In recent decisions the High Court has moved towards a view of legal professional privilege as a 'basic human right'.[90] In *Carter*, McHugh J took the view that:

> By protecting the confidentiality of communications between lawyer and client, the doctrine protects the rights and privacy of persons including corporations by ensuring unreserved freedom of communication with professional lawyers who can advise them of their rights under the law and, where necessary, take action on their behalf to defend or enforce those rights. The doctrine is a natural, if not necessary, corollary of the rule of law and a potent force for ensuring that the equal protection of the law is a reality.[91]

19.73 Some commentators have suggested that the reasoning adopted by the High Court has not been based on human rights, but rather a pragmatic view of the desirability that people fearlessly seek legal advice.[92] If that reasoning underpins the desirability of legal professional privilege, then there is no reason that it should not apply to corporations as strongly as individuals.

19.74 Dorne Boniface has commented:

> The majority decision in *Yuill* did not acknowledge the important part that professional legal advice can play in encouraging compliance with the law … instead, the reasoning of the majority was confined to analysing linguistic, textual and historical considerations without reference to the underlying policy debate ... by implication, the public policy that underpins legal professional privilege was displaced in *Yuill* by the court's identification of the public policy that underpinned the *Companies Code*. Such a method of analysis reinforces the application of the assumption that the public policy identified by the courts as the legislative intention is of paramount importance rather than the public policy that is said to underpin legal professional privilege.[93]

19.75 Bruce notes another crucial difference between legal professional privilege and the privilege against self-incrimination — legal professional privilege cannot be used to shield evidence of illegal activity.[94] A similar point was made by the Law Council of Australia.[95]

19.76 It was anticipated that the High Court would comment on the availability of the privilege to corporations in the *Daniels* decision. However, as the judgments were so clear that the words of s 155 could not, by implication, abrogate legal professional privilege, the issue of its availability to corporations did not need to be considered. Kirby J, however, did look at the question in his judgment and made some important remarks. He noted that while legal professional privilege is an important human right

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90 A Bruce, 'The Trade Practices Act 1974 (Cth) and the Demise of Legal Professional Privilege' (2002) 30 *Federal Law Review* 373, 385.

91 *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 (McHugh J), 161.

92 A Bruce, 'The Trade Practices Act 1974 (Cth) and the Demise of Legal Professional Privilege' (2002) 30 *Federal Law Review* 373, 386, citing V Waye, 'The Corporation and Legal Professional Privilege' (1997) 8 *Australian Journal of Corporate Law* 25, 25.

93 Ibid, 394, citing D Boniface, 'Legal Professional Privilege and Disclosure Powers of Investigative Agencies' (1992) 16 *Criminal Law Journal* 320, 328.

94 Ibid, 388.

95 Law Council of Australia, *Consultation*, Sydney, 25 July 2002.

deserving of special protection, Daniels as a corporation may not be entitled to all of the rights described as fundamental human rights. 'Nevertheless, in the expositions of the rationale for legal professional privilege, it has not so far been suggested (nor was it argued in this case) that such privilege is somehow inapplicable to a corporation or is of a kind that would not attract the presumption of parliamentary respect for its continuance in such a case'.[96]

19.77 Kirby J cited the comments of United Kingdom Advocate-General Slynn in explaining the principle as applicable to both natural and legal persons:

> Whether it is described as the right of the client or the duty of the lawyer, this principle has nothing to do with the protection or privilege of the lawyer. It springs essentially from the basic need of a man in a civilised society to be able to turn to his lawyer for advice and help, and if proceedings begin, for representation; it springs no less from the advantages to a society which evolves complex law reaching into all the business affairs of persons, real and legal, that they should be able to know what they can do under the law, what is forbidden, where they must tread circumspectly, where they run risks.[97]

19.78 Whilst noting the argument that the right to the privilege as a 'fundamental human right' should only apply to humans — and further acknowledging that the interests of the public may be well served in some cases by allowing these documents to be in the public realm, Kirby J ultimately drew a distinction between the privilege against self-incrimination and legal professional privilege, based on their very different historical origins.

> A broad construction of s 155 would, on occasion, impinge upon individual human rights. A consistent application of the interpretative principle obliges this Court to demand a uniform clarity in provisions that abolish legal professional privilege if that is truly the Parliament's purpose. Occasionally, in any case, a fundamental human right is an expression of an even larger concept, namely a fundamental civil right belonging also to artificial persons such as corporations. Protection from self-incrimination rests upon different historical, legal and policy considerations almost all related to individual human beings. The entitlement to sound legal advice, immune from compulsory disclosure to investigating or prosecuting public authorities, is arguably necessary both for natural and artificial persons. If so, its withdrawal by the Parliament must be enacted in clear terms.[98]

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96 *The Daniels Corporation International Pty Ltd v ACCC* [2002] HCA 49, 18 (Kirby J).

97 Ibid, 18 (Kirby J), citing *AM & S Europe Ltd v Commission of the European Communities* [1983] QB 878, 913.

98 Ibid, 21 (Kirby J).

Consultations and submissions

19.79 As DP 65[99] did not directly propose that legal professional privilege not be available for corporations, not all of the submissions addressed this issue.

19.80 It was submitted to the ALRC that corporations should not be able to assert legal professional privilege for the following reasons:

- The High Court has repeatedly expressed concern about the ability of corporations to extract advantages in the litigation process through the tactical use of legal professional privilege. This is especially so in the context of trade practices litigation.
- The widening of the common law test for legal professional privilege from 'sole purpose' to 'dominant purpose' potentially exacerbates the ability of corporations to shield documents relevant to the truth of a course of conduct.
- It is arguable that the High Court is moving to characterise legal professional privilege as a fundamental human right and, as such, it is not properly a 'corporate' right.[100]

19.81 Further, the view was put that it is questionable whether corporations should be considered beneficiaries of a privilege which was created at a time when corporations were not yet in existence, and to protect rights that were not thought to apply to corporations.[101]

19.82 The ATO submitted that, while *Baker v Campbell* expressed the view that legal professional privilege ensures 'some protection of the citizen — particularly the weak, the unintelligent and ill-informed citizen — against the leviathan of the modern state', the ATO's experience is that it is rare for a privilege claim to be made by, or on behalf of a citizen who would fit that description. Often it is claimed by large corporates or promoters of tax avoidance schemes.[102]

19.83 Further, the ATO sees merit in removing legal professional privilege for all pre-trial investigations. In the ATO's view, only removing the privilege for corporations would not be sufficient as individuals can conduct their affairs under a number of guises. Such removal would also not cover individual promoters of tax avoidance schemes.[103]

19.84 The Law Council of Australia made a late submission to the Inquiry which vigorously defended the right of corporations to assert legal professional privilege. The Law Council argued that legal professional privilege 'is a doctrine which must be pre-

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99 Proposal 9–1.
100 Australian Competition & Consumer Commission, *Submission CAP 24*, 15 October 2002. This submission was received prior to the High Court handing down its decision in *Daniels*.
101 Ibid.
102 Australian Taxation Office, *Submission CAP 16*, 17 September 2002.
103 Ibid.

served unless there are exceptional circumstances where the furtherance of higher public policy interests requires its abrogation'.[104]

19.85 Any proposal to abrogate the privilege for corporations was opposed by the Law Council on the ground that the privilege plays a crucial role in the administration of justice, facilitating the representation of clients by legal advisors by encouraging full and frank disclosure of the relevant circumstances.[105] Further, 'to the extent the proposal denying companies the benefit of LPP [legal professional privilege] is linked to the rationale for companies not enjoying privilege against self-incrimination, it is quite clear that LPP is fundamentally different and based on different principles to the self-incrimination styled principles'.[106]

19.86 The Law Council also noted that 'implicit assumptions' made in DP 65 that enforcement activities are frustrated by corporations being afforded legal professional privilege were inappropriate. It noted that in *Daniels* the High Court repeatedly asserted that the investigatory activities of the ACCC were not frustrated by the operation of the privilege.

> It is wrong to attempt to circumvent due legal process because of administrative inconvenience which may result for individual agencies. … Moreover, the public interest is served by ensuring thorough and proper investigatory processes are followed.[107]

Other approaches

19.87 Following the release of DP 65, the ALRC was informed of two other matters that may be of interest on this issue, being the extension of the privilege to registered tax practitioners and the offering of immunities to documents related to the development of compliance systems.[108]

New Zealand: A proposed new structure for legal professional privilege

19.88 The New Zealand Inland Revenue Department has proposed extending the concept of legal professional by enacting a new privilege for opinion on tax law by registered tax practitioners. This extension is aimed at 'promoting the efficient conduct of compliance with the law by allowing tax practitioners who give opinions on tax law to have a candid relationship with their clients'.[109] This extension of privilege would be

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104 Law Council of Australia, *Submission CAP 27*, 6 December 2002.
105 Ibid, citing *Grant v Downs* (1976) 135 CLR 674, 685.
106 Ibid.
107 Ibid.
108 Law Council of Australia, *Consultation*, Sydney, 25 July 2002; The Australian Compliance Institute, *Submission CAP 8*, 30 August 2002.
109 New Zealand Inland Revenue Department, *Tax and Privilege: A Proposed New Structure: A Government Discussion Document — May 2002*, New Zealand Inland Revenue Department, <www.taxpolicy.ird.govt.nz/publications/index.php?catid=2>, 26 July 2002, 9. At the time of writing submissions were being considered on the proposal.

balanced by improving the Department's ability to access factual information. The Department draws a distinction between the facts of a transaction and an advisor's opinion on how the law applies to those transactions.[110]

19.89 The proposed scheme would work as follows:

- The privilege would apply only to opinions on tax law given at any time (whether before or after the filing of a tax return in respect of a tax period) by members of approved professional bodies.
- The privilege would apply only if claimed by the taxpayer and would apply only in respect of identified documents and information.
- If a document included both an opinion on tax law and other information, the whole document would have to be provided, with any proper deletions of the material consisting solely of the opinion on tax law being clearly identified in the document. The balance of any document consisting of material that was not an opinion on tax law would not be privileged.
- If Inland Revenue disputed the validity of a privilege claim, the privilege would not apply unless the claimant applied within one month for a determination by a District Court Judge of what part, if any, is privileged because it is an opinion on tax law. This would require the taxpayer to provide the unedited document to the court for review.[111]

19.90 In addition, the existing litigation privilege would be based on the test contained in the New Zealand Evidence Code (a dominant purpose test).

19.91 The ATO notes the similarity between the New Zealand approach and the ATO guidelines that exist in relation to Accountant Work Papers.[112] Some interest was expressed to the ALRC in the model put forward in New Zealand, and the potential for its adoption in Australia.[113]

Immunity for compliance systems

19.92 The Australian Compliance Professionals Association (ACPA) expressed the view that records of compliance systems require special protection.[114] The benefits of compliance programs were noted in DP 65, and again in this Report in chapters 7 and 29. However, good compliance systems contain elements that increase the legal risks of an organisation, simply by virtue of its operation. ACPA cites examples where programs may include acknowledgement of breaches as a tool for rectifying errors and re-

110 Ibid, 9.
111 Ibid, 2.
112 Australian Taxation Office, *Submission CAP 16*, 17 September 2002.
113 Law Council of Australia, *Consultation*, Sydney, 25 July 2002.
114 The Australian Compliance Institute, *Submission CAP 8*, 30 August 2002.

sponding to them promptly.[115] At present, all this information is available to regulators by way of investigatory notices[116] or to third parties via discovery or subpoena.

19.93 ACPA suggests that this critical issue be addressed by formulating a special form of immunity from discovery of compliance records and steps.

> Such records and the steps taken to achieve compliance and rectify problems should not be available to third parties for the purpose of ascertaining what problems have arisen, obtaining evidence, or as an indicator of where else in the organisation to look for evidence or information disclosing other possible breaches.[117]

19.94 Under the ACPA model, this scheme, which would allow prima facie immunity in respect of all records created for the purpose of a compliance program, would be separate from the law of privilege.[118] ACPA acknowledges the perception that such a scheme could lead to difficulties in investigations. Its assertion is that those who have done the right thing and implemented a compliance program should not be disadvantaged for it by comparison with those who have not.

Conclusion

19.95 The ALRC was not able to undertake the intensive consultation and research needed to make a recommendation on the issue of whether legal professional privilege should be available to corporations. In addition, the related issue of the investigatory powers of regulators were not included in the Terms of Reference for this Inquiry. It is difficult to undertake a sufficiently detailed review of the operation of legal professional privilege without an assessment of these powers. As noted above, these questions did not form a significant part of the deliberations of the High Court in *Daniels.* Accordingly, issues surrounding the availability to legal professional privilege for corporations are essentially beyond the scope of this Inquiry.

19.96 However, the lack of uniformity and clarity in the operation of these powers has become apparent to the ALRC in the course of its research. As noted earlier, the ALRC does not recommend the abrogation of legal professional privilege for corporations as a default position (see Recommendation 19–1). Where it is considered desirable within a certain regime that the privilege be abrogated, this can be done by Parliament in clear, express terms.

19.97 Nonetheless, despite some comments of the High Court in *Daniels*, it is clear from the variety of recent case law that the availability of the privilege to corporations is not 'beyond argument' in Australian federal law. Accordingly the ALRC recom-

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115 Ibid.
116 For example, a s 155 notice under the TPA.
117 The Australian Compliance Institute, *Submission CAP 8*, 30 August 2002.
118 Ibid.

mends that these matters be looked at more closely as the subject of a specific inquiry on this subject.

19.98 The suggestions made to the ALRC of extending the privilege to non-legal professionals and offering immunity from investigation to compliance programs are also beyond the scope of this Inquiry. However, without comment on their merit, the ALRC considers that they could also be looked into as part of the general inquiry proposed.

Recommendation

Recommendation 19–4. The Attorney-General should order a review of federal investigative powers with a view to providing greater certainty and consistency between regulators in relation to their ability to compel the disclosure of information and the operation of legal professional privilege.

20. Accountability — Appeal and Review

Contents

Introduction

20.1 Decisions made by regulators concerning penalties involve the exercise of public power. Principles of accountability require public officials to account for their actions to the community. The underlying assumption is that all government powers are held on behalf of the community and therefore account must be made to it.[1] For accountability to be meaningful, there must be some public awareness of the decision-making process, the basis upon which regulatory decisions are taken,[2] and of the means by which decisions can be reviewed.

20.2 Accountability is a broad concept. In the context of this Inquiry, it extends from the review of individual penalty decisions to the general transparency of the activities of regulators. A regulator may make a number of administrative decisions prior to commencing criminal or civil penalty proceedings and before the imposition of a penalty. The ALRC draws a distinction between these penalty-related administrative decisions and decisions to impose penalties themselves. Review of a decision made by a regulator to impose a quasi-penalty is considered in detail in chapter 21. Review of other decisions made as part of the penalty process is considered in chapter 23.

1 D Galligan, 'Procedural Fairness' in P Birks (ed), *The Frontiers of Liability* (1994) Oxford University Press, Oxford, 4.

2 R Baldwin, C Scott and C Hood (eds), *A Reader on Regulation* (1998) Oxford University Press, Oxford.

20.3 The first section of this chapter briefly discusses court-imposed penalties and the accountability provided by courts. The second section considers appeal and review bodies and the nature of an appeal. Consideration is also given to the three forms of review of administrative decisions — internal review, external merits review and judicial review. The third section considers the choice between internal review, external merits review and judicial review and whether all forms of administrative review should be available to challenge a decision to impose an administrative penalty.

Court-imposed penalties

20.4 The majority of federal penalties are imposed by a court, in either criminal or civil proceedings, instituted by the regulator or the DPP, to enforce the criminal offence or non-criminal contravention. One of the strengths of a court-imposed penalty scheme is that the process by which the penalty is imposed is strictly regulated and held in full public view. Further, a written, reasoned judgment explaining the decision is provided. It is in these formal procedures that the most stringent and rigorous procedural safeguards are found.

20.5 Civil penalty decisions are made by courts and are therefore appellable to a higher court.[3] The principal functions of an appellate court are:

- to correct errors in the decision of trial courts or in the reasoning used by them in reaching those decisions; and
- to develop the body of law through judicial exposition.[4]

20.6 It is not the ALRC's task in this Inquiry to consider in any detail the procedural rules and practices of courts and tribunals administering federal criminal law and civil penalty systems. The issues concerning court procedure relevant to this Inquiry focus on the choice of procedure and, importantly, the protections available to the alleged offender,[5] rather than the details of the procedural rules. As criminal and civil penalties are court-imposed and, therefore, the process is strictly regulated and held in full public view, the focus of the Inquiry in relation to the review of decisions imposing penalties is on administrative penalties and penalty-related administrative decisions.

Administrative penalties

20.7 When penalties are imposed administratively by a regulator, many of the benefits of independence and transparency that are inherent in a court-imposed penalty

3 The structure of original and appellate jurisdiction of courts is well established under various pieces of legislation including the Constitution and *Judiciary Act 1903* (Cth) and courts' principal legislation and other legislation for example, the *Corporations Act 2001* (Cth) and *Environment Protection and Biodiversity Conservation Act 1999* (Cth). See also Australian Law Reform Commission, *The Judicial Power of the Commonwealth*, ALRC 92 (2001), Australian Law Reform Commission, Sydney.

4 The Hon Justice D Ipp, 'Reforms to the Adversarial Process in Civil Litigation — Part II' (1995) 69 *Australian Law Journal* 790.

5 See for example the discussion of privilege in ch 18 and 19.

scheme may be lost.[6] Here, particularly in the case of quasi-penalties,[7] the value of an appeal and review mechanism becomes more pronounced. Internal review, external merits review and judicial review each fulfil a different function and provide different remedies in relation to administrative decisions, including the decision to impose a penalty.

Appeal and review

20.8 Appeal and review processes are an important mechanism to ensure accountability by allowing decisions made by one decision maker to be tested by another. Appeal and review can also result in more rigorous and lawful decision-making because regulators are aware that their decisions will be subject to scrutiny. Avenues of appeal and review are also a source of legitimacy — regulators can claim that their activities are legitimate and acceptable because they are properly accountable to, and controlled by, other public institutions. Formal avenues of appeal and review also structure a person's participation in the penalty process. They determine when complainants are heard, how they are heard, what evidence they can produce, and how many times they can be heard. It is well established that the existence of certain types of appeal rights may affect the application, or at least enforcement, of the requirements of natural justice.[8]

20.9 The terms 'appeal' and 'review' are sometimes used interchangeably in administrative law. Wherever possible, this chapter uses the term 'appeal' to describe the right of a person to seek review by a person other than the primary decision maker of a decision. 'Review' is used more broadly to refer to the process of reconsideration by another person or body of decisions made by regulators as part of the penalty process. Review may be internal or external and may involve either or both a reconsideration of the merits of the case ('merits review') or the legality of the decision ('judicial review'). In this Report, 'internal review' means the reconsideration of a decision within the same agency by a person other than the original decision maker, 'external merits review' means the reconsideration of the merits of a decision by a court or other independent tribunal specifically constituted for the purpose of reviewing decisions, and 'judicial review' means the reconsideration of the legality of a decision by a court.

Avenues of appeal and review

20.10 Currently, the decision to impose a penalty through a civil or administrative process under federal legislation may be appealed to, and reviewed by, a number of bodies.

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6 See para 10.47 in Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney.

7 In this Report, the ALRC has used the term 'quasi-penalties' to mean administrative procedures that result in the imposition of certain restrictions on a person's activities or the curtailing of benefits that might be loosely regarded as penalties but are not penalties as a matter of law. Common examples are licence restrictions and social security 'penalties'.

8 M Aronson and B Dyer, *Judicial Review of Administrative Action* (2nd ed, 2000) LBC Information Services, Sydney, 371. Typically, the concept of 'natural justice' incorporates the 'hearing rule' and the 'bias rule'. For a detailed discussion of these rules see ch 14.

- *Court appeals.* Civil penalties are imposed using formal court proceedings and appeals are provided for by legislation. This avenue of appeal generally involves a court sitting in its appellate jurisdiction.

- *Court approval of agreed penalties.* A court may also review a penalty that has been negotiated and agreed to by the parties. For example, the Federal Court will often sanction agreed penalties arrived at through negotiation between the regulator and the regulated entity (see discussion of agreed penalties in chapter 16).

- *Court enforcement of negotiated settlements.* The ACCC and ASIC, as appropriate, can apply to the Federal Court to enforce an undertaking given under s 87B of the *Trade Practices Act 1974* (Cth) (TPA) or s 93AA of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act). See discussion of enforceable undertakings in chapter 16.

- *Internal review.* Quasi-penalties and other penalty-related decisions (such as decisions to remit a penalty) are sometimes subject to single- or two-tier internal review. This review can be statute- or non-statute-based, and may operate alongside a complaint resolution service. A typical example of internal review is the Authorised Review Officer system used within Centrelink to reconsider the imposition of breach penalties. See discussion of the Centrelink internal review process in chapter 21 at para 21.13.

- *External merits review.* Most administrative decisions, including some quasi-penalties, can be reviewed by external review bodies. These avenues can include a single-tier merits review, such as an appeal directly to the AAT. Another avenue is a two-tier external merits review, for example, a review by the Social Security Appeals Tribunal (SSAT) whose decision can then be appealed to the AAT.

- *Judicial review.* Courts can provide judicial review of administrative decisions. A person can appeal to the Federal Court from an AAT decision under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act). Judicial review is also available under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act), the Constitution and the *Judiciary Act 1903* (Cth).

Internal review

20.11 Internal review involves reconsideration of a decision within the same agency by a person other than the original decision maker. In most cases, the review officer may make a new decision based on the merits of the matter or affirm the original decision. Another officer within the same agency, usually a more senior officer, undertakes the review. The review may be undertaken in consultation with the original decision maker, but the person making the decision on review should be independent of the original decision maker. Internal review can take a number of forms and an agency

may have more than one system of internal review. Some agencies have relatively formal internal review systems, while others have less formal systems in place.

20.12 Many quasi-penalties are reviewed internally prior to external review. In most cases the availability of internal review is desirable as it can deliver quick, accessible decision making for the regulated. Internal review is often less formal than external review and may be less intimidating for unsophisticated members of the regulated community who may be satisfied if the decision is 'looked at again'.[9] It is also attractive to many regulators as it can be less resource- and time-consuming than formal external processes.

20.13 In its report, *Better Decisions: Review of Commonwealth Merits Review Tribunals*,[10] the ARC briefly considered internal review, recognising its advantages as being that it provides:

- a quick and easily accessible form of review which can efficiently satisfy large numbers of people who might otherwise:
    - not take up external review rights (because of perceived barriers); or
    - unnecessarily pursue the more resource- and time-consuming external processes (with internal review acting as a filter);[11] and
- a useful quality control mechanism, wholly 'owned' by an agency, with the best chance of feeding back and influencing primary decision making.[12]

20.14 The *Better Decisions* report identified the disadvantages of internal review to include:

- it can act as a barrier, introducing lengthy delays and deterring members of the regulated community from reaching a genuinely independent review body;[13]
- it is subject to regulatory capture,[14] resulting in few variations of original decisions;[15] and

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9 The ATO noted in its submission 'that relatively few disputes proceed past internal review, whether because the internal review process enables new information to be provided to decision-makers or because it enables an applicant for review to gain a better understanding of the basis for the decision': Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.127.

10 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report 39 (1995), Commonwealth of Australia, Canberra.

11 Ibid, para 6.49. See also N Waters, 'Internal Review and Alternative Dispute Resolution: The Hidden Face of Administrative Law III' (1996) 79 *Canberra Bulletin of Public Administration* 91, 92.

12 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report 39 (1995), Commonwealth of Australia, Canberra, para 6.49.

13 Ibid, para 6.50. The delays experienced by some applicants with Centrelink's two-tier system of internal review was criticised by the Commonwealth Ombudsman: see Commonwealth Ombudsman, *Social Security Breach Penalties — Issues of Administration* (2002), Commonwealth Ombudsman.

14 'Regulatory capture' can occur when the regulator becomes too closely identified with the regulated community and fails to make independent decisions. This may arise because of frequent interchange of staff between industry and the regulator.

- it can lead to inconsistent treatment of members of the regulated community in different geographic areas or regions.[16]

20.15 Despite these disadvantages, the *Better Decisions* report concluded that internal review should be encouraged, provided that it is relatively timely, free, undertaken by sufficiently independent review officers, and involves an appropriate level of contact between internal review officers and applicants.[17]

20.16 Commentators have also observed that some people cannot, or do not, access internal review. Contributing factors include delay, expense (for example, the operation of the penalty might not be suspended until review is completed), different needs depending on the character of the next level of review available, resources, mode of contact, perceived lack of independence, the status of agency policy in internal review, the nature of internal review and the lack of representation.[18] An emerging theme in Australian government policy is the increased emphasis on internal review processes, often at the expense of external review.[19] However, it should be noted that internal review can never be a substitute for external review.

> Internal review mechanisms alone lack independence and credibility. They cannot effectively ensure accountability or the avoidance of conflict of interest, nor protect individuals against abuse of power.[20]

20.17 The ALRC agrees with this proposition and considers that any system that purports to provide accountability through internal review alone is inadequate. The ALRC considers that true accountability can only be achieved through the provision of independent, external avenues of review.

Features of internal review

20.18 In November 2000 the ARC released a report, *Internal Review of Agency Decision Making*.[21] Based on its research and analysis, the ARC produced a Best Practice Guide to Internal Review. Some of the features of effective internal merits review iden-

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15 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report 39 (1995), Commonwealth of Australia, Canberra, para 6.60.

16 Ibid, para 6.51. Concern about geographic inconsistency in decision-making was raised in the context of infringement notice schemes in several consultations: see Custom Brokers and Forwarders Association, *Consultation*, Brisbane, 29 August 2002; National Farmers' Federation, *Consultation*, Canberra, 4 September 2002. See also the discussion of infringement notice schemes in ch 12.

17 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report 39 (1995), Commonwealth of Australia, Canberra. See Proposal 10-4 in Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney.

18 For a more detailed outline of these factors, refer to N Waters, 'Internal Review and Alternative Dispute Resolution: The Hidden Face of Administrative Law III' (1996) 79 *Canberra Bulletin of Public Administration* 91, 93–95.

19 R Creyke, 'Sunset for the Administrative Law Industry? Reflections on Developments under a Coalition Government' (1998) 87 *Canberra Bulletin of Public Administration* 39, 47.

20 J Uhr, 'Accountability Without Independent External Review' (1997) 84 *Canberra Bulletin of Public Administration* 57, 58.

21 Administrative Review Council, *Internal Review of Agency Decision Making: Report to the Attorney-General* (2000), Commonwealth of Australia, Canberra.

tified by the ARC were independence, single-layer review, accessibility, personal contact, new information and timeliness.

Independence

20.19 In order to review decisions in an impartial manner, internal review officers require a degree of independence from the makers of the original decisions. In its *Better Decisions* report the ARC acknowledged that internal review, by definition, cannot be completely independent of the relevant agency.[22] However, it recommended that internal review be undertaken by internal review officers who are sufficiently independent of the original decision makers.[23] Examples of ways in which this can be achieved include having internal review officers in physically separate locations, not having internal review officers as part of the same team as primary decision makers or supervised by the same manager, having the salaries of internal review officers funded from a separate part of the organisation, and having appropriate protocols in place with a view to maintaining an arm's length relationship. See also discussion of the 'bias rule' in chapter 14.

Number of layers of review

20.20 In some agencies there may be numerous layers of internal review, with decisions being reviewed by progressively more senior officers. However, multiple layers of review can lead to delay, 'appeal fatigue'[24] and wastage of resources. The ARC states that it is preferable to have a simplified structure consisting of one layer of review by a senior officer uninvolved in the primary decision.[25] The delay inherent in any system of internal review that involves reconsideration by more than one officer was criticised by the Commonwealth Ombudsman in his report on social security breach penalties.[26]

Accessibility

20.21 Accessibility is particularly important in relation to penalty decisions. Commentators have noted that internal review can form a barrier to external review as several layers of review can cause 'appeal fatigue'.[27] Accessibility of internal review, then, is particularly important. An important aspect of the accessibility of internal review is providing certainty as to how and when review is initiated. In the context of the

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22 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report 39 (1995), Commonwealth of Australia, Canberra, para 6.60.

23 Ibid, rec 75.

24 'Appeal fatigue' refers to a reluctance on the part of potential applicants to pursue an appeal process when they have already gone through several stages which may have taken a considerable period of time.

25 Administrative Review Council, *Internal Review of Agency Decision Making: Report to the Attorney-General* (2000), Commonwealth of Australia, Canberra, para 3.49.

26 Commonwealth Ombudsman, *Social Security Breach Penalties — Issues of Administration* (2002), Commonwealth Ombudsman.

27 Administrative Review Council, *Internal Review of Agency Decision Making: Report to the Attorney-General* (2000), Commonwealth of Australia, Canberra, para 3.41. One submission also commented on the potential for 'appeal fatigue' in multiple layered systems of review: Environment Australia, *Submission CAP 26*, 24 October 2002.

social security breach penalties regime, the Commonwealth Ombudsman commented that some people were not aware that internal review processes had been undertaken when the matter had merely been referred to the original decision maker for reconsideration.[28] The report noted that 'complainants do not usually see the option of raising the matter with the person who made the decision as part of a genuine review process'.[29] The Commonwealth Ombudsman recommended that if any contact was made with Centrelink by the person on whom the breach penalty had been imposed, that person should be specifically asked if they wanted to request a review of the decision.[30]

Personal contact with the applicant

20.22 A common criticism of internal review procedures is that they are undertaken by the internal review officer without any personal contact with the applicant. Some empirical evidence exists to support the claim that, if an agency's review officers spoke to the applicant prior to making a decision, there would be fewer appeals to external tribunals.[31] It is clear, that without an appropriate level of contact with applicants, agencies' internal review systems may not satisfy the need for natural justice (or the perception of natural justice). However, there is an apparent tension with other principles such as efficiency: one of the strengths of internal review is seen to be the speed and ease with which the process can efficiently satisfy large numbers of clients who might view external review as being too inaccessible.[32] See discussion of the 'hearing rule' in chapter 14.

New information

20.23 It has been pointed out that, if internal review is to add value to the decision-making process, the review officer needs to do more than reconsider the same material as the original decision maker as it is only when the review officer has taken additional steps to obtain new information and to analyse and to evaluate any new information that the aims of the internal review process will be met.[33] Obtaining new information obviously requires that contact be made with the applicant, either to obtain new information or present new information to the applicant and seek a response.

Timeliness of internal review decisions

20.24 The timeliness of review of a decision to impose a penalty can be particularly important. One of the perceived advantages of internal review mechanisms is the speed with which they can deliver merits review. However, it is also a common criticism of internal review processes that it takes too long for internal review decisions to be

28 Commonwealth Ombudsman, *Social Security Breach Penalties — Issues of Administration* (2002), Commonwealth Ombudsman, para 28.
29 Ibid, para 28.
30 Ibid, rec 24.
31 R Creyke, 'Sunset for the Administrative Law Industry? Reflections on Developments under a Coalition Government' (1998) 87 *Canberra Bulletin of Public Administration* 39, 47.
32 N Waters, 'Internal Review and Alternative Dispute Resolution: The Hidden Face of Administrative Law III' (1996) 79 *Canberra Bulletin of Public Administration* 91, 92.
33 R Creyke, 'Sunset for the Administrative Law Industry? Reflections on Developments under a Coalition Government' (1998) 87 *Canberra Bulletin of Public Administration* 39, 47.

made.[34] A number of agencies do have informal performance standards for timeliness of internal review.[35] Other agencies have time limits prescribed by legislation.[36] In its *Better Decisions* report, the ARC concluded that, as a general principle, time limits should be introduced for internal review in order to reduce the potential prejudice that can result from lengthy delays in internal review. An alternative may be to give applicants the choice to abandon internal review and proceed to external review once the time limit on internal review has expired.

External review

20.25 There are two main forms of external review — merits review and judicial review.

Merits review

20.26 Merits review enables a review of all aspects of the challenged administrative decision,[37] including the finding of facts and the exercise of any discretion conferred upon the decision maker. A merits review body will 'stand in the shoes' of the primary decision maker and will make a fresh decision[38] based upon all the evidence[39] available to it.[40]

Judicial review

20.27 Judicial review is concerned only with whether the decision made by the original decision maker was properly made within the legal limits of the relevant power. If a court finds that the decision was unlawfully made, the remedy will generally be limited to setting aside the decision and remitting the matter to the original decision maker for reconsideration according to law.[41] There are several forms of judicial review that may be available in a particular case. The relevant forms at federal level are:

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34 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report 39 (1995), Commonwealth of Australia, Canberra, para 6.55. See also Commonwealth Ombudsman, *Social Security Breach Penalties — Issues of Administration* (2002), Commonwealth Ombudsman.

35 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report 39 (1995), Commonwealth of Australia, Canberra, para 6.56. For example, Centrelink's internal performance targets for timeliness of internal reviews are that 75% of all reviews should be completed within 28 days, and that 95% of reviews in which the customer has been left with no income as a result of Centrelink actions should be completed within 14 days: Commonwealth Ombudsman, *Social Security Breach Penalties — Issues of Administration* (2002), Commonwealth Ombudsman, xxvi–xxvii.

36 For example, under s 286 of the *Radiocommunications Act 1992* (Cth) the Australian Communications Authority (ACA) must make a review decision within 90 days after receiving the application or after receiving further information.

37 Except for the constitutional validity of any legislation under which the decision was made: *Re Adams* (1976) 1 ALD 251.

38 Generally, the 'correct or preferable decision'.

39 Including any new evidence not available to the primary decision maker.

40 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report 39 (1995), Commonwealth of Australia, Canberra, para 2.2–2.3, 2.54–2.55. See *Administrative Appeals Tribunal Act 1975* (Cth), s 43(1).

41 See *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 578–579, 598–600.

- review under the ADJR Act, which specifies grounds on which a decision or conduct may be reviewed; and
- review under the Constitution or the *Judiciary Act*, which gives the High Court and the Federal Court jurisdiction to grant common law administrative remedies.

Administrative Decisions (Judicial Review) Act 1977 (Cth)

20.28 Unless specifically excluded, most decisions of an administrative character made under federal legislation are subject to judicial review by the Federal Court and, with some exceptions, the Federal Magistrates Service (FMS), under the ADJR Act.[42] A wide variety of decisions to impose an administrative penalty have been reviewed under this legislation.[43] Unless a decision is explicitly exempted from the ADJR Act, it will be subject to judicial review.[44] Sections 5 and 6 of the ADJR Act set out the various grounds on which the court can review a decision, including:

- that a breach of the rules of natural justice occurred;[45]
- that procedures that were required by law to be observed were not observed;[46]
- that the person who purported to make the decision did not have jurisdiction to make the decision;
- that the decision was not authorised by the enactment;
- that the making of the decision was an improper exercise of power;
- that the decision involved an error of law;
- that the decision was induced or affected by fraud;
- that there was no evidence or other material to justify the making of the decision; or
- that the decision was otherwise contrary to law.

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42 Other than decisions by the Governor-General and certain other specified decisions: *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 5 and 6.

43 Decisions reviewed under this legislation include decisions in relation to tax penalties: the exercise of the Commissioner's discretion to audit an individual in order to impose a penalty (*Robinswood Pty Ltd v Federal Commission of Taxation* (1998) 55 ALD 717); the calculation of a penalty (*Strathfield Group Wholesale Pty Limited v Deputy Commissioner of Taxation* (1997) 77 FCR 233); a legitimate expectation that a person would not be liable for unremitted group tax and penalties if agreement was reached under the *Income Tax Assessment Act 1936* (Cth) (*Ruddy v Deputy Commissioner of Taxation* (1998) 82 FCR 337); whether tax prosecutions are an abuse of power (*Smiles v Federal Commissioner of Taxation* (1992) 37 FCR 538).

44 Specific exemptions to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) are discussed in ch 22 at para 22.14.

45 The rules of natural justice are discussed in ch 14

46 Procedural fairness is discussed in ch 14.

20.29 Sections 15 and 15A of the ADJR Act give the Federal Court and FMS power to suspend the operation of a decision or stay proceedings whilst review is undertaken. Section 16 sets out the remedial orders that may be made once review is concluded including setting aside all or part of the decision or referring the matter back to the original decision maker for reconsideration.

20.30 The ADJR Act gives the court the jurisdiction to review decisions of an administrative character made under an enactment.[47] Three criteria need to be satisfied:

- There must be a 'decision';
- It must be a decision 'of an administrative character'; and
- It must be a decision 'made under an enactment'.

A 'decision'

20.31 The type of 'decision' that will be amenable to review under the ADJR Act has been considered in a number of cases. The leading case is *ABT v Bond*, in which the High Court described a decision reviewable under the ADJR Act as 'generally … a decision which is final or operative and determinative, at least in a practical sense, of the issue of fact calling for consideration'.[48]

20.32 Section 6 of the ADJR Act permits the review of 'conduct' on the same grounds as review of a decision under s 5. In *ABT v Bond*, the distinction between a decision and conduct was described by Mason CJ in the following terms:

> The distinction between reviewable decisions and conduct engaged in for the purpose of making such a decision is somewhat elusive. However, once it is accepted that 'decision' connotes a determination for which provision is made by or under a statute, one that generally is substantive, final and operative, the place of 'conduct' in the statutory scheme of things becomes reasonably clear. In its setting in s.6 the word 'conduct' points to action taken, rather than a decision made, for the purpose of making a reviewable decision. In other words, the concept of conduct looks to the way in which the proceedings have been conducted, the conduct of the proceedings, rather than decisions made along the way with a view to the making of a final determination. Thus, conduct is essentially procedural and not substantive in character.[49]

20.33 In the context of this Inquiry, reviewable conduct might include an administrative proceeding undertaken as part of a decision to impose a quasi-penalty, for exam-

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47 *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 3.

48 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 337 (Mason CJ). The need for a 'final and operative' decision to support an application for review was mentioned in ASIC's submission which noted: 'In ASIC's view, it is only the final and operative penalty decision which arguably should be subject to external merits or judicial review': Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 37.

49 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 341–342.

ple, the administrative hearings undertaken by ASIC in accordance with s 51–60 of the ASIC Act.[50]

A decision 'of an administrative character'

20.34 For a decision to be 'of an administrative character' it must not be a legislative or judicial decision. In practice, this requirement has not caused courts much difficulty. This concept is discussed in chapter 6.

A decision 'made under an enactment'

20.35 'Enactment' is defined in the ADJR Act to include Commonwealth, State and Territory Acts and instruments (including rules, regulations or by-laws) made under an Act.[51] Primary legislation (federal Acts) and delegated legislation (statutory rules including regulations and disallowable instruments) are made, or allowed, by Parliament and are clearly enactments for the purpose of the ADJR Act. Where a decision to impose a penalty is provided for in either primary or delegated legislation then it seems clear that such a decision will have been made 'under an enactment' for the purposes of the ADJR Act.

20.36 An important issue for the Inquiry is whether decisions made in accordance with a regulator's published practice notes, policy statements or guidelines are decisions 'made under an enactment'. This issue is considered in chapter 6. In *Australian Petroleum Pty Ltd v ACCC*,[52] the Federal Court held that an undertaking given under s 87B of the TPA was an 'instrument' made under the TPA, with the result that a decision by the ACCC not to accept a variation or withdrawal of an undertaking was a decision 'made under an enactment' and was, therefore, reviewable under the ADJR Act.

Appeals from AAT decisions

20.37 Decisions of the AAT are subject to judicial review by the Federal Court principally by means of appeal on a question of law under s 44 of the AAT Act or by way of application under the ADJR Act or s 39B of the *Judiciary Act.*

The Constitution and Judiciary Act

20.38 Two other important sources of judicial review of administrative action are the Constitution and the *Judiciary Act*.[53] Section 75(iii) of the Constitution confers original jurisdiction on the High Court in relation to any matter in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party. Under this power, the High Court can issue a declaration against the Commonwealth in respect of unconstitutional action where the Commonwealth or its agent is a party to proceedings.

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50 See the outline of the procedure in Australian Securities & Investments Commission, *Hearings Practice Manual* (1999) Australian Securities & Investments Commission.

51 *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 3.

52 *Australian Petroleum Pty Ltd v Australian Competition and Consumer Commission* (1997) 73 FCR 75.

53 There is much debate whether judicial review is underpinned by the Constitution or the common law. See S Gageler, 'The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution' (2000) 28(2) *Federal Law Review* 303.

20.39 The High Court's jurisdiction to issue other administrative law remedies is explicit in s 75(v) of the Constitution, which provides that the High Court has jurisdiction to grant mandamus (compelling the exercise of jurisdiction), prohibition (preventing the exercise of jurisdiction), an injunction against a Commonwealth officer (restraining or compelling action), and certiorari (quashing a decision made in excess of jurisdiction). These remedies are commonly referred to as prerogative writs and are issued by courts to prevent officials from exceeding the limits of their powers. The common law provides the grounds upon which these administrative law remedies can be obtained.

20.40 The original jurisdiction of the High Court under s 75(v) of the Constitution in relation to prerogative writs is also conferred on the Federal Court by s 39B of the *Judiciary Act*. This provision enables prerogative writ proceedings to be commenced in the Federal Court. Under s 44 of the *Judiciary Act*, the High Court is also able to remit to the Federal Court cases arising under the High Court's original jurisdiction under s 75(v) of the Constitution.

Features of external review

Independence

20.41 Courts and tribunals are deliberately structured to maintain independence,[54] which may be an important counter to the possibility of regulatory capture.[55] The independence of the courts is guaranteed by the doctrine of the separation of powers, which requires that the legislature, the executive and the judiciary operate independently and separately from each other. The independence of the courts provides a system of 'checks and balances' to ensure that neither the legislature nor the executive exceed their powers or act for an improper purpose.

Number of layers of review

20.42 Where external review fits in the overall penalty process depends on the design of the particular scheme. External review might be the first or only avenue of review; for example, ADJR Act review of the legality of a decision might be the only opportunity to seek review.[56] External review might be the next step following an unsatisfactory internal review outcome, for example, internal review within Centrelink is generally a mandatory pre-requisite to review by the SSAT.[57] Some forms of external review might be an intermediate step, for example, some decisions of the AAT may be appealed to the Federal Court and decisions of the SSAT may be reviewed by the AAT. External review might also be conducted by two bodies simultaneously for different reasons, for example, a decision might be subject to merits review by the AAT

54 The Hon D Williams AM QC MP, 'Opening Ceremony' (Paper presented at Judicial Conference of Australia Colloquium 2001, Uluru, 7 April 2001).

55 See T Ison, 'Administrative Justice: Is it such a Good Idea?' in M Harris and M Partington (eds), *Administrative Justice in the 21st Century* (1999) Hart Publishing, Oxford, 31.

56 In one consultation it was noted that the only avenue for review of the decision to issue an infringement notice might be to seek reasons under the ADJR Act: Custom Brokers and Forwarders Association, *Consultation*, Brisbane, 29 August 2002.

57 *Social Security (Administration) Act 1999* (Cth), s 142.

and the legality of the same decision might be challenged by way of judicial review by the Federal Court.[58]

Accessibility

20.43 The accessibility in terms of cost, formality and the need for legal representation during external review differs significantly depending on whether the review body is a court or tribunal. Tribunals were originally established on the basis of lower costs, less formality,[59] and that legal representation was not necessary.[60] In contrast, courts have much more formal procedures, follow legal rules as to what evidence will be admissible and how evidence must be presented, are expensive and are designed on the basis that parties will be legally represented.[61] Both courts and tribunals can, therefore, be less accessible than internal review, which is generally free, informal (just a matter of writing a letter or completing a form) and undertaken without the assistance of legal advisers.

Personal contact with the applicant

20.44 An essential component of review by a court or tribunal is the personal involvement of the applicant. The applicant becomes a party to proceedings and is granted specific rights to provide information and present evidence, and to appear before the court or tribunal at a hearing. In contrast, the personal involvement of the applicant in an internal review process may consist of nothing more than requesting that review be undertaken, although it is arguable that personal contact with the applicant is essential if there is to be any genuine review of the merits of the decision.[62]

New information

20.45 Whether new information can be presented by the applicant will depend on the form of external review — merits or judicial review. Generally, new information is permitted to be presented in merits review, but not in judicial review.

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58 Although this scenario seems unlikely as the AAT must not make a decision pending the outcome of judicial review. Section 45 of the AAT Act gives the AAT power to refer questions of law to the Federal Court and prevents the AAT from making a decision until the reference has been finalised.

59 The AAT and SSAT are not bound by the rules of evidence and 'may inform itself on any matter … in any manner it considers appropriate': *Social Security (Administration) Act 1999* (Cth), s 167; *Administrative Appeals Tribunal Act 1975* (Cth), s 33.

60 Though it is permitted and in practice most applicants will be legally represented if they are able to afford it.

61 The difficulty that courts face in dealing with unrepresented litigants is well documented. See, for example, ch 5 of Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (2000), Australian Law Reform Commission, Sydney.

62 On this point see Commonwealth Ombudsman, *Social Security Breach Penalties — Issues of Administration* (2002), Commonwealth Ombudsman, para 3.21.

Timeliness of external review decisions

20.46 Most courts and tribunals acknowledge the need for timely delivery of decisions and have informal benchmarks.[63] In some cases legislation provides for the expedition of a matter. For example, under reg 4.24 of the *Migration Regulations 1994* (Cth) a decision to cancel a visa must be reviewed immediately by the AAT on receipt of an application for review of the decision. The AAT must give notice of its decision in respect of an application for review to the applicant 'as soon as practicable'.

20.47 Most courts and tribunals now have provisions allowing for decisions to be made on the papers. For example, under s 34B of the AAT Act, if it appears to the AAT that the issues for determination on the review of a decision can be adequately determined in the absence of the parties, and the parties consent, the AAT may review the decision by considering the documents or other material provided to the AAT without holding a hearing.

20.48 A related issue is the time taken by a regulator to act on the decision resulting from external review. This issue was noted by the Commonwealth Ombudsman in his report on social security breach penalties.[64]

Review by courts and tribunals

20.49 Whereas courts in federal jurisdiction exercise judicial power, tribunals are part of the executive arm of government and make administrative, not judicial, decisions. Review tribunals are directed to make the correct or preferable decision after considering the whole of the evidence[65] and to ensure that their decisions are in accordance with relevant legislation.

20.50 If both tribunal and judicial review are available what factors influence a party's choice of forum when contesting an administrative penalty? The ALRC's research reveals that there are myriad reasons why a party will choose one forum over the other, and that the appropriateness of a particular forum will vary with every penalty proceeding. Tribunal review is generally considered to be less formal and costly than judicial review by a court. Cost and formality will be important considerations for many people who want to challenge a penalty decision, for example social security re-

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63 For example, the AAT has benchmarks of 85% of matters having their first conference within 13 weeks and 85% of matters having a hearing within 40 weeks. Those targets were not met in 2001–2002, only 80% of matters proceeded to conference within 13 weeks and only 42% of matters proceeded to hearing within 40 weeks: Administrative Appeals Tribunal, *Annual Report 2001–2002*, Administrative Appeals Tribunal, <www.aat.gov.au/pdf/annual/ar2002.pdf>, 28 October 2002, tables 2.2 and 2.3, 15–16.

64 Commonwealth Ombudsman, *Social Security Breach Penalties — Issues of Administration* (2002), Commonwealth Ombudsman, para 8.6–8.7. The Ombudsman noted that Centrelink has 28 days to lodge an appeal against a decision of the SSAT or the AAT, but that in many cases it would not be necessary to wait until the appeal period had elapsed before a decision was implemented. The Ombudsman recommended that where no appeal was considered the decision should be implemented immediately: rec 27.

65 See *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577. While Bowen CJ and Deane J used the phrase 'correct or preferable' in *Drake* to describe the question for the determination of the AAT, the ARC prefers the phrase 'correct and preferable': see Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report 39 (1995), Commonwealth of Australia, Canberra, 10, fn 31.

cipients. For this reason it would seem appropriate to maintain a choice of external merits review and judicial review mechanisms.

20.51 The choice of forum or review may be limited by legislation. Occasionally legislation will exclude a certain avenue of appeal. However, while it is generally acknowledged that multiple avenues of appeal and review are desirable, too many layers of review can lead to problems associated with delay and 'appeal fatigue' on the part of the applicant.

Benefits of review

20.52 Formal legal proceedings provide an independent and authoritative statement of the law as it relates to the matter being adjudicated including the consequences of breaches of the law, such as what penalties will be imposed.[66] Decisions by courts and tribunals also provide guidance to regulators when making decisions in relation to penalties. In resolving disputes, courts and tribunals provide 'norms and procedures'[67] which regulate adjudication of disputes, providing guidance to adjudicators. For example, in *Trade Practices Commission v CSR Ltd*,[68] French J noted that the purpose of s 76 of the TPA is neither 'retribution nor rehabilitation' and elaborated on the criteria relevant to the determination of the quantum of the penalty.[69] These principles have impacted on the ACCC's leniency guidelines[70] and acceptance of s 87B undertakings.[71] Indeed, the 'French factors' have been applied to other regulatory schemes, not just the TPA.[72]

20.53 Court decisions, in particular judicial review, can also furnish a guide for a regulator's processes; for example, the ACCC guidelines on the use of investigative powers in s 155 of the TPA incorporate guidance from caselaw. ASIC's published policy statements and practice notes make frequent reference to court decisions which support and guide ASIC's enforcement activities.[73]

20.54 As has been noted recently, in the context of administrative decision making:

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66 The court's role in setting penalties in individual cases is discussed in detail in ch 30.

67 M Galanter, 'The Radiating Effects of Courts' in K Boyyum and L Matheu (eds), *Empirical Theories About Courts* (1983) Longman, New York, 121.

68 *Trade Practices Commission v CSR Ltd* (1991) 13 ATPR ¶41–076.

69 See ch 3 and 18 of Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney.

70 Australian Competition & Consumer Commission, *Cooperation and Leniency in Enforcement*, Australian Competition & Consumer Commission, <www.accc.gov.au/compliance/leniency.htm>, 23 October 2001. See discussion of the ACCC's leniency policy in ch 17.

71 Australian Competition & Consumer Commission, *Section 87B of the Trade Practices Act: A Guideline on the Australian Competition and Consumer Commission's Use of Enforceable Undertakings* (1999), Australian Competition & Consumer Commission, Canberra. See discussion of enforceable undertakings in ch 16.

72 See discussion of the 'French factors' in ch 29.

73 For example Australian Securities & Investments Commission, *Policy Statement 103: Confidentiality and Release of Information*, Australian Securities & Investments Commission, <www.cpd.com.au/asic/ps/ps103.pdf>, 23 October 2001 states that 'in this policy statement ASIC indicates the practices it will adopt in relation to the disclosure of information obtained by the exercise of its compulsory powers. The practices are adopted in the light of the High Court's decision in *Johns v Australian Securities Commission* (1993) 178 CLR 408': para PS 103.1.

> It can readily be conceded that together, the internal and external review can contribute to a better performing public administration. Internal review will, however, never be sufficient on its own. People will only be confident in a system which is independent from the decision maker; here, external review alone qualifies. And, if there has to be a choice between internal and external review, for cost or efficiency grounds, external review must take precedence.[74]

20.55 It has been stated in consultations with the ALRC that when a decision to impose a penalty is made by a regulator, external review should always be available.[75] Further, internal review can never be a complete substitute for external independent review. For this reason the ALRC would recommend that administrative decisions that impose a penalty should be subject to at least one level of external review, whether it be judicial review by a court, merits review by a tribunal (excluding review of true administrative penalties) or, if appropriate, both.

Should appeal and review form part of the penalty process?

20.56 One issue for the ALRC is whether appeal and review mechanisms should be an essential component of all federal regulatory penalty processes. A number of commentators have reservations about the provision of appeal and review mechanisms in regulatory arrangements. Robert Baldwin and Martin Cave, for example, acknowledge that appeal procedures are often viewed as useful safeguards, but note that:

- Appeal mechanisms may increase delays and costs;
- To allow government-instituted appeals might expose regulators to political interference and undermine their authority;
- A divergence between policies adopted at first instance and on appeal may be produced and lead to confusion;
- Appeals involving legalistic arguments before generalist decision makers may provide less timely and less expert decisions than decisions by specialists; and
- An appeal and review procedure may not always provide a second opportunity for a fair decision. It may offer an avenue to the 'real' decision maker that is delayed by a kind of mock examination before the first-instance body. This is especially the case where appeals proliferate.[76]

20.57 Baldwin and Cave have further noted that controversy will often attend the selection of the individuals and bodies that provide accountability.[77] Appeal and review

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74 R Creyke, 'Sunset for the Administrative Law Industry? Reflections on Developments under a Coalition Government' (1998) 87 *Canberra Bulletin of Public Administration* 39, 48.

75 For example, the Victorian Bar Association, *Consultation*, Melbourne, 8 October 2001.

76 R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) Oxford University Press, Oxford, 295. See discussion in Administrative Review Council, *Internal Review of Agency Decision Making: Report to the Attorney-General* (2000), Commonwealth of Australia, Canberra on 'appeal fatigue'.

77 R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) Oxford University Press, Oxford, 79.

may assist a regulator to claim public support because it uses procedures that are fair, accessible and open.[78] However, further guiding principles are required in order to explain, for example, who should be able to participate and in what manner.[79] Disputes may also arise concerning the appropriate mode of participation in appeal and review processes.

Preliminary view

20.58 In DP 65, the ALRC proposed that, with the exception of decisions concerning the commencement of proceedings seeking a penalty,[80] all administrative penalty and quasi-penalty schemes should provide avenues of internal review, external merits review and judicial review unless one or more of these avenues is clearly inappropriate.[81]

Consultations and submissions

20.59 Several submissions commented on this proposal.[82] The proposal was generally supported, although one submission noted that 'the volume of certain penalties imposed … would suggest that some restrictions need to apply'.[83] Another submission noted that:

> While this proposal would provide additional opportunities for review to applicants, having three layers of review may hamper the achievement of relevant and efficient regulatory regimes. Where decisions are taken at a high level (many of the decisions under the EPBC Act are taken at Ministerial level) and there has been a high level of transparency and consultation in the process leading to the decision, judicial review is considered adequate. Internal review is generally available (either under provisions for reconsideration or otherwise) to support consistent, efficient and fair decision making in relation to quasi-penalties. The review opportunities need to take into account the extent to which 'quasi-penalties' affect the interests of a person and the extent of consultation and participation in the matter leading up to the decision. Potential disadvantages include appeal fatigue, delay, and wastage of resources for relatively minor matters.[84]

20.60 Despite these disadvantages, the ALRC considers that the public interest in regulator's acting in a consistent, fair and transparent manner demands that regulator's be accountable for their decisions through the provision of systems of appeal and review. The ALRC acknowledges that all three forms of review — internal review, external merits review and judicial review — may not be necessary or appropriate in all situations,[85] however, the ALRC considers that, particularly in relation to decisions to impose quasi-penalties that have the potential to directly adversely affect the person on

78 Ibid, 79.
79 Ibid, 79.
80 See discussion of the reviewability of prosecutorial discretion in ch 23.
81 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Proposal 10–4. When an avenue of review might be clearly inappropriate is considered in ch 22.
82 Australian Taxation Office, *Submission CAP 16*, 17 September 2002; Environment Australia, *Submission CAP 26*, 24 October 2002; K Yeung, *Submission CAP 20*, 9 October 2002.
83 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.123.
84 Environment Australia, *Submission CAP 26*, 24 October 2002, 7–8.
85 See ch 21 for a discussion of situations where particular forms of review might be inappropriate.

whom the penalty is imposed, as a general principle all three forms of review should be available. Circumstances in which one or more forms of review might be expressly limited or excluded are considered in chapter 22.

20.61 Taking into account the support expressed for this proposal and the absence of any specific opposing views, the ALRC concludes that as a general principle, and subject to express exclusion from a particular penalty scheme, accountability requires that avenues of review be available in all administrative and quasi-penalty schemes and therefore the ALRC recommends that all penalty schemes should provide avenues of internal review, external merits review and judicial review, unless one or more of these avenues is clearly inappropriate.

Recommendation

Recommendation 20–1. All penalty schemes should provide avenues of internal review, external merits review and judicial review, unless one or more of these is clearly inappropriate in the circumstances.

21. Review of Decisions Imposing Quasi-Penalties

Contents

Introduction

21.1 As noted in chapter 20, most penalties imposed for criminal offences and non-criminal contraventions of federal laws are imposed by a court as part of formal legal proceedings. Administrative penalties are an exception. Administrative penalties either arise automatically by operation of legislation (true administrative penalties) or are imposed as a result of a decision or administrative action taken by a regulator (quasi-penalties). In the context of this Inquiry, the ALRC considers quasi-penalties to include administrative procedures that result in the imposition of certain restrictions on a person's activities or the curtailing of benefits that might be loosely regarded as penalties

but are not penalties as a matter of law. Common examples are licence restrictions and social security breach 'penalties'.

21.2 Although not within the traditional definition of a penalty as a form of punishment, quasi-penalties nevertheless have many characteristics in common with true penalties:

- they are imposed in response to non-compliance with the law;
- their purpose is often to deter the particular offender and others from future non-compliance; and
- they have a direct adverse impact on the person on whom they are imposed, either a direct financial impact (if money which would otherwise be paid to the person is withheld) or an indirect financial impact (if the person's right to undertake a particular activity is restricted).

21.3 True administrative penalties are also not strictly within the traditional definition of a penalty. True administrative penalties arise by operation of legislation when certain triggering events or circumstances are present. As the imposition of these penalties does not result from a decision of the regulator, the ALRC does not consider that administrative review has much of a role in respect to these penalties, as there is no administrative decision to challenge. Where the regulator has discretion to remit in whole or part a true administrative penalty,[1] or, as is the case with some taxation penalties, is given the discretion to determine in accordance with statutory criteria the level of penalty to be imposed,[2] review of the regulator's decision is an important right for the person subject to the penalty and options for review of such decisions should always be available. Decisions about remission of penalties are considered in detail in chapter 23.

21.4 In chapter 20, the ALRC recommends that:

> **Recommendation 20–1.** All penalty schemes should provide avenues of internal review, external merits review and judicial review, unless one or more of these is clearly inappropriate in the circumstances.

21.5 Chapter 20 outlined the features and benefits of internal review, external merits review and judicial review. This chapter considers how these forms of review might apply to a decision to impose a quasi-penalty and in what circumstances, if any, one or more avenues of review might be inappropriate. This chapter also considers important issues such as:

- The operation and implementation of a decision under review;

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1 See for example *Broadcasting Services Act 1992* (Cth), s 205D; *Income Tax Assessment Act 1936* (Cth), s 221N; *Radiocommunications Taxes Collection Act 1983* (Cth), s 11; *Taxation Administration Act 1953* (Cth), s 8AAG, sch 1 s 16–45, 45–640, 298–20; *Telecommunications Act 1997* (Cth), s 73, 468; *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth), s 23D, 101A.

2 See *Taxation Administration Act 1953* (Cth), Sch 1, Div 284.

- Standing to seek review; and
- Notification of appeal and review rights.

Forms of review of a decision to impose a quasi-penalty

21.6 As discussed in chapter 20, there are two main forms of review — review of the merits of a decision (merits review may be internal or external) and review of the legality of a decision (most commonly by way of judicial review). The different forms of review have different levels of procedural formality and may result in different outcomes. Merits review requires that a new decision be made in substitution for the original decision, although that new decision might affirm the original decision. Judicial review does not result in a new decision; if the challenge to the legality of the decision is successful, the original decision will be set aside and the matter usually remitted to the original decision maker for reconsideration.

Decisions suitable for merits review

21.7 Whereas the right to request judicial review of an administrative decision is available unless excluded by legislation, the right to request merits review (either internal or external) must be specifically provided for in legislation. In its publication, *What Decisions Should Be Subject to Merits Review?*, the Administrative Review Council (ARC) described the decisions it believes to be appropriate for merits review:

> As a matter of principle, the Council believes that an administrative decision that will, or is likely to affect the interests of a person, should be subject to merits review.[3]

21.8 Most administrative penalty decisions would 'affect the interests of a person'. However, not all decisions made as part of an administrative penalty process may be suitable for merits review. The ARC has identified two types of decisions that, by their nature, are unsuitable for merits review:

- legislation-like decisions of broad application (which are subject to the accountability safeguards that apply to legislative decisions);[4]
- decisions that automatically follow from the happening of a set of circumstances (which leave no room for merits review to operate).[5] This exception would apply to penalties that arise automatically by the operation of legislation where there is no scope for the exercise of discretion (true administrative penalties).

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3 Administrative Review Council, *What Decisions Should Be Subject to Merits Review?* (1999), Commonwealth of Australia, 5. See also *Administrative Appeals Tribunal Act 1975* (Cth), s 27.

4 One example the ARC considered arose under the *Child Care Act 1972* (Cth) and involved a power to make fee relief guidelines for child care centres. The decisions made under that power were of a legislative character, and should have been subject to the regime of scrutiny and publication that applies to legislative instruments: Administrative Review Council, *What Decisions Should Be Subject to Merits Review?* (1999), Commonwealth of Australia, para 3.4.

5 Administrative Review Council, *What Decisions Should Be Subject to Merits Review?* (1999), Commonwealth of Australia, para 8.

One example is automatic disqualification under s 206B of the *Corporations Act 2001* (Cth) upon conviction for certain criminal offences.

21.9 The ARC also listed a number of factors that may be relevant in excluding merits review. Those relevant to penalty decisions are outlined below.[6]

(a) The nature of the decision:

- *Preliminary or procedural decisions.* Decisions that facilitate or lead to the making of a substantive decision are not appropriate for merits review as they do not generally have substantive consequences and review of these preliminary decisions may frustrate the making of substantive decisions.

- *Law enforcement decisions.* If review of such decisions, including decisions to investigate, were available, both the investigation of possible breaches and the subsequent enforcement of the law could be jeopardised.[7] See the discussion of review of a decision to investigate in chapter 23.

- *Decisions to institute proceedings.* An example is an exercise of power under s 49 or 50 of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) to institute criminal prosecutions or civil proceedings respectively. See the discussion of review of a decision to initiate proceedings in chapter 23.

(b) The effect of the decision:

- *Recommendations to ultimate decision makers.* The merits review of such recommendations has the potential to disrupt the decision-making process without necessarily changing a substantive or operative decision. If, however, a decision is styled as a recommendatory decision but does in fact have a substantive or operative effect, it should not be excluded from merits review.[8] This may depend on whether the decision maker looks at all the facts and circumstances in order to make a decision, or simply 'rubber stamps' the recommendation. An example of this type of decision might be a breach penalty recommendation made by a member of the Job Network to Centrelink. (See the discussion of the Job Network scheme at para 10.126 of DP 65 and para 22.35 of this Report).

- *Decisions where there is no appropriate remedy.* For example, where a decision has been taken and implemented and the results are irrevocable (such as a decision to destroy documents) or decisions which operate for

6 See ibid for more categories of decisions that have not been included here.
7 Ibid, para 4.31–4.33.
8 Ibid, para 4.47–4.48.

such a short period that their effect would be spent by the time of review (for example, a decision imposing a short suspension of a licence).

(c) The costs of review of the decision:

- *Decisions that have such limited impact that the costs of review cannot be justified.* It would obviously be inappropriate to provide a system of merits review where the cost of that system would be disproportionate to the significance of the decision under review.[9]

21.10 A statement of principle emerges from this discussion — not all administrative penalty decisions are suitable for merits review. Penalties that arise automatically by operation of legislation (true administrative penalties) and do not involve any exercise of discretion by a decision maker are not suitable for merits review. Importantly, judicial review of true administrative penalties may still be suitable, for example, to consider whether the amount of penalty was calculated in accordance with the correct provision of the legislation. As administrative review is limited for these types of penalties, legislators should carefully consider the appropriate use of penalties that arise by operation of legislation. In many such cases, the regulator has the power to remit all or part of the penalty.[10] In these cases, liability for the penalty arises automatically by operation of the legislation; the regulator, however, has discretion not to collect all or part of it. Review of these decisions is discussed in detail in chapter 23.

21.11 Decisions to impose quasi-penalties, whether they are the removal, cancellation or placing of conditions on a licence or the withdrawal of a benefit, are suitable for merits review. Other penalty-related administrative decisions may also be suitable for merits review, subject to considerations such as the nature and effect of the decision, and the cost of review of that decision.[11]

Internal review

21.12 Internal reconsideration of a decision is a feature of many quasi-penalty schemes. It may be a formal process involving a written application for review, time limits within which reconsideration must take place and a written decision, including a statement of reasons. It may also be a less formal process that might be initiated verbally, have no set time limits and result in a verbal, rather than written response. Internal review is typically merits review.

21.13 Internal review may be single or two-tiered. An example of a single-tiered internal review process is Part IVC of the *Taxation Administration Act 1953* (Cth) that provides for reconsideration of taxation objections by the Commissioner of Taxation. If

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9 Ibid, para 4.56–4.57.

10 See ch 15 of Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney.

11 As one submission noted: 'The review opportunities need to take into account the extent to which "quasi-penalties" affect the interests of a person and the extent of consultation and participation in the matter leading up to the decision': Environment Australia, *Submission CAP 26*, 24 October 2002.

the person is not satisfied with the decision made after reconsideration, the person may seek external merits review of the decision by the AAT. An example of a double-tiered internal review system is that used by Centrelink. Requests for internal review go first to the original decision maker (ODM) for reconsideration and, if not reversed, then to an Authorised Review Officer (ARO).[12] The ARO may set aside, vary or affirm a decision. AROs will advise the client in writing of their decision. The Ombudsman was critical of this two-tier system, noting that:

> This practice of referring all 'requests for review' firstly to the original decision maker appears to cause some confusion among complainants about the review/reconsideration process. Complainants do not usually see the option of raising the matter with the person who made the decision as part of a genuine review process. In some cases, there has been some discussion with the ODM, either in conveying the decision (prior to written advice) or when the person makes a complaint or inquiry about notice of a breach or disruption to their payment. When this occurs after notification, it is not clear to the complainant (or to the Ombudsman's office) if the discussion with the ODM and the ODM's confirmation and explanation of the decision is a 'review' in the terms of the Administration Act.[13]

21.14 The Ombudsman also noted that the system could involve significant delays — both in getting an appointment to speak to the ODM and in a matter being referred after reconsideration from an ODM to an ARO. The practice of requiring applicants to contact the ODM (after the ODM had confirmed or explained a decision) in order to request review by an ARO was criticised as having the potential to 'discourage complainants from exercising their rights to administrative review and unduly delay the administrative review process'.[14]

Internal review is not suitable for all regulators

21.15 As noted above, not all administrative penalty decisions are suitable for merits review. Internal review is also not suitable for all regulators.

High volume regulators

21.16 The main argument supporting internal review is efficiency; that is, internal review should be quick, cheap and used by applicants prior to more formal and expensive external procedures.[15] For 'high volume' regulators such as the ATO and Centrelink, internal review serves as an effective filter in reducing the number of appeals to external review tribunals and, since internal review is typically very much cheaper than external review, this contributes substantially towards the overall efficiency of the mer-

12 AROs are usually experienced ODMs who are specifically delegated to review decisions. They are generally senior to ODMs (AROs are mostly ASO6 level while ODMs are mostly at ASO4 level).

13 Commonwealth Ombudsman, *Social Security Breach Penalties — Issues of Administration* (2002), Commonwealth Ombudsman, para 8.3.

14 Ibid, para 8.5. This practice also raises the possibility of 'appeal fatigue' which refers to a reluctance on the part of potential applicants to pursue an appeal process when they have already gone through several stages which may have taken a considerable period of time.

15 Some commentators, however, have highlighted the potential for internal review to reduce the efficiency of 'high volume' regulators: S Skehill, 'The Hidden Dimension of Administrative Law: Internal and First Tier Review' (1989) 58 *Canberra Bulletin of Public Administration* 137, 138.

its review system.[16] There is little point in an external review body such as the AAT handling numerous cases involving the same basic issue, requiring only the application of settled law to individual facts. The preferable role for the AAT is the resolution of cases that are 'too hard' for internal review.[17] This requires regulators to be guided by the decisions of external review bodies.

21.17 When an administrative penalty arises under taxation legislation, the ATO sends a written notice to the taxpayer (sometimes in the form of an assessment) stating the type and amount of penalty.[18] It also notifies the taxpayer that he or she can request a review of the penalty decision, in which case an ATO officer with no involvement in the original decision conducts a review.[19] Other penalty decisions that may be relevant to the imposition of an administrative penalty (for example, a decision refusing an extension of time to lodge an objection under s 14ZX of the *Taxation Administration Act*) are directly appellable to the AAT.

21.18 Centrelink received 37,699 requests for internal review of decisions in 2001–02.[20] Nationally in 2001–02, AROs finalised 76% of reviews within 28 days.[21] These reviews are stated by Centrelink to be 'reviews of decisions on entitlements of FaCS payments'.[22] It is unknown what proportion of these reviews related to administrative and activity test breach penalties. Internal review of various decisions, including activity test and administrative breaches, is provided for in Part IV, Division 2 of the *Social Security (Administration) Act 1999* (Cth). Since 1993, internal review by an ARO has been a mandatory pre-requisite to review by the Social Security Appeals Tribunal (SSAT).[23]

21.19 There are advantages and disadvantages of internal review for both applicants and regulators. In theory, both should benefit from a timely, inexpensive and informal system of review. The best outcome of internal review is if the applicant is satisfied with the decision made after reconsideration by the regulator and therefore does not seek to challenge the decision through external review. In this way, internal review acts as a filter to reduce the number of applications for external review. In practice, internal review may have a filtering effect for another reason — appeal fatigue. If internal review is not timely, or requires an applicant to provide large amounts of new material or to respond to multiple requests for further information, many applicants with legitimate

16 N Waters, 'Internal Review and Alternative Dispute Resolution: The Hidden Face of Administrative Law III' (1996) 79 *Canberra Bulletin of Public Administration* 91, 93.

17 S Skehill, 'The Hidden Dimension of Administrative Law: Internal and First Tier Review' (1989) 58 *Canberra Bulletin of Public Administration* 137, 137.

18 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.65.

19 Australian National Audit Office, *Administration of Tax Penalties*, Report 31 (2000), Australian Government Printing Service, Canberra, para 2.42.

20 Centrelink, *Annual Report 2001–2002*, <www.centrelink.gov.au/internet/internet.nsf/ar0102/index.htm>, 11 November 2002, 38.

21 Ibid, 39.

22 Ibid, 38.

23 Subject to certain exceptions: *Social Security (Administration) Act 1999* (Cth), s 142. In 2001–02, 7647 applications for review were made to the SSAT: Centrelink, *Annual Report 2001–2002*, <www.centrelink.gov.au/internet/internet.nsf/ar0102/index.htm>, 11 November 2002, 38.

claims may give up and decide that it is simpler and more convenient to accept the penalty.

Complaint handling schemes

21.20 To assist in the resolution of disputes, 'high volume' regulators will often supplement internal review with complaint handling services. Complaint handling is a broader concept than that of internal review. Complaint handling can encompass issues of service delivery and process whereas internal review involves reviewing a particular decision on the merits, with the possibility of a changed outcome. Both ATO and Centrelink have extensive complaint handling schemes.[24]

Low volume regulators

21.21 Regulators who make relatively low numbers of quasi-penalty decisions (for example, the Australian Broadcasting Authority (ABA) and ASIC) tend not to have internal review. This could be for a number of reasons:

- Administrative penalty decisions may be directly appellable to an external review body, such as the AAT.[25]

- Penalty decisions are not 'high volume'.[26] This means that, rather than delegating decision-making powers to lower officers and providing internal review, it is more efficient to have high level officers make the original decision. In the case of the ABA, it is the Board that decides whether to cancel, suspend, or (more typically) place a condition on a licence. As the Board is the highest level of decision maker within the ABA, there is no option other than to seek external review. In the case of ASIC, decisions are made by senior officers.

- The decision to suspend or cancel a licence may have repercussions not only for the individual or organisation but also for third parties, for example, investors, advertisers or program makers. The seriousness of decisions may necessitate de-

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24 See discussion of the ATO scheme in Australian National Audit Office, *Administration of Tax Penalties*, Report 31 (2000), Australian Government Printing Service, Canberra, para 2.45–2.48. The Centrelink scheme is described in Centrelink, *Annual Report 2001–2002*, <www.centrelink.gov.au/internet/internet.nsf/ar0102/index.htm>, 11 November 2002, ch 2. See also table 15 in ch 3 for statistics on the finalisation of customer complaints: 58. Centrelink also has a Customer Charter — described in ch 6 of the Annual Report.

25 For example a decision by the ABA under s 143(1) of the *Broadcasting Services Act 1992* (Cth) to suspend or cancel a licence.

26 For example, in 2001–02 the ABA reported only 93 breaches, of these 71 were breaches of the various broadcasting codes of practice, 20 of licence conditions, and two of the *Broadcasting Services Act*: Australian Broadcasting Authority, *Annual Report 2001–2002*, Australian Broadcasting Authority, <www.aba.gov.au/abanews/annRpt/an01-02/index.htm>, 29 October 2002, 39–40. In 2001–02, ASIC 'fined or banned 21 people from directing companies through the Courts or administratively, 35 people from offering financial services, and disciplined 10 company auditors and liquidators': Australian Securities & Investments Commission, *Annual Report 2001–2002*, Australian Securities & Investments Commission, 29.

cision making to be undertaken at very senior levels with the option of fast-track external review.[27]

- The process leading to imposition of the penalty may have involved significant participation by the person on whom the penalty is imposed, including providing multiple opportunities to make submissions and appear before the decision maker at a hearing.[28]

Preliminary view

21.22 In DP 65, the ALRC asked whether there are any categories of decision or administrative penalties that should be exceptions to the principles stated in Proposals 10–3 and 10–4, that avenues of internal review, external merits review and judicial review should be available in all civil and administrative penalty schemes unless one or more of these avenues is clearly inappropriate; and if so, what are the justifications for excluding review or appeal.[29]

Consultations and submissions

21.23 Several submissions received from regulators commented on the availability of internal review or reconsideration of a decision as a feature of the administrative and quasi-penalty schemes they administered.[30]

21.24 The circumstances in which internal review might be inappropriate were noted to include situations where

- Decisions are taken at a high level (for example, by senior officers, the board of the regulator or the Minister).[31] In its submission, ASIC noted that:

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27 This may also explain why there is no internal review by CASA of decisions under the *Civil Aviation Act 1988* (Cth). In 2001–02, 27 applications for review of CASA decisions were made to the AAT. There were three applications made to the Federal Court under the ADJR Act: Civil Aviation Safety Authority, *Annual Report 2001–02*, Civil Aviation Safety Authority, <www.casa.gov.au/corporat/ar_2002/contents.htm>, 20 November 2002, 131.

28 For example, the ABA Board drives the ABA's policy and enforcement functions. Further, some ASIC administrative proceedings, such as those under s 206F of the *Corporations Act 2001* (Cth), require notice in a prescribed form requiring persons to demonstrate why they should not be disqualified. A disqualification order may be made after the person has been given an opportunity to be heard: see *Australian Securities and Investments Commission Act 2001* (Cth), s 51–60. Similarly, before making a banning order under s 920A or suspending or cancelling a licence under s 915C of the *Corporations Act*, ASIC is required to give the affected person the opportunity of a private hearing. Here, because the decision-making process is so extensive — the legislation requires each matter to be determined on its merits, a person may call witnesses, written reasons are given, and so on — a further internal level of review would be redundant.

29 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Question 10–1.

30 Australian Broadcasting Authority, *Submission CAP 23*, 14 October 2002; Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002; Australian Taxation Office, *Submission CAP 16*, 17 September 2002; Environment Australia, *Submission CAP 26*, 24 October 2002.

31 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002; Australian Broadcasting Authority, *Submission CAP 23*, 14 October 2002; Environment Australia, *Submission CAP 26*, 24 October 2002, respectively.

> Decisions made by ASIC with respect to the outcome of an administrative hearing are made by senior officers to whom ASIC has delegated the power to conduct the hearing pursuant to s102 of the ASIC Act. Decisions made with respect to other civil penalty decisions are also made by senior officers within ASIC. To mandate that an internal review of their decision must be taken would be inappropriate and unnecessary.[32]

- There has 'been a level of transparency and consultation in the process leading to the decision'.[33]

- Penalties are automatically imposed by operation of the legislation and there is a high level of awareness in the regulated community of the penalty and the circumstances in which it will apply.[34] In its submission, the ATO noted that:

> As part of the ATO's work to assist taxpayers to understand their obligations and encourage voluntary compliance, the ATO makes its penalty policies public. The ATO does this so that taxpayers are aware of penalties which may apply if the taxpayer does not comply with their taxation obligations.[35]

- The high volume of penalties imposed makes individual review of each penalty impracticable, particularly if penalties are applied in an automated way.[36] In its submission, the ATO noted that:

> While the ATO supports the broad thrust of the proposal that all administrative penalties should be the subject of review, the volume of certain penalties imposed e.g. GIC and the Failure To Lodge Penalty, would suggest that some restrictions may need to apply.
>
> The ATO's administrative penalties were the subject of a wide ranging review in 2000 and as part of that work the reviews available to taxpayers were limited from those adopted previously. Specifically, Parliament considered that where less than or equal to 2 penalty units for Failure To Lodge were applied, this decision should not be available for internal review but the decision could be reviewed under *Administrative Decisions (Judicial Review) Act 1977*.[37]

Conclusion

21.25 The ALRC recognises that there will be situations such as those described above where it is inappropriate for internal review to form part of the penalty process. When internal review will be inappropriate will depend on the nature of the penalty scheme and the regulated community. For example, it may be inappropriate to provide for internal review of penalties imposed for late payment of tax where those penalties are less than a specified amount. As pointed out by the ATO in its submission, internal review of some taxation penalties is not available where those penalties are less than or

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32 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 38.
33 Environment Australia, *Submission CAP 26*, 24 October 2002. Another example is ASIC's administrative hearings process: see *Australian Securities and Investments Commission Act 2001* (Cth), s 51–60.
34 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 1.48.
35 Ibid, para 7.
36 Ibid, para 8–9 and 2.123.
37 Ibid, para 2.123–2.124.

equal to two penalty units.[38] A limit of not more than two penalty units may be appropriate in the taxation context and the ALRC has no difficulty with the legislators choosing to restrict internal review in a particular scheme in this way where it is justified by the nature of the penalty and the way in which it is applied and where it does not result in unfairness for the persons subject to the penalty.

21.26 However, in a different context such as social security, where a person's only source of income may be financial benefits paid by the state, and those benefits are reduced by the state in response to a breach of eligibility requirements, even a penalty of not more than two penalty units may be too harsh and disproportionate to the breach. The ALRC considers that as a general rule a person affected by a decision to impose a quasi-penalty should be given the opportunity to seek review of that penalty in a timely and informal way. Internal review is ideally suited to providing a quick and informal reconsideration of the merits of a decision; therefore, the ALRC recommends that at least one level of internal review of a decision to impose a quasi-penalty should be available, unless internal review is clearly inappropriate.[39]

Should internal review be statute-based?

21.27 An important issue is whether a statute-based internal review system would be more effective than a system without a statutory basis.[40] The most obvious advantage of a statute-based internal review system is that it can give the applicant a guaranteed right of review. There are other advantages in having a legislative framework for internal review. For example, it allows for a formal delegation of power to review officers, and would allow for further details to be specified (such as the decisions open to review, the conditions under which review can occur, and the time limits within which review must be completed).[41] Similarly, there may be a need for legislative provisions to clarify whether, and when, external review of a decision that has already been subject to internal review will be available.

Conclusion

21.28 In chapter 6, the ALRC noted that the *Legislation Handbook* provided that 'provisions conferring enforceable rights on citizens or organisations' should be implemented in primary legislation.[42] The ALRC considers that the right to request internal review of a decision to impose a quasi-penalty confers an 'enforceable right' on the person affected and, therefore, the right to request review or reconsideration of a deci-

38 Ibid, para 2.124.

39 See Recommendation 21–1(a).

40 It has been argued that s 33(1) of the *Acts Interpretation Act 1901* (Cth) provides for a general power of internal review. The section provides that where 'an Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires'. However, *Uniway Pty Ltd v Chief Executive Officer of Customs* [1999] AATA 208 rejects this argument. Section 33(1) is discussed in ch 15 in the context of correctability of a decision.

41 S Skehill, 'The Hidden Dimension of Administrative Law: Internal and First Tier Review' (1989) 58 *Canberra Bulletin of Public Administration* 137, 139.

42 Department of Prime Minister and Cabinet, *Legislation Handbook*, Commonwealth of Australia, <www.dpmc.gov.au/pdfs/LegislationHandbookMay00.pdf>, 4 November 2002, 3.

sion to impose a quasi-penalty should be provided in the primary legislation that creates the offence or contravention for which the penalty is being imposed.[43] See Recommendation 21–1(a) below.

Should internal review be mandatory?

21.29 A significant issue in regard to internal review is whether it should be a mandatory step before external review is available. Opponents of mandatory internal review criticise it as a barrier to access to independent external review rights. The additional number of steps the applicant must proceed through in order to finally reach external review may mean that people with meritorious cases will fall victim to 'appeal fatigue'. Further, there may be cases where it is clear that a primary decision will not be altered by an agency — such as where the decision is based on an untested agency interpretation of the law. In such a case, mandatory internal review would be a waste of both the applicant's and the agency's time and effort. In this scenario, it may be preferable for internal review to be optional at the election of the person affected by the decision.

Preliminary view

21.30 In DP 65, the ALRC asked whether there are any circumstances where internal review should be a mandatory precursor to access to external review.[44]

Consultations and submissions

21.31 In para 21.24 above, the circumstances in which internal review might not be appropriate were considered. Clearly, if internal review is not appropriate then it should not be a mandatory step before external review may be sought. The difficulties in introducing a mandatory process of internal review into penalty schemes that do not already provide for internal review was noted in several submissions.[45] One submission noted that if internal review were to be made mandatory, legislative amendment would be necessary 'to enable lower level decision-making' as the legislation 'imposes significant restrictions on the power of the ABA to delegate its functions'.[46] Another submission noted that:

> Guidelines for internal review are preferred to mandatory requirements so that internal review can be effectively used to achieve better penalty decision-making while not hampering access to timely external review and resource wastage on circumstances where little is to be achieved through a mandatory process.[47]

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43 At which level of regulation rights and liabilities should be specified is discussed in ch 6.

44 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Question 10–2.

45 Australian Broadcasting Authority, *Submission CAP 23*, 14 October 2002; Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002; Environment Australia, *Submission CAP 26*, 24 October 2002.

46 Australian Broadcasting Authority, *Submission CAP 23*, 14 October 2002, 10.

47 Environment Australia, *Submission CAP 26*, 24 October 2002, 8.

21.32 Several submissions supported mandatory internal review.[48] One submission noted that it is appropriate that when a special body has been established with the express purpose of undertaking review (such as the Takeovers Panel), internal review be a mandatory precursor to external review. However:

> Mandatory internal review should not be put in place so as to limit any person's rights to review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), any similar legislation or the common law. Rather, internal review should serve as a necessary precursor to any further review proceedings.[49]

21.33 Another submission noted that:

> The ATO sees benefits in a mandatory internal review as a precursor to all external reviews (but this may limit taxpayer choice).
>
> Internal review should be used in the first instance and may provide for a speedier process of resolution and also alleviate the need for an external review, saving taxpayer and court or tribunal costs. The ATO's experience is that relatively few disputes proceed past internal review to external review, whether because the internal review process enables new information to be provided to decision-makers or because it enables an applicant for review to gain a better understanding of the basis of the decision.[50]

21.34 Provided that internal review is conducted quickly and does not involve undue delay (particularly in situations where no stay of the implementation of the penalty decision is available), the ALRC does not consider that providing for mandatory internal review prior to external review unduly restricts the rights of the person on whom the penalty has been imposed. The ALRC therefore accepts that internal review of a decision to impose a quasi-penalty may be a mandatory requirement before external merits review or judicial review can be sought. See Recommendation 21–1(b) below.

External review

21.35 As noted in chapter 20, there are two main forms of external review:

- merits review — where the review body may consider the merits of the decision; and
- judicial review — where the review body is limited to considering whether the decision under review was made lawfully.

21.36 Each form of review is not exclusive. Both external merits review and judicial review may be options available to the person affected by a decision to impose a quasi-penalty. The outcomes of each form of review are very different. Merits review enables

48 M Adams, *Submission CAP 12*, 5 September 2002; Australian Taxation Office, *Submission CAP 16*, 17 September 2002.
49 M Adams, *Submission CAP 12*, 5 September 2002, 4.
50 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.126–2.127.

a review of all aspects of the challenged administrative decision,[51] including the finding of facts and the exercise of any discretion by the original decision maker. Judicial review has more limited outcomes. If it is successful, the decision being challenged will usually be set aside and the matter remitted to the original decision maker for reconsideration according to law.

External merits review

21.37 External merits review is undertaken by specially constituted review bodies. The review body may be limited to reviewing decisions made in a particular penalty scheme, for example, the SSAT is a body established specifically to review social security decisions,[52] or it may have wider jurisdiction to review decisions made in a number of penalty schemes, for example, the AAT has jurisdiction to review a wide range of penalty decisions.

Social Security Appeals Tribunal

21.38 The SSAT has jurisdiction to review a very broad range of decisions relating to eligibility for, and the rate of, social security payments.[53] Appeals may be made from the SSAT to the AAT, thus creating a second tier of merits review.

Administrative Appeals Tribunal

21.39 The AAT is an independent body that reviews, on the merits, a broad range of administrative decisions made under federal (and, in limited circumstances, state) legislation. The AAT decides whether, on the facts before it, the correct or, in a discretionary area, the preferable decision has been made in accordance with the applicable law. It may affirm, vary or set aside the original decision and make a new decision in its place. In order for the AAT to have jurisdiction to review a decision, a right to apply to the AAT for review of the decision must be specifically provided for in the primary legislation.[54]

Judicial review

21.40 Judicial review is concerned only with whether the decision made by the original decision maker was properly made within the legal limits of the relevant power. If a court finds that the decision was unlawfully made, the remedy will generally be limited to setting aside the decision and remitting the matter to the decision maker for reconsideration according to law, at least where the court's decision leaves

51 Except for the constitutional validity of any legislation under which the decision was made: *Re Adams* (1976) 1 ALD 251.

52 Note also that the AAT has a division exclusively established to review particular tax decisions, the Small Taxation Claims Tribunal.

53 Including all decisions made under the *Social Security Act 1991* (Cth); *Farm Household Support Act 1992* (Cth); *Child Support (Assessment) Act 1989* (Cth), and decisions as to an aged care recipient's income made under the *Aged Care Act 1997* (Cth); *Social Security Act 1991* (Cth), s 1245.

54 *Administrative Appeals Tribunal Act 1975* (Cth), s 25.

the decision maker with any residual discretion or where outstanding facts remain to be found.[55]

21.41 Judicial review of decisions imposing penalties may be available from the High Court (under s 75(iii) or 75(v) of the Constitution) or the Federal Court (under s 39B of the *Judiciary Act 1903* (Cth), the ADJR Act or on appeal from certain decisions of the AAT). The availability and features of these forms of judicial review was considered in chapter 20.

Preliminary view

21.42 In DP 65, the ALRC proposed that, with the exception of decisions concerning prosecutorial discretion,[56] legislation establishing civil and administrative penalty schemes should provide that all administrative decisions relating to the imposition of a penalty should be subject to at least one level of external merits review and judicial review.[57]

Consultations and submissions

21.43 This proposal was commented on in several submissions.[58] Some noted the availability of judicial review of penalty decisions under the ADJR Act[59] and the *Judiciary Act*.[60] Other submissions noted the availability of external merits review by the AAT.[61] The ATO noted that it 'supports the proposal for avenues of review as this adds to the fairness and transparency of the process. The ATO does not generally impose civil penalties but does impose administrative penalties. Penalties imposed by the ATO are subject to internal and external review'.[62]

21.44 One submission did not support the proposal, noting that:

> To suggest that '**all decisions relating** to the imposition of a penalty should be subject to merits or judicial review' runs contrary to established law and practice. In ASIC's view, it is only the final and operative penalty decision which arguably should be subject to external merits or judicial review.[63]

21.45 It was not the ALRC's intention in Proposal 10–3 to displace the tests of standing and jurisdiction that apply to applications for external merits review or judicial review *of a decision*. In the ALRC's view, those tests would be unlikely to permit

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55 See *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 578–579, 598–600.

56 See discussion of the reviewability of prosecutorial discretion in ch 23.

57 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Proposal 10–3.

58 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002; Australian Taxation Office, *Submission CAP 16*, 17 September 2002; Environment Australia, *Submission CAP 26*, 24 October 2002; K Yeung, *Submission CAP 20*, 9 October 2002.

59 Environment Australia, *Submission CAP 26*, 24 October 2002; Australian Taxation Office, *Submission CAP 16*, 17 September 2002.

60 Australian Taxation Office, *Submission CAP 16*, 17 September 2002.

61 Ibid; Environment Australia, *Submission CAP 26*, 24 October 2002.

62 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.121–2.122.

63 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 37.

review of a decision that was not 'final and operative'. The way in which jurisdiction to review a decision arises under the ADJR Act and the AAT Act was considered in chapter 20. The ALRC notes, however, that judicial review *of conduct or other activities* of a regulator may be available where there has been no final and operative penalty decision. The ALRC supports the availability of this form of external review.

Conclusion

21.46 In chapter 20, the features of internal review and external review were considered. In comparison with internal review, external review has the advantage of being wholly independent of the original decision maker. External review often follows internal review and as the final step in the review process provides finality for both the regulator and the applicant. External review also facilitates certainty as a clear decision will result and will often be accompanied by a detailed statement of reasons for the decision. External review also generally provides an opportunity for the applicant to seek a stay of the implementation of the penalty decision until the matter has been finalised.[64] External review also always requires significant involvement of the applicant in the proceedings, which may mean that the person better understands the reason for the final decision and is satisfied after having their 'day in court'. Because of these benefits, the ALRC recommends that at least one level of external merits review of a decision to impose a quasi-penalty should be available and that judicial review of a decision to impose a quasi-penalty should be available. See Recommendation 21–1(c) and (d) below.

Other issues

21.47 In order for the right of review of a decision to impose a quasi-penalty to be meaningful, the person on whom the penalty is imposed must be aware that the right of review exists, understand whether they are eligible to seek review, and what the effect of review will be on the operation and implementation of the decision under review.

Notification of appeal and review rights

21.48 Proper access to appeal and review is dependent on people being notified by the regulator of their right of appeal and review.[65] The issue of notification of the decision to impose a quasi-penalty, and notification of the right to request review of that decision, is considered in chapter 15.

21.49 As it is not possible for a person to exercise a right if they are unaware of that right, the ALRC recommends that any person directly affected by a decision to impose

64 A stay may be sought under the *Administrative Appeals Tribunal Act 1975* (Cth), s 41 and under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 15 or 15A.

65 One of the recommendations of the Commonwealth Ombudsman in his report on social security breach penalties was that 'written notice of advice to the person [of the outcome of internal review] should include advice of the right to seek an independent review by the SSAT and give advice on how to do so': Commonwealth Ombudsman, *Social Security Breach Penalties — Issues of Administration* (2002), Commonwealth Ombudsman, rec 25.

a quasi-penalty should receive adequate notice of such a decision. The notice should include information about the appeal and review rights available to the person affected.[66] See Recommendations 15–6 and 15–7.

Standing to seek review

21.50 In order to seek review of a decision to impose a quasi-penalty, a person must have 'standing' to seek review. The rules of standing are a way of filtering applications for review to ensure that only persons affected by the decision may challenge it and that review bodies are not required to deal with multiple challenges made by persons with no genuine interest in the decision.[67] Increasingly, the rules of standing in administrative proceedings are not governed by the common law but rather by a particular form of words in the statute under which, or in respect of which, proceedings are to be brought.[68] Generally, the test for standing to seek internal review is that the person is a 'person affected' by the decision of the regulator to impose the quasi-penalty. This is the test used, for example, in s 129 of the *Social Security (Administration) Act 1999* (Cth), s 85-5 of the *Aged Care Act 1997* (Cth) and s 558 of the *Telecommunications Act 1997* (Cth). The test for standing to seek reconsideration of a taxation decision provides that 'a person who is dissatisfied' may make a taxation objection: s 14ZL of the *Taxation Administration Act*.

21.51 Standing is also critical for external review. Standing is fundamental to access to justice. Many courts and tribunals have the power to determine standing in matters before them. For example, s 27(1) of the AAT Act provides that 'any person or persons (including the Commonwealth or an authority of the Commonwealth) whose interests are affected by the decision' may seek review of the decision by the AAT. The AAT has stated that in applying the 'interests affected' test it should be more generous than the common law and that familial, personal or other non-material interests can suffice.[69] The AAT can be more demanding, however, when commercial interests are at stake.[70]

21.52 Only 'persons aggrieved' can seek review under the ADJR Act. A 'person aggrieved' includes a person whose interests are adversely affected.[71] However, cases under the ADJR Act suggest that the formula's application largely depends upon the particular statutory context concerned, because it is only by looking to the Act's scope,

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66 The Commonwealth Ombudsman recommended that written advice to the person of a decision after internal review should 'include advice of the right to seek an independent review by the SSAT and give advice on how to do it': ibid, rec 25.

67 In Australian Law Reform Commission, *Beyond the Door-keeper: Standing to Sue for Public Remedies*, 78 (1996), Commonwealth of Australia, Canberra, the ALRC recommended that the tests of standing to seek public remedies be relaxed. Although a decision to impose a quasi-penalty involves a decision by a public official, the ALRC does not consider that review of such a decision involves proceedings having a public element, therefore the ALRC's recommendations in ALRC 78 are not relevant to this Inquiry.

68 L Campbell, 'Who Should Right the Public Wrong? The ALRC's Proposal for a Test for Standing' (1997) 5 *Australian Journal of Administrative Law* 48, 51.

69 See *Re Control Investments Pty Ltd and Australian Broadcasting Tribunal (No 3)* (1981) 4 ALD 1, 5.

70 See M Aronson and B Dyer, *Judicial Review of Administrative Action* (2nd ed, 2000) LBC Information Services, Sydney, 547.

71 See *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 3(4)(a)(i).

objects and purposes that one can determine the relevance of the applicant's interests.[72] However, the court has adopted the common law formula of requiring a 'special interest' that is more than 'a mere intellectual or emotional concern' in order to be considered a 'person aggrieved' for the purposes of the ADJR Act.[73]

21.53 A lack of formal provision for standing can exclude third parties from seeking a review of a decision to impose a quasi-penalty. As was observed in one consultation in relation to aged care legislation,[74] a number of relatives had chosen a certain nursing home for their relatives and disagreed with the regulator's decision to close it down. The ALRC was told that the relatives were adversely affected by being required to find suitable alternative accommodation for their relatives at short notice but had no rights to seek review of the decision to close the facility.

Operation and implementation of decisions under review

21.54 As noted, one advantage of having statute-based internal review is that the process and certain rights can be detailed in a way that provides a high level of certainty to the regulated community. One issue relevant to the current Inquiry is the operation of the penalty while internal review takes place.[75] Section 131 of the *Social Security (Administration) Act*, for example, provides that if an adverse decision has been made in relation to a social security payment, under certain circumstances the Secretary may declare that the payment of social security is to continue pending the determination of the review as if the adverse decision had not been made.[76] Some legislation does not specifically allow for the suspension of the operation of a penalty decision while internal review takes place, but does provide for the lifting of sanctions at the regulator's discretion.[77] Other penalty schemes are silent on the operation of the penalty during review.

21.55 The negative impact of administrative penalties is well recognised.[78] An important aspect of any meaningful system of review is the ability to seek a stay of the

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72 M Aronson and B Dyer, *Judicial Review of Administrative Action* (2nd ed, 2000) LBC Information Services, Sydney, 547.

73 R Glindemann, 'Standing to Sue for Environment Protection: A Look at Recent Changes' (1996) 24 *Australian Business Law Review* 246, 252.

74 The Victorian Bar Association, *Consultation*, Melbourne, 29 May 2001.

75 See discussion of operation of penalty in relation to courts and tribunals at para 10.66–10.69 in Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney.

76 It is not known whether this power is regularly exercised in practice.

77 For example, s 126 of the *Radiocommunications Act 1992* (Cth) provides that the ACA may at any time, by written notice, revoke the suspension of a licence. Under the *Aged Care Act 1997* (Cth) a sanction will usually take effect when notification occurs under s 67-5 of the Act. However, the Secretary may defer the effect of the sanction or, under s 67A-5, allow for the progressive revocation or suspension of allocation of places.

78 For example, a recent report the Australian Council of Social Services noted that third breach penalties result in tremendous personal hardship and put additional pressure on families and community welfare agencies that are called on for support during the period of non-payment: Australian Council of Social Service, *Breaching the Safety Net: The Harsh Impact of Social Security Penalties*, ACOSS Info 305 (2001), Australian Council of Social Service. Other examples would be banning and disqualification orders and suspension and cancellation of licences. All these quasi-penalties have the potential to jeopardise livelihood.

operation of the penalty decision until the review is concluded. The power to order a stay is generally discretionary.[79] There will be situations where a court or tribunal will find that it is inappropriate to make a stay order. For example, a court or tribunal may be hesitant to order a stay of an administrative banning order where the public needs to be protected.

21.56 The Federal Court's general powers in relation to interlocutory matters are dealt with under s 25 of the *Federal Court of Australia Act 1976* (Cth). Section 29 of the *Federal Court of Australia Act* specifically gives the Court broad power to order stays and suspension of orders the subject of appeal. Similarly, s 41 of the AAT Act allows the AAT, on request by a party to a proceeding, to stay the operation or implementation of the decision to which the relevant proceeding relates 'for the purpose of securing the effectiveness of the hearing and determination of the application for review'.

21.57 However, some administrative penalty provisions restrict the granting of stays for certain types of penalties. For example, s 128E of the *Radiocommunications Act 1992* (Cth) restricts the right to grant a stay under the ADJR Act, AAT Act and the *Judiciary Act* in relation to decisions to cancel or suspend datacasting transmitter licences if the order would have the effect of suspending the operation of the eligible decision for more than 3 months. Section 17A of the *Taxation Administration Act* prohibits the grant of a stay under the ADJR Act if it has the effect of preventing or restraining the recovery of additional tax.

Preliminary view

21.58 In DP 65, the ALRC asked whether legislation should always provide for the option to seek a suspension of an administrative penalty decision while internal review, external merits review or judicial review is undertaken.[80]

Consultations and submissions

21.59 Only one submission specifically supported this proposal.[81] Two submissions specifically opposed this proposal,[82] noting that:

> In ASIC's opinion such a suspension would be inappropriate. There is no reason to assume, as some matter of course, that administrative action taken by an agency is flawed. Where an administrative remedy is imposed to protect the public it is impor-

79 Under proposed reforms to its powers, CASA's power to vary, cancel or suspend an aviation approval will be subject to an automatic stay of the decision once review is sought. 'This will mean that no operator will be put out of business as they wait for a court or tribunal to determine whether CASA acted appropriately': The Hon John Anderson MP, *Media Release A140/2002: CASA Reform*, <www.ministers.dotars.gov.au/ja/releases/2002/november/A140_2002.htm>, 18 November 2002.

80 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Question 10–3.

81 K Yeung, *Submission CAP 20*, 9 October 2002.

82 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002; Australian Taxation Office, *Submission CAP 16*, 17 September 2002.

> tant that the protection afforded should not be reduced through delay in implementation of the decision.[83]

21.60 ASIC also commented that applications for external review were often made and then withdrawn leading to a delay of 'many months, if not years' so that 'a considerable period may have elapsed from the initial decision until notice of the withdrawal of the application or a final decision is made by the reviewing body'.[84]

21.61 The ATO noted that although the 'tax laws usually provide that an assessed liability is due and payable notwithstanding that there may be a dispute about the amount of the liability', it is ATO policy not to 'attempt to recover a debt including a penalty, whilst an objection is under consideration, unless there is a considerable risk. Accordingly, the client is not usually disadvantaged by the raising of administrative penalties prior to the internal and external review process'.[85] The ATO also commented that:

> It is considered that the application of this policy is preferable to legislation suspending the imposition of penalty while it is being reviewed. The situation protects the revenue in relation to high risk taxpayers, but usually does not disadvantage taxpayers. In addition, taxpayers can apply to the courts to have the debt stayed.
>
> The ATO would not be in favour of suspension being legislated to be allowed 'automatically'. If such legislation were contemplated it would need to address situations where a person is dissipating assets or taking other steps to avoid any penalty eventually found justified.[86]

Conclusion

21.62 Whilst noting that the ATO policy is not to attempt to recover the penalty whilst review is being undertaken, the ALRC is concerned that this stay on the operation of the penalty decision is informal and that the person affected has no right to request a stay. The ALRC considers that the right to request that the implementation of a decision to impose a quasi-penalty be suspended until review has been completed is an important right. This is particularly so if the effect of the penalty decision is to withhold financial benefits that would otherwise be paid to the person. The ALRC notes that the right is to request a stay of the effect of a decision rather than a right to an automatic stay of a decision. It will be for the court or tribunal considering the request for a stay of the decision to impose a quasi-penalty to decide if a stay should be granted or if there are good reasons, such as the need to protect the public or safeguard the revenue, against granting a stay.

21.63 For the reasons stated above the ALRC recommends that the option to seek a stay or suspension of a decision to impose a quasi-penalty while internal review, external merits review or judicial review is undertaken should be available. Where the effect of the decision is to withhold financial benefits that would otherwise be paid to the per-

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83 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 38.
84 Ibid, 38.
85 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.128–2.129.
86 Ibid, para 2.130–2.131.

son, the quasi-penalty decision should be automatically stayed from the time that internal review is requested (see Recommendation 22–2).

Recommendation

Recommendation 21–1. Legislation under which quasi-penalties may be imposed should provide:

(a) at least one level of internal review of a decision to impose a quasi-penalty, unless internal review is clearly inappropriate;

(b) that internal review of a decision to impose a quasi-penalty should, unless inappropriate in the circumstances, be a mandatory requirement before external merits or judicial review can be sought;

(c) at least one level of external merits review of a decision to impose a quasi-penalty; and

(d) for judicial review of a decision to impose a quasi-penalty.

22. Excluding or Limiting Review

Contents

Introduction

22.1 In DP 65, the ALRC asked:

> **Question 10–1.** Are there any categories of decision or administrative penalties that should be exceptions to the principles stated in Proposals 10–3 and 10–4? If so, what are the justifications for excluding review or appeal?

22.2 The issue of what penalty decisions are suitable for merits review was considered in chapter 21. One conclusion from that discussion is that not all penalty decisions are suitable for review on the merits.

22.3 Judicial review of an administrative decision imposing a quasi-penalty should always be available (see Recommendation 21–1(d)) as the public interest in ensuring that persons entrusted with the exercise of public power act lawfully and be accountable for their decisions outweighs any detriments to the regulatory process that might

result from the review process (for example, delay, uncertainty) or from the overturning of individual penalty decisions.

22.4 Review might be limited or excluded explicitly:

- through the use of privative clauses (also known as 'finality' or 'ouster' clauses) in the primary legislation; or
- through a failure to give jurisdiction to a review body; or
- through a specific exemption from review legislation such as the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act); or
- as a result of the design of the penalty scheme, for example, schemes under which infringement notices can be issued do not generally permit external review of the decision to issue the notice.

22.5 Review might also be limited or excluded as a result of the nature of the person making the decision to impose or recommend the imposition of the penalty where responsibility for those regulatory functions has been contracted to private bodies that are not subject to administrative review.[1]

Privative clauses

22.6 The exclusion of any form of review of decisions using privative clauses is contentious. A privative clause is a legislative provision that purports to make a decision 'final' and to exclude challenge or review of a decision by any court. There are various ways in which Parliament can restrict the scope of judicial review.[2] The statute may, for example, state that the decision 'shall be final and without appeal', 'shall be final' or 'shall be final and binding on the parties', or 'shall be final and conclusive'. The intended effect of a finality clause is to preclude the operation of the more general statutory provisions that allow for appeals against decisions.

22.7 Section 474 of the *Migration Act 1958* (Cth) is an example of a privative clause. It provides that:

> (1) A privative clause decision:
>
> (a) is final and conclusive; and
> (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and

1 The Terms of Reference for this Inquiry specifically direct the ALRC to consider what limitations, if any, should exist on the use of private contractors to issue infringement notices or other process for the payment of administrative penalties. Their role in infringement notice schemes is discussed in ch 12. Their role in relation to quasi-penalties is discussed in this chapter.

2 See M Aronson and B Dyer, *Judicial Review of Administrative Action* (2nd ed, 2000) LBC Information Services, Sydney, 675–6.

(c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

22.8 Section 474 applies to a range of decisions under the *Migration Act* including decisions about visas. The provision is contentious and has been challenged many times in the Federal Court.[3] The present law on whether privative clauses will definitely exclude all forms of judicial review is unclear. The decision of the High Court in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicants S134/2002*[4] may clarify the position.

22.9 The ALRC considers that external judicial review of decisions imposing penalties should always be available. Whilst the ALRC has not identified any examples of the use of privative clauses to exclude review of decisions imposing administrative penalties or other decisions by regulators related to the imposition of civil or administrative penalties, the ALRC considers that, as a general principle, privative clauses should not be used to attempt to exclude review of decisions imposing penalties.

Failure to give jurisdiction to review

22.10 Section 25 of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) provides that the AAT may only review decisions where it has been expressly given jurisdiction to do so. Many decisions imposing penalties are subject to AAT review and the ALRC supports the provision of independent, external merits review as an essential part of administrative penalty schemes. In its submission to the Inquiry,[5] the AAT stated that whilst it was appropriate for the AAT to review decisions to impose or remit penalties, any expansion in the types of decisions subject to AAT review was 'a matter for the Parliament'.

22.11 Some concern was expressed over the exclusion of AAT review of a decision to issue an infringement notice under the *Customs Act 1901* (Cth) infringement notice scheme.[6] These comments were directed at a specific aspect of a specific penalty scheme which was the subject of much debate during its passage through Parliament and the ALRC does not consider these comments to be indicative of any general con-

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3 Prior to the cases the position was reasonably settled on the basis of Dixon J's judgment in *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 (the *Hickman* principle). 'The '*Hickman* principle' states that the contradictory intention of privative clauses may be resolved if, rather than reading privative clauses at face value as direct limits on the review powers of the High Court, they are read as indirect grants of jurisdiction to a decision-maker. The effect of this indirect grant of jurisdiction is that the definition of a valid decision is expanded beyond what is overtly defined as a valid decision in the relevant Act or the common law. As Brennan J has noted, this in effect means that a privative clause 'treats an impugned act as if it were valid' (in *Deputy Commissioner of Taxation v Richard Walker Pty Ltd* (1995) 183 CLR 168, 194) rendering judicial review unnecessary in nearly all cases': Department of the Parliamentary Library, *Bills Digest No. 90, Migration Legislation Amendment (Judicial Review) Bill 1998*, Parliament of Australia, <www.aph.gov.au/library/pubs/bd/1998-99/99bd090.htm>, 2 October 2002.

4 Heard on 3–4 September 2002 in conjunction with *Plaintiff S157 of 2002 v Commonwealth of Australia*.

5 Administrative Appeals Tribunal, *Submission CAP 18*, 27 September 2002.

6 A Hudson, *Submission CAP 19*, 8 October 2002; Customs Brokers & Forwarders Council of Australia Inc, *Submission CAP 17*, 16 September 2002; JJ Lawson Customs & Freight Brokers, *Submission CAP 9*, 29 August 2002.

cern over the jurisdiction of the AAT. No other comment was made in submissions or consultations on the issue of the jurisdiction of the AAT to review a decision. As there appears to be no obvious problem in this area, the ALRC sees no compelling reason to recommend any change to the way in which the AAT is granted jurisdiction to review a matter. Provided that the decision whether or not to exclude an avenue of review continues to be considered on a case-by-case basis, the ALRC considers that no change to the law is needed.

Modification of jurisdiction to review

22.12 Some penalty schemes limit or modify the jurisdiction of the AAT to review a decision to impose a penalty. Division 4 of Part IVC of the *Taxation Administration Act 1953* (Cth) modifies the application of the AAT Act to review of certain decisions imposing administrative penalties. The main modifications are the removal of the right to seek reasons for a decision,[7] putting the burden of proof onto the person seeking review,[8] and the removal of the power of the AAT to suspend the operation of a decision pending review.[9] The *Taxation Administration Act* also provides a modified procedure for making applications to the AAT for review,[10] permits hearings to be held in private,[11] and makes other amendments to the usual AAT procedure.

22.13 No comments were made in either submissions or consultation opposing modification of the AAT's jurisdiction in this way. In the absence of any objections, the ALRC concludes that there is no obvious problem in this area and accordingly there is no need to reform the law.

Specific exemptions in review legislation

22.14 Schedules 1 and 2 of the ADJR Act specifically exempt some penalty-related decisions from review under that Act. Schedule 1(xa) provides that 'decisions to prosecute persons for any offence against a law of the Commonwealth, a State or a Territory' are not decisions for which review under the ADJR Act is available. In Recommendations 23–1 and 23–2, the ALRC recommended extending this exemption to include decisions to initiate civil proceedings for the imposition of a penalty or administrative proceedings for the imposition of a quasi-penalty. The ALRC considers that decisions initiating action should not be subject to review under the ADJR Act for the following reasons:

- any defects in the decision can be addressed as part of the subsequent court process;

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7 *Taxation Administration Act 1953* (Cth), s 14ZZB.

8 Ibid, s 14ZZK.

9 Ibid, s 14ZZM. Although the ATO noted in its submission that it was 'the policy of the ATO not to attempt to recover a debt including a penalty, whilst an objection is under consideration, unless there is considerable risk': Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.129.

10 *Taxation Administration Act 1953* (Cth), s 14ZZC.

11 Ibid, s 14ZZE.

- allowing collateral challenge of decisions under the ADJR Act may unnecessarily delay court proceedings and frustrate the expedient exercise of justice; and
- judicial review under the *Judiciary Act 1903* (Cth) and under the original jurisdiction of the High Court is still available to cure any abuse of process.

22.15 Schedule 2 of the ADJR Act provides exemptions from the requirement under s 13 of that Act that written reasons for a decision may be obtained. Schedule 2(e) provides exemptions for certain decisions relating to the administration of criminal justice including:

> (i) decisions in connection with the investigation, committal for trial or prosecution of persons for any offences against a law of the Commonwealth or of a Territory;
> (ii) decisions in connection with the appointment of investigators or inspectors for the purposes of such investigations;
> (iii) decisions in connection with the issue of warrants, including search warrants and seizure warrants, under a law of the Commonwealth or of a Territory;
> (iv) decisions under a law of the Commonwealth or of a Territory requiring the production of documents, the giving of information or the summoning of persons as witnesses;
> (v) decisions in connection with an appeal (including an application for a new trial or a proceeding to review or call in question the proceedings, decision or jurisdiction of a court or judge) arising out of the prosecution of persons for any offences against a law of the Commonwealth or of a Territory;

22.16 Schedule 2(f) provides exemptions for 'decisions in connection with the institution or conduct of proceedings in a civil court, including decisions that relate to, or may result in, the bringing of such proceedings for the recovery of pecuniary penalties arising from contraventions of enactments' including:

> (i) decisions in connection with the investigation of persons for such contraventions;
> (ii) decisions in connection with the appointment of investigators or inspectors for the purposes of such investigations;
> (iii) decisions in connection with the issue of search warrants or seizure warrants issued under Division 1 of Part XII of the Customs Act 1901 under enactments; and
> (iv) decisions under enactments requiring the production of documents, the giving of information or the summoning of persons as witnesses;

22.17 The exemptions from the requirements to provide written reasons for a decision are discussed in chapter 15. In other parts of this Report, the ALRC has recommended that consideration be given to expanding the use of non-monetary penalties,[12] for this reason the ALRC recommends that the wording of schedule 2(f) be amended by substituting the words 'imposition of a penalty' for 'recovery of pecuniary penalties'.

12 See ch 27.

Consultations and submissions

22.18 Comment was made on the provision of specific exemptions to the ADJR Act in three submissions.[13] One submission opposed the provision of exemptions noting that the exemptions already in place 'appear to be a deeply retrograde step, and make severe and unjustifiable encroachments into the fairness and integrity of the criminal justice process, and directly erode the central core of the rule of law'.[14]

22.19 Two submissions supported the provision of exemptions to the ADJR Act. The ATO supported the provision of exemptions in this way, noting that:

> Any decision associated with initiating, or not initiating, criminal penalty action is already excluded from any form of judicial review by reason of section 9A of the *Administrative Decisions (Judicial Review) Act 1977* and this exclusion should remain.[15]

22.20 The restriction of rights to judicial review of decisions to initiate action was commented on in another submission, which noted that restricting statutory rights to review 'avoids the potential for penalty proceedings to be frustrated by multiple review applications'.[16]

Conclusion

22.21 As providing exemption from the ADJR Act does not preclude judicial review under either s 39B of the *Judiciary Act* or the Constitution, the ALRC does not consider that excluding the option of review (or merely the right to request reasons for a decision) under the ADJR Act unjustifiably diminishes 'the fairness and integrity of the criminal justice process'.[17] The ALRC considers that there is a strong argument that the types of decisions specified in Schedule 1 as exempt from the ADJR Act would not, in the absence of express exemption, necessarily be reviewable under the ADJR Act as they may lack the necessary quality of being a final and operative determination of substantive rights. The ALRC therefore is not convinced that providing specific exemptions from the ADJR Act has the effect of abrogating established existing rights.

22.22 For this reason, the ALRC concludes that provided that whether or not to provide a specific exemption is considered on a case-by-case basis and only made when there is a good reason to do so, there is no need to reform the law to prevent such exemptions being made. However, as noted above as the ALRC is recommending that the use of non-monetary penalties be expanded, some amendment to schedule 2(f) is desirable. Accordingly, the ALRC recommends that the words 'imposition of a penalty' be substituted for the words 'recovery of pecuniary penalties' in schedule 2(f) of the ADJR Act.

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13 Australian Taxation Office, *Submission CAP 16*, 17 September 2002; Environment Australia, *Submission CAP 26*, 24 October 2002; K Yeung, *Submission CAP 20*, 9 October 2002.

14 K Yeung, *Submission CAP 20*, 9 October 2002, 6–7.

15 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.119.

16 Environment Australia, *Submission CAP 26*, 24 October 2002, 7.

17 K Yeung, *Submission CAP 20*, 9 October 2002, 7.

Recommendation

Recommendation 22–1. Schedule 2(f) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be amended by substituting the words 'imposition of a penalty' for the words 'recovery of pecuniary penalties'.

Design of the penalty scheme

Infringement notice schemes

22.23 Infringement notice schemes (discussed in detail in chapter 12) do not generally provide for external review of the decision to issue the notice. A form of internal review of the decision to issue an infringement notice is generally available, as schemes provide a right for the person to whom the notice has been issued to request that the notice be withdrawn.[18] If the delegate who considers withdrawal of the notice is different from the delegate who made the original decision to issue the notice, some accountability can be achieved.[19] In chapter 12 of this Report, the ALRC has recommended that this form of accountability be included in the proposed model infringement notice scheme.[20]

22.24 The unavailability of external merits review of the decision to issue a notice may be justified on the basis that a decision to issue a notice is not a decision imposing a penalty and does not affect the interests of the person to whom the notice is issued. The decision to issue a notice is not strictly a penalty — the issue of the notice has no substantive effect. As suggested by the ALRC at para 12.7, the issue of an infringement notice is better characterised as an offer of settlement made by the regulator in respect of prospective proceedings. The alleged offender is under no compulsion to accept this offer. For this reason it is difficult to contemplate how a court or tribunal could effectively review the decision.

22.25 The absence of external merits review became an issue during passage of the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* (Cth) which replaced the administrative penalty regime for making false statements under s 243T and 243U of the *Customs Act* with a three-tiered approach to the offences and penalty regime. An infringement notice may be issued in relation to second and third tier offences. There is no avenue of appeal to the AAT in relation to the

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18 See, for example, *Customs Act 1901* (Cth), s 243ZA; *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) reg 14.07; *Migration Regulations 1994* (Cth) reg 5.26; *Radiocommunications Regulations 1993* (Cth) reg 26.

19 The Customs Act guidelines provide that 'a different decision-maker from the one who made the decision to serve the infringement notice should decide the merits of withdrawing the infringement notice:' Australian Customs Service, *Guidelines for Serving Infringement Notices, Customs Act 1901 Part XIII – Division 5*, 1 June 2002, para 6.1.

20 See Recommendation 12–10 in ch 12.

decision to issue an infringement notice. Instead, a person served with an infringement notice may elect to pay the penalty, try to convince the relevant decision maker to withdraw the notice, or may refuse to pay the penalty and defend the matter in court.

22.26 Opponents of the exclusion of a right to apply to the AAT for review of a decision to issue an infringement notice claimed that:

- As most claims would be heard in the Small Claims Division of Local Courts (where costs are not awarded for claims of up to $10,000), it would not be commercially realistic for many actions to be defended and so administrative review should be available;

- The absence of review of the decision to issue an infringement notice leaves too much to the discretion of the decision makers and removes one area of jurisdictional challenge to people involved in the industry.[21]

22.27 In response the ACS has asserted that the operation of the proposed regime does not lend itself to merits review because:

- a person issued with an infringement notice can approach the CEO to withdraw the notice and, if it is withdrawn, there will be no decision to review;

- a person issued with an infringement notice has the option to pay or not to pay the penalty — there is no compulsion to pay at that time and therefore no decision imposing a penalty to be reviewed;

- payment of the amount specified in the infringement notice prevents further proceedings being taken; and

- non-payment shifts the onus back to the ACS to decide whether to prosecute — and any decision in relation to the offence is thereafter a decision of a judge or magistrate. There is therefore no 'final decision' made by an administrative decision maker that could be reviewed by the AAT.[22]

22.28 A more detailed discussion of infringement notice schemes appears in chapter 12. The policy behind these schemes is to provide a system for the expeditious collection of monetary penalties arising with respect to minor offences. The procedure contemplates a saving of court time and resources. If the decision to issue a notice were subject to review it would possibly undermine the policy objectives of speed and expedition. It should be noted that decisions to issue infringement notices are not immune

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21 Law Council of Australia, 'Transcript of Evidence' in Senate Legal and Constitutional Legislation Committee (ed), *Inquiry into the Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2002, Import Processing Charges Bill 2000, and the Customs Depot Licensing Charges Amendment Bill 2000*, (2001), Commonwealth of Australia, 35.

22 Senate Legal and Constitutional Legislation Committee, *Inquiry into the Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2001, Import Processing Charges Bill 2000, and the Customs Depot Licensing Charges Amendment Bill 2000* (2001), Commonwealth of Australia, 40–41.

to all forms of review. Whilst external merits review is excluded, external judicial review may be available if the decision satisfies the tests required to establish jurisdiction for judicial review.[23]

Conclusion

22.29 For the reasons discussed above, the ALRC sees no particular need to recommend changes to the reviewability of a decision to issue an infringement notice. As recommended in chapter 12, the ALRC considers that

- all infringement notice schemes should include a right for the person to whom the notice has been issued to seek to have the notice withdrawn;
- the delegate who considers the application for withdrawal of the notice should be different from the original decision maker;
- the exclusion of external merits review is acceptable as there is no penalty imposed by the infringement notice and therefore no final and operative decisions affecting rights to be reviewed.[24]

Recommendation

Recommendation 22–2. External merits review of a decision to issue an infringement notice in an infringement notice scheme established in accordance with Recommendation 12–8 should not be available.

True administrative penalties

22.30 True administrative penalties are most commonly financial administrative penalties that arise by operation of the legislation. In these cases the legislation determines when a contravention has occurred. The application and the amount or method of calculation of monetary administrative penalties is predetermined by the relevant legislation. The regulator has no power before liability for a penalty arises to determine the level of penalty[25] or whether there are extenuating circumstances that might warrant a variation in its application. The regulator does, however, have a limited discretion to remit some or all of the penalty after it has been imposed.[26] Examples of true administrative penalties imposed by legislation include where tax, levies or penalties

23 This was noted in several submissions JJ Lawson Customs & Freight Brokers, *Submission CAP 9*, 29 August 2002; Customs Brokers & Forwarders Council of Australia Inc, *Submission CAP 17*, 16 September 2002.

24 See Recommendations 12–8 and 12–10.

25 The exception to this is that under sch 1, div 284 of the *Taxation Administration Act*, the Commissioner of Taxation has power to determine the amount of an administrative penalty that will apply in certain circumstances.

26 See discussion of remission of penalties in ch 17 and 23.

are underpaid, paid late, or not paid; where required information is not provided; or where incorrect information is provided to the regulator.

22.31 Another form of true administrative penalty is a non-monetary penalty that follows as an automatic consequence of an event. An example is the automatic disqualification from managing a corporation which takes effect under s 206B of the *Corporations Act 2001* (Cth) if the person is convicted of specified offences, is an undischarged bankrupt or certain conditions relating to Part X arrangements under the *Bankruptcy Act 1966* (Cth) apply.

22.32 In neither of these forms of true administrative penalty is any decision made to impose the penalty, it arises automatically by operation of legislation. As there is no decision, the ALRC sees no role for internal or external review. The ALRC notes, however, that a decision made by the regulator to refuse to remit a penalty in whole or part, is a decision that affects rights and should be subject to review. See discussion in chapter 24.

Use of private contractors

22.33 In recent years, there has been an increase in the use of private contractors by government departments and administrative agencies. The ALRC defines 'private contractors' for present purposes as non-government bodies, such as individuals, corporations or not-for-profit organisations, which perform regulatory functions.[27] The devolution of public power to private contractors raises questions about how the exercise of regulatory power is controlled. Where contracts confer regulatory functions on non-government entities, it is doubtful whether citizens are privy to these contractual arrangements. There are also implications for the availability of administrative law remedies against non-government entities.

> One of the effects of providing services through non-statutory means is to prevent review by the Administrative Appeals Tribunal … When contracting out a service agencies should, wherever possible, ensure that rights of access to merits review of decisions relating to that service should not be lost or diminished.[28]

22.34 This area of concern has been highlighted particularly in relation to the Job Network scheme.[29]

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27 The regulatory functions of private contractors need not be their sole or dominant purpose. Frequently, the main purpose of private contractors is service delivery, with secondary regulatory functions. Regulatory functions include penalty-related decision-making, and the exercise of recommendatory and investigative powers.

28 Administrative Review Council, *The Contracting Out of Government Services — Report to the Attorney-General*, Report no 42 (1998), Administrative Review Council, 83.

29 K Owens, 'The Job Network; How Legal and Accountable are its (Un)employment Services?' (2001) 8(2) *Australian Journal of Administrative Law* 49 and the works referred to there.

Job Network scheme

22.35 Job Network members are private contractors engaged by the Department of Employment and Workplace Relations (DEWR) to deliver job matching, job search and intensive assistance services for unemployed people in receipt of Centrelink payments. In addition to their service delivery functions, Job Network members also make recommendations to Centrelink about whether clients have breached their obligations under social security law although they cannot impose 'breach penalties' (quasi-penalties) themselves. The Draft Employment Services Contract 2000–2003, released by DEWR as part of the Job Network tender, states:

> 19.1 The Provider must notify Centrelink of changes in the circumstances of eligible job seekers and any breach or possible breach by an eligible job seeker to whom the Provider is providing Services of obligations relating to Unemployment Allowances within 7 days of becoming aware of the change in circumstances, the breach or possible breach.
>
> 19.2 When requested by Centrelink, the Provider must, within 7 days of the date of the request, provide Centrelink with information about the change in circumstances, breach or possible breach referred to in clause 19.1.[30]

22.36 The contractual duty to notify Centrelink of any breach or possible breach therefore requires Job Network members to make discretionary decisions about a welfare recipient's compliance with social security law. After a Job Network member makes a breach recommendation, Centrelink is required by statute to assess if there was a 'reasonable excuse' for non-compliance before imposing a quasi-penalty.[31] The Commonwealth Ombudsman's report on social security breach penalties[32] noted that:

> Job network providers (and other providers of employment services) are contracted to the Department of Employment and Workplace Relations (DEWR) to deliver employment services to jobseekers. DEWR sets conditions and expectations for providers that include a requirement to advise Centrelink of any job seeker actions which could indicate a breach. DEWR also provides procedures and mechanisms for this to be done.
>
> The understanding of these roles and responsibilities appears to have become confused (including for some Centrelink staff) because of the difficult matrix of relationships arising from the establishment of the job network and the purchaser-provider arrangements between Centrelink and its two main client departments, FaCS and DEWR.

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30 Department of Employment Workplace Relations and Small Business, *Employment Services Contract 2000–2003 (Draft)* (ESC 2), Part A (General Conditions), cl 19 ('Notification to Centrelink'): on the Australian Workplace website at <www.workplace.gov.au>, 9 August 2002. The same clause is included in the Department of Employment and Workplace Relations, *Employment Services Contract ECS3 2003–2006 (Draft)*, <http://www.workplace.gov.au/WP/Content/Files/ES/JN/Tenders/Appendix%206.pdf>, 12 August 2002. Note that ESC2 has been extended until 30 June 2003.

31 See, for example, *Social Security Act 1991* (Cth), s 601A and 577C.

32 Commonwealth Ombudsman, *Social Security Breach Penalties — Issues of Administration* (2002), Commonwealth Ombudsman.

> For instance some public commentary on breach penalties indicates that commentators (and perhaps some Centrelink staff) may have the following misconceptions about roles and responsibilities.
> - Job Network and other DEWR service providers are responsible for breach investigations or decisions.
> - Centrelink simply processes breach penalties on the advice of those providers – in effect a breach decision is mandatory.
> - DEWR is responsible for policy on breach decisions and penalties.[33]

22.37 A similar comment was also made in the Pearce Report, which identified inadequate attention to, or understanding of, the relevant criteria for imposing breach penalties and the placing of an incorrect onus on the jobseeker to establish that no breach has occurred.[34]

> In relation to the statutory and policy criteria, and the onus on Centrelink to be satisfied that a breach has occurred, the first step is to dispel misunderstandings that providers' compliance reports are determinative, recommendatory or establish a presumption that a breach has occurred. There is also a strong case for simplifying and rationalising the criteria, ensuring that governmental policies are strictly consistent with them and with the correct legal onus on Centrelink, and strengthening training and monitoring to ensure that the legal requirements are being correctly understood and applied. In particular, a decision to impose a breach should require endorsement by another Centrelink higher-level officer who has special training and experience in applying the criteria. In addition, all relevant governmental policies, instructions and other statements (whether from Centrelink, DEWR, DFACS or elsewhere) should be made public so that their legality and appropriateness can be monitored and, if necessary, questioned.[35]

22.38 If no independent inquiry is being made of the welfare recipient, the Centrelink officer's decision may not be based on consideration of the facts and circumstances of the case and may merely be a 'rubber stamping' of the recommendation by the Job Network provider. The private contractor's recommendation then may directly result in the imposition of a quasi-penalty. The Ombudsman was particularly critical of the failure by Centrelink officers to contact the welfare recipient to ascertain whether that person had a 'reasonable excuse' for failing to comply with activity test requirements before imposing a breach penalty.[36] The Ombudsman recommended that an attempt must be made to contact the person by telephone and by letter, 'allowing at least 10 days from the date of the letter before any breach decision is made'.[37]

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33 Ibid, para 2.18–2.20.

34 Independent Review of Breaches and Penalties in the Social Security System, *Report of the Independent Review of Breaches and Penalties in the Social Security System* (2002), Independent Review of Breaches and Penalties in the Social Security System (Pearce Report), para 6.16.

35 Ibid, para 6.17. A similar comment was made in the Ombudsman's report: Commonwealth Ombudsman, *Social Security Breach Penalties — Issues of Administration* (2002), Commonwealth Ombudsman.

36 Commonwealth Ombudsman, *Social Security Breach Penalties — Issues of Administration* (2002), Commonwealth Ombudsman, ch 5.

37 Ibid, rec 7. The giving of notice prior to the imposition of a quasi-penalty is discussed in ch 14 of this Report.

Implications of using private contractors

External merits review

22.39 Decisions that are not made pursuant to statute cannot be reviewed on their merits by the AAT as the AAT's jurisdiction to review a decision must be specifically conferred by statute.[38] The ARC has expressed the view that merits review of many non-statutory decisions that affect a person's interests should be available through an independent external body such as the AAT.[39] The ARC noted that, where the service is one that the Commonwealth could not deliver directly, there might be constitutional problems in providing for merits review by a Commonwealth tribunal of decisions of contractors relating to these services. The review may need to be provided through other arrangements.[40]

Judicial review

22.40 Judicial review under the Constitution and s 39B of the *Judiciary Act* is limited to cases involving 'a Commonwealth officer'. The availability of judicial review of decisions made by private contractors will, therefore, generally apply only to decisions made by the private contractor acting as the agent of the Commonwealth. It is only in this capacity, if at all, that private contractors' actions can be imputed with the necessary official status.[41]

22.41 Currently, the ADJR Act only extends to the review of a decision made under an enactment. Arguably, there is currently narrow scope for judicial review of Job Network members when they are deemed to be acting as agents for the Commonwealth. However, Job Network providers are not acting as agents in relation to the making of breach recommendations.[42]

Commonwealth Ombudsman

22.42 Complaints to the Ombudsman can be made in relation to 'a matter of administration'.[43] This means that the Ombudsman may be able to investigate the manner in which the relevant agency has dealt with a contractor but may not be able to address the complaint directly. The Ombudsman has no direct jurisdiction over private contractors as an entity must be a 'prescribed authority' to come under its investigative powers. Such an authority is a body established for a public purpose under a statute.[44] The

38 *Administrative Appeals Tribunal Act 1975* (Cth), s 25.
39 Administrative Review Council, *The Contracting Out of Government Services — Report to the Attorney-General*, Report no 42 (1998), Administrative Review Council, 86.
40 Ibid, 86.
41 K Owens, 'The Job Network; How Legal and Accountable are its (Un)employment Services?' (2001) 8(2) *Australian Journal of Administrative Law* 49, 56.
42 Ibid , 56–57.
43 *Ombudsman Act 1976* (Cth), s 5(1).
44 Ibid, s 3 and 5.

actions of private contractors may therefore be scrutinised only as part of an investigation by the Ombudsman of the activities of the relevant regulator.[45]

Some options

22.43 The general principle to emerge from this discussion is that when a regulator uses private contractors, accountability for any decision to impose an administrative penalty should not be lost or diminished. See Recommendation 22–3 below.

22.44 One option, suggested by the ARC, is to expand the scope of the current range of administrative law remedies and accountability mechanisms so that they encompass decisions made by non-statutory contractors. Another option is to ensure that the regulator complies with the requirements of legislation rather than relying on recommendations from private contractors. For example, at present, social security legislation provides that Centrelink officers are to impose penalties for activity test or administrative breaches only after considering if there is a 'reasonable excuse' for non-compliance. Under the legislation, Centrelink must not rely on recommendations made by private contractors; it must make its own decisions based on the evidence available to it.[46] Of course, if the regulator is wholly responsible for making the decision to impose the penalty, and does not in practice simply adopt a private contractor's recommendations, the risk of excluding administrative review or other accountability mechanisms is minimised.

Preliminary view

22.45 In DP 65, the ALRC proposed that when a private contractor is used by a regulator in relation to any criminal, civil or administrative penalty process, that contractor should be no less accountable for any penalty-related decision it makes than if it were a government regulator.[47]

Consultations and submissions

22.46 This proposal received support in a number of submissions.[48] One submission proposed that a private contractor should be 'deemed to be the government regulator for the purposes of accountability'.[49]

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45 Ibid, s 5.

46 Centrelink's failure to make its own investigations by failing to contact the welfare recipient before imposing a breach penalty were criticised by the Ombudsman in his report: Commonwealth Ombudsman, *Social Security Breach Penalties — Issues of Administration* (2002), Commonwealth Ombudsman.

47 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Proposal 10–5.

48 M Adams, *Submission CAP 12*, 5 September 2002; Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002; Australian Taxation Office, *Submission CAP 16*, 17 September 2002, K Yeung, *Submission CAP 20*, 9 October 2002.

49 M Adams, *Submission CAP 12*, 5 September 2002.

Conclusion

22.47 Whilst the ALRC sees merit in the suggestion that the private contractor be 'deemed' to be the regulator as a method for ensuring accountability, the ALRC's preferred option would be that the regulator does not delegate the power to make a decision imposing a penalty to a private contractor. Taking into account the general support expressed for the proposal and in the absence of any specific comments in opposition to it, the ALRC concludes, therefore, that the following recommendations are appropriate.

Recommendations

Recommendation 22–3. A private contractor used by a regulator in relation to any criminal, civil or administrative penalty process should be no less accountable for any penalty-related conduct than if it were a regulator.

Recommendation 22–4. A regulator should not delegate, or purport to delegate, the power to make any decision to impose a quasi-penalty to any private contractor.

Recommendation 22–5. Any private contractor whose contractual obligations towards any regulator involves penalty-related conduct should be explicitly appointed as the agent of the regulator to ensure that review is available as if the penalty-related conduct undertaken by the private contractor had been undertaken by the regulator.

22.48 The ALRC also notes that whilst the Draft Employment Services Contract 2000–2003, released by DEWR as part of the Job Network tender, states that 'when requested by Centrelink, the Provider must, within 7 days of the date of the request, provide Centrelink with information about the change in circumstances, breach or possible breach'[50] this might not be adequate to ensure that the regulator is provided with sufficient information upon which to make a decision to impose a penalty and, if requested, to provide reasons for, or review, such a decision. The ALRC is also concerned to ensure that if other regulators use private contractors, the regulator is able to access sufficient information from the private contractor to enable it to make a fully informed, independent decision.

22.49 The ALRC also notes the comments by the Commonwealth Ombudsman that the inclusion of performance criteria in contracts that a certain percentage of recom-

50 Department of Employment Workplace Relations and Small Business, *Employment Services Contract 2000–2003 (Draft)* , cl 19.2. The same clause is included in the contract proposed for 2003–2006 (as cl 20.2): Department of Employment and Workplace Relations, Employment Services Contract ECS3 2003–2006 (Draft), <http://www.workplace.gov.au/WP/Content/Files/ES/JN/Tenders/Appendix%206.pdf>, 12 August 2002.

mendations made by private contractors be affirmed was inappropriate as it might result in a penalty recommendation being adopted without proper inquiry being undertaken by the relevant government agency.[51] The Ombudsman expressed concern that targets or benchmarks 'contributed to some Centrelink staff adopting inadequate investigation practices when considering breach decisions'.[52] The ALRC notes that steps have been taken by Centrelink and FaCS to change the way in which performance is measured in relation to breach penalties. The ALRC does not wish to comment on these changes in particular. However, the use of performance indicators in a context where private contractors perform some penalty-related functions raises broader issues concerning decision accuracy, quality, timeliness, and, in particular, whether persons affected by penalty decisions have been afforded procedural fairness. The ALRC therefore considers that where private contractors are involved in the penalty process, it is not appropriate that their participation be subject to performance criteria or targets such as the number of penalty recommendations made during a particular period.

Recommendation

Recommendation 22–6. Regulators should ensure that their contracts with private contractors in relation to any penalty-related conduct:

(a) include the rights of the regulator to require the private contractor to provide the regulator with any information that it reasonably requires to enable it to make any proper relevant penalty-related decision;

(b) include obligations for the private contractor to cooperate with the regulator to the extent necessary to permit an appropriate review of a decision to be undertaken, whether that review is internal review, external merits review or judicial review; and

(c) exclude any performance indicators that involve the number of penalty-related recommendations or other penalty-related conduct, or similar criteria.

51 Commonwealth Ombudsman, *Social Security Breach Penalties — Issues of Administration* (2002), Commonwealth Ombudsman, ch 9.

52 Ibid, para 9.33.

23. Review of Other Decisions by Regulators

Contents

Introduction

23.1 The review of a decision by a regulator to impose a quasi-penalty was considered in chapter 21. This chapter considers the review of other decisions made by regulators as part of the penalty process or to settle a matter which might otherwise be the subject of court action by the regulator seeking a penalty. This chapter looks at:

- Review of a decision to institute proceedings;
- Review of a decision not to institute proceedings;
- Review of a decision to investigate a particular person;
- Review of a decision to use coercive powers;
- Review of a decision to accept or reject an enforceable undertaking;
- Review of a decision as to the amount of an administrative penalty; and

- Review of a decision not to remit in whole or part a true administrative penalty.

Review of prosecutorial discretion

23.2 In the context of the current Inquiry, 'prosecutorial discretion' refers to the choice, by the regulator or the DPP, whether or not to impose an administrative penalty, to commence penalty proceedings or to target a particular person for investigation that may ultimately lead to the imposition of penalties. The exercise of this discretion may be guided by formal or informal agency guidelines.[1]

23.3 It is debateable whether decisions made pursuant to prosecutorial guidelines should be subject to merits or judicial review. In a recent study it was reported that

> the general feeling of all respondents [ASIC enforcement officers] towards both judicial and administrative review was that the principles and processes of such reviews are necessary in order to maintain public and parliamentary confidence in ASIC; even though there are occasions when such review is employed as a tactical device to delay ASIC proceedings.[2]

Merits review of decisions to prosecute

23.4 The ARC included decisions to institute proceedings as a class of decisions inappropriate for merits review.[3] The AAT has held that it lacks jurisdiction to review a decision to prosecute breaches of the *Corporations Law*.[4]

23.5 In *Toll*, McMahon DP held that

> whether the decisions capable of being reviewed are said to be either the formation of the view by the [ASC] that a person may have committed an offence, or the causing of a prosecution, or whether the relevant decisions are the subsequent decisions relating to the way in which the prosecution is to be conducted, and whether the applicant should consequently be given leave to amend his application to include the latter category of decisions, all seem to me to be irrelevant. The fact is that none of this series of administrative steps can be regarded as a decision capable of being reviewed by this Tribunal because none of them is an 'ultimate or operative determination' (Director General of Social Services v. Chaney (1980) 47 FLR 80 at 100).[5]

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1 See, for example, discussion of the Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*, Commonwealth Director of Public Prosecutions, <www.cdpp.gov.au/cdpp/>, 16 November 2001 in ch 9 and 10.

2 G Gilligan, H Bird and I Ramsay, *Regulating Directors' Duties — How Effective are the Civil Penalty Sanctions in the Australian Corporations Law?* (1999), Centre for Corporate Law and Securities Regulation, Melbourne, 44.

3 Administrative Review Council, *What Decisions Should Be Subject to Merits Review?* (1999), Commonwealth of Australia, para 4.8.

4 *Re Toll and Australian Securities Commission* (1993) 29 ALD 412 (on the basis that the decision was only preliminary and was not 'ultimate or operative'); *Re Bond and Minister for Justice* (1995) 39 ALD 707 (on the basis that the decision to allow a prosecution to be commenced was a decision made under a State law and was, therefore, not a decision reviewable by the AAT under s 1317B of the *Corporations Law*) — confirmed by the Federal Court in *Bond v Minister for Justice of the Commonwealth* (1997) 72 FCR 505.

5 *Re Toll and Australian Securities Commission* (1993) 29 ALD 412, para 16, 415–416.

> Until guilt or innocence is determined, all acts done leading up to the court's findings, can not be regarded as anything other than acts done preparatory to the making of a decision which will be reviewable in accordance with appropriate law at an appropriate time.
>
> 20. Indeed it is hard to imagine any circumstances in which an initial decision to refer a matter to an external court, panel, tribunal or other appropriate forum can ever be a reviewable decision. The essential character of such a decision is tentative in its application to the real issues. Even in Lamb v. Moss (1983) 49 ALR 533, the high water mark of reviewability, the court did not go so far as to hold that a decision to prosecute, as distinct from a committal decision, would be reviewable.[6]

23.6 The reasoning applied by the AAT in *Toll* is also relevant to judicial review of decisions to commence proceedings.

Judicial review of decisions to prosecute

23.7 The courts have generally excluded judicial review of decisions to prosecute. In *Maxwell v The Queen,* Gaudron and Gummow JJ of the High Court of Australia stated that:

> It ought now be accepted, in our view, that certain decisions involved in the prosecution process are, of their nature, insusceptible of judicial review. They include decisions whether or not to prosecute, to enter a nolle prosequi, to proceed ex officio, whether or not to present evidence and, which is usually an aspect of one or other of those decisions, decisions as to the particular charge to be laid or prosecuted. The integrity of the judicial process — particularly, its independence and impartiality and the public perception thereof — would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what.[7]

23.8 *Maxwell* was concerned with traditional criminal law (the case involved prosecution by the New South Wales DPP of a murder charge). Whether the same principles apply to prosecution of criminal regulatory offences was considered in *Smiles v Commissioner of Taxation*.[8] The taxpayer, Smiles, sought judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) and s 39B of the *Judiciary Act 1903* (Cth) of a decision by the DPP to prosecute offences under the *Crimes Act 1914* (Cth) and the *Taxation Administration Act 1953* (Cth). Prosecutions were commenced under the *Justices Act 1902* (NSW). Smiles sought an injunction to prevent the prosecutions being continued. Smiles alleged that the prosecutions were an abuse of process having been brought for the improper purpose of obtaining publicity (Smiles was a member of the NSW Parliament).

23.9 Davies J held that whilst a decision to prosecute was unlikely to be reviewable under the ADJR Act as either a 'decision' or 'conduct' leading to a decision (on the ba-

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6 Ibid, para 19–20, 416.

7 *Maxwell v The Queen* (1996) 184 CLR 501, 534. Maxwell concerned a criminal prosecution, in which the prosecutor had initially accepted a plea of guilty to manslaughter (in a murder case) but then asked the court to reject the plea. The High Court held that a prosecutor was entitled to withdraw acceptance of a plea.

8 *Smiles v Federal Commissioner of Taxation* (1992) 35 FCR 405.

sis of the reasoning in *Australian Broadcasting Tribunal v Bond*[9]), there was jurisdiction under s 39B of the *Judiciary Act* as the injunctions were being sought against officers of the Commonwealth. Declining to review the decision to institute proceedings, Davies J noted cases concerning the reviewability of a decision to prosecute, observing that:

> The approach taken in the cases I have mentioned is that a decision to prosecute taken by or on behalf of the Director of Public Prosecutions is unexaminable, but this does not prevent a court, certainly a higher court, from controlling legal proceedings so as to prevent abuse of process. Section 5 of the ADJR Act and s 39B of the Judiciary Act are not, however, appropriate vehicles for the general control of abuse of process in State courts.[10]

23.10 Davies J held, however, that taking into account the publicity that would be generated from prosecution of a high profile person in deciding whether to institute proceedings was not an abuse of power, where the proceeding was not being instituted purely for the purpose of publicity. Davies J held:

> It is not wrong to take account of the publicity likely to arise from and the deterrent effect of a prosecution when considering whether or not a prosecution for a taxation offence should be instituted. I see no element of abuse of power in that consideration, rather good administration.[11]

23.11 On appeal to the Full Court of the Federal Court,[12] the Court agreed that it was inappropriate for the Federal Court to interfere with the proceedings in the NSW Local Court, as that court had the power to stay the proceedings, if it considered them to be an abuse of process. *Smiles* case, therefore, leaves open the possibility of judicial review of a decision to prosecute on the basis of abuse of process, at least under s 39B of the *Judiciary Act*.

23.12 It should be noted that the Full Court of the Federal Court disapproved *Smiles* in 1998 in *Oates v Williams*.[13] That case concerned whether a decision by the Minister to consent to proceedings being commenced outside the 5-year statutory limit in the *Corporations Law* was reviewable under s 39B of the *Judiciary Act* on the grounds that the appellant had been denied procedural fairness by not being given an opportunity to be heard prior to the decision being made.

23.13 The Court noted that decisions to prosecute had been held to be reviewable under the ADJR Act in a number of cases prior to the High Court's decision in *ABT v Bond*.

> We will assume it to be correct that the ADJR Act has brought about a fundamental change to the type of decision that is capable of review so that a decision to prosecute may now be reviewable. This would require the conclusion that a decision to prosecute is relevantly a 'decision' that is capable of review under the ADJR Act. It must

9 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.
10 *Smiles v Federal Commissioner of Taxation* (1992) 35 FCR 405, 410.
11 Ibid, 419–420.
12 *Smiles v Federal Commissioner of Taxation* (1992) 37 FCR 538.
13 *Oates v Williams* (1998) 84 FCR 348.

> be remembered that the only decisions that are capable of review under that enactment are ultimate or operative determinations and not expressions of opinion: see *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 337–338. However, the fact that a decision to prosecute might be reviewable if made under a Commonwealth enactment does not alter our conclusion that such a decision is not reviewable under the common law.[14]

23.14 The Court further noted that:

> Because a decision to commence a prosecution is not a reviewable decision that decision-maker can be under no duty or obligation to accord procedural fairness to the accused before the decision is made.[15]

23.15 The Court held that a decision taken under s 1316 of the *Corporations Law* could not be likened to a decision to commence a prosecution. The Court distinguished decisions to *consent to* prosecutions from decisions to *commence* prosecutions, holding that in the former the decision maker need only be satisfied that the proposed prosecution was not frivolous or vexatious (that is, the decision maker was not required to consider the merits of the case), whilst in the latter the decision maker had to be satisfied that there was a prima facie case (that is, the decision maker was required to consider the merits of the case).

23.16 In the present case, the Court held that s 1316 provided a statutory defence to a prosecution because it conferred immunity from a prosecution commenced out of time.

> Even according to traditional theory the Minister could not take away this right or immunity without giving the appellant an opportunity to be heard unless the legislation manifested a clear intention that no such duty existed.[16]

23.17 The Court distinguished the present situation from a decision to prosecute on the basis that

> there is little analogous between a decision to prosecute and a decision that will deprive an accused of a defence. A decision to prosecute does not affect a right or interest at all. But when a bar to a prosecution is no longer available a legal right or immunity has been lost.[17]

23.18 As the Minister had not given the appellant an opportunity to be heard, the Court made a declaration that the consent given was void.

23.19 On appeal, the High Court held that the Minister's consent was not required to commence a prosecution outside the 5-year time limit.[18] The High Court, therefore, did not consider the reviewability of the decision or whether there was a duty to accord procedural fairness.

23.20 The conclusion which may be drawn from these cases is that:

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14 Ibid, 354.
15 Ibid, 354.
16 Ibid, 359.
17 Ibid, 360.
18 *Attorney-General of the Commonwealth v Oates* (1999) 198 CLR 162.

- Under the common law, a decision to commence proceedings will not generally be amenable to judicial review, unless the decision would result in an abuse of the process of the courts;[19]

- Under the ADJR Act, a decision to commence proceedings will only be reviewable if it can be characterised as a 'decision' or 'conduct' within the meanings specified by the High Court in *Australian Broadcasting Tribunal v Bond*.[20]

Excluding judicial review of decisions relating to criminal proceedings

23.21 Statutory rights to judicial review of decisions made as part of the criminal justice process have been restricted.[21] Schedule 2 of the *Jurisdiction of Courts Legislation Amendment Act 2000* (Cth) amended the ADJR Act to remove or restrict rights to review the legality of administrative decisions made in the criminal justice system.[22] The major features are the:

- removal of the right of review of a decision to prosecute;

- restriction of the right to have a related criminal justice process decision heard while a prosecution for an offence or an appeal arising out of a prosecution is before any court;[23] and

- removal of the requirement under the ADJR Act to provide a written statement of reasons for a decision in relation to a range of criminal justice process decisions.

23.22 Clearly, there are good policy reasons why a regulator should be accountable in some way for who it targets for an administrative or civil penalty. It is desirable that the discretion to prosecute is exercised consistently and fairly (see discussion of enforcement discretion in chapter 15 at para 15.20–15.22). This may necessitate the use of published prosecution guidelines,[24] but may not support judicial review of decisions in the absence of the factors referred to in *Smiles* and other cases.

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19 This principle was confirmed by the Federal Court in *Elliott v Knott* [2002] FCA 1030, in which the Federal Court noted that it was open to Elliott to seek a stay of the Victorian Supreme Court proceedings commenced against him by ASIC (in relation to Water Wheel Holdings Ltd and Water Wheel Mills Pty Ltd) on the basis that the decision to commence proceedings had stemmed from an improper use of investigatory powers and was, therefore, an abuse of process.

20 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.

21 See in general the discussion in ch 22 of the various ways in which review has been limited or excluded.

22 *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 9A. There is also no right to seek written reasons for these decisions: *Administrative Decisions (Judicial Review) Act 1977* (Cth), sch 2(e).

23 'Related criminal justice process decisions' specifically include decisions relating to investigation, committal for trial or prosecution of the defendant; decisions in connection with the appointment of investigators or inspectors; decisions in connection with the issue of a warrant, including search and seizure warrants; decisions requiring the production of documents, the giving of information or the summoning of persons as witnesses; and decisions in connection with an appeal.

24 If regulators were to publish prosecution guidelines, certain procedural rights under those guidelines, such as the right to notification and natural justice requirements, could be reviewable. Prosecution guidelines and policies are discussed in ch 9 and 10.

23.23 However, the public interest is also served by a regulator having a broad discretion to institute proceedings. As suggested by the court in *Maxwell v The Queen*,[25] and in relation to merits review[26], not all penalty-related decisions are appropriate for review. The ALRC suggests that the decision to prosecute or institute civil or administrative proceedings is one of those decisions. If courts or tribunals were able to review the exercise of this discretion, penalty proceedings could be frustrated by multiple review applications. The ALRC cannot see how the policy arguments against review of a criminal prosecutor's decision to prosecute would differ from a regulator's decision to target a person for the imposition of a civil or administrative penalty.

Decisions to commence administrative proceedings

23.24 Some form of administrative proceeding may be held before a decision is made by a regulator to impose a quasi-penalty. The form of administrative proceeding varies considerably and includes:

- the formal administrative hearings process under the *Corporations Act 2001* (Cth), which includes the right to be represented, to call witnesses and present evidence;[27]
- the less formal process under the *Telecommunications Act 1997* (Cth), which provides the right to make submissions to the ACA as to why a carrier licence should not be cancelled[28] but does not give a right to a formal hearing; and
- the very informal procedural rule followed by Centrelink that a breach penalty will not be imposed unless the person has first been contacted by telephone or letter.[29]

23.25 In chapter 14, quasi-penalty schemes that include the right to a hearing or to make submissions to the regulator prior to the imposition of a quasi-penalty were considered in greater detail. In those cases, the person on whom the quasi-penalty might be imposed is given an opportunity to make a case to the regulator either at the hearing or by way of submission as to why the penalty should not be imposed.[30] As procedural fairness is to be afforded as part of the administrative proceeding undertaken by the regulator in order to decide whether to impose the quasi-penalty, the ALRC sees no reason that a decision to commence an administrative proceeding for imposition of a quasi-penalty should be open to challenge under the ADJR Act. It is not a final or op-

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25 *Maxwell v The Queen* (1996) 184 CLR 501.

26 See ch 21.

27 The procedure is explained in detail in Australian Securities & Investments Commission, *Hearings Practice Manual* (1999) Australian Securities & Investments Commission (updated: 7 March 2002) and available on ASIC's website at <www.asic.gov.au>.

28 *Telecommunications Act 1997* (Cth), s 72.

29 The Commonwealth Ombudsman recommended that this practice be the minimum requirement during an investigation and before a breach penalty was imposed: Commonwealth Ombudsman, *Social Security Breach Penalties — Issues of Administration* (2002), Commonwealth Ombudsman, rec 7.

30 The ALRC also recommended that regulated parties be given adequate prior notice of a regulator's intention to impose a quasi-penalty or to commence proceedings to determine if a quasi-penalty should be imposed: see Recommendations 14–2 and 14–4.

erative decision and, in any event, the ensuing administrative proceeding provides an opportunity to cure any defect in the decision to commence the proceeding.

Preliminary view

23.26 In DP 65, the ALRC proposed that:

> **Proposal 10–1.** A regulator's decision to initiate any form of criminal, civil or administrative penalty action, or not to initiate any such action, should not be subject to any form of review.
>
> **Proposal 10–2.** A regulator's decision to target or investigate any entity or group of entities, or not to target or investigate further or at all any entity or group of entities, should not be subject to any form of review.[31]

Consultations and submissions

Review of a decision to initiate action

23.27 Response to this proposal was mixed. In some submissions and consultations, the view was expressed that review of decisions to initiate action were unnecessary as any defect could be cured in the ensuing court process[32] and issues were better resolved as part of the substantive trial or hearing.[33] In particular, it was stated that merits review should not be available.[34] Another submission noted that review of a decision to initiate action to impose a penalty was an unnecessary step as the penalty itself was subject to review.[35] Another submission strongly opposed Proposals 10–1 and 10–2 noting that:

> Such a broadly framed prohibition on reviewing enforcement decisions of this nature would unduly and unacceptably threaten the values of accountability, legality and procedural fairness.[36]

23.28 Environment Australia submitted that 'a decision to initiate penalty action is not appropriate for review. Accountability is more appropriately provided through guidelines'.[37] ASIC submitted that a decision to initiate criminal, civil or administrative action was not a decision for the purposes of the ADJR Act or AAT review as it was not a substantive decision because it was not final, operative and determinative.[38] ASIC opposed review of this type of decision noting that there were strong policy reasons for such decisions being exempt from administrative law review including that allowing review might encourage a proliferation of actions that could delay or frustrate

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31 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Proposals 10–1 and 10–2.

32 Australian Government Solicitor, *Consultation*, Sydney, 27 August 2002; A Hudson, *Consultation*, Melbourne, 4 September 2002; Attorney-General's Department, *Consultation*, Canberra, 10 September 2002.

33 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.

34 A Hudson, *Consultation*, Melbourne, 4 September 2002.

35 Australian Taxation Office, *Submission CAP 16*, 17 September 2002.

36 K Yeung, *Submission CAP 20*, 9 October 2002, 7.

37 Environment Australia, *Submission CAP 26*, 24 October 2002, 7. The use of guidelines is discussed in detail in ch 6.

38 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.

the process of justice. ASIC submitted that there was strong policy support for prompt determination of issues to resolve the uncertainty faced by the person accused.[39] ASIC expressed concern that the role of the Commonwealth Ombudsman should not be diminished by excluding jurisdiction for the Ombudsman to review decisions. Another regulator noted:

> It is a fundamental characteristic of regulatory independence that threshold decisions to commence investigations remain unchallengeable. As a matter of law the mere *decision* to commence an investigation does not of itself necessarily involve compromising any common law or administrative rights that repose in an entity.[40]

23.29 In one consultation support was expressed for review of decisions to initiate action. The Taxation Committee of the Law Council of Australia noted that review of tax decisions under s 39B of the *Judiciary Act* was very constrained — that the *Hickman*[41] principle precluded review in the absence of 'bad faith'. It stated that there was a need for accountability if power is exercised for an improper purpose.[42]

Review of a decision not to take action

23.30 ASIC also considered that a decision not to take action should not be subject to review as it was not determinative of any issue.[43] In one consultation it was noted that it was almost impossible to review a decision not to take action in the absence of specific statutory provisions requiring action to be taken.[44] The reasons why action was not taken might be required to be given, but if there was potential for abuse, for example through frivolous complaints being made by competitors, the regulator's decision should be exempt from review.[45] The problem of frivolous or unfounded complaints was also mentioned in another consultation.[46]

23.31 Another issue raised was how standing to seek review of a decision not to take action would be determined and it was noted that the potential number of persons with 'interests affected' by the decision might be huge.[47] The undesirability, from a public policy perspective, of allowing victims of crime to seek review of decisions by the police or the DPP not to proceed with a prosecution was also noted. The risk that investigatory procedure or information that the regulator would prefer to keep confidential might be revealed to the person accused was also noted.[48]

Review of a decision to investigate a particular person

23.32 The present absence of review by anyone other than the Commonwealth Ombudsman of how investigations were undertaken was noted with concern in one ~~consultation.[49] In one submission~~, the view was expressed that if an investigation

39 Ibid.
40 Australian Competition & Consumer Commission, *Submission CAP 24*, 15 October 2002, 12.
41 Derived from *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598.
42 Law Council of Australia, *Consultation*, Sydney, 25 July 2002.
43 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.
44 A Hudson, *Consultation*, Melbourne, 4 September 2002.
45 Ibid.
46 Attorney-General's Department, *Consultation*, Canberra, 10 September 2002.
47 Ibid.
48 Ibid.

tation.[49] In one submission, the view was expressed that if an investigation amounted to an attempt to improperly prosecute a person, the regulator 'should be held accountable for such actions by judicial review'.[50]

23.33 Another submission opposed allowing review or challenge of a decision to commence an investigation, noting that if review were available the 'objective of regulatory efficiency risks being hindered by challenges intended to sterilise an investigation, or unreasonably hinder court proceedings'.[51] It also stated that:

> It is a fundamental characteristic of regulatory independence that threshold decisions to commence investigations remain unchallengeable. As a matter of law the mere *decision* to commence an investigation does not of itself necessarily involve compromising any common law or administrative rights that repose in an entity.
>
> It is only after regulatory activity is undertaken that such rights might be in issue. For example, the decision to investigate a company, without more, means little and there would be no utility in challenging such a decision.[52]

23.34 One other submission commented that 'accountability and transparency can be assured through guidelines … and other mechanisms (such as agency annual reports and ANAO performance reports)'.[53]

Conclusion

23.35 The ALRC acknowledges that the availability of some form of judicial review of prosecutorial discretion *on limited grounds* is an important avenue of accountability and does not propose recommending any changes to the current law to exclude the possibility of judicial review of a decision to institute proceedings on the grounds of abuse of process. In relation to a decision not to take action and to a decision to target a particular person for investigation, the ALRC also does not propose recommending any changes to the current law on these issues.

23.36 The ALRC does consider, however, that there is no reason why a decision to institute proceedings for the imposition of a civil or administrative penalty should be open to challenge under the ADJR Act, when a decision to institute criminal proceedings is immune from review under the ADJR Act. The ALRC therefore recommends that the law be harmonised in this area by amending Schedule 1 of the ADJR Act to exclude a decision to institute civil proceedings for imposition of a penalty and a decision to institute administrative proceedings for the imposition of a quasi-penalty (such as a disqualification order under s 206F or a banning order under s 920A of the *Corporations Act*) from review under the ADJR Act.

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49 A Hudson, *Consultation*, Melbourne, 4 September 2002.
50 A Hudson, *Submission CAP 19*, 8 October 2002.
51 Australian Competition & Consumer Commission, *Submission CAP 24*, 15 October 2002, 6.
52 Ibid, 12.
53 Environment Australia, *Submission CAP 26*, 24 October 2002, 7. See discussion of guidelines in ch 6 and discussion of other sources of public accountability in ch 24.

Recommendations

Recommendation 23–1. Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be amended to provide that decisions to initiate civil proceedings for imposition of a penalty for contraventions of a law of the Commonwealth are not decisions to which that Act applies.

Recommendation 23–2. Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be amended to provide that decisions to initiate administrative proceedings for the imposition of a quasi-penalty for contraventions of a law of the Commonwealth are not decisions to which that Act applies.

Decisions to use coercive powers

23.37 Schedule 2 of the ADJR Act provides that s 13 of that Act (the right to seek written reasons for a decision) does not apply to:

> (f) decisions in connection with the institution or conduct of proceedings in a civil court, including decisions that relate to, or may result in, the bringing of such proceedings for the recovery of pecuniary penalties arising from contraventions of enactments, and, in particular: …
>
> (iv) decisions under enactments requiring the production of documents, the giving of information or the summoning of persons as witnesses'.[54]

23.38 The extent of this exemption was considered in *Ricegrowers Co-operative Mills Ltd v Bannerman*,[55] a case concerning a notice to provide information and documents issued under s 155 of the *Trade Practices Act 1974* (Cth) (TPA). The Full Court of the Federal Court held that whilst the decision to issue the notice was a decision to which the ADJR Act applied, it was subject to the exemption and the applicant was not entitled to seek reasons for the decision. The Court held that sch 2(f)(iv) applied to 'decisions in connection with the investigation of persons for contraventions of enactments and decisions under enactments requiring the production of documents and the giving of information'.[56]

23.39 In relation to the use of coercive powers in taxation matters, schedule 1(e) of the ADJR Act provides that:

> (e) decisions making, or forming part of the process of making, or leading up to the making of, assessments or calculations of tax, charge or duty, or decisions disallowing objections to assessments or calculations of tax, charge or duty, or deci-

54 *Administrative Decisions (Judicial Review) Act 1977* (Cth), sch 2(f)(iv). The right to seek written reasons for a decision is discussed in ch 15.
55 *Ricegrowers Co-operative Mills Ltd v Bannerman* (1981) 38 ALR 535.
56 Ibid, 541.

> sions amending, or refusing to amend, assessments or calculations of tax, charge or duty …

are not reviewable decisions.

23.40 Section 264 of the *Income Tax Assessment Act 1936* (Cth) gives the Commissioner a broad power to require the provision of information and documents. Whether a decision to issue a notice under s 264 was a decision reviewable under the ADJR Act was considered by the Full Court of the Federal Court in *Deputy Commissioner of Taxation v Clarke and Kann*.[57] In *Clarke and Kann*, the Commissioner served a s 264 notice on a law firm requiring information about the affairs of a client. The firm sought review under s 5 of the ADJR Act of the decision to issue the notices.

23.41 The Court held that the decision was a decision to which the ADJR Act applied and that the exemption did not apply as the decision to issue the notices was not a decision leading up to an assessment.

> [A] decision does not lead to the making of an assessment merely because it precedes the making of an assessment or because its purpose is to enable or facilitate the making of any assessment which may be made. A decision is not a decision leading up to the making of an assessment unless the making of an assessment has followed or will follow from the decision.[58]

23.42 Since *Clarke and Kann* it has been accepted that a decision to issue a notice under s 264 of the *Income Tax Assessment Act* may be reviewed under the ADJR Act.[59] Section 263 of the *Income Tax Assessment Act* gives the Commissioner a broad power to enter premises to search for documents. Exercise of this power has also been held by the Federal Court to be amenable to review under the ADJR Act and the *Judiciary Act*.[60] Similar powers to require the production of documents under s 30 and 33 of the *Australian Securities Commission Act 1989* (Cth)[61] have also been held to be amenable to judicial review.[62]

Consultations and submissions

23.43 Whilst there is no right to seek reasons for a decision to issue a notice under s 155 of the TPA, the decision to issue the notice may still be subject to review. The ACCC noted in its submission that 'investigative activity *subsequent* to that decision [to commence an investigation] (such as the issue of s 155 notices) necessarily impacts

57 *Deputy Commissioner of Taxation v Clarke and Kann* (1984) 1 FCR 322.
58 Ibid, 325.
59 See, for example, *McCormack v Deputy Commissioner of Taxation* [2001] FCA 1700.
60 See *Federal Commissioner of Taxation v Citibank Ltd* (1989) 20 FCR 403; *Allen Allen & Hemsley v Deputy Commissioner of Taxation* (1989) 20 FCR 576.
61 Now covered by *Australian Securities and Investments Commission Act 2001* (Cth), s 30, 31, 32A, 33.
62 *Financial Custodian Corp of Victoria Pty Ltd v Taylor* (1991) 6 ACSR 215; *MacDonald v Australian Securities Commission* (1993) 43 FCR 466; *Kirk v Australian Securities Commission* (1994) 12 ACLC 306; *Clifford Corp Ltd v Australian Securities and Investments Commission* (1998) 30 ACSR 130.

on rights that entities enjoy. In these circumstances, such activity is both reviewable by the courts and/or Administrative Appeals Tribunal'.[63]

23.44 The ALRC's research and the lack of many comments in consultations or submissions on this issue indicate that there is no obvious problem in this area and that the current law adequately addresses this issue, accordingly the ALRC sees no need to make any recommendations to reform the law in this area.

Decisions to accept or reject an enforceable undertaking

Merits review

23.45 The AAT does not prima facie have power to review a decision made under either s 87B of the TPA or s 93AA of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) to accept an enforceable undertaking as neither the TPA or the ASIC Act confers jurisdiction on the AAT to review such a decision. However, in *Re Donald and Australian Securities and Investment Commission*,[64] a Deputy President and two members of the AAT held that as part of its jurisdiction to review a decision imposing a banning order under s 829 of the *Corporations Law*, the AAT was given power by s 43 of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) to 'exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision'. As ASIC had power to accept an enforceable undertaking under s 93AA of the ASIC Act in the circumstances of the case (that is, as an alternative to making a banning order), the AAT had power to 'exercise [ASIC's] powers under s 93AA of the Act' as part of its review of ASIC's decision to make a banning order.[65]

23.46 The AAT set aside ASIC's decision that a banning order be made for a period of four years and substituted a banning order for a shorter period and directed ASIC to accept an enforceable undertaking. On appeal to the Federal Court the decision of the AAT was upheld.[66] From this case, it appears that in certain circumstances, the failure by a regulator to accept an enforceable undertaking may be subject to merits review, where the decision made by the regulator in place of the acceptance of an undertaking, is itself subject to merits review.

23.47 One commentator has criticised the lack of an avenue of external merits review of a regulator's decision to accept or reject an enforceable undertaking. In an article about s 87B undertakings,[67] Frank Zumbo, was critical of the unavailability of review of the ACCC's decision to accept an undertaking. He proposed that undertakings be subject to review by the Australian Competition Tribunal (ACT) to 'consider

63 Australian Competition & Consumer Commission, *Submission CAP 24*, 15 October 2002, 12. The ACCC referred to two cases on this issue — *Melbourne Home of Ford Pty Ltd v Trade Practices Commission* (1979) ATPR 40–107 and *TNT Australia Pty Ltd v Fels* (1992) ATPR 41–190.

64 *Re Donald and Australian Securities and Investment Commission* (2001) 64 ALD 717.

65 Ibid, 729.

66 *Australian Securities & Investments Commission v Donald* [2002] FCA 1174 (20 September 2002).

67 F Zumbo, 'Section 87B Undertakings; There's No Accounting for Such Conduct!' (1997) 5 *Trade Practices Law Journal* 121.

whether the undertaking is in keeping with the statutory criteria to be applied by the ACCC in accepting the undertaking'[68] — it is not clear whether he proposed a review of the merits of the decision or its legality. He also contended that review of an undertaking should be available to third parties who are affected by the decision. This review would also be by the ACT, to determine 'whether or not the s 87B undertaking adequately takes into account any adverse impact of the undertaking on the third party seeking review'.[69] The issue of the standing of third parties to challenge the acceptance of an undertaking is discussed below at para 23.51–23.53.

23.48 In its submission, the ACCC referred to a review of the use of s 87B undertakings conducted in 1997 by Associate [ACCC] Commissioner Don Watt. The review concluded that the use of enforceable undertakings was an appropriate strategy for the ACCC to pursue as it 'provided a quicker and more cost-effective mechanism for resolution of court proceedings'.[70] That review did not address the issue of whether a decision to accept or reject an enforceable undertaking should be subject to merits review.

Judicial review

23.49 In *Australian Petroleum Pty Ltd v ACCC*,[71] the Federal Court held that a decision made by the ACCC refusing to negotiate a variation or withdrawal of an undertaking given in relation to a merger was reviewable under the ADJR Act, as the decision to withhold consent was a decision within the meaning of s 3 of the ADJR Act. Lockhart J held that the undertakings were 'an instrument' made under the TPA and that the undertakings had 'the capacity to affect legal rights and obligations; and in fact do affect them'.[72] The decision did not specifically address whether the initial decision to accept an undertaking was reviewable.[73]

23.50 Some commentators consider that the decision to accept an undertaking is, at least, reviewable under the ADJR Act in relation to procedural fairness.[74] However, as undertakings are negotiated and agreed, it seems unlikely that a situation would arise in which the party giving the undertaking would seek to have the ACCC's acceptance of the undertaking reviewed. On this point, ASIC noted in its submission that:

> Unlike a true administrative penalty an enforceable undertaking is given to and not imposed by the regulatory agency. For example, sections 93AA and 93A of the Aus-

68 Ibid, 124.
69 Ibid, 124.
70 Australian Competition & Consumer Commission, *Submission CAP 24*, 15 October 2002. Enforceable undertakings are discussed further in ch 16.
71 *Australian Petroleum Pty Ltd v Australian Competition and Consumer Commission* (1997) 73 FCR 75.
72 Ibid, 89.
73 Although counsel for the ACCC argued that it was not. The same view was expressed by counsel for the ACCC in *Virgin Blue Airlines Pty Ltd v Australian Competition and Consumer Commission and Another* (2002) 186 ALR 377.
74 Under *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 5(1)(b). See K Yeung, *The Public Enforcement of Australian Competition Law* (2001), Australian Competition and Consumer Commission, Canberra, 114. Note also that the submission by the Australian Industry Group to the Dawson Committee Review of the TPA stated that ADJR Act review was available: The Australian Industry Group, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/109_Submission_AIG.pdf>, 23 July 2002.

> tralian Securities and Investments Commission Act 2001 (the 'ASIC Act') empower ASIC to accept written enforceable undertakings in certain circumstances. ASIC does not have the power to require a person to enter into an undertaking. Equally, ASIC cannot be compelled by the promisor to accept an undertaking.[75]

Third party rights to seek review

23.51 Whether third parties have rights to seek review of an undertaking accepted by the ACCC was raised in *Virgin Blue Airlines Pty Ltd v ACCC*,[76] in which Virgin sought to challenge the acceptance by the ACCC of an undertaking given by a competitor of Virgin in relation to a merger between the competitor and Impulse Airlines. Virgin sought reasons under s 13 of the ADJR Act for the ACCC's decision to accept the undertaking.

23.52 The ACCC argued that judicial review of the decision to accept an undertaking was not available. Counsel argued that the ACCC had sole standing to seek an injunction in relation to a prospective breach of s 50 of the TPA and that this was evidence that the parliament did not intend 'that commercial competitors should have standing to unsettle merger arrangements by an attack upon administrative decisions of the ACCC'.[77] Counsel for the ACCC also argued that a right to seek judicial review of a decision to accept an undertaking was inconsistent with the rights of a competitor to seek any form of relief other than an injunction in relation to a merger, including divestiture.

23.53 The issue of Virgin's standing to seek review under either the ADJR Act or s 39B of the *Judiciary Act* and the reviewability of the ACCC's decision to accept the undertaking from Virgin's competitor was reserved for decision at hearing. The case had not yet been decided as at 24 October 2002.

Consultations and submissions

23.54 The ALRC received only one submission on this issue. ASIC noted:

> Any discussion or recommendation made with respect to administrative law review of the acceptance of an enforceable undertaking or decisions associated thereto must recognise the fact that it is an agreement voluntarily entered into by the promisor and the regulatory agency. ASIC is very concerned about any suggestion that an agreement to enter into, or the terms of, an undertaking should be subject to an administrative law challenge, particularly by third parties not a party to the undertaking.[78]

23.55 The ALRC notes that the issue as to whether a third party has standing to challenge the acceptance by the regulator of an enforceable undertaking is currently before the Federal Court in the *Virgin Blue* case,[79] and, therefore, it is inappropriate for the

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75 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 5.

76 *Virgin Blue Airlines Pty Ltd v Australian Competition and Consumer Commission and Another* (2002) 186 ALR 377.

77 Ibid, 389.

78 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 5.

79 *Virgin Blue Airlines Pty Ltd v Australian Competition and Consumer Commission and Another* (2002) 186 ALR 377.

ALRC to make any recommendations pending the outcome of that case. The absence of any comments other than those of ASIC on the reviewability of a decision to accept or reject an enforceable undertaking suggests that the current law adequately addresses this issue and accordingly there is no need to reform the law in this area.

Review of a decision as to the amount of an administrative penalty

23.56 Under Schedule 1, Division 284 of the *Taxation Administration Act*, the Commissioner of Taxation has power to determine the amount of an administrative penalty that will apply in certain circumstances. The penalty is calculated as a base penalty[80] subject to any percentage increase[81] or reduction.[82] Determining whether the base penalty should be increased involves exercise of discretion by the Commissioner as the factors considered relevant include any attempt to prevent or obstruct the Commissioner[83] and any failure to disclose information within a reasonable time.[84] Discretionary factors are also relevant to any reduction in the penalty, voluntary disclosure of information to the Commissioner in circumstances in which the disclosure 'can reasonably be estimated to have saved the Commissioner a significant amount of time or significant resources in the audit'[85] will result in a 20% reduction in the base penalty.

23.57 A person dissatisfied with the amount of an administrative penalty determined by the Commissioner under division 284 may object to that decision in accordance with Part IVC of the *Taxation Administration Act*. This process is described below at para 23.68.

Decisions not to remit a penalty in whole or part

23.58 Legislation under which true administrative penalties arise generally includes a power to remit those penalties.[86] The power to remit the penalty is a specific form of discretion. Most monetary true administrative penalties are in taxation and communications legislation. Taxation legislation provides discretions to remit penalties for late lodgement and late payment. Communications legislation provides discretions to remit penalties for late payment of licence and other fees. The power to remit a penalty is generally automatic; there is no requirement that the person on whom the penalty is imposed make an application for remission.[87]

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80 Determined under sch 1, s 284–85.

81 Determined under sch 1, s 284–220.

82 Determined under sch 1, s 284–225.

83 *Taxation Administration Act 1953* (Cth), sch 1, s 284–220(a).

84 Ibid, sch 1, s 284–220(b).

85 Ibid, sch 1, s 284–225(1)(b).

86 See for example *Broadcasting Services Act 1992* (Cth), s 205D; *Income Tax Assessment Act 1936* (Cth), s 221N; *Radiocommunications Taxes Collection Act 1983* (Cth), s 11; *Taxation Administration Act 1953* (Cth), s 8AAG, sch 1 s 16–45, 45–640, 298–20; *Telecommunications Act 1997* (Cth), s 73, 468; *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth), s 23D, 101A.

87 Although under determinations made by the ACA under s 73 and 468 of the *Telecommunications Act 1997* (Cth) a person may apply to the ACA for remission of a late payment penalty. See Australian Communications Authority, *Telecommunications (Late Payment of Annual Carrier Licence Charge) Determination No 1 of 1999*, <www.aca.gov.au>, 19 February 2002, s 7 and Australian Communications

Factors relevant to remission of penalties

23.59 The Australian Communications Authority (ACA) and the ATO use contrasting policy approaches to the remission of penalties.[88] The ACA makes determinations that set out broad reasons for remission, but do not specify the levels of remission.[89] Determinations made by the ACA are disallowable instruments,[90] which means that they must be tabled in Parliament and are subject to disallowance by Parliament. The ATO's remission policies are published in the form of tax rulings setting out prescriptive ranges of remissions based on mitigating and aggravating factors.[91] ATO tax rulings are not disallowable instruments (and therefore not subject to scrutiny by Parliament) and are only 'administratively binding' on the ATO.[92] This means that they are not legally binding, but the ATO has stated that 'the basic administrative policy of the ATO is to stand by what is said in a Taxation Ruling and to depart from a Taxation Ruling only where there are good and substantial reasons to do so'.[93]

Remission of penalties under communications and broadcasting legislation

23.60 In the communications and broadcasting penalties scheme, there are several ways that a late payment penalty applies (calculated as a percentage of the amount unpaid). It may arise:

- By operation of the primary legislation, by being specified as applying to late payments. The percentage per year is specified in the primary legislation (20%);[94]
- By operation of the primary legislation, by being specified as applying to late payments. The percentage per year is specified in the primary legislation (20%), subject to a lower rate being set by the ACA in a determination;[95]

Authority, *Telecommunications (Annual Numbering Charge — Late Payment Penalty) Determination 2000*, <www.aca.gov.au>, 19 February 2002, s 9.

88 See ch 17 for a more detailed discussion of the factors relevant to the discretion to remit a penalty.

89 See for example Australian Communications Authority, *Telecommunications (Annual Numbering Charge — Late Payment Penalty) Determination 2000*, <www.aca.gov.au>, 19 February 2002. The ACA also has discretion to remit penalties for late payment of a telecommunications carrier licence charge (*Telecommunications Act 1997* (Cth), s 73), late payment of a universal service levy (*Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth), s 23D), late payment of a National Relay Service levy (*Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth), s 101A) and penalty interest for late payment of radiocommunications taxes (*Radiocommunications Taxes Collection Act 1983* (Cth), s 7A).

90 *Telecommunications Act 1997* (Cth), s 73(10).

91 See for example Australian Taxation Office, *TR 2000/3 Taxation Ruling — Income Tax: Remission of Penalty and General Interest Charge from RPS, PAYE and PPS Payments*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/findrul.htm>, 19 February 2002.

92 Ibid, Preamble. See also *Taxation Administration Act 1953* (Cth), Pt IVAAA, which makes it clear that public rulings set out the ways in which, 'in the Commissioner's opinion', tax laws apply.

93 Australian Taxation Office, *TR 92/1 Taxation Ruling — Income Tax and Fringe Benefits Tax: Public Rulings*, <www.ato.gov.au>, 19 February 2002, para 23.

94 *Broadcasting Services Act 1992* (Cth), s 205D.

95 *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth), s 23D, 101A.

- At the discretion of the ACA, who may make a written determination that a late payment penalty will apply. The percentage per year is specified in the primary legislation (20%), subject to a lower rate being set by the ACA in a determination;[96] or

- At the discretion of the ACA, who may make a written determination that a late payment penalty will apply and at what percentage.[97]

23.61 Similarly, there are several ways in which the power to remit the late payment penalty is expressed. It may be:

- Specified in the primary legislation, by permitting the Minister or an officer authorised by the Minister to remit the additional fee or part of that fee;[98]

- Specified in the primary legislation, by permitting the ACA to remit the whole or part of a penalty;[99]

- At the discretion of the ACA, who may make a written determination that the whole or part of a late payment penalty may be remitted;[100] or

- At the discretion of the Governor-General, who may make regulations providing for the remission of a tax.[101]

23.62 The right of review of a decision not to remit a penalty in whole or part, and the form review will take, may also be provided at different levels of regulation. Under the *Broadcasting Services Act 1992* (Cth) the right of the licensee to appeal directly to the AAT a decision not to remit in whole or part an additional fee is specified in the primary legislation.[102] The *Broadcasting Services Act* scheme, therefore, does not provide for internal review, but allows for external merits review. In its submission to this Inquiry, the ABA commented generally on the inappropriateness of internal review of ABA decisions noting that:

> The *Broadcasting Services Act* was designed to require most significant decisions to be made at board level, and accordingly, this feature of the Act would require amendment to enable lower level decision-making, before internal review could have a significant place in the ABA's enforcement regime. Schedule 3, clause 18 of the Act imposes significant restrictions on the power of the ABA to delegate its functions. While internal review can clearly improve the quality of decision-making, a balance needs to be struck between the values of quality and speedy resolution of matters. In the ABA's case, the practice of decision-making by staff recommendation to the ABA effectively means that decisions are the product of input by the 7 ABA members, as well as by the team of staff that prepares the draft decision, so that there is an informal

96 *Telecommunications Act 1997* (Cth), s 73, 468.
97 *Broadcasting Services Act 1992* (Cth), s 7A.
98 Ibid.
99 *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth), s 23D, 101A.
100 *Telecommunications Act 1997* (Cth), s 73, 468.
101 *Radiocommunications Taxes Collection Act 1983* (Cth), s 11.
102 *Broadcasting Services Act 1992* (Cth), s 204.

> review process in place. In the ABA's view, the weaknesses of this process are more about inefficiency than about the absence of internal review.[103]

23.63 As decisions are made at the most senior level possible within the ABA (ie, by the Board itself), internal review of such decisions is not possible. For this reason, the ALRC considers that a decision made under the *Broadcasting Services Act* not to remit in whole or part an additional fee is one where internal review is clearly inappropriate and it is appropriate that the first available form of review should be external merits review.

23.64 Under the *Telecommunications Act* and the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth), the right to request internal review of a decision not to remit in whole or part a late payment penalty is provided by s 555 of the *Telecommunications Act* which specifies the decisions for which an application may be made to the ACA for reconsideration of the decision (ie, internal review).[104] If the person is not satisfied with the decision of the ACA after reconsideration, an application may be made to the AAT for review of the ACA's decision.[105] These schemes, therefore, provide a system of mandatory internal review followed by external merits review.[106]

23.65 Unlike the ABA, decisions about whether to remit in whole or in part an additional fee or late payment penalty are not made at the highest level of the ACA. For this reason, the ALRC considers that it is appropriate that such decisions be subject to internal review in the form of reconsideration by the ACA under s 559 of the *Telecommunications Act.* As there are strict time limits for the process of reconsideration by the ACA,[107] and as the penalty will not have any effect on the person until and unless the ACA takes action to collect it,[108] the ALRC considers that a process of mandatory internal review before external merits review may be sought is appropriate.

23.66 Remission of a penalty under the *Radiocommunications Taxes Collection Act 1983* (Cth) is automatic provided certain conditions are met and, therefore, as no decision to remit the penalty in whole or part is made, there is no decision capable of being reviewed.

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103 Australian Broadcasting Authority, *Submission CAP 23*, 14 October 2002, 10–11.

104 *Telecommunications Act 1997* (Cth), s 559.

105 Ibid, s 562.

106 The ACA publishes a plain English guide to the laws it administers, including details of review rights: ACA, Australian Communications Authority, *The ACA, the Law and You*, Australian Communications Authority, <www.aca.gov.au/publications/brochure/acalaw.pdf>, 24 October 2002.

107 The ACA must make a decision within 90 days of receiving an application for reconsideration. If the ACA does not make a decision within the time limit, the original decision is deemed to have been affirmed: *Telecommunications Act 1997* (Cth), s 560.

108 Late payment penalties may be recovered by the ACA, on behalf of the Commonwealth, as debts due to the Commonwealth: ibid, s 73, 468; *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth), s 23D, 101A.

Remission of penalties under taxation legislation

23.67 The Commissioner of Taxation has legislative power to remit in whole or part a number of tax penalties[109] and the general interest charge (GIC).[110] In all cases, the power to remit the penalty is specified in the primary legislation.

23.68 If a decision is made not to remit the penalty in whole or part, a person who is dissatisfied with the decision may make an application for internal review in accordance with Part IVC of the *Taxation Administration Act*.[111] In some cases, an objection may only be made if the amount payable after the refusal is more than 2 penalty units.[112] The form of review provided is internal merits review. In its submission, the ATO noted that:

> With the exception of 'true administrative penalties' such as the General Interest Charge (GIC), all penalties imposed or applied by the ATO are subject to merit review in processes prescribed under the *Taxation Administration Act 1953*.
>
> A taxpayer generally has rights of objection against any penalties imposed. Objections are handled internally but are independent of the original decision maker.[113]

23.69 Part IVC provides that a person who is dissatisfied with an assessment, determination, notice or decision may make a 'taxation objection'.[114] A taxation objection must be made in an approved form to the Commissioner.[115] The Commissioner must make an objection decision and provide it in writing.[116] If the person is dissatisfied with the Commissioner's decision an application for review may be made to the AAT or to the Federal Court.[117]

23.70 The AAT's review of the decision is subject to modifications specified in Division 4 of Part IVC. The most relevant modification is that the AAT has no power to grant a stay of the operation of the decision (as s 41 of the AAT Act is excluded)[118] and:

> The fact that a review is pending in relation to a taxation decision (other than a registration-type sales tax decision) does not in the meantime interfere with, or affect, the

109 *Income Tax Assessment Act 1936* (Cth), s 221N; *Taxation Administration Act 1953* (Cth), sch 1, s 16–45, 298–20.

110 *Taxation Administration Act 1953* (Cth), s 8AAG,, sch 1, s 45–640.

111 In relation to decisions made under the *Income Tax Assessment Act 1936* (Cth), s 221N; *Taxation Administration Act 1953* (Cth), sch 1, s 16–45 and 298–20.

112 *Taxation Administration Act 1953* (Cth), sch 1, s 298–20. The ATO commented on this limit in its submission, noting that: 'The ATO's administrative penalties were the subject of a wide ranging review in 2000 and as part of that work the reviews available to taxpayers were limited from those adopted previously. Specifically, Parliament considered that where less than or equal to 2 penalty units for Failure To Lodge were applied, this decision should not be available for internal review but the decision could be reviewed under [the] Administrative Decisions (Judicial Review) Act 1977': Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.124.

113 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 1.37–1.38.

114 *Taxation Administration Act 1953* (Cth), s 14ZL.

115 Ibid, s 14ZU.

116 Ibid, s 14ZY.

117 Ibid, s 14ZZ.

118 Ibid, s 14ZZB.

> decision and any tax, additional tax or other amount may be recovered as if no review were pending.[119]

23.71 The ATO notes, however, that its policy is 'to not attempt to recover a debt including a penalty, whilst an objection is under consideration, unless there is a considerable risk. Accordingly, the client is not usually disadvantaged by the raising of administrative penalties prior to the internal and external review process'.[120]

23.72 Review by the Federal Court is also subject to modifications specified in Division 5 of Part IVC. Again, the most relevant modification is that the decision is not affected by the pending Federal Court review and 'any tax, additional tax or other amount may be recovered as if no review were pending'.[121] This scheme provides for internal review followed by external merits review or judicial review.

23.73 There is no avenue for internal review of a decision not to remit in whole or part the GIC.[122] In its submission the ATO noted that:

> While the ATO supports the broad thrust of the proposal that all administrative penalties should be the subject of review, the volume of certain penalties imposed e.g. GIC and the Failure To Lodge Penalty, would suggest that some restrictions may need to apply.[123]

23.74 The ATO noted that where there is

> the broadscale imposition *by statute* of penalties such as the GIC to a considerable number of taxpayers … the feasibility of addressing remissions in all cases prior to imposition is impossible due to the numbers of cases and the lack of individual taxpayer information.[124]

23.75 The ATO also commented that '[r]emission decisions in relation to the GIC are reviewable under the *Administrative Decisions (Judicial Review) Act 1977*'.[125] The ATO stated that:

> A discretionary decision, made by a regulator, not to remit administrative penalties imposed by statute should be, and is, subject to review where such a decision falls within the definition of a 'decision of an administrative character' for the purposes of the *Administrative Decisions (Judicial Review) Act 1977*.[126]

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119 Ibid, s 14ZZM.

120 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.129. See also ch 28: Australian Taxation Office, *ATO Receivables Policy*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/browse.htm?toc=03:ATO%20Guidelines%20and%20Policy:ATO%20Receivables%20Policy>, 12 September 2001.

121 *Taxation Administration Act 1953* (Cth), s 14ZZR.

122 Part IVC does not apply to a decision under s 8AAG or sch 1, s 45–640 of the *Taxation Administration Act 1953*..

123 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.123.

124 Ibid, para 3.8.

125 Ibid, para 3.21.

126 Ibid, para 2.118.

23.76 The view expressed by the ATO is supported by *Strathfield Group Wholesale Pty Ltd v Deputy Commissioner of Taxation*,[127] in which Lindgren J of the Federal Court noted that where a taxpayer is not given a right of objection under Pt IVC of the *Taxation Administration Act*, that person's rights to review were limited to the ADJR Act (subject to any applicable exemptions in sch 1(e) of that Act) and s 39B of the *Judiciary Act*. The ability to seek review under the ADJR Act of a decision under s 8AAG not to remit an amount of GIC was considered by the Federal Court in *Elias v Federal Commissioner of Taxation*,[128] where, although the right to review under the ADJR Act was accepted, the applicant was not successful.

23.77 The ATO explained the lack of an internal review mechanism for a decision not to remit in whole or part the GIC thus:

> The GIC is imposed by statute primarily for the late payment of tax related liabilities. The imposition of an interest charge for non payment of a debt on time is consistent with commercial practice and generally understood by the community. Parliament's intent at the time of introducing the GIC was to dissuade taxpayers from using the Government as a financier, while the deductible nature of the GIC mitigates against the GIC being seen as unduly burdensome.[129] …
>
> The GIC is imposed by the Act and notification is done in an automated manner given the volume of debts the ATO manages at any one point in time and the nature of the charge, which accrues daily. Individual prior notice of GIC each time the charge is raised would require a duplication of processes and may lead to taxpayers being subject to GIC for a longer period because of the 'prior notification' requirement. The ATO sees the value in the taxpayer understanding any amounts of GIC applied but prior notice of this charge may not be the most appropriate manner for the taxpayer to understand the application of GIC to their particular situation.[130]

Conclusion

23.78 As a true administrative penalty arises by operation of legislation once specified circumstances exist, the person on whom the penalty is imposed has no opportunity to seek review of the penalty prior to its imposition. There is no opportunity for a hearing or to otherwise make submissions to the regulator prior to its imposition as to why the penalty should not apply. In order to ensure fairness in the imposition of true administrative penalties, it is therefore particularly important that provisions creating those penalties provide for some form of review, usually by granting the regulator a power of remission. It is the ALRC's preferred position that all provisions creating true administrative penalties be supported by a power for the regulator to remit the penalty in whole or part.

23.79 In chapter 15, the ALRC recommended that there be a right to request written reasons for a decision not to remit in whole, or in part, a true administrative penalty (see Recommendation 15–8). Reasons for a decision are important as they provide in-

127 *Strathfield Group Wholesale Pty Ltd v Deputy Commissioner of Taxation* (1997) 77 FCR 233.
128 *Elias v Federal Commissioner of Taxation* [2002] FCA 1132.
129 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.37.
130 Ibid, para 2.39.

formation to the person subject to the decision and may form the basis of a decision whether to seek review of the decision. Without reasons, a right to seek review can be rendered almost meaningless, as without knowledge of the reason why a decision was made, it can be difficult to identify a ground for challenge. The ALRC therefore considers that Recommendation 15–8 provides fundamental support to the recommendation that a decision not to remit in whole, or in part, an administrative penalty should generally be available. (See Recommendations 23–3 to 23–5 below.)

23.80 The ALRC acknowledges, however, that review of a remission decision may not be appropriate or practicable in all circumstances. The ALRC accepts the arguments of the ATO that small levels of GIC are not appropriate for review by way of an application for remission as the GIC is a penalty that arises in response to purely factual circumstances (eg, late payment) and is applied to a large number of taxpayers using an automated system. The ALRC also accepts that, where only very small amounts of penalty are involved, it will not be practicable to allow for external review of the imposition of the penalty as external review bodies are not resourced to process indefinite numbers of applications for review. Consistent with the current law in respect of taxation penalties and with recommendations made elsewhere in this Report,[131] the ALRC considers that two penalty units provides an appropriate cut-off point to restrict the right to seek external merits review and notes that in some penalty schemes it may also provide an example of when internal review is clearly inappropriate.

Recommendations

Recommendation 23–3. At least one level of internal review of a decision not to remit in whole, or in part, an administrative penalty should be available unless internal review is clearly inappropriate.

Recommendation 23–4. At least one level of external merits review of a decision not to remit in whole, or in part, a monetary administrative penalty should be available, unless the amount of penalty payable (after remission, if any) is equal to or less than two penalty units.

Recommendation 23–5. Judicial review of a decision not to remit in whole, or in part, a monetary administrative penalty should be available.

131 See recommendations made in ch 12 about payment of the amount specified in an infringement notice by instalments and in ch 35 about payment of administrative penalties by instalments.

24. Other Sources of Accountability

Contents

Introduction

24.1 This chapter considers other sources of public accountability of the regulatory and enforcement activities of federal regulators. There is no one body that has a specific oversight role in relation to the activities of federal regulators.[1] Instead, regulators are responsible to a variety of public and independent bodies, and to the community at large. The Parliament, the Commonwealth Ombudsman, the Privacy Commissioner and the ANAO provide some accountability and recourse in relation to both individual penalty decisions and general penalty processes. An investigation by the Commonwealth Ombudsman or a review by a Parliamentary Committee could potentially result in a recommendation that a specific penalty decision be changed or the process by which it was imposed reviewed. An audit by the Privacy Commissioner may result in a finding that a regulator has not complied with privacy legislation. However, most of the bodies described in this chapter provide general oversight to ensure that regulators remain democratically accountable (through review of systems and practices and making recommendations for systemic change) rather than a direct avenue for the correction of a particular penalty decision.

1 Establishment of a 'super enforcement' body responsible for all federal regulators was proposed in one submission to this Inquiry: K Yeung, *Submission CAP 20*, 9 October 2002. This proposal is considered in ch 16 at para 16.41.

24.2 It has been argued that such accountability can lead to a less efficient regulatory regime and merely provide tactics to be used by litigating parties.[2] However, others have argued that these avenues of oversight need expansion. For example, the Industry Commission's report, *Competitive Tendering and Contracting by Public Sector Agencies,* drew attention to the need to preserve accountability when services are contracted out.[3] Since publication of DP 65, the Minister for Revenue and Assistant Treasurer, Senator Helen Coonan announced that legislation would be introduced to provide for a specific oversight body for the ATO, the Inspector-General of Taxation.[4] Proposals have also been made for the creation of oversight bodies for the ASX[5] and the ACCC.[6] The Prime Minister has also announced a review of the corporate governance practices of key federal regulators, including the ATO, ACCC, ASIC, APRA and Centrelink.[7]

24.3 Of course, the methods of accountability and review considered in this chapter are intended to complement, not supplant, the political and parliamentary processes involving the responsibility of officials to ministers, the accountability of ministers to Parliament and its committees, and the answerability of Members of Parliament through the processes of Parliament and to the people at elections. Ministerial responsibility, in particular, has the capacity to maintain accountability for decisions by departments and government regulators to impose penalties.

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2 See comment by J Longo in T Sykes, 'Battling With the Law', *The Australian Financial Review* (Sydney), 13 August 2001, 53.

3 Industry Commission, *Competitive Tendering and Contracting by Public Sector Agencies*, Report no 48 (1996), AGPS, Melbourne, 4–5. See discussion of accountability of private contractors in ch 22.

4 Minister for Revenue and Assistant Treasurer (Senator Helen Coonan), 'A New Tax Advocate', *Media Release C62/02*, 29 May 2002.

5 It has been proposed that a Disclosure Division of the Takeovers Panel be created to undertake the ASX's functions in relation to monitoring compliance with disclosure obligations: B Frith, 'Disclosure obligations should get their very own panel', *The Australian*, 19 July 2002, 20. In August 2002, the ASX announced formation of a Corporate Governance Council to develop corporate governance standards for listed companies: Australian Stock Exchange, *Media Release: Corporate Governance Council — Statement by Participants: 15 August 2002*, <www.asx.com.au>, 28 August 2002.

6 Numerous submissions to the Dawson Committee have proposed that a board be established to oversee the ACCC: see, for example, submissions by The Australian Industry Group, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/109_Submission_AIG.pdf>, 23 July 2002; Australian Chamber of Commerce & Industry, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/104_Submission_ACCI.pdf>, 17 July 2002; Business Council of Australia, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/071_Submission_BCA.pdf>, 11 July 2002.

7 The review, announced on 14 November 2002, will take 6 months to complete and will be chaired by former Westpac Chairman John Uhrig: Prime Minister of Australia, *Media Release: Review of Corporate Governance of Statutory Authorities and Office Holders*, Department of Prime Minister and Cabinet, <www.pm.gov.au/news/media_releases/2002/media_release1991.htm.>, 14 November 2002. The terms of reference for the review note: 'The review is to examine and report on improving the structures and the governance practices of Commonwealth statutory authorities and office holders, with particular attention being paid to those that impact on the business community'.

Specific oversight bodies

Inspector-General of Taxation

24.4 As proposed, the Inspector-General of Taxation would review tax administration issues and make recommendations to the Government for systemic reform.[8] The performance of this function is envisaged to require the conferral of extensive information-gathering powers to provide for access to confidential taxpayer information held by the ATO. The Inspector-General would also adopt a consultative role, and it is envisaged that the Inspector-General could undertake reviews of specific tax administration matters, either on his or her own motion, at the direction of the Minister or on referral from the Commonwealth Ombudsman. However, the Inspector-General would not have the power to override decisions made by the ATO in relation to individual taxpayers.[9]

Proposals for an oversight board for the ACCC

24.5 A number of submissions made to the Dawson Committee[10] have proposed the establishment of an oversight board for the ACCC. Some submissions recommend that the board be responsible for ensuring the ACCC's compliance with the TPA and a set of proposed 'procedural guidelines'.[11] Other submissions recommend that the board be responsible for handling complaints about the ACCC and that the board's approval be required prior to the ACCC's implementation of important policy decisions.[12] Still others recommend that the board be empowered to review individual decisions of the ACCC upon application by affected parties.[13] In general, the submissions recommend that the board report to the Treasurer on an ongoing basis on the ACCC's compliance with both the provisions of the TPA and a proposed set of procedural guidelines. Similar to the proposed Inspector-General of Taxation, it is envisaged that the board would have the power to make recommendations to the Treasurer regarding amendments to the TPA.

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8 See The Board of Taxation, *Inspector-General of Taxation: A Report to the Minister for Revenue and Assistant Treasurer — July 2002*, The Board of Taxation, <www.taxboard.gov.au/content/inspector_general/index.asp>, 15 November 2002. The Senate Economics Legislation Committee reported on the Inspector-General of Taxation Bill 2002: see <www.aph.gov.au/senate/committee/economics_ctte/igot/Report/ig_of_tax.pdf>, tabled on 3 December 2002 recommending that it proceed (subject to some amendments). The Labor members on the Committee opposed the Bill in a minority report.

9 The Inspector-General would not assume the role of the Commonwealth Ombudsman in terms of investigating complaints by individual taxpayers: ibid, rec 3.

10 See Review of the TPA, http://tpareview.treasury.gov.au/content/home.asp, 15 November 2002.

11 The Australian Industry Group, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/109_Submission_AIG.pdf>, 23 July 2002.

12 Business Council of Australia, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/071_Submission_BCA.pdf>, 11 July 2002; Australian Chamber of Commerce & Industry, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/104_Submission_ACCI.pdf>, 17 July 2002.

13 Telstra, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/117_Submission_Telstra.pdf>, 23 July 2002; Woolworths Ltd, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/171_Submission_Woolworths.pdf>, 23 July 2002.

General oversight bodies

Commonwealth Attorney-General

24.6 Federal agencies are accountable to the Attorney-General for compliance with *Legal Services Directions* made by the Attorney-General under s 55ZF of the *Judiciary Act 1903* (Cth). Section 55ZF allows the Attorney-General to issue directions applying to Commonwealth legal work.[14] The Attorney-General is the only person with standing to enforce a legal services direction.[15] Legal services directions have been made covering a number of topics. The most relevant to the Inquiry is the Commonwealth's *Model Litigant Policy*, which 'requires that the Commonwealth and its agencies, as parties to litigation, act with complete propriety, fairly and in accordance with the highest professional standards'.[16]

24.7 The Attorney-General also has power to give directions or issue guidelines to the DPP in relation to particular cases,[17] including the power to direct that proceedings be instituted or that immunity under s 9(6) be granted.[18]

24.8 Another way in which a regulator is accountable to the Attorney-General is through the requirement that legislative proposals be made in accordance with the *Legislation Handbook*[19] and in consultation with the Attorney-General's Department to ensure a consistent approach across agencies to the creation of provisions that impose penalties.

Commonwealth Ombudsman

24.9 The Commonwealth Ombudsman investigates complaints about the actions of Commonwealth government departments and agencies to see if they are unlawful, wrong, unjust or discriminatory. It accepts complaints from any person or group who feel that they have been disadvantaged by an action or decision. Through the investigation of complaints, the Ombudsman identifies systemic deficiencies or issues and may make recommendations for administrative reform.

24.10 In 2002, the Commonwealth Ombudsman released a major report on the administration by Centrelink and the Department of Family and Community Services of social security breach penalties.[20] The investigation was undertaken in response to an increase in the number of complaints received by the Ombudsman about breach penal-

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14 Broadly defined as either legal work performed by or on behalf of the Australian Government Solicitor or legal work performed for the Commonwealth: s 55ZF(3).

15 *Judiciary Act 1903* (Cth), s 55ZG.

16 Attorney-General's Department, *Legal Services Directions: Appendix B — Directions on the Commonwealth's Obligations to Act as a Model Litigant*, <www.law.gov.au/olsc>, 28 August 2002, note 2.

17 *Director of Public Prosecutions Act 1983* (Cth), s 8.

18 The DPP's power to grant an immunity under s 9(6) of the *Director of Public Prosecutions Act* is discussed further in ch 17.

19 Department of Prime Minister and Cabinet, *Legislation Handbook*, Commonwealth of Australia, <www.dpmc.gov.au/pdfs/LegislationHandbookMay00.pdf>, 4 November 2002. See discussion in ch 6.

20 Commonwealth Ombudsman, *Social Security Breach Penalties — Issues of Administration* (2002), Commonwealth Ombudsman.

ties and the rise in the incidence of breach penalties between 1998 and 2001. The investigation was undertaken in the context of an internal review of breach penalty practices by Centrelink, an independent review[21] and changes to the breach penalty rules applied by Centrelink to introduce more contact with welfare recipients prior to breach penalties being imposed.[22] The Ombudsman's report made 29 recommendations covering issues such as investigation of the circumstances of a breach, providing procedural fairness, training for staff making penalty decisions and rights of appeal and review.

24.11 The Commonwealth Ombudsman also acts as Taxation Ombudsman and has a Special Tax Adviser whose role is to assist the Ombudsman with the investigation and resolution of complaints about the ATO. In 2001–02, the Ombudsman received 2618 complaints about the ATO, 22% less than in the previous year'.[23] The Ombudsman undertook 1012 tax-related investigations in 2002–02.[24] The ATO and the Ombudsman have agreed protocols for the referral and investigation of complaints.[25]

24.12 Several submissions commented on the importance of the Commonwealth Ombudsman as a source of scrutiny and oversight.[26] ASIC noted that 'the role of the Ombudsman is invaluable in ensuring that the public has confidence that decisions made by regulators are just and justifiable'.[27]

Australian National Audit Office

24.13 The ANAO has power to audit the performance of federal regulators. This is 'long term' accountability, however, rather than accountability for day-to-day or individual penalty decisions. The ANAO aims to provide an independent view of the performance and financial management of public sector agencies and bodies.[28] It does this through providing a series of audit services and products. Its main task is the preparation of performance audits,[29] financial statement audits and better practice guides. The Auditor-General has discretion to undertake performance audits of almost all government agencies and departments.[30] In addition, the Auditor-General can be requested to

21 Independent Review of Breaches and Penalties in the Social Security System, *Report of the Independent Review of Breaches and Penalties in the Social Security System* (2002), Independent Review of Breaches and Penalties in the Social Security System (Pearce Report).

22 Senator the Hon Amanda Vanstone, *'Breaching Rules Change to Protect the Vulnerable', Media Release: 4 March 2002*, <www.facs.gov.au>, 4 March 2002.

23 Office of the Commonwealth Ombudsman, *Annual Report 2001–2002* (2002), Commonwealth of Australia, Canberra, 62.

24 Commissioner of Taxation, *Annual Report 2001–2002* (2002), Australian Taxation Office, 169.

25 See Office of the Commonwealth Ombudsman, *Annual Report 2001–2002* (2002), Commonwealth of Australia, Canberra, 63; Commissioner of Taxation, *Annual Report 2001–2002* (2002), Australian Taxation Office, 169.

26 Attorney-General's Department, *Submission CAP 14*, 9 September 2002; Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002; Australian Taxation Office, *Submission CAP 16*, 17 September 2002.

27 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 37.

28 Australian National Audit Office, *Website*, Australian National Audit Office, <www.anao.gov.au>, 22 October 2001.

29 The role of performance audits as sources of scrutiny was mentioned by the ATO (see Australian Taxation Office, *Submission CAP 16*, 17 September 2002) and Environment Australia (see Environment Australia, *Submission CAP 26*, 24 October 2002).

30 *Auditor-General Act 1997* (Cth), Pt IV.

undertake an audit by a minister, the Finance Minister or the Joint Committee of Public Accounts and Audit.[31]

24.14 Most of the reports published by the ANAO are the result of performance audits. The audit of the administration of tax penalties undertaken in 2000 found that there was scope for improvement in the ATO's administration of the penalty regime.[32] In response to the report, the ATO implemented a corporate governance framework for penalties; studied the effectiveness of penalties; updated training material to include references to and discussions of the Taxpayers' Charter and the Compliance Model; implemented an on line decision support tool to assist officers in the Personal Tax Business Service Line to apply Tax Shortfall Penalty and GIC; and provided various information products for taxpayers, explaining penalties in plain English.[33]

Privacy Commissioner

24.15 The Privacy Commissioner can provide some accountability for the activities of a regulator.[34] Most complaints received by the Commissioner involve allegations that an agency has not complied with the Information Privacy Principles, and are resolved through negotiation. While the Privacy Commissioner has formal complaint determination powers under the *Privacy Act*,[35] in practice these powers are rarely used. The Privacy Commissioner will generally not investigate a complaint until the complaint has first been made directly to the agency.

24.16 Commonwealth agencies must comply with the 11 Information Privacy Principles set out in s 14 of the *Privacy Act*. The Privacy Commissioner has powers under the *Privacy Act* to audit an agency's compliance with the Information Privacy Principles. Commonwealth agencies must also comply with the spent convictions scheme as provided for by the *Crimes Act*. The Australian Taxation Office and assistance agencies must comply with the *Data-matching Program (Assistance and Tax) Act 1990* (Cth) and guidelines issued by the Privacy Commissioner under that Act governing the conduct of data-matching using tax file numbers. Commonwealth agencies are also affected by privacy rules set out in other laws, including secrecy provisions in their own legislation.

Independent review bodies

24.17 From time to time independent review bodies may be established to review specific aspects of government activity. An example is the Independent Review into Breaches and Penalties in the Social Security System.[36] The terms of reference for the

31 Ibid, s 20.
32 Australian National Audit Office, *Administration of Tax Penalties*, Report 31 (2000), Australian Government Printing Service, Canberra.
33 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 3.2.
34 This was specifically noted by the ATO: Ibid, 14; and the Attorney-General's Department: Attorney-General's Department, *Submission CAP 14*, 9 September 2002.
35 *Privacy Act 1988* (Cth) s 52.
36 See *Independent Review of Breaches and Penalties in the Social Security System*, <www.breachreview.org>, 22 October 2002.

Independent Review were, in part, to identify the consequences of recent changes in the incidence of social security breaches and penalties and to recommend any improvements in the effectiveness and fairness of the system.

24.18 In March 2002 the Independent Review of Breaches and Penalties in the Social Security System released its final report (Pearce Report). The Independent Review was established by a number of organisations interested in issues relating to support for unemployed persons.[37] The Independent Inquiry reported that, in the context of breach penalties:

> A considerable number of jobseekers have incurred substantial financial penalties and consequential hardship as a result of breaches which were minor, inadvertent and/or did not demonstrate a deliberate intent to evade their obligations …
>
> It must be remembered in this context that the relevant allowance levels are already at or below a basic minimum for meeting ordinary living expenses …[38]

24.19 The Pearce Report also stressed that greater efforts should be made to match penalties to the seriousness of the relevant breach and the apparent need for deterrence.[39] The current quasi-penalty system covers a very wide range of seriousness from an isolated instance of failure to attend an interview to a deliberate and sustained refusal to seek work and attend appropriate job interviews. Some degree of 'proportionality' is attempted by drawing a distinction between administrative and activity test breaches, and between the number of prior activity breaches.

24.20 The Pearce Report noted that there is a strong case for adopting a more carefully graduated system that distinguishes between deliberate and other failures to comply with obligations, and perhaps replace the current activity test/administrative breach distinction. The Pearce Report therefore recommended that:

- The structure of the penalty system should be modified to match penalties more accurately with the seriousness of the breach in question.
- If the current penalty structure is retained administrative requirements should not be written into activity agreements; and the accumulation period should be reduced to twelve months.[40]

Other methods of oversight

Parliamentary committees

24.21 Parliamentary committees are established either to conduct inquiries into specific issues or as standing committees. They have the power to summon witnesses,

37 See discussion below of the recommendations of the Independent Review of Breaches and Penalties in the Social Security System, *Report of the Independent Review of Breaches and Penalties in the Social Security System* (2002), Independent Review of Breaches and Penalties in the Social Security System.
38 Ibid, para 7.6.
39 Ibid, para 7.9.
40 Ibid, Rec 24.

compel the production of information, accept submissions, report and make recommendations. Members may be appointed from either House of Parliament. Reports from select, legislative and general purpose standing committees frequently recommend changes to policies, legislation and administrative practices.[41] The direction and extent of a committee's inquiry is determined by its terms of reference. A relevant example of a Senate Committee inquiry into the operation of penalties is the inquiry by the Senate Community Affairs Legislation Committee into the social security participation requirements and penalties with reference to parents and mature-aged unemployed Australians.[42]

24.22 Another very relevant parliamentary committee is the Senate Standing Committee for the Scrutiny of Bills. Standing Order 24(1) of the Senate Standing Committee for the Scrutiny of Bills requires the committee to review all proposed primary legislation introduced into the Senate and to report on whether they contain provisions that:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent on insufficiently defined administrative powers;

(iii) make such rights, liberties or obligations unduly dependent on non-reviewable decisions,

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.[43]

24.23 A recent relevant report of the Scrutiny of Bills Committee was its report on the application of absolute and strict liability offences in Commonwealth legislation.[44]

Annual reporting

24.24 Regulators must prepare annual reports[45] in accordance with the requirements of legislation[46] and guidelines issued by the Department of Prime Minister and Cabi-

41 The ATO gave the example of the Senate Estimates References Committee inquiry into mass-marketed tax schemes: Australian Taxation Office, *Submission CAP 16*, 17 September 2002.

42 Senate Community Affairs References Committee, *Report on Inquiry into Participation Requirements and Penalties — Family and Community Services Legislation Amendment Australians*, (2002), Parliament of Australia, <www.aph.gov.au/senate/committee/clac_ctte/partic_requ/report/index.htm>, 22 October 2002 (tabled 25 September 2002).

43 See D Pearce and S Argument, *Delegated Legislation in Australia* (2nd ed, 1999) Butterworths, Sydney, 28 and ch 6.

44 Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002), AGPS. The report included a discussion of when the use of infringement notices to deal with strict liability offences is appropriate. Infringement notice schemes are considered in detail in ch 12 of this Report.

45 This form of accountability was specifically mentioned in Environment Australia, *Submission CAP 26*, 24 October 2002.

46 Usually including *Public Service Act 1999* (Cth), s 63; *Commonwealth Authorities and Companies Act 1997* (Cth) and the relevant primary legislation administered by the agency.

net.[47] These requirements generally relate to the reporting of financial and staffing resources and require agencies to report on program performance and the achievement of program objectives and results.[48]

Freedom of information

24.25 The *Freedom of Information Act 1982* (Cth) (FOI Act) 'enables Australians to scrutinise, discuss and contribute to government decision-making'.[49] The FOI Act requires agencies to disclose particular information about the agency's organisation, functions, decision-making powers and extent of public participation in its work in the agency's annual report. The FOI Act also creates the right for an individual to access documents held by an agency,[50] and where that information contains personal information that is incomplete, incorrect, out of date or misleading to request that the information be amended or annotated.[51]

24.26 Freedom of information rights are often used by the media and other special interest groups to obtain information about an agency's activities. An example of the use of the FOI Act in this way was the use of information obtained from Centrelink by ACOSS as the basis for its submission to the Senate Inquiry into Participation Requirement and Penalties.[52]

Media and publicity

24.27 The role of the media in providing accountability and mobilising public scrutiny of regulators is important. There are daily news features on the role, successes and failings of regulation and regulators. Media coverage may result from decisions of courts or from statements by, or on behalf of, regulators and members of the regulated community. Media coverage may also consist of commentary on the activities of regulators. Some regulators publish their own journals or contribute articles to other publications. Most regulators also regularly give speeches and participate in, or host, relevant conferences.

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47 Department of Prime Minister and Cabinet, *Requirements for Annual Reports: for Departments, Executive Agencies and FMA Act Bodies: June 2002*, <www.dpmc.gov.au/pdfs/annualreportrequirements.pdf,> 18 November 2002.

48 These requirements will differ depending on whether the regulator is classified as a department, Commonwealth authority or Commonwealth company.

49 Administrative Review Council, *The Contracting Out of Government Services — Report to the Attorney-General*, Report no 42 (1998), Administrative Review Council, para 3.12.

50 The ATO noted that the FOI Act allows a person to request 'copies of documents relating to a [penalty] decision': Australian Taxation Office, *Submission CAP 16*, 17 September 2002, 14.

51 *Freedom of Information Act 1982* (Cth), s 48.

52 See Australian Council of Social Service, *Submission to the Senate Community Affairs References Committee Inquiry into Participation Requirements and Penalties,* (2002), Australian Council of Social Service, <www.acoss.org.au>. Also Australian Council of Social Service, *Media Release — New Freedom of Information Data Shows: $200m in 'Fines' Push Unemployed & Students Deep into Poverty*, <www.acoss.org.au/media/2002/mr0805_breach.htm>, 5 August 2002.

Public statements by regulators

24.28 Informing the public about the legislation they enforce and the activities undertaken to encourage compliance is an important function of regulators. Primary legislation may include amongst the powers and functions of the regulator, a function of providing guidance to the regulated community and making information available to the general public.[53] If legislation does not include a specific function of providing guidance, information or advice, the regulatory aims of deterring undesirable conduct and encouraging compliant behaviour require education of, at least, the regulated community to ensure that those subject to regulation know what is necessary to ensure compliance with the law. Regulators cannot, therefore, regulate without making public statements.

24.29 The making of public statements by some regulators has been criticised. A major issue in the Dawson Committee review of the TPA has been the use made by the ACCC of publicity. A number of submissions have advocated adoption by the ACCC of a media code of conduct or other policy statement on the use of publicity.[54]

24.30 In its submission to the Dawson Committee the ACCC stated:

> The Commission considers that the current legislative framework … adequately protects reputation and commercial affairs, while balancing the public interest in effectiveness, certainty, transparency and accountability by publicising trade practices issues.[55]

24.31 The ACCC noted that the benefits of publicity include satisfying the public interest in information about cases involving breaches of the TPA, ensuring accountability of ACCC processes through public scrutiny, ensuring compliance with the TPA and acting as a deterrent. The ACCC also stated that where a corporation under investiga-

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53 See, for example, *Trade Practices Act 1974* (Cth), s 28; *Australian Communications Authority Act 1997* (Cth), s 6 and 7.

54 Including Minter Ellison, *Submission to the Review of the Trade Practices Act 1974*, <http://tpareview.treasury.gov.au/content/subs/048_submission_minter%20ellison.pdf>, 4 July 2002; Caltex Australia Ltd, *Submission to the Review of the Trade Practices Act 1974*, <http://tpareview.treasury.gov.au/content/subs/065_submission_caltex.pdf>, 11 July 2002; The Australian Industry Group, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/109_Submission_AIG.pdf>, 23 July 2002; Australian Chamber of Commerce & Industry, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/104_Submission_ACCI.pdf>, 17 July 2002; Law Council of Australia, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/138_Submission_LCA.pdf>, 30 July 2002. Several submitters specifically supported the ACCC's use of the media: Consumer Law Centre Victoria, *Submission to the Review of the Trade Practices Act 1974*, <http://tpareview.treasury.gov.au/content/subs/031_submission_clc.pdf>, 4 July 2002; Council of Small Business Organisations of Australia Ltd, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/089_Submission_COSBOA.pdf>, 17 July 2002; Australian Consumers' Association, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/105_Summary_ACA.pdf>, 17 July 2002.

55 Australian Competition & Consumer Commission, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P1.pdf, www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P2.pdf, www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P3.pdf>, 13 August 2002, 176.

tion has made statements to the media, there is a need for the ACCC to respond to ensure balanced reporting. The ACCC noted:

> [Publicity] is one of the most effective ways of educating the public, small and large businesses and consumers about their rights and obligations under the law and how the Commission applies the law.[56]

Regulators' publicity policies

24.32 One method of ensuring that regulator's use of the media is responsible is the development and use of publicity policies. ASIC has a published policy on when public comment will be made and who is authorised to speak on behalf of ASIC — *Policy Statement 47: Public comment*.[57] PS 47 sets out the circumstances in which ASIC will make a public comment or issue a media release. In general, ASIC will only make public statements:

- when charges are laid;
- when civil actions are commenced;
- when administrative actions involving public hearings are commenced; and
- when matters are referred to the Corporations and Securities Panel.[58]

24.33 The policy states that:

> **[PS 47.8]** Where we have publicised the laying of charges, we will publicise the outcome, including withdrawal of charges, acquittal or successful prosecution. If a matter is appealed, we will ordinarily publicise the outcome of the appeal.
>
> **[PS 47.9]** In the same way, where we are a party to civil litigation, we will issue a media release on the outcome of that litigation.

24.34 Other regulators do not have such formal statements about when public comment will be made but follow similar policies. Whilst having no formal guidelines, the ACCC follows internal regulatory principles when deciding whether to make media statements.

> As a matter of practice, the Commission follows certain internal processes to ensure adequate protection of reputation when appropriate. It limits its media releases to actual and accurate accounts of cases instituted and the outcomes of decisions. The Commission does not comment publicly on ongoing investigations, except in excep-

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56 Australian Competition & Consumer Commission, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P1.pdf, www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P2.pdf, www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P3.pdf>, 13 August 2002, 179.

57 Australian Securities & Investments Commission, *PS 47: Public Comment*, Australian Securities & Investments Commission, <www.cpd.com.au/asic/ps/ps047.pdf>, 20 August 2002.

58 Ibid, para PS 47.3, PS 47.6. The Corporations and Securities Panel is now called the Takeovers Panel.

> tional circumstances. This avoids raising public perceptions that a potential offender has breached the law, before the Commission has decided to institute proceedings.[59]

24.35 The ATO's Prosecution Policy require that 'any cases which involve prominent or high profile figures or which, for any reason, are likely to attract public attention' must be referred to the DPP, rather than being prosecuted by the ATO.[60] This policy was challenged by a taxpayer in *Smiles v FCT*[61] (see discussion below). The DPP's Prosecution Policy does not specifically address the issue of publicity but does include 'whether the alleged offence is of considerable public concern' a relevant consideration in making a decision to prosecute.[62]

Judicial comments on use of publicity by regulators

24.36 The use of publicity by regulators has been the subject of judicial comment in several cases. Cases which are relevant to accountability are discussed below.

Decisions to prosecute

24.37 The role of publicity in enforcement of federal regulation was commented on by the Federal Court in *Smiles v FCT*.[63] In *Smiles*, the ATO's decision to prosecute was challenged on the basis that it had been made for the improper purpose of obtaining publicity.[64] Davies J held that:

> It is not wrong to take account of the publicity likely to arise from and the deterrent effect of a prosecution when considering whether or not a prosecution for a taxation offence should be instituted. I see no element of abuse of power in that consideration, rather good administration.
>
> Publicity which makes known to the community that an offender has been convicted and a penalty imposed is not in itself in conflict with the criminal justice system. General deterrence is one of the aims of punishment.[65]

Decisions to investigate

24.38 In *R v Elliott*,[66] the defendant was successful in persuading the Victorian Supreme Court that the National Crime Authority (NCA) had abused its statutory powers in an investigation undertaken by the NCA in relation to Elders IXL. Elliott argued that

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59 Australian Competition & Consumer Commission, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P1.pdf, www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P2.pdf, www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P3.pdf>, 13 August 2002, 177.

60 Australian Taxation Office, *ATO Prosecution Policy*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/index.htm>, 9 March 2001, para 4.4.1.

61 *Smiles v Federal Commissioner of Taxation* (1992) 35 FCR 405 (Davies J); *Smiles v Federal Commissioner of Taxation* (1992) 37 FCR 538 (Full Court of the Federal Court).

62 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*, Commonwealth Director of Public Prosecutions, <www.cdpp.gov.au/cdpp/>, 16 November 2001, para 2.10(m).

63 *Smiles v Federal Commissioner of Taxation* (1992) 35 FCR 405 (Davies J); *Smiles v Federal Commissioner of Taxation* (1992) 37 FCR 538 (Full Court of the Federal Court).

64 See further discussion of *Smiles* in ch 23.

65 *Smiles v Federal Commissioner of Taxation* (1992) 35 FCR 405, 419–420.

66 *R v Elliott* (1996) 128 FLR 172.

the purpose of the NCA's investigation was to target him as a 'high profile' person and damage him for political reasons. Vincent J held that there was an arguable case that the NCA had engaged in a deliberate abuse of its statutory powers, noting that the claim for abuse of power would be strengthened if 'one of the perceived benefits was the discrediting of the persons under investigation'.[67]

Statements about current cases

24.39 In *Cassidy v Medical Benefits Fund of Australia (No. 2)*,[68] Hill J declined to order an advertising agency to circulate a notice to all members of the Advertising Federation of Australia advising them that advertisements produced by the agency for MBF had been found to be misleading and deceptive. The reason Hill J gave was that:

> Such an order would not, as such, assist in informing the public. Rather it would seem directed at punishing the agency by reporting it to its peers and announcing a win for the applicants [the ACCC]. In refusing to make such an order I take into account that the agency no longer acts for MBF, that something over two years have passed and, more significantly, that members of the Federation will in any event learn of the orders made against MBF from the newspaper advertising and, it may be presumed, from press releases of the ACCC.[69]

24.40 Hill J also commented on other publicity given to the case by the ACCC (in a speech given by the ACCC Chairman, Professor Fels, to the Advertising Federation of Australia and in an article written by the ACCC Chairman for *Business Review Weekly*), noting that:

> It might be said that while the Commission is entitled to tell the public that proceedings have been brought and the general nature of those proceedings, there is a danger that wide dissemination of the fact before a hearing might in a particular case injure, perhaps irreparably, the person against whom the proceedings are brought.[70]

Opinions on the interpretation of legislation

24.41 In *Electricity Supply Association of Australia Ltd v ACCC*,[71] the Federal Court considered whether the ACCC's publication of its views on the operation of the TPA pursuant to a statutory power to provide information and guidance to members of the public (under s 28 of the TPA) was a reviewable decision under the ADJR Act. The case concerned an ongoing debate between the ACCC and the ESAA whether implied conditions that goods would be fit for the purpose for which they are acquired applied to electricity supply contracts. The ACCC contended that they did; the ESAA disagreed. Each party had obtained legal advice supporting their view.

24.42 Finn J held that the publication by the ACCC (on several occasions) of its views of the operation of the TPA were not decisions to which the ADJR Act applied as:

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67 Ibid, 189. The Victorian Supreme Court subsequently acquitted Elliott.
68 *Cassidy v Medical Benefits Fund of Australia (No. 2)* [2002] FCA 1097.
69 Ibid, para 93.
70 Ibid, para 94.
71 *Electricity Supply Association of Australia Ltd v ACCC* (2001) 113 FCR 230.

> They were not undertaken in consequence of an implied requirement of the performance of the function [under s 28] itself. That function was unrelated intrinsically or incidentally to a requirement to make substantive decisions. The function was merely one of informing and educating.
>
> I am in consequence, of the view that it cannot properly be said that the Publication Decisions were made 'under an enactment' even though, as I will later indicate, they involved the performance of a public function capable of attracting legal consequences for that reason.[72]

24.43 In addition, Finn J held that the decisions

> did not, and could not of themselves, determine anything. They were not decisions of a substantive nature … They neither gave rights to a consumer nor imposed obligations upon on a supplier, though they expressed opinions in relation to rights and obligations. They decided no factual issue. They were, and could only be, in the nature of opinion no matter how strongly and unqualifiedly expressed.[73]

24.44 In relation to the general issue of reviewability of actions taken by the ACCC under s 28, Finn J said:

> The range of 'decisions' taken by the ACCC and its officers in providing information and guidance to consumers etc is so diverse and sufficiently voluminous as to raise the spectre of significant 'disruption of the [ACCC's] activities' were such decisions to be characterised as 'reviewable decisions' for ADJR Act purposes: cf *Salerno v National Crime Authority*, above, at 143. To make every such 'decision' examinable by the Court could put in peril the very information and educational services that the TP Act requires. For my own part, it would require significant textual and contextual indications (which clearly are lacking here) before I would be prepared to conclude that such decisions were nonetheless properly to be characterised as reviewable decisions.[74]

24.45 Finn J clarified these comments by noting that they were limited to the applicability of the ADJR Act and that the ACCC's performance of its functions under s 28 was not completely immune from review.

> My finding that, in performing the functions in question in this case, the ACCC is not subject to the ADJR Act does not carry with it the consequence that it is thus relieved from any form of judicial supervision in the performance of that function. The ACCC and/or its officers, for example, remain potentially liable either criminally or civilly for misfeasance in public office for egregious abuses of their functions: see eg *Sanders v Snell* (1998) 196 CLR 329. They may likewise be exposed to tortious liability in some circumstances for negligent misstatements etc: see eg *San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979* (1986) 162 CLR 340; etc. My conclusion is, merely, that one statutorily created form of judicial supervision is not available against the ACCC because of limitations that have been imposed on that supervision.[75]

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72 Ibid, 253.
73 Ibid, 253.
74 Ibid, 254.
75 *Electricity Supply Association of Australia Ltd v ACCC* (2001) 113 FCR 230, 254.

24.46 One submission to this Inquiry noted that 'publicity and accountability are not the same thing'.[76]

> Publicity can be the basis upon which false, as well as true, information is purveyed. Publicity can create fog and obscure real issues. Publicity can create the impression, contrary to actuality, that information sources are so unimpeachable that they do not need questioning.[77]

24.47 Professor Warren Pengilley was critical of the use of publicity by the ACCC, stating that the ACCC has used publicity to stifle debate, engaged in 'doublespeak', damaged the reputation of business by making claims which are not subsequently established, and failed to respond to criticism by claiming to be 'under siege from big business'.[78] He claimed that, in the particular case of the ACCC, publicity did not give rise to accountability. In order for publicity to assist accountability, Pengilley states that it needs to:

- be literally correct;
- convey a correct impression; and
- tell the whole story.[79]

24.48 The use of the media by regulators, and issues of fairness which this might raise, are considered in chapter 16.

76 W Pengilley, *Submission CAP 7*, 17 July 2002, 3.
77 Ibid, Attachment A, 3.
78 Ibid, Attachment A, 6–12.
79 Ibid, Attachment A, 14.

Part E
Setting Penalties

25. Penalty Theory and Penalty Setting

Contents

Introduction

25.1 Chapter 3 considered the purpose of penalties and particularly the role of punishment in civil penalties. As the chapter noted, penalties generally serve one or more purposes 'retribution, condemnation, specific or general deterrence, compensation, and protection'.[1] It noted some differences in the approaches of regulatory theorists and the courts. Regulatory theorists generally emphasise the need for a substantive and practical approach to categorisation of contraventions.[2] This approach values proportionality between harm done, the seriousness of the penalty and degree of procedural protection and complexity. It emphasises the need for regulators to make the most efficient use of their resources by selecting targets and approaches to maximise the regulatory or deterrent effect of their actions (the 'risk management' approach).[3]

25.2 The values of the risk management approach sometimes directly conflict with the judicial approach, which must apply principles and procedural protections to the facts of specific cases and which values individual rights over efficient regulation. Ideally, these two approaches should operate as checks and balances, but this may be difficult if they represent fundamentally different ways of seeing a crucial matter.

25.3 While regulatory theorists would normally emphasise deterrence as the prime aim of penalties in the regulatory arena, the courts, while noting the importance of deterrence, often set penalties that demonstrate the influence of principles that apply to a criminal law setting. In particular the approach will be to consider the penalty in the light of the perceived seriousness of the contravention, an approach more akin to just deserts.[4]

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1 Para 3.5.
2 For example, Freiberg, Braithwaite, Sparrow, Ogus.
3 See Sparrow in particular.
4 D Round, 'Consumer Protection: At the Merci of the Market for Damages' (Paper presented at Current Issues in Regulation: Enforcement and Compliance, Melbourne, 2–3 September 2002), 2.

The purpose of civil penalties — deterrence or just deserts?

25.4 Penalty setting — both within legislation and in particular cases — is influenced by the theory that underpins it. Is the principal aim of the penalty to dissuade future breaches or to punish past ones? The two main theories are 'deterrence' and 'just deserts'. Professor David Round describes the former as 'forward looking' seeking to price breaches and 'providing a signal that will reduce the demand for them to a socially efficient level' and suggests the latter 'takes a retrospective stand and adopts the moral view that those who break the law should get their just deserts'.[5]

25.5 Anne-Marie Allgrove says of civil penalties for breaches of economic regulation:

> Traditionally, the remedies for breaches of the criminal law are deterrence, retribution, rehabilitation and compensation … [for] economic regulation, deterrence is viewed as the primary, if not the only, rationale for the imposition of penalties.[6]

25.6 Dr Karen Yeung suggests that because rehabilitation, incapacitation and restoration are

> prima facie unsuited to penalty setting in the context of regulatory law … [t]his leaves the competing theories of deterrence and desert as possible theoretical bases for determining the quantum of penalties for regulatory offences.[7]

25.7 French J in *TPC v CSR Ltd* emphasised deterrence:

> Punishment for breaches of criminal law traditionally involves three elements: deterrence, both general and individual, retribution and rehabilitation. Neither retribution nor rehabilitation … have any part to play in economic regulation of the kind contemplated by Part IV.[8]

'Just deserts'

25.8 Desert theory is traditionally associated with criminal penalties. However, Yeung suggests it can assist to determine the quantum of a civil penalty. Desert theory's basis is morality with 'punishment communicating state censure and disapprobation'.[9] Under this approach 'sanctions should be commensurate with the nature of the wrongfulness'.[10] Central to the theory is the principle of proportionality that links the penalty to the perceived seriousness of the offence. Seriousness is determined by two concepts — harm and culpability: harm being a measurement of loss or damage; culpability taking account of factors that allow blameworthiness to be determined including intent

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5 Ibid, 7.

6 A Allgrove, 'The Assessment of Penalties Under the Trade Practices Act for Breaches of the Competitive Conduct Rules' (1996) 4(3) *Trade Practices Law Journal* 104, 104.

7 K Yeung, 'Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective' (1999) 23(2) *Melbourne University Law Review* 440, 445.

8 *Trade Practices Commission v CSR Ltd* (1991) 13 ATPR ¶41–076, 52,152.

9 K Yeung, 'Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective' (1999) 23(2) *Melbourne University Law Review* 440, 443.

10 Ibid, 442.

and motive. Intent is not always an inquiry in the civil penalty area. Fault only sometimes is an element of a non-criminal contravention.[11] Nevertheless, it is still possible to form an assessment of the degree of blameworthiness of the offender taking account of factors such as the period of time over which the conduct extended, past history, deliberateness of the conduct and, in the case of a corporation, corporate culture.[12]

The deterrence approach

25.9 The deterrence approach seeks to '"price" unlawful conduct in order to minimise social costs arising from such conduct'.[13] It assumes that the regulated community act rationally and will be deterred when the price of a contravention outweighs the benefits.

25.10 There are variants within the model: the 'optimal deterrence' model and the 'absolute deterrence' model. The optimal deterrence model recognises that some conduct, although unlawful, may nevertheless have gains for society. A penalty under this theory should reflect the total harm to others, with the aim of the penalty being to ensure the offender bears the full cost of its actions. Under the absolute deterrence model, the penalty is set to require the offender to disgorge the gains made from the unlawful conduct. This model assumes the cost of the conduct in question always outweighs the benefits. Because detection and enforcement are not without cost, the models must be adjusted to account for them.[14]

25.11 There are two aspects to deterrence: specific and general. Specific deterrence seeks to deter the individual offender from re-offending. In *ACCC v Rural Press Ltd*, Mansfield J said:

> Even though it may be unlikely that a respondent will contravene a provision of Part IV of the Act in the proximate future, it is desirable to impose a penalty to ensure that the respondent, as well as the public generally, is reminded of the consequences of contravention.[15]

25.12 Despite his Honour's words, there have been cases of repeat contraventions under the *Trade Practices Act 1974* (Cth). In *ACCC v George Weston Foods Ltd*, Goldberg J noted that the respondent had incurred a similar penalty under the Act 'a short time earlier in somewhat similar circumstances' and considered this 'a significant matter'.[16]

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11 See discussion in ch 4.
12 See discussion on corporate culture in ch 7.
13 K Yeung, 'Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective' (1999) 23(2) *Melbourne University Law Review* 440, 442.
14 See discussion below at para 25.14–25.20.
15 *Australian Competition and Consumer Commission v Rural Press Ltd* [2001] FCA 1065, para 15.
16 *Australian Competition and Consumer Commission v George Weston Foods Ltd* (2000) ATPR ¶41–763, 40,986.

25.13 General deterrence underpins civil penalties. Professor Andrew Ashworth has noted the difficulties — in relation to criminal law at least — of assessing the effectiveness of general deterrence, particularly its long-term effectiveness.[17] He says 'there has been sufficient criminological and philosophical enquiry to demonstrate the doubtfulness of many of the assumptions which appear to be made by sentencers'.[18] This is not to suggest that general deterrence is anything other than a highly significant factor to be used in the setting of penalties, especially in the regulatory area, but Ashworth indicates some difficulty in demonstrating whether the level of specific penalties has acted as a deterrent.

Optimal penalty theory

25.14 The optimal deterrence approach seeks to reflect fully the cost to society of the conduct in question. Not only would such a penalty seek to recover all the profits from the illegal conduct, but also the costs of detection and prosecution. That is, the penalty would be set at a level that reflects the cost to society of the harm. Round notes that those economists who are proponents of this theory argue that it can provide deterrence equivalent to a gaol sentence but be more efficient for society given the costs associated with gaol.[19]

25.15 Under the theory there are two important influences on deterrence: likelihood of detection and level of penalty. The greater the level of detection, the greater the deterrence; the higher the level of penalty, the higher the level of compliance. Penalty levels depend on the legislative maximums and on the willingness of judges to impose high penalties.

25.16 The optimal penalty theory has been particularly associated with competition law. The theory assumes those engaged in anti-competitive conduct act rationally and will only be deterred if a penalty is set at a level that takes account of a range of factors: the gains from the illegal conduct; costs to the firm arising out of detection; risk aversion; a factor based on the probability that punishment will deter the illegal conduct; and the probability of detection and punishment.

25.17 As a New Zealand report on hard core cartels and competition policy said recently:

> Firms will tend to discount the expected cost of penalties or remedies by some factor that represents their view on the likelihood of detection and punishment … As detection and punishment are not perfect, effective deterrence requires penalties (or reme-

17 A Ashworth, *Sentencing and Penal Policy* (1983) Weidenfeld and Nicolson, London, 33.
18 Ibid, 34.
19 D Round, 'Consumer Protection: At the Merci of the Market for Damages' (Paper presented at Current Issues in Regulation: Enforcement and Compliance, Melbourne, 2–3 September 2002), fn 6.

> dies) to be greater than the expected benefit from the illegal activity to compensate for imperfect detection and prosecution.[20]

25.18 US academic, Stephen Calkins suggests:

> It is now accepted that one can vary the level of penalty with the likelihood of being apprehended and punished. If an entity faces a ten percent chance of being caught, it is important that its prospective punishment be dramatically greater than the actual harm it imposes. This conclusion applies to entities and to individuals within entities.[21]

25.19 In its review of the *Commerce Act 1986* (NZ), the New Zealand Ministry of Commerce discussed, without recommending, the optimal penalty theory.[22] Finkelstein J in *ACCC v ABB Transmission & Distribution (No 2)* also discussed, and rejected, this approach. His Honour stated '[s]o far as I have been able to discover, the optimum penalty theory has not been adopted by any court as an appropriate theory of punishment'.[23] He then elaborated on some of the criticisms 'to show why it should not be accepted here':

- The penalty would be confined to the cost of detection and the cost of prosecution … the potential effect of the anti-competitive arrangement would have to be ignored.
- The theory assumes that the corporation is a rational actor … this is not always so, and may be an unrealistic view of corporate behaviour.
- The model is far too rigid because in many cases it is impossible to calculate, or it may be far too costly to calculate, the damage that has been caused by the contravention.
- The effect of a fine imposed on a corporation will often be passed on to the consumer, rather than the individual actor who was responsible for the conduct. So the suggestion that the corporation alone and not its agents should bear the fine is not without its difficulties.
- According to the theory, small and large corporations would pay the same fine (or at least one that is proportionately the same) but that would undermine both the specific and general deterrent effect.[24]

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20 Quoted in Organisation for Economic Cooperation & Development, *Report on the Nature and Impact of Hard Core Cartels and Sanctions against Cartels under National Competition Laws,* report no 7, (2002), OECD, Paris, 13.

21 S Calkins, 'Corporate and the Antitrust Agencies Bi-Modal Penalties' (1997) 60 *Law and Contemporary Problems* 127, 142.

22 Ministry of Commerce (New Zealand), *Penalties, Remedies and Court Processes under the Commerce Act 1986: A Discussion Document* (1998), Ministry of Commerce, Wellington, 7–11.

23 *Australian Competition and Consumer Commission v ABB Transmission and Distribution Limited (No 2)* [2002] ATPR ¶41–872, 44,946.

24 Ibid, 44,946.

25.20 Round too notes that:

> The optimal deterrence theory has not been widely accepted, especially for breaches of competition laws, for a number of reasons, including its inability to produce large penalties when only an attempt was made to behave in anti-competitive ways, and when the respondent has been involved previously in other similar conduct; its reliance on the firm always acting as a rational maximiser of its own interests; its need for a precise determination of the damage caused by the conduct and the expected costs of detecting and prosecuting it; its disregard for the possibility that the firm may be able to pass the penalty on to its customers by way of higher prices; and, perhaps most importantly, the fact that such optimal penalties rely on marginal deterrence according to the nature of the offence and the damage caused, which means that all firms regardless of size would pay the same penalty for an identical breach. Use of an optimal penalty method would provide neither the right quantum of specific deterrence or of general deterrence.[25]

Penalty theory and decided cases

25.21 Chapter 17 of DP 65[26] cited a number of cases in which courts have discussed the nature of particular penalty provisions and noted that where punishment is seen as the purpose of the penalty, the courts may lean towards the criminal standard of proof and enforce other procedural protections. However, DP 65 also noted that some judges have acknowledged that 'punishment' may be a factor in the setting of civil penalties. Goldberg J in *ACCC v Australian Safeway Stores Pty Ltd* commented that:

> None of the cases which have emphasised the deterrent nature of penalties makes deterrence an exclusive consideration and excludes punishment as a relevant consideration save for *Trade Practices Commission v CSR Ltd*.[27]

25.22 However, other judges have been more concerned to emphasise the role of deterrence. As noted above, French J in *TPC v CSR Ltd*, determined that:

> Neither retribution nor rehabilitation … have any part to play in economic regulation of the kind contemplated by Pt IV. Nor, if it be necessary to say so, is there any compensatory element in the penalty fixing process … 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 contravenor and by others who might be tempted to contravene the Act.[28]

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25 D Round, 'Consumer Protection: At the Merci of the Market for Damages' (Paper presented at Current Issues in Regulation: Enforcement and Compliance, Melbourne, 2–3 September 2002), 7.

26 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney.

27 *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 75 FCR 238, 241.

28 *Trade Practices Commission v CSR Ltd* (1991) 13 ATPR ¶41–076, 52,152. Yeung suggests that French J conflated the rules surrounding whether a breach of Part IV had occurred with the principles in setting the penalty. She suggests that while 'morality has no place in determining whether a breach of the TPA has occurred, it does not necessarily follow that morality has no place in determining the appropriate penalty': K Yeung, 'Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective' (1999) 23(2) *Melbourne University Law Review* 440, 472–473.

25.23 In *ASIC v Adler*, Santow J in the NSW Supreme Court emphasised deterrence over punishment, but suggested that a pecuniary penalty could have a punitive character.[29]

25.24 This is apparent too in Burchett J's judgment in *TPC v TNT Australia Pty Ltd* in which he said:

> Penalties are not designed to express outrage; but they certainly should not be in an amount suggesting a weak tolerance of defiance of the law. The purpose of penalties imposed under s. 76 is that the provisions of the Act shall be adhered to in commerce and industry. It follows that a serious, deliberate, and systematic course of conduct contrary to the requirements of the Act must generally be met by really severe penalties. Especially must that be so where the senior management of a large company is involved.[30]

25.25 As was said in chapter 17 of DP 65, it is difficult to escape the conclusion that punishment is an aspect of specific deterrence or, as has been said, 'deterrence *relies* on the pain of punishment'.[31] Indeed as noted above, punishment is a feature of both main theories behind regulatory penalties, but it serves a different purpose in each. Fair punishment is the gist of 'just deserts'; but it is *a* means of deterrence. Arguably, when the courts have referred to 'punishment' as not being an element of civil penalties, they have been seeking to distinguish between the deterrence approach and the 'just deserts' approach, rather than excluding altogether punishment as an element of the deterrence approach. As the Canadian judge, Justice Marceau said:

> Punishment means 'the imposition of a penalty' and a penalty is, in a broad sense, a 'disadvantage of some kind' imposed as a consequence of a misbehaviour …[32]

25.26 Yeung contends that a regulatory penalty regime 'should be a hybrid':

> State punishment for regulatory offences should therefore encapsulate the essential concerns of *both* the deterrence and desert theories of punishment ... The deterrence justification for regulatory offences suggests that the quantum of regulatory penalties should, in the first instance, be set at a level that is sufficiently high to deter the offender and others from contravening the law. On the other hand a system of punishment must not overlook the requirements of fairness in seeking to secure effective regulation.[33]

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29 *ASIC v Adler* [2002] NSWSC 483, para 125.

30 *Trade Practices Commission v TNT Australia Pty Ltd* (1995) 17 ATPR ¶41–375, 40,167.

31 T Newkirk and I Brandriss, *The Advantages of a Dual System: Parallel Streams of Civil and Criminal Enforcement of the US Securities Laws, 16th International Symposium on Economic Crime, Jesus College, Cambridge England, 19 September 1998*, US Securities and Exchange Commission, <www.sec.gov/news/speech/speecharchive/1998/spch222.html>, 28 May 2002, Part VII.

32 *Knockaert v Canada (Commissioner of Corrections)* [1987] 2 FCR 202, 205 cited in Butterworths, *Words and Phrases Legally Defined* (3rd ed, Supplement 2001), 351.

33 K Yeung, 'Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective' (1999) 23(2) *Melbourne University Law Review* 440, 461.

She suggests that an examination of decisions in Australian competition cases reveals judges 'are in fact adopting a combination of both models in a manner which largely conforms to the hybrid model'.[34] Yeung suggests this is appropriate allowing both for deterrence 'while also ensuring that the penalties imposed in any individual case are fair and just'.[35]

25.27 Yeung draws a distinction between the theory underlying penalties in the regulatory arena and the basis on which their quantum is determined:

> Although the justification for punishing regulatory offences rests on deterrence, it does not necessarily follow that penalties for regulatory offences must be quantified in accordance with the deterrence theory of punishment.[36]

25.28 She suggests further that 'ignoring considerations of fairness would be unacceptable as a matter of principle, but would also be unwise as a matter of practice'[37] and contends that, as an appropriate basis for determining the quantum of a penalty,

> the deterrence justification for regulatory offences suggests that the quantum of regulatory penalties should, in the first instance, be set at a level that is sufficiently high to deter the offender and others from contravening the law. But, in any case, if the goal of general deterrence requires the imposition of a penalty of a magnitude that would be disproportionate to the seriousness of the offence, the goal of deterrence … must give way to the moral principle that the 'punishment must fit the crime'. In other words, the proportionality principle should circumscribe the outer limits of the range of acceptable penalties. … An effective penalty regime for regulatory offences should be based on a hybrid of the two models, so that the quantum of punishment reflects the goal of deterrence provided that it us not unfairly disproportionate to the seriousness of the offence.[38]

25.29 Recommendation 29–1 proposes legislative guidance for civil penalties which would take account of factors such as the gain made or loss caused but also factors that go beyond pricing the breach to include such matters as the deliberateness of the conduct and the respondent's compliance history. Similarly, in discussing the factors used by the courts in setting individual penalties, it is apparent that the courts do, and should, take account of factors to allow the 'punishment to fit the crime'.

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34 Ibid, 443.
35 Ibid, 443.
36 Ibid, 461.
37 Ibid, 462.
38 Ibid, 463.

26. Monetary Penalties in Legislation

Contents

Introduction

26.1 The Terms of Reference for this Inquiry direct the ALRC to report, *inter alia*, on the level of administrative and civil penalties, including 'the principles for setting maximum penalties'.

26.2 This chapter considers some of the issues concerning the setting of monetary penalty levels in legislation. The first part considers the factors that have a bearing on the level set within legislation, including the purpose of the penalty and parity between penalties. It also examines issues such as the relationship between civil penalties and fines for criminal offences and it looks at the relationship between penalties for individuals and penalties for corporations.

26.3 The second part examines alternative ways of setting monetary penalties including linking them to financial gain, turnover penalties, equity fines and the use of minimum penalties.

26.4 The chapter also considers the link between payment of a penalty and payment of compensation and finally it considers some overseas developments with regard to penalties for small business.

26.5 Chapter 27 considers penalties that are alternatives to monetary penalties.

Maximum penalties

26.6 Penalties for all federal contraventions are set in legislation. The type of penalty and its level are set to reflect its purpose and this includes the need to send signals to the regulated community about how seriously the proscribed conduct is viewed. Unlike criminal penalties, it is not appropriate merely to compare levels of civil penalties across regulatory regimes, in order to gauge how seriously particular contravening conduct is viewed vis-à-vis other contraventions.[1]

26.7 As discussed in chapter 25 of this Report, the principal purpose of financial penalties for non-criminal regulatory contraventions is deterrence and where significant gains can be made, the penalty, particularly a monetary penalty, needs to be set to reflect this. There are two aspects to deterrence: specific and general. Specific deterrence seeks to deter the offender from re-offending by pricing and punishing the breach. General deterrence seeks to signal to others the price of a breach.

26.8 In federal legislation, civil penalties are set at maximum amounts allowing courts discretion to tailor the penalty to the circumstances of the case.[2] This flexibility is one of the strongest arguments for the use of pecuniary penalties where there have been breaches in the regulatory area.

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1 See discussion starting at para 26.18 below.

2 Under the *Crimes Act 1914* (Cth), s 4D(1), unless otherwise provided, a penalty amount set out at the foot of any provision is a maximum penalty. See too, for example *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 481(2) and *Corporations Act 2001* (Cth), s 1317G(1).

26.9 Environment Australia in a submission to this Inquiry suggested that

> there should not necessarily be a relationship between the severity of a penalty, or the nature of behaviour, and its classification as criminal, civil or administrative. In the context of civil penalties, it is best not to adopt too prescriptive approach [sic], otherwise there is a risk that the flexibility that civil penalties introduced will be undermined … Undue emphasis should not be placed on maximum values because in practice maximum penalties are rarely applied.[3]

26.10 But maximum penalties do have implications for the overall level of penalties set by courts. Professor David Round has demonstrated that following the increase in 1993 in maximum penalties under the *Trade Practices Act 1974* (Cth) (TPA), the median corporate penalty increased five-fold to $252,859.[4] However, the maximum available penalty increased 40 times. Round's study was prior to the $15 million penalty in the *Roche Vitamins* case.[5] Nevertheless, while illustrating that the median or the average did not increase at the rate of the increase in the legislative maximum, his figures demonstrate that the increase in the maximum penalty did cause the courts to move average penalties upwards. It might be suggested too that penalties at the top of the range were always to be reserved for the most egregious cases of price fixing and for those cases where the corporation involved made a very large gain.

26.11 Officers of the Australian Government Solicitor, in a consultation, suggested that a fixation on maximum penalties can have a detrimental effect on small companies.[6] However, individual penalties set to take account of capacity to pay may overcome this problem. See discussion in chapter 30.

26.12 One result of increasing maximum penalties can be an increase in defended matters. A study of prosecutions under environmental legislation in New South Wales showed that an increase in the number of prosecutions undertaken in the years 1989, 1990 and 1991, coupled with the imposition of higher fines, saw more defendants defending the prosecutions suggesting that the attitudes of the regulated community 'hardened' with the introduction of higher maximum penalties.[7]

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3 Environment Australia, *Submission CAP 5*, 22 January 2002.

4 D Round, 'An Empirical Analysis of Price-Fixing Penalties in Australia from 1974 to 1999; Have Australia's Corporate Colluders Been Corralled?' (2000) 8 *Competition & Consumer Law Journal* 83, 94. The largest penalty so far against a corporation is $15 million: *Australian Competition & Consumer Commission v Roche Vitamins Australia Pty Ltd* (2001) ATPR ¶41–809.

5 *Australian Competition & Consumer Commission v Roche Vitamins Australia Pty Ltd* (2001) ATPR ¶41–809.

6 Australian Government Solicitor, *Consultation*, Sydney, 27 August 2002.

7 J Kelly, 'Recent Developments in Environmental Criminal Law in New South Wales' (Paper presented at Australian Institute of Criminology; Environmental Crime: Conference, 1–3 September).

Maximum penalties and their purpose

26.13 As DP 65 noted, Chief Justice Spigelman and others have observed that a purpose of maximum penalties is to provide an indication to the courts of how seriously a contravention is viewed.[8] It follows that those setting the maximum penalty in legislation must have regard to how they treat the seriousness of a contravention relative to similar contraventions and other contraventions.

26.14 But there is an important qualification. While the maximum is important for signalling how seriously a contravention is viewed, in the regulatory area, the objective of deterrence means that it is not appropriate merely to consider the size of a penalty as an indication of seriousness relative to other regulatory contraventions. The emphasis in deterrence theory is both on pricing the illegal behaviour and having a penalty large enough to deter a well-resourced corporate offender. If large gains can be made then the maximum ought to reflect this. This is the purpose of a high maximum such as the $10 million penalty for a breach of Part IV of the TPA.

26.15 Deterrence is also behind the recommendation in CLERP 9 that the maximum penalty that may be imposed on a body corporate in relation to a contravention of the continuous disclosure requirements in the *Corporations Act 2001* (Cth) be increased from $200,000 to $1 million. CLERP 9 notes that while $200,000 'may represent a substantial impost in relation to a small entity, it is unlikely to be regarded as such by a large body corporate'.[9]

26.16 The Commonwealth Director of Public Prosecutions (DPP) has also noted that current penalties for corporate wrongdoing under the *Corporations Act* may be inadequate and it has called for a review of the level of the penalties.[10] In particular the DPP noted a disparity in the case of offences against State law, which it says, often carry a higher maximum penalty than offences for similar conduct under the *Corporations Act*.[11]

26.17 Santow J in *ASIC v Adler* stated that different principles might apply in quantifying levels of penalties depending on the purpose and objects of the relevant legislation. In relation to issues of honesty or propriety of purpose, his Honour said 'the sphere of discourse applicable to economic legislation such as antitrust law is wholly distinct from corporations law with its emphasis on proper purpose and honesty'. [12]

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8 The Hon Chief Justice J Spigelman, *Sentencing Guidelines Judgments*, NSW Supreme Court, <www.agd.nsw.gov.au/sc/sc.nsf/pages/CJ_240699>, 12 December 2001; *Hayes v Weller (No 2)* (1988) 93 FLR 64. See also A Freiberg, *Sentencing Review Discussion Paper*, Attorney-General (Victoria), <www.justice.vic.gov.au>, 23 January 2002.

9 Treasury, *CLERP 9: Corporate Disclosure — Strengthening the financial reporting framework*, <www.treasury.gov.au/contentitem.asp?pageId=&ContentID=403>, 18 September 2002, 144.

10 Commonwealth Director of Public Prosecutions, *Annual Report 2001–2002* (2002), Commonwealth of Australia, 21.

11 Ibid, 21.

12 *ASIC v Adler* [2002] NSWSC 483, para 126.

Recommendation

Recommendation 26–1. In setting civil penalties, legislators should have regard to whether the level set will achieve the aim of deterrence, which is the principal purpose of civil penalties.

Hierarchy of contraventions and quantum of penalties

26.18 As noted above, DP 65 raised the issue of the link between the levels of penalties set in legislation and an understood hierarchy of seriousness and severity and noted that principles of fairness 'require that there be a degree of proportionality between the seriousness of the contravention and the quantum of the maximum penalty'.[13] The theory underlying this approach is more akin to the 'just deserts' approach to sentencing. But as noted above, deterrence theory will result in high maximum pecuniary penalties in some legislation, not because the contravention is more serious than another, but because of the gains that can be made. This makes setting maximum penalties particularly difficult if the aim is to achieve some principled hierarchy, or as Dr Karen Yeung noted of the TPA, 'there is no quantum of penalty which suggests itself as uniquely appropriate for competition law violations'.[14]

26.19 Yeung suggests that

> in theory it may be possible to rank the seriousness of competition law violations relative to other types of commercial conduct which is subject to regulation and punishable by monetary sanction — such as laws relating to insider trading, disclosure of corporate information, financial services regulation and so forth, by reference to the potential harm caused by such practices in monetary terms.[15]

26.20 She identifies 'harm and culpability' as the two criteria needed to assess seriousness.[16] Harm is not problematic in the area of civil penalties because it requires an assessment of damage caused or of the potential to cause damage. This is relevant whether or not the harm is strictly economic loss or physical damage, such as damage to the environment. Harm would need to be seen broadly: some civil and administrative penalties seek to deter minor breaches. The mischief sought to be addressed may be little more than regulator convenience seeking an orderly and systematic regulatory regime. Culpability is arguably more contentious because of its focus on the blamewor-

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13 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, para 18.15.

14 K Yeung, 'Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective' (1999) 23(2) *Melbourne University Law Review* 440, 468.

15 Ibid, 468.

16 Ibid, 452. Also K Yeung, *Submission CAP 20*, 9 October 2002 who stated 'the guiding principle should be that offences of equivalent levels of *seriousness* (reflected in the twin principles of (i) harm and (ii) culpability) should attract broadly similar penalty levels'.

thiness of the offender. Considerations of intent or motive have parallels with *mens rea* in criminal law. But they are not generally a feature of federal civil penalty provisions. (See discussion in chapter 4.)

26.21 Various United States statutes imposing civil penalties adopt a 'tiered-approach' based on the degree of culpability of the defendant. For example s 21B of the *Securities Exchange Act 1934* (US) provides for three tiers of penalty being, respectively, (a) US$5000, (b) US$50,000 and (c) US$100,000 for a natural person and (a) US$50,000, (b) US$250,000 and (c) US$500,000 for any other person based on (a) a breach; (b) a breach involving fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; or (c) a breach involving fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement together with an act or omission that directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the act or omission.

26.22 The tiers described above have parallels with criminal law and require proof of matters such as intent. This is a different approach to that adopted so far in Australian federal legislation in that, where parallel or sequential proceedings are possible, the choice of which proceedings to take is linked to the intention of the person facing the proceedings, with 'criminal' behaviour leading to criminal proceedings. Civil penalties are not determined by concepts of degrees of 'guilt' although intention in the context of the *purpose* of the behaviour may be an element of the non-criminal contravention.

26.23 Whilst the legislative clarity of the US approach in clearly setting out a hierarchy of seriousness and its links to the penalty is commendable, it introduces a level of complexity into the proceedings that does not seem warranted in Australia. If penalties were to be dependent on proof of matters such as fraud or deceit, there would be strong arguments for this proof to be at the criminal standard, given the implications for someone's reputation of such a finding. There would also be a strong argument for this behaviour to be subject to criminal law on the basis that any breach involving fraud, deceit and probably reckless behaviour, ought to result in a criminal prosecution.[17]

26.24 DP 65 noted that prior to the CLERP reforms, the relationship between criminal liability and civil penalties was not clearly drawn under the *Corporations Law*.[18] The legislation included a hierarchy of contraventions based on 'honesty'. Evidence of 'intentional dishonesty' would escalate a contravention from a civil penalty under s 232, to a criminal offence under s 1317FA. The scheme was criticised for providing insufficient guidance as to how to assess the level of culpability between 'lack of honesty' and 'intentional dishonesty'. DP 65 noted that this uncertainty led to a reluctance by ASIC to use civil penalty provisions.

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17 Subject to policy considerations as set out in the DPP's Prosecution Policy as discussed in ch 9.

18 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, para 8.31–8.34.

26.25 The regime of civil and criminal penalties under the *Superannuation Industry (Supervision) Act 1993* (Cth) is similar to the pre-CLERP *Corporations Law* model. Section 202 provides that if a person contravenes a civil penalty provision either (a) dishonestly or (b) intending to deceive or defraud someone that person is guilty of a criminal offence punishable on conviction by a gaol term of not more than five years. DP 65 expressed an interest in receiving submissions on this point, but none was forthcoming.[19]

26.26 As discussed in chapter 4, the ALRC's suggested approach to fault would not allow for a hierarchy of civil penalties based on degrees of culpability, although it would not prevent tiers based on an assessment of damage caused, for example. But also as discussed in chapters 29 and 30, in assessing penalties in particular cases, factors such as the impact of a breach or the role played by an individual facing a penalty, including the level of 'blameworthiness' or culpability should be taken into account.

Consultations and submissions

26.27 The Members of the Advisory Committee expressed support for legislative criteria that would allow the culpability of the offender to be considered.[20] This is discussed further in chapter 29.

26.28 The ATO said it sees 'culpability of the offender and the seriousness of the contraventions' as equally important in determining the penalty.[21]

Conclusion

26.29 Maximum civil penalty levels in legislation need to be set at a level that gives courts the ability to tailor a particular penalty to a level that will deter a range of offenders. This is particularly relevant where the contravention is such that large gains can be made, or large losses caused. While the level should allow the penalty to reflect the loss or the gain, penalty guidelines should also allow for variations in the levels set to reflect the culpability of the offender. In this regard there is a parallel with criminal penalty setting.

Parity

26.30 As DP 65 said, it is impossible to establish a rigid hierarchy of contraventions that would cover the range of conduct for which civil penalties may be imposed. The same conduct may have far more significant consequences in one area of regulation than in another, and therefore merit a different position in the hierarchy of seriousness of contraventions. However, it should be possible to establish a form of equivalence

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19 Ibid, para 8.34.
20 Advisory Committee members, *Advisory Committee meeting*, 17 October 2002.
21 Australian Taxation Office, *Submission CAP 16*, 17 September 2002.

across a range of penalties so that the relative seriousness of conduct and penalties can be compared. The ALRC suggested the development of a table of comparative provisions across all areas of regulation.[22]

26.31 As the 1998 Senate Scrutiny of Bills Committee report stated:

> It is self-evident that penalties should be fair and appropriate for each particular offence ... [but] there is no necessity that every apparently similar offence should attract the same penalty … offences which appear similar in form may attract different penalties because of the context in which those offences appear.[23]

26.32 Record-keeping was cited as an example of this principle. There are numerous statutes that impose an obligation for record-keeping. But it does not follow that there ought to be an identical penalty for a failure to comply. Context is important. In most cases record-keeping carries with it a mainly evidentiary purpose: assisting a regulator to determine if the law has been complied with or to assist with legal actions in the event of a breach. However, under the *Corporations Act,* for example, record-keeping plays a more central role. Company registers are key to the information available to members and prospective members of the company. Failure to keep the registers up to date can have serious ramifications for investors. Professor John Braithwaite suggests that the provision of fraudulent data to regulators in the environment or health area, for example, could put lives at risk.[24] In this light there need be no parity between the penalty for failing to keep records up to date and accurate under some legislation, and under other legislation where its purpose is different and less central. But where the purpose is largely the same, unless there is a good reason otherwise, there should be a similar penalty imposed within and across all relevant legislation.

26.33 CLERP 9 suggests

> it would be desirable to keep the increase of penalties in relation to financial reporting offences appropriately proportionate to other comparable penalties under the Corporations Act. Accordingly, a revision of penalties will be undertaken covering all of the Corporations Act, focusing on financial reporting and officers' duties. This will encompass civil penalties, especially for bodies corporate … [25]

26.34 DP 65 cited as an example of apparently differential treatment of similar conduct, market manipulation under the TPA and under the reforms introduced into the *Corporations Act* by the *Financial Services Reform Act 2001* (Cth). Under Part IV of the TPA, market manipulation in the form of price fixing or various collusive arrangements is subject to a maximum $10 million penalty for a corporation or $500,000 for

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22 See Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Proposal 18–3 and Question 18–2.

23 Parliament of Australia Senate Scrutiny of Bills Committee, *Scrutiny of Bills Eighth Report of 1998: The Appropriate Basis for Penalty Provisions in Legislation Comparable to the Productivity Commission Bill 1996* (1998), Parliament of Australia.

24 J Braithwaite, 'Penalties for White-Collar Crime' (Paper presented at Complex Commercial Fraud conference, 20 August 1991).

25 Treasury, *CLERP 9: Corporate Disclosure — Strengthening the financial reporting framework*, <www.treasury.gov.au/contentitem.asp?pageId=&ContentID=403>, 18 September 2002, para 10.1.

an individual. Market manipulation that might affect the price of a financial product can be subject to a civil penalty under the *Corporations Act*, with the offender liable to a $200,000 penalty.[26] Although the contraventions are not identical, there is an issue as to whether they are so different as to explain the difference in the size of the penalties.[27] As discussed below, ASIC suggested there were sound reasons for such a difference.

26.35 The issue of parity of penalties also raises issues concerning the size of the administrative penalties for breaches of the *Social Security Act 1991* (Cth). As was discussed in chapter 7 of DP 65 and para 15.45 of this Report, the ALRC has noted considerable academic writings and comments from social and public welfare groups that the penalties under this legislation are too onerous, particularly in their comparative effect on offenders.

26.36 The Senate Community Affairs Reference Committee's *Report on Inquiry into Participation Requirements and Penalties* commented on the size of some penalties and concluded:

> The Committee considers the breaching regime and associated penalties proposed for Parenting Payment and mature age Newstart recipients are unjustifiably harsh and inequitable and should be amended in line with the recommendations of the Pearce review into breaches and penalties. The Committee believes that the emphasis of a breaching system should be to encourage compliance and not act as a form of punishment.[28]

26.37 It is beyond the scope of this Inquiry to comment specifically on the adequacy or fairness of the levels of penalties within the social security legislation. However, the ALRC agrees with the Senate Committee's comment that 'the emphasis of a breaching system should be to encourage compliance and not act as a form of punishment'. The level of the penalties should be set at no higher level than is necessary to achieve the aim of compliance. But it may also be that the penalties within the social security legislation are sufficiently unique to make comparison with other penalties difficult.

Consultations and submissions

26.38 In DP 65, the ALRC proposed that:

> **Proposal 18–3**. In order to promote consistency and fairness in penalty setting across all areas of regulation, a table of comparative provisions should be developed across all areas of regulation to permit a comparison of similar contravention provi-

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26 *Corporations Act 2001* (Cth), s 1041A and Sch 3.

27 J Longo, 'Civil Penalties under the Corporations Act — Reflections of a Gamekeeper turned Poacher' (Paper presented at Corporation Law Workshop, 27–29 July 2001).

28 Senate Community Affairs Reference Committee, *Report on Inquiry into Participation Requirements and Penalties*, (2002), Commonwealth of Australia, <www.aph.gov.au/senate/committee/clac.ctte/partic_req/index.htm>, 25 September 2002, para 2.83.

> sions. Where anomalies are revealed that are not explained by their context, legislation should be amended to achieve greater consistency.

26.39 ASIC expressed concerns that

- the table may emphasise similarities of provisions at the expense of more relevant, and in a penalty setting context, more decisive differences between the broad range of provisions across the legislative spectrum; and
- insufficient attention might be paid to the regulatory objectives of specific provisions in the effort to find usable comparisons.[29]

26.40 ASIC also suggested that the civil penalty provisions in the *Corporations Act* have 'important and unique functions to fulfil in the regulation of corporations and financial markets' and said it was difficult to envisage offences offering a true comparison with those offences. ASIC took issue with DP 65's comments about the market manipulation provisions in the TPA and the *Corporations Act* suggesting that, while there were a number of similarities between the two, those in the *Corporations Act* applied to natural persons as well as corporations and the corporations legislation also created corresponding criminal offences. ASIC said:

> More importantly, the function, context and objectives of the market manipulation provisions in the TPA have a strong economic and competition law focus. The market manipulation provisions in the Corporations Act are less concerned with competition issues focussing on the overall fair operation and integrity of the market for financial products. There is a strong transactional focus in the Corporations Act provisions in contrast to the behavioural focus in the TPA.[30]

26.41 The ATO supported the proposal of developing a table of comparative provisions and exploring any anomalies.[31] However, the ATO also indicated it could not see any problems with applying different penalties for non-compliance with revenue laws than for non-compliance with other laws suggesting that it may not be possible or desirable to have uniform compliance strategies for every Commonwealth agency.[32]

26.42 Yeung suggested that such a table might be helpful, but said 'identifying "equivalence" is an unavoidably difficult and contentious task, owing to the subjectivity involved in making such assessments'.[33]

26.43 Similarly, Environment Australia supported the principle but indicated it might not be easy to determine comparability in provisions taking into account factors such as the subject matter, legislative characteristics and the regulated community.[34]

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29 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.
30 Ibid.
31 Australian Taxation Office, *Submission CAP 16*, 17 September 2002. As did M Adams, *Submission CAP 12*, 5 September 2002 and Customs Brokers & Forwarders Council of Australia Inc, *Submission CAP 17*, 16 September 2002.
32 Australian Taxation Office, *Submission CAP 16*, 17 September 2002.
33 K Yeung, *Submission CAP 20*, 9 October 2002.
34 Environment Australia, *Submission CAP 26*, 24 October 2002.

Conclusion

26.44 The ALRC considers that a table of comparative provisions could be helpful and should be developed across all areas of regulation with the aim of assisting parity and consistency. However, the ALRC also concurs with the cautions that the aims and objectives of the legislation and the particular provision in question are vital considerations. At best, a table of comparative provisions could give legislative guidance when penalties are being set. The legislature could depart from the levels set for apparently similar provisions, provided the departure was done with an understanding of the differing objectives of the penalty provisions.

Recommendation

Recommendation 26–2. In order to promote consistency and fairness in penalty setting, the Attorney-General should develop a table of comparative provisions across all areas of regulation to permit a comparison of similar contravention provisions. Where significant anomalies are revealed that are not explained by their context, legislation should be amended to achieve greater consistency. A table of comparative provisions could give legislative guidance when new penalties are being set.

26.45 Question 18–2 in DP 65 asked:

> If Proposal 18–3 were not adopted;
>
> (a) should hierarchies of conduct within each area of legislation be established? If so, should this be available to the public or simply be a checklist for drafters of legislation; and
>
> (b) should drafters of legislation be required to have regard to contravention hierarchies for all areas of legislation when setting maximum penalties? Alternatively, would it be feasible to develop indicators of the seriousness of contraventions? What should these indicators be? Should they be taken into account in making individual decisions about penalties or only in the legislation setting maximum penalties?

26.46 Environment Australia suggested that the development of a hierarchy of conduct would facilitate regulatory practice using the 'enforcement pyramid' and would also have the benefit of promoting consistency between penalty provisions. Similarly, it suggested that drafters 'should have regard to, but not be constrained by, penalties in

other regulatory areas'. It suggested this would promote consistency while allowing flexibility.[35]

26.47 ASIC considered the function of hierarchies of conduct and seriousness 'was not clear' but suggested it might be possible to establish generic factors against which seriousness can be assessed or measured. They said that the kinds of factors that appear to be most relevant are:

- the defendant's awareness of impropriety;
- the amount of money involved; and
- the extent to which the defendant was involved in covering up, concealing etc the contravention.[36]

26.48 Yeung agreed with Question 18–2(a) and said 'probably yes' to 18–2(b).[37]

Conclusion

26.49 The ALRC has made Recommendation 26–2 in line with Proposal 18–3. As is discussed in chapters 29 and 30, factors which the ALRC suggests should be included in legislation, and by the courts, do take account of the seriousness of the contravention and the culpability of the offender.

Relationship between criminal and civil penalties

26.50 DP 65 raised the issue of the relationship between criminal and civil penalties. Question 18–3(d) asked whether there was any inconsistency in the levels of civil penalties generally (or particular civil penalties) relative to administrative or criminal penalties for comparable conduct and Proposal 18–4 suggested that when considering the relationship between criminal and civil penalties, the fact of a criminal conviction should be taken into account when considering the relative severity of penalties. This would mean that a penalty for a non-criminal regulatory contravention could be larger than the penalty for a parallel criminal offence.

26.51 The disparity within the TPA between the civil pecuniary penalties and the criminal fines was cited as a possible example of a disparity between criminal and civil penalties. In the TPA a body corporate faces a maximum fine of $1.1 million for a Part VC offence and a maximum civil penalty of $10 million for a Part IV contravention. However, DP 65 noted that the TPA covers a disparate range of activities and, arguably at least, while the contraventions under Part IV, or many of them, lack the moral content of those in Part VC, the impact of a Part IV contravention might be significantly greater than that of a Part VC breach in that, for example, many more people might be affected.

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35 Ibid.
36 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.
37 K Yeung, *Submission CAP 20*, 9 October 2002.

26.52 The different objectives of criminal and civil penalties are also important. As was noted in chapter 3, criminal penalties serve a number of purposes including punishment. But deterrence, including pricing the contravention, is the most important objective of civil penalties. The difference in the purposes might explain some variations in the levels in legislation and, in particular, why some civil penalties are set at a higher level than some criminal ones.

26.53 As this Report has noted, if a major purpose of the penalty is to deter, only a sizeable penalty will deter corporations that stand to make multi-million dollar profits from market misconduct. There is evidence that sizeable monetary penalties do deter.[38]

26.54 It can be misleading therefore to look only at the comparative levels of monetary penalties in legislation that permits a choice of proceedings, or generally when comparing criminal and civil penalties. A successful prosecution results in a criminal conviction. For individuals, the consequences cannot be measured in terms only of the monetary amount: the fact of a criminal conviction and its ongoing effect is in itself a penalty. The issue is more complex with corporations.

26.55 Under s 4B of the *Crimes Act 1914* (Cth), courts have the power to convert a term of imprisonment to a monetary penalty under a formula based on the number of months of the maximum term of imprisonment multiplied by five. For example, under the *Commonwealth Authorities and Companies Act 1997* (Cth), a breach of good faith by an officer of a Commonwealth authority carries a maximum civil pecuniary penalty of $200,000. The equivalent criminal offence carries a maximum five year term of imprisonment or a fine of $33,000 or both. Theoretically therefore, a person convicted of the criminal offence, but not sent to prison, could receive a fine that is significantly smaller than the pecuniary penalty for a person liable for the parallel civil contravention. A tiered approach to penalties would suggest that the criminal penalty ought to be greater than the civil one, but such a conclusion would ignore the impact of the fact of a criminal conviction on an individual.

26.56 Under the *Corporations Act*, a director breaching the obligation to act in good faith (but without proof of dishonesty) may face a pecuniary penalty of up to $200,000 but a director breaching the obligation to act in good faith and acting dishonestly may face a fine of up to 2000 penalty units (currently $220,000) and up to five years' imprisonment or both. Theoretically at least, a director convicted of a first offence breach, and not sent to gaol, could receive a fine in a lesser amount than another director facing a pecuniary penalty for breaching the parallel civil penalty provision.

26.57 The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) in particular, illustrates some of the problems faced when parallel or sequential proceedings are available in relation to the same physical element and where

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38 M Bagaric, *Consultation*, Melbourne, 8 October 2001.

there are very different penalty levels. Sections 12 and 15A of the EPBC Act cover illegal activities that may have a significant impact on the world heritage values of a World Heritage property. The civil penalty, under s 12, is a maximum of 5000 penalty units for an individual and 50,000 for a body corporate. The criminal penalty for a natural person under s 15A is a maximum of seven years gaol and/or a fine of 420 penalty units and for a body corporate, the criminal penalty is determined using the formula found in s 4B of the *Crimes Act* for fining bodies corporate; that is, 420 multiplied by five, or 2100 penalty units. (There are numerous similar examples in the EPBC Act.)

26.58 For an individual, the fact of a potential long gaol sentence and a criminal conviction means comparing the two types of penalties is not straightforward and both would appear to have considerable deterrent effect with a strong punishment element in the criminal penalty.

26.59 However, the disparity in the penalties is considerably more problematic in relation to bodies corporate. In the case of a serious breach, a body corporate might face a civil penalty of $5.5 million (50,000 penalty units) compared with a maximum fine for the criminal offence of $231,000 (420 penalty units multiplied by 5). Given the potential for considerable damage to the environment, and the need to deter where profits might be made, the level of civil penalty is understandable.

26.60 But an explanation for the level of the criminal penalty vis-à-vis the civil penalty for a body corporate is more difficult to find other than it is consistent with the usual formula for determining corporate liability.

26.61 However, under s 495 of the EPBC Act an executive officer of a body corporate may be held to be criminally liable if the body corporate is convicted under s 15A.[39] In that event, the executive officer would then be liable for the same criminal penalty as may be faced by a person under s 15A. The possibility of the managerial liability and the level of that penalty may provide some rationale for the disparity in the level of the criminal fine and the civil penalty for a body corporate, but otherwise, it is difficult to account for such a large disparity. That explanation assumes too a prosecution policy to seek to act against a corporate officer when a body corporate is being prosecuted. In the absence of a history of convictions under this legislation it is difficult to know if this is the case.

Consultations and submissions

26.62 The ATO supported Proposal 18–4 saying that a criminal penalty need not be larger than a civil one because there is considerable deterrence value in the fact of a conviction.[40] Yeung also indicated support.[41]

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39 This is discussed in more detail in ch 8.
40 Australian Taxation Office, *Submission CAP 16*, 17 September 2002.
41 K Yeung, *Submission CAP 20*, 9 October 2002.

26.63 In DP 65, Question 18–8 asked, where a choice of proceedings is possible, whether the maximum criminal penalty should be set in such a way as to minimise the possibility of a person found guilty of a criminal offence receiving a smaller monetary penalty than a person liable for a parallel civil penalty contravention. ASIC noted that because it was possible for it to bring a criminal proceeding after civil penalty proceedings, 'it is possible that the criminal penalty might be less than the civil penalty but it would be a very rare and unusual case where a lower criminal penalty was imposed for reasons other than the fact that the person has already been punished for the same offence'.[42]

Conclusion

26.64 The different objectives of criminal and civil penalties provide some rationale for different penalty levels and explain why some civil pecuniary penalties are set at higher levels than fines for parallel criminal offences. In the case of criminal offences, there is a need too for parity across the range of criminal offences. Given the impact of a criminal conviction on an individual, the ALRC believes that it is not necessary for a criminal fine to be larger than a civil pecuniary penalty. However, the issue is more problematic with bodies corporate and this is highlighted by the example from the EPBC Act cited above. This example suggests that there may be a need for a reexamination of the level of penalties for bodies corporate in legislation where choice of proceedings is possible.

Recommendation

Recommendation 26–3. When considering the relationship between criminal and civil penalties, the effect of a criminal conviction should be taken into account when considering the relative severity of penalties. This would mean that a penalty for a non-criminal contravention could be larger than the penalty for a parallel criminal offence.

Relationship between corporate and individual penalties

26.65 Question 18–3(a) of DP 65 asked whether there was any inconsistency or unfairness in the levels of regulatory penalties and, if so, whether this relates to the relative penalties applied to corporations and individuals?

26.66 Much of the legislation reviewed by the ALRC provides for higher penalties if the contravention is by a body corporate rather than by an individual. However, between, and even within, statutes there are variations in the ratio between the levels of

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42 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.

corporate and individual penalties. Typically, it is a multiple of five, as with criminal fines under s 4B of the *Crimes Act*, but this is not always the case. Examples in legislation looked at by the ALRC include:

1. Under the TPA, the penalties for breaches of Part IV are $10 million for corporations and $500,000 for individuals, a corporate penalty twenty times larger than that for an individual. The $10 million penalty is set to reflect the large profits that may be made by corporations from breaches of competition laws and such a differential is therefore appropriate.

2. As discussed above, the maximum civil penalties under the EPBC Act are $5.5 million for corporations and $550,000 for individuals.[43] Here the corporate penalty is ten times that of the individual. Under s 12 of the EPBC Act, which seeks to protect World Heritage property, there is a civil penalty for an individual of 5000 penalty units and for a body corporate, 50,000 penalty units. However, where the Act makes a breach a criminal offence, such as s 15A, the multiple is five times that of an individual penalty by reason of the operation of s 4B of the *Crimes Act*.[44]Accordingly, sections with apparently similar aims, but differentiated on the basis of one being a civil penalty provision and the other being a criminal offence, deal differently with individual and corporate offenders in relation to the maximum penalties set in the legislation.

3. In the *Telecommunications Act 1997* (Cth), the maximum civil penalty that may be imposed on an individual is $50,000, whereas it is $10 million for corporations. However, the $10 million penalty applies only in two areas: breaches of carrier licences[45] and breaches of service provider service agreements,[46] areas not likely to be relevant to individuals. For all other penalty provisions, bodies corporate face a $250,000 penalty.[47] This is a multiple of five times the individual penalty.

4. Under s 1312 of the *Corporations Act*, where a body corporate is convicted of an offence it is liable to a fine up to five times that 'but for this section, the court could impose as a pecuniary penalty for that offence'. However, the civil penalty provisions do not provide for any differential. Under s 1317G a court may order a pecuniary penalty of up to $200,000. There is no differentiation between the maximum penalty for individuals and corporations.

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43 Expressed as 50,000 and 5000 penalty units respectively. See, for example, *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 18 which provides for penalties of up to 5000 penalty units for individuals and 50,000 for corporations for actions that have or will have a significant impact on listed threatened species.

44 Under the *Crimes Act 1914* (Cth), s 4B(3): 'Where a body corporate is convicted of an offence against a law of the Commonwealth, the court may, if the contrary intention does not appear and the court thinks fit, impose a pecuniary penalty not exceeding an amount equal to 5 times the amount of the maximum pecuniary penalty that could be imposed by the court on a natural person convicted of the same offence'.

45 *Telecommunications Act 1997* (Cth), s 68(1) and (2).

46 Ibid, s 101(1) and (2).

47 Ibid, s 570(3)(b).

26.67 CLERP 9 suggests that some penalties under the *Corporations Act* especially for large corporations are unlikely 'to operate as a credible deterrent'[48] and recommends an increase in the penalty for corporations to $1 million from $200,000.

> This could be achieved by inserting into the Corporations Act a provision similar to section 1312 to provide that the maximum civil penalty that may be imposed on a body corporate in relation to contravention of a financial services penalty provision is five times the maximum penalty that applies to an individual (which would remain at $200,000). This would bring financial services penalty provisions into line with the offence provisions of the Corporations Act, in which the maximum financial penalty that may be imposed in relation to a body corporate is five times the maximum financial penalty listed for the offence in Schedule 3 (which sets out the maximum financial penalty in relation to a criminal contravention by an individual).[49]

26.68 In the case of criminal offences, where imprisonment for a natural person is part of the penalty, a higher fine for a corporation reflects the non-availability of gaol for a corporation. But the multiple of five is also used in legislation where imprisonment is not part of the penalty, as with civil penalties. The multiple therefore appears to play two different roles:

- in some legislation it appears to reflect the fact that corporations cannot be sent to gaol and is the price of avoiding this punishment; and
- in other statutes (where gaol is not an option), it reflects a view that corporations ought to pay more than individuals, presumably on the basis of capacity to pay and the need for the higher penalty to act as a deterrent to a larger entity.

26.69 With civil penalties, as illustrated above, there is less consistency in the relationship between individual and corporate penalties. Given that gaol is not a factor in civil penalties, then the differential appears to reflect a view of a greater corporate capacity to pay and the need to provide a penalty of sufficient size to achieve deterrence. However, it is not always apparent why there are differences in the corporate/individual ratio between and even within legislation, and this raises issues whether in some statutes corporations are unduly favoured over individuals or vice versa.

26.70 The antitrust laws in the US had alterations to the multiple over time. In 1974 the maximum fines distinguished between individual and corporate offenders for the first time. They were set at US$100,000 and US$1 million respectively.[50] That is, a multiple of ten. In 1990, the maximum corporate fine was increased to US$10 million, while individuals could face fines of up to US$350,000. This altered the multiple to almost 30. In 1991, Corporate Sentencing Guidelines further increased corporate fines.

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48 Treasury, *CLERP 9: Corporate Disclosure — Strengthening the financial reporting framework*, <www.treasury.gov.au/contentitem.asp?pageId=&ContentID=403>, 18 September 2002, ch 8.

49 Ibid, ch 8.

50 *Antitrust Procedures and Penalties Act*, Pub L No 93-528, 88 Stat 1706 (1974) (US).

However, antitrust violations in the US are felonies and imprisonment is available for individual offenders. In this light one might expect the monetary penalty for corporations to be significantly greater than for individuals.

26.71 In New Zealand, the *Commerce Act 1986* (NZ) provides for civil penalties. Under s 83, the Court may order a pecuniary penalty not exceeding NZ$500,000 in the case of an individual and NZ$5 million in the case of a body corporate for breaches of the business acquisition provisions. This is a multiple of 10 between the individual and corporate rates. Under s 80, there is a penalty not exceeding NZ$500,000 for an individual and, for a body corporate, either the greater of NZ$10 million or three times the value of the commercial gain or 10% of turnover of the body corporate and all interconnected bodies corporate for a contravention of the restrictive trade practices provisions.

26.72 The question of the appropriate ratio between individual and corporate penalties raises issues of fairness and effectiveness. The impact on an individual of a NZ$500,000 penalty may be far greater than a NZ$10 million penalty on a corporation, particularly one that has made large profits from a breach. However, corporate breaches occur only because of the decisions of individuals. Exposing individuals who make decisions to engage in illegal activity to large penalties, may have a greater deterrent effect than a large penalty on a corporation. On the other hand, fairness would suggest that those who profit most from the breach should pay the greater penalty. This discussion refers to the penalty set within legislation. At the individual case level, the court can consider factors such as capacity to pay and any gains made when setting penalty levels. This may ameliorate potential unfairness.

Consultations and submissions

26.73 ASIC suggested it was 'anomalous' that criminal convictions may carry an increased penalty for corporations relative to individuals, but that the same does not apply in relation to civil penalties [in the *Corporations Act*]. ASIC said, 'arguably, there ought to be a distinction between the size of a penalty that can be imposed on a natural person and on a company'.[51] ASIC suggested one reason for the apparent anomaly in the *Corporations Act* might be that the usual basis for the distinction in criminal sentencing is that the corporation does not face the same risk of imprisonment and so a higher financial penalty is required to ensure there is an effective deterrent. But this is not applicable to the civil penalty scheme.

Conclusion

26.74 The ALRC supports the principle, that in general, a maximum civil penalty set in legislation for a natural person should be less than that for a body corporate.

26.75 Where a body corporate has, or may have, made significant financial gains from any contravention, it is appropriate, and consistent with other recommendations

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51 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.

in this Report, that the size of the penalty be significantly larger than that for a natural person. Seen in this light, multiples greater than five may well be appropriate in some legislation as illustrated by the TPA and the EPBC Act, discussed above.

26.76 However, the example from the EPBC Act described above also raises an anomaly in that it seems, relative to a natural person, a corporation charged with a criminal offence, may get a lower fine, than if it were to get a penalty under a corresponding civil penalty provision.

26.77 Further inconsistencies are highlighted by the *Corporations Act* which makes no distinction between a natural person and a body corporate in relation to its civil penalty scheme.

26.78 It is outside the scope of this Inquiry to consider whether five is the appropriate multiple for fines for bodies corporate in the *Crimes Act* and in specific legislation in relation to criminal offences. This might be an area for further research.

26.79 However, on the assumption that five is the appropriate multiple, as noted above, it is not always apparent why, in relation to civil penalties, there are other differences in the corporate/individual multiple between and even within legislation, and this raises issues whether in some statutes corporations are unduly favoured over individuals or vice versa. As noted above, the ALRC believes there are good grounds to have a higher penalty for corporations in relation to natural persons in many areas, however, it suggests that when a decision is made to use other than the standard multiple, the reasons for this should be made apparent in the Explanatory Memorandum accompanying the legislation.

26.80 The ALRC also believes that, in relation to legislation that provides a choice of proceedings, civil or criminal, for the same conduct, that there should be strong reasons to depart from the standard multiple.

Recommendations

Recommendation 26–4. For the sake of consistency with the *Crimes Act 1914* (Cth), a penalty for a body corporate should be five times that for a natural person for the same contravention, unless there are compelling reasons otherwise. Where a body corporate stands to obtain a much greater financial benefit from a contravention than could be obtained by a natural person, this is a compelling reason to use a larger multiple or another method of assessment. Where there are compelling reasons to depart from the standard, these should be stated in the Explanatory Memorandum.

Recommendation 26–5. Unless there are compelling reasons otherwise, any legislation that does not provide for a differential between the civil penalty for a natural person and that for a body corporate, should be amended to do so.

Alternative ways of setting pecuniary penalties

Penalties linked to financial gain

26.81 Proposal 18–1 in DP 65 suggested a possible recommendation linking the quantum of a penalty to the financial benefit obtained as one of the alternative approaches to setting the penalty. This is relevant to areas such as competition law; potentially, market manipulation and Customs breaches. Such an approach seeks to overcome the problem that where there are very large gains, even a large maximum set in the legislation, may be insufficient to act as a deterrent.

26.82 A report by the New Zealand Ministry of Commerce[52] discussed the variety of approaches to assessing penalties and fines in OECD countries for competition law breaches. It noted that:

> Several countries' laws recognise that the greater the illegal gain the greater should be the punishment. Examples are:
>
> - A mixed absolute maximum/multiple-of-the-illegal-gain;
> - A percentage of annual turnover; and
> - A mixed multiple-of-the-illegal-gain/percentage of annual turnover.[53]

26.83 In New Zealand, the civil penalty obtainable for insider trading under the *Securities Amendment Act 1988* (NZ) is three times the amount of the gain made or the loss avoided by the insider in buying or selling the securities, whichever is greater.[54] Similarly, in the United States insider traders pay penalties of up to triple the amounts of profits they make as a result of their illegal activity.

26.84 This is not the approach in Australia. Under the *Corporations Act*, civil penalties for market manipulation, continuous disclosure and insider trading provisions include a pecuniary penalty of up to $200,000[55] or a compensation order for the corporation or registered scheme which has suffered a loss through the contravention.[56]

26.85 Linking penalties to financial gain can be done in a number of ways. First, there can be a precise accounting of profit or gain made, or loss avoided. This approach

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52 Ministry of Commerce (New Zealand), *Penalties, Remedies and Court Processes under the Commerce Act 1986: A Discussion Document* (1998), Ministry of Commerce, Wellington.
53 Ibid, 14.
54 *Securities Amendment Act 1988* (NZ), s 7(4), 9(4), 11(4), 13(4).
55 *Corporations Act 2001* (Cth), s 1317G.
56 Ibid, s 1317H.

does not require a maximum penalty to be set within legislation although a statutory maximum could be set as a ceiling. DP 65 noted the comments of the ALRC in ALRC 60 in relation to evasion of duty under Customs and excise legislation:

> Customs and excise fraud aims at obtaining financial rewards — very large financial rewards — and both deterrence and justice to the offender are, in some circumstances, best satisfied by a penalty directed at the offender's illicit financial gain. It is possible in the customs context to relate the penalty very directly to prospective financial gains as the penalty can be based on a multiple of the duty evaded. This is a distinct advantage. The duty evaded is not, of course a conclusive criterion but it is relevant to relate the offence, where it was directed to illicit gain, to the amount of gain expected to have been acquired. In the case of major fraud offences the penalty proposed is five times the duty evaded. In the case of false representations the maximum penalty is twice the duty evaded.
>
> Such a penalty is more satisfactory than the conventional fixed amount in which it is not easy to establish any measurable relationship of the amount specified to the offence involved.[57]

26.86 A second approach is for the penalty to take into account 'estimated'[58] or 'indicative' profits[59] utilising information such as sales and profit figures and market size. In the *Roche Vitamins* case, Lindgren J noted the parties' submissions on previous approaches to penalty based on estimates of financial gain:

> 14. … In *Australian Competition and Consumer Commission v Pioneer Concrete (Qld) Pty Limited* (1996) ATPR ¶41–457, where the Court imposed the highest penalties against any corporate contravener to date, the only material put to the Court on this issue consisted of the value of the sales of the pre-mix concrete the subject of the collusive arrangements admitted in that proceeding.
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> 15. In *ACCC v Tyco Australia Pty Ltd & Ors* (2000) ATPR ¶41–740, where the Court imposed corporate penalties of $3.3 million and $1.4 million, as recommended by the parties, the Court noted that no 'attempt had been made to give any estimate of the order of magnitude of the losses imposed by these anti-competitive arrangements on consumers ...' (page 40,573).
>
> 16. In *ACCC v Foamlite (Australia) Pty Ltd* (1998) ATPR ¶41–615, the Court, after finding that the loss or damage caused to customers could not be precisely determined, judged the deterrent effect of the corporate penalties suggested by the parties ($1.2 million and $600,000) by comparing such penalties to post tax profits.
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> 17. In *ACCC v Tubemakers Australia Pty Ltd* (2000) ATPR ¶41–745, the Court looked to the overall size of the relevant market in dollar terms and to the sales of the

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57 Australian Law Reform Commission, *Customs and Excise*, ALRC 60 (1992), Australian Law Reform Commission, Sydney, para 11.12–11.13; *Customs Act 1901* (Cth), s 234(1).

58 As used, for example, with regard to BASF Australia Ltd and Aventis Animal Nutrition Pty Ltd in *Australian Competition & Consumer Commission v Roche Vitamins Australia Pty Ltd* (2001) ATPR ¶41–809, para 39.

59 As used, for example, in the case of *Roche Vitamins* : ibid, para 38.

> corporate respondents of the relevant product in assessing and approving the recommended penalties of $1.2 million and $550,000.
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> …
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> 19. Other cases where the Court has imposed penalties without, it appears from the reported judgments, making any estimate of the profits made or losses sustained as a result of contraventions of the Act, include *TPC v TNT & Ors* (1995) ATPR ¶41–375 and *TPC v Hymix Industries* (1995) ATPR ¶41–369 and (1996) ATPR ¶41–465.
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> 20. In *ACCC v NW Frozen Foo*ds (1996) ATPR ¶41–515, the Court noted that '[i]n view of the period of conduct in question it is not possible to determine what the price would have been were it not for the price fixing agreements.' (page 42,442) The Court did however have access to invoice material that indicated what prices had been when discounted, which were significantly lower than the agreed prices. These were not matters that were subject to the subsequent appeal *in NW Frozen Foods v ACCC* (1997) 71 FCR 285.
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> 21. In *TPC v Simsmetal & Ors* (1996) ATPR ¶41–449, the Court was 'satisfied that the penalties that have been agreed by the respondents and the TPC have a sufficient deterrent effect to counter balance the profit apparently derived from the contravening conduct.' (page 41,512) It is not clear from the reported judgment whether any specific profit figures were received into evidence.[60]

26.87 These cases suggest a loose accounting of the gains and, in some instances,[61] the result is similar to that achieved by the use of turnover penalties, discussed below.

26.88 The *Roche Vitamins* case illustrates that it is not always easy for parties to provide the courts with precise figures as to the gains made as a result of illegal conduct. Accordingly, as will be discussed below, an approach that allows for a choice of means of determining a penalty is suggested.

26.89 The Productivity Commission, in its submission to the Dawson Committee, argued for a linking of the penalty to the financial gain. The Commission said that while deterrence is the 'conceptual underpinning for a penalty regime … there is evidence that the existing penalty regime may not be sufficient to achieve the optimal deterrent effect'.[62] It suggested that:

> Penalties could be explicitly crafted to achieve better deterrence by seeking to extract some multiple of the harm associated with anticompetitive conduct. It is necessary to apply a multiplier because the costs of enforcement are non-zero, while the probability of detection is far from one hundred per cent. Of course, harm may be hard to assess. One option would be to base the penalty on some multiplier of the commercial gain to the firm engaging in anticompetitive conduct.[63]

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60 Ibid, para 41.

61 In *Australian Competition & Consumer Commission v Ithaca Ice Works Pty Ltd* [2001] FCA 1716 the Full Court of the Federal Court noted that it 'can be accepted that turnover or size is an appropriate factor to take into account in the computation of a penalty': para 38.

62 Productivity Commission, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/125_Submission_ProdComm.pdf>, 25 July 2002, xi.

63 Ibid, 41.

26.90 Another approach is that adopted in New Zealand under the *Commerce Act 1986* (NZ),[64] which provides a number of alternative ways of setting the penalty. There is a fixed maximum penalty or a penalty linked to financial gain. The Act provides for a penalty of 'the greater of three times the unlawful gain, NZD 10 million … or 10% of the total turnover of the enterprise'.[65]

26.91 The Law Council of Australia, in a supplementary submission to the Dawson Committee, argued that 'ill-gotten gain should certainly be a relevant factor in the determination of penalties under the TPA' but that it should be left to the discretion of the court in assessing a penalty to take account of such gain.[66]

26.92 The Law Council indicated it was conscious of a number of concerns that have arisen in the United States where the Federal Trade Commission (FTC) is able to seek a disgorgement remedy. The Council cited an American Bar Association (ABA) submission to the FTC in which the ABA suggested such a remedy was vulnerable to abuse and it increased the FTC's bargaining power in settlement negotiations. The Council noted the ABA's concerns about the difficulties in differentiating, in practice, between legitimate and illegitimate profits, which it said was illustrated in Australia by the *Roche Vitamins* case*,* and its concerns about double liability and double recovery.[67]

Consultations and submissions

26.93 No submissions were opposed to Proposal 18–1. The ATO,[68] Dr Karen Yeung[69] and Professor Michael Adams[70] supported the proposal. Subject to certain qualifications, ASIC also supported it.[71]

26.94 The ATO said that the proposal would be 'particularly useful for promoters of tax avoidance schemes, fraudulent activities of company directors and unregistered income tax preparers'.[72]

26.95 In its submission, ASIC noted:

> A penalty may be an ineffective sanction for contraventions in which significant profits, in excess of the maximum penalty, can be earned. In these cases, a link, such as

64 *Commerce Act 1986* (NZ), 41.
65 Ibid, s 80(2B).
66 Law Council of Australia, *Supplementary Submission to the Review of the Trade Practices Act 1974*, < http://tpareview.treasury.gov.au/content/subs/196.pdf>, 16 October 2002.
67 Ibid.
68 Australian Taxation Office, *Submission CAP 16*, 17 September 2002.
69 K Yeung, *Submission CAP 20*, 9 October 2002.
70 M Adams, *Submission CAP 12*, 5 September 2002.
71 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.
72 Australian Taxation Office, *Submission CAP 16*, 17 September 2002.

> the one suggested, between the size of the penalty and the amount of the gain may be necessary to ensure the penalty contains an effective deterrent.[73]

26.96 However, ASIC also cautioned that '[s]uch a link may result in prejudice if the size of the penalty might unduly detract from the capacity of the defendant to pay compensation to the victims of the wrongdoing'.[74]

26.97 ASIC also suggested that the penalty scheme in Part 9.4B of the *Corporations Act* strikes 'the right balance' by making specific provision for the imposition of penalties and the compensation of victims and indicating that compensation may be based on profits as well as losses flowing from the contravention. ASIC suggested that

> the need for a link such as the one proposed, is significantly reduced where there is a scheme, like the civil penalty scheme, that makes provision for the payment of compensation to victims.[75]

Conclusion

26.98 As discussed below,[76] the ALRC supports the payment of compensation to victims of a contravention ahead of payment of a penalty. Accordingly the qualifications made by ASIC to its support of the proposal to link the form or quantum of the penalty to the financial gain as one of the alternative approaches to setting the penalty is supported.

26.99 The ALRC recommends that a link to financial gain be one of several alternative ways of penalty setting. This would leave the courts some discretion based on all the circumstances of the case.

Recommendation

Recommendation 26–6. Where appropriate, the legislation that establishes a civil or administrative penalty scheme should allow a court to link the form or quantum of the penalty to the financial gain as one alternative approach to setting the penalty. Section 80(2B) of the *Commerce Act 1986* (NZ) provides a model for such an approach.

Turnover penalties

26.100 One of the options in the New Zealand legislation, noted above, is the use of turnover penalties. Chapter 18 of DP 65 specifically raised the issue of 'turnover' penalties (directed at the revenue of the corporation) and asked whether the option of a monetary penalty expressed as a percentage of turnover of the corporation should be

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73 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.
74 Ibid.
75 Ibid.
76 See Recommendation 26–8.

available.[77] Turnover penalties are sometimes used where corporations may make significant profits through illegal conduct but where the precise profit may be difficult to determine. Hence they are used in economic regulatory areas such as competition laws and laws regulating financial markets. Unlike the approach to penalties and financial gain described above, they avoid the need for an accounting of the profit made by a breach, but there is a broad link to a corporation's financial position and hence indirectly to the potential gains made by the illegal behaviour.

26.101 The OECD has noted that while the competition laws of most countries provide for large penalties:

> In some cases, however, the maximum fines found in these laws may not be sufficiently large enough to accommodate multiples of the gains to the cartels, as recommended by many experts … The maximum fines found in the competition laws of most countries are expressed either in absolute terms or as a percentage of the annual turnover of the respondent company. Without more experience in assessing the unlawful gain realised by cartels, it is difficult to know whether these maximums are sufficiently large to accommodate the desired multiples of that gain.[78]

26.102 The OECD suggested that one 'benchmark in this regard might be the new law in New Zealand' which provides for a maximum fine of 'the greater of three times the unlawful gain, NZD 10 million … or 10% of the total turnover of the enterprise'.[79] See Recommendation 26–6 above.

26.103 In the United States, the *Federal Sentencing Guidelines* require that fines imposed in respect of specific antitrust law offences (bid rigging, price fixing and market allocation agreements) be related to the 'volume of commerce' that was 'affected by the violation'.[80] For individuals, fines should be from 'one to five per cent of the volume of commerce, but not less than US$20,000' and for corporations, the base fine is '20 per cent of the volume of affected commerce'.[81] The purpose of specifying a percentage of the volume of commerce is to avoid the time and expense that would be required for the court to determine the actual gain or loss.[82]

26.104 In the United Kingdom, the *Competition Act 1998* (UK) also utilises the concept of a turnover penalty. Under that Act, turnover penalties may not exceed 10% of

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77 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney.

78 Organisation for Economic Cooperation & Development, *Report on the Nature and Impact of Hard Core Cartels and Sanctions against Cartels under National Competition Laws* (2002), OECD, Paris, Question 18–1.

79 Ibid, 3–4.

80 US Sentencing Commission, *Federal Sentencing Guideline Manual*, US Sentencing Commission, <www.ussc.gov/2001guid/tabcon01_2.htm>, 12 December 2001, 4. See *Commerce Amendment Act 2001* (NZ), s 17(2)(B).

81 Ibid, §2R1.1.

82 Ibid, §2R1.1(c), (d). Statutory maximum fines of US$350,000 for individuals and US$10 million for corporations apply for each offence.

the 'section 36(8) turnover' of the undertaking. 'Relevant turnover' becomes the starting point for determining the level of financial penalty. It is determined by reference to the turnover of the undertaking in the relevant product market and the relevant geographic market affected by the infringement in the previous financial year. The Director-General of the Office of Fair Trading published guidance pursuant to s 38 in March 2000.[83] This states that any financial penalty imposed by the Director under s 36 of the Act is determined by following a five-step approach:

- the starting point is the relevant turnover, up to a maximum of 10%, determined by considering the seriousness of the infringement;[84]
- adjustment for duration;
- adjustment for other factors;
- adjustment for further aggravating or mitigating factors; and
- adjustment if the maximum penalty of 10% based on the section 36(8) turnover is exceeded and to avoid double jeopardy.[85]

26.105 The UK Office of Fair Trading guidance on the setting of penalties suggests that the ranges within each of the categories would allow differential treatment depending on the nature of the infringement; the capacity of the offenders to harm others, especially consumers; and would ensure that the level set would have a 'sufficiently deterrent effect'.[86] The other major factor taken into account is duration of the infringement and this is used to increase penalties so that an infringement of short duration (generally less than a year) has no impact, but infringements of medium duration (one to five years) increase the amount determined for 'gravity' by up to 50% and those of long duration (generally more than five years) increase the amount by up to 10% a year. In addition to gravity and duration, there are further aggravating circumstances that may add to the penalty[87] and mitigating circumstances that may reduce it.[88]

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83 UK Office of Fair Trading, *Competition Act 1998: Director-General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty*, UK Office of Fair Trading, <www.oft.gov.uk>, 21 March 2001, §2R1.1, application note 4.

84 Seriousness is determined by reference to several factors: nature of the product, structure of the market, market share(s) of the undertaking(s) involved, conditions for entry into the market, effect on competitors and third parties with damage to consumers being an important consideration: ibid, para 2.5.

85 Ibid, para 2.1. Details of each of these are in the Guidance.

86 Ibid.

87 These include repeated infringements of the same type; refusal to cooperate with the OFT or attempts to obstruct; leader in or instigator of the infringement; retaliatory measures to try and enforce infringing behaviour; and an increase in the penalty to exceed the gains made by the infringement where these can be objectively measured.

88 These include passive role; non-implementation of offending agreements or practices; termination as soon as the OFT intervenes; existence of reasonable doubt by the undertaking as to whether the restrictive practice constitutes an infringement; negligent or unintentional infringements and effective cooperation.

Turnover penalties and the Dawson Committee

26.106 The issue of turnover penalties was raised in a number of the submissions to the Dawson Committee's review of the TPA. The ACCC proposed an amendment to the TPA to allow for a maximum penalty of $10 million or three times the value of any commercial gain from the contravention, but where it is difficult to estimate the gain, the court should have the option of substituting a penalty of 10% of the corporation's Australian turnover for the duration of the contravention up to a maximum of three years.[89]

26.107 Telstra Corporation Ltd argued that the TPA should not be amended to permit turnover penalties until there had been a 'proper assessment' as to whether:

- the current penalties under Part IV of the Act are inadequate; and
- whether a turnover based penalty regime is the appropriate response to any identified difficulties.[90]

26.108 However, it said that, if the Dawson Committee did decide to recommend turnover penalties, they should be part of a system of 'checks and balances'[91] and in particular:

- penalties should be calculated on the basis of 'clear impartial guidelines which are published and widely available';
- decisions to impose a penalty should be published with reasons stated for the level;
- there should be opportunities to appeal if a corporation believes irrelevant factors were considered or relevant ones omitted; and
- the Act should provide for the ACCC to establish a clear leniency policy directed towards the first to come forward.

26.109 Telstra also argued that penalties based on turnover could

> potentially have serious consequences for the commercial viability of some businesses and may damage a whole company when breaches have occurred as a result of the behaviour of a few managers.[92]

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89 Australian Competition & Consumer Commission, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P1.pdf, www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P2.pdf, www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P3.pdf>, 13 August 2002, 57.

90 Telstra, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/117_Submission_Telstra.pdf>, 23 July 2002, 106.

91 Ibid, 108.

26.110 Similarly, the Law Council of Australia opposed the ACCC's proposal that in those circumstances where it is difficult to calculate the illicit gain, the court should have the power to substitute a penalty of 10% of the firm's Australian turnover for the past three years on the basis that:

- the difficult work of assessing the illicit gain could be avoided by simply going to the turnover proxy;
- there was a lack of necessary connection between a firm's total turnover and the contravening conduct; and
- there was no evidence from the cases of the courts being inhibited by the current $10 million maximum pecuniary penalty particularly given the capacity of the courts to regard each separate activity pursuant to a cartel arrangement as a separate contravention.[93]

26.111 The Business Council of Australia noted the arguments used in favour of turnover penalties as:

- the profits gained from acts of collusion far exceed the current maximum penalty the courts are able to impose;
- the fines currently imposed on individuals or corporations have, in practice, little impact on the wrongdoer's personal or professional standing … ;
- Australia is out of step with its major trading partners who currently impose turnover-based penalties — such as the UK, the European Union and the United States.[94]

26.112 The Business Council argued that the penalties in the *Roche Vitamins* case and the *ABB Transmission* case 'demonstrates that the current regime allows scope for imposing more stringent penalties, without the need for turnover-based penalties'. It said that even if it were viewed that the current penalties were inadequate 'the other issue to consider is whether a turnover-based penalty system is an appropriate response'.[95] The Council noted that such penalties do not relate to:

- the harm caused by the conduct;
- the extent to which the company may have benefited from the conduct; or
- the company's capacity to pay.[96]

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92 Ibid, 108.
93 Law Council of Australia, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/138_Submission_LCA.pdf>, 30 July 2002, 91–92.
94 Business Council of Australia, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/071_Submission_BCA.pdf>, 11 July 2002, 109.
95 Ibid.
96 Ibid.

26.113 On the other hand, the Australian Consumers' Association said that:

> The system of fines which allows a penalty to be set as a percentage of turnover or a multiple of the wrongly derived gain is probably the fairest and allows the court the discretion of nominating very high penalties should it so choose in any particular instance.[97]

26.114 The Productivity Commission cautioned that 'fines set as a share of turnover … is a problematic base because it may be weakly correlated with the excess returns of the firm'.[98] It suggested further that:

> If penalties cannot be set proportional to harm or the perpetrator's gain, then high penalties based on simple rules of thumb, such as turnover fees, can have the perverse impact of increasing incentives for harmful anticompetitive action.
>
> As Block and Sidak (1980) note, the problem is akin to the risk that a death sentence for minor crimes might incite more serious crimes on the 'in for a penny, in for a pound' basis.[99]

Consultations and submissions

26.115 Officers of the Australian Government Solicitor expressed support for the introduction of turnover penalties as an alternative penalty. They suggested that the level of penalties, even under the TPA might not be sufficient. Support was also expressed for 'the volume of commerce' approach of the United States.[100]

26.116 ASIC considered that the modified equity fine (turnover penalty) would be of little value in setting penalties in relation to contraventions of the market manipulation provisions contained in the *Corporations Act*. ASIC noted that actions for these breaches are usually taken against natural persons — those responsible for the contraventions and an equity fine approach is not suitable for natural persons. ASIC also considered that contraventions of the *Corporations Act* do not have the same economic consequences that typically flow from market manipulation provisions of the TPA.[101]

26.117 The ATO considered that the matter was worthy of consideration.[102]

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97 Australian Consumers' Association, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/105_Summary_ACA.pdf>, 17 July 2002, 33.

98 Productivity Commission, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/125_Submission_ProdComm.pdf>, 25 July 2002, 41.

99 Ibid, 41–42.

100 Australian Government Solicitor, *Consultation*, Sydney, 27 August 2002.

101 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.

102 Australian Taxation Office, *Submission CAP 16*, 17 September 2002.

Conclusion

26.118 Turnover penalties are one way in which penalties can be linked to financial gain and for this reason they deserve consideration. As evidenced by Recommendation 26–6, the ALRC supports alternative approaches to penalty setting and notes the developments in New Zealand and support of the OECD for that approach. However, the ALRC also notes the caution expressed by the Productivity Commission. Accordingly, the ALRC suggests that a turnover penalty as an alternative penalty ought only be considered if and when it is demonstrated that the existing maximum penalties are inadequate.

Equity fines

26.119 An alternative form of penalty linked to the finances of a corporate offender are equity fines. Equity fines, which operate through stock dilution, were first proposed by Professor John Coffee.[103] They were discussed in chapter 18 of DP 65. An equity fine involves three stages:

- transfer of shares from the corporation to a state criminal compensation fund;
- disposal of the shares by the fund; and
- distribution of the assets to persons affected by the conduct of the corporation.

26.120 Coffee claims that the advantages of equity fines include:

- reduced opportunity for overspill to employees or creditors;
- improved loss spreading across shareholders;
- ability to pass on loss to management (by company action against individual directors responsible for the misconduct); and
- passing on benefits to victims.[104]

26.121 Professor John Braithwaite notes the advantages of equity fines compared to ordinary monetary penalties:

> Unlike the cash fine, the equity fine does not deplete the capital available for investment. Instead of depleting the firm's liquid assets, it simply reallocates ownership of both fixed and liquid assets. And it gets shareholders upset with their management![105]

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103 J Coffee, '"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79(3) *Michigan Law Review* 386.

104 Coffee cited in C Kennedy, 'Criminal Sentences for Corporations: Alternative Fining Mechanisms' (1985) 73 *California Law Review* 443.

105 J Braithwaite, 'Penalties for White-Collar Crime' (Paper presented at Complex Commercial Fraud conference, 20 August 1991).

26.122 Brent Fisse notes that

> with stock dilution shareholders bear the burden, just as they bear other losses when the company in which they have invested is unsuccessful. … Moreover, in the face of severe equity fines, shareholders might be prompted to insist upon internal disciplinary action by management.[106]

26.123 Fisse's point is important. If the shareholders have ultimately benefited from the contraventions, then there is an argument that they should bear the loss caused by the penalty, and this might lead the shareholders to insist that management comply with legislation.

26.124 However, one of the major disadvantages of equity fines would be the complex administration required for the victim compensation scheme. In addition, the volatility of the share market impacts on the ability to ensure consistent fines are imposed on different corporations liable for similar conduct. Also, as shareholdings change, those who benefited may avoid sharing the cost and later shareholders may bear the burden. Equity fines too assume an identifiable group of victims. In many regulatory areas, it will be difficult, if not impossible to identify the victims and the loss by an individual may be either small or difficult to prove. In ALRC 68, the ALRC stated it was not satisfied that the benefits of equity fines outweighed their disadvantages.[107] Accordingly, the ALRC did not recommend the introduction of equity fines in Australia and this remains the ALRC's recommendation.[108]

Minimum penalties

26.125 Both the *Customs Act 1901* (Cth) and the *Excise Act 1901* (Cth) provide for minimum penalties for evasion of duty.[109] Each of these provisions has given rise to cases in which judges have noted the potential for undue severity and sought to reduce undue hardship through mechanisms such as dismissing certain charges under s 19B(1) of the *Crimes Act*.

26.126 In *Comptroller-General of Customs v Grills,* a case concerning a penalty for evasion of duty, Perry J identified a number of mitigating features which took the case 'out of the norm'[110] and expressed the view that

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106 B Fisse, 'Sentencing Options against Corporations' (1990) 1(2) *Criminal Law Forum* 211, 231–232.

107 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), Australian Law Reform Commission, Sydney, para 10.27.

108 See Recommendation 28–1.

109 *Customs Act 1901* (Cth), s 234. This provides for a penalty not exceeding five times the duty evaded and not less than two times the duty. The *Excise Act 1901* (Cth), s 120 provides for a fine not exceeding five times the duty evaded and not less than two times the duty.

110 These included the defendant's age and previous good character; his financial and other difficulties at the time owing to his marriage breakdown; and the fact that he made a full and frank confession in circumstances in which it was unlikely that the offences would have been detected and that he promptly repaid

> imposition of even the minimum offences on the totality of charges would result in a penalty which would be crushing and disproportionately severe, having regard to the totality of the offending, considered against the background of the unusual circumstances.[111]

26.127 His Honour also noted that 'it is not a proper exercise of the sentencing discretion to impose a fine which the defendant has no hope of paying'.[112] In order to reach an appropriate penalty despite the setting of minimum penalties in the legislation, Perry J exercised his power under s 19B(1) of the *Crimes Act* to dismiss six of the ten charges.

26.128 In a case concerning similar provisions of the *Customs Act*, the Full Court of the South Australian Supreme Court overturned a trial judge's decision to use the same mechanism to dismiss charges of smuggling while sentencing the accused for lesser offences in return for his entering into a recognizance. The Full Court expressed some sympathy with the trial judge's dilemma at the harshness of the penalty, but noted that the provision of minimum penalties clearly indicated an intention by Parliament to impose severe penalties even at the low end of the scale.[113]

26.129 The ALRC has previously recommended that minimum penalties not be used.[114]

Consultations and submissions

26.130 Both ASIC[115] and the ATO[116] opposed minimum penalties. The ATO suggested they fettered the discretion of the courts. There were no submissions in favour.

Recommendation

Recommendation 26–7. As a matter of principle**,** legislation should not specify minimum civil penalties as it would otherwise unduly fetter judicial discretion.

Penalties and compensation

26.131 As noted above, in discussing whether the option of linking a penalty to financial gain should be available, ASIC suggested that

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the money he had unlawfully obtained: *Comptroller-General of Customs v Grills* (1992) 110 FLR 431, 434.

111 Ibid, 435.

112 Ibid, 435. The effect of financial inability to pay a penalty is considered in ch 30.

113 *Hayes v Weller (No 2)* (1988) 93 FLR 64.

114 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), AGPS, Canberra.

115 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.

116 Australian Taxation Office, *Submission CAP 16*, 17 September 2002.

> the need for a link such as the one proposed, is significantly reduced where there is a scheme, like the civil penalty scheme, that makes provision for the payment of compensation to victims.[117]

26.132 Under s 1317H of the *Corporations Act*, as well as making a civil penalty order, the court can order the person who committed the contravention to pay compensation equal to the amount of the loss or damage. Similarly, compensation can be ordered under s 82 or 87 of the TPA and s 500 of the EPBC Act.

26.133 Under s 79B of the TPA, compensation takes preference over a penalty in the event of inability to pay both. However, s 79B only applies where there has not already been an order for a pecuniary penalty. Any compensation claim would need to have been made at the time of the action for a penalty.[118]

Recommendation 26–8. The Regulatory Contraventions Statute should include a provision similar to s 79B of the *Trade Practices Act 1974* (Cth) which prefers the payment of compensation to payment of a penalty in the event of an offender's inability to pay both.

Penalties for small business

26.134 In the United States, the *Small Business Regulatory Enforcement Fairness Act of 1996*,[119] requires regulatory agencies to have programs and policies which reduce or, in appropriate circumstances, waive civil penalties where a small entity has committed a statutory or regulatory violation. A Small Business Administration National Ombudsman and ten Regional Regulatory Fairness Boards oversee implementation of the Act. An example of the operation of the policy is a statement issued by the US Customs Service regarding violations of s 592 of the *Tariff Act 1930* (US)[120] that provides for penalties for commercial fraud or negligence.[121] Under the Customs RegFair Program, Customs will apply mitigating factors to small business[122] and, where an alleged

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117 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.

118 *Trade Practices Amendment Act 2001 (No 1)* (Cth), Schedule 1, clause 15.

119 Pub L No 104–121, 101 Stat 847 (US).

120 19 USC § 1592 (US).

121 United States Customs Service, *Policy Statement Regarding Violations of 19 U.S.C. §1592 by Small Entities*, <www.customs.gov/news/fed-reg/notices/sbrefa.htm> 21 May 2002.

122 These include '(1) reasonable reliance on misleading or erroneous advice given by a Customs official; (2) cooperation with the investigation beyond that expected for an entity under investigation; (3) immediate remedial action … (4) inexperience in importing, providing the violation is not due to fraud or gross negligence; (5) prior good record … (6) the inability of the violator to pay the penalty claim; (7) extraordinary expenses incurred by the violator in cooperating … and (8) actual knowledge by Customs of a violation not due to fraud, where Customs failed to inform the entity so that it could have taken earlier corrective action': United States Customs Service, *Policy Statement Regarding Violations of 19 U.S.C. §1592 by Small Entities*, <www.customs.gov/news/fed-reg/notices/sbrefa.htm>, 21 May 2002.

violator has been issued with a pre-penalty notice and has met a number of conditions,[123] the issuing of a penalty notice will be waived.

26.135 In the United Kingdom, businesses with annual turnover of less than £20 million or £50 million are exempted from some provisions of the *Competition Act 1998* (UK).[124]

26.136 Australia has no legislation similar to that of the United States or the United Kingdom. However, as discussed in chapter 30, indirectly the principle of capacity to pay does allow consideration to be taken of the smaller turnover/profits of small business. As noted at para 30.50 in *ACCC v ABB Transmission and Distribution Ltd (No 2)*,[125] Finkelstein J took account of the size and profitability of one of the respondent companies in assessing the penalty to ensure that the penalty would not affect its capacity to trade.

26.137 The National Farmers' Federation in a consultation with the ALRC suggested that for much of the rural sector any monetary penalty was a problem, particularly at difficult times such as when there was a drought. Issues raised included lack of understanding of the regulatory environment, low income for some and cash flow difficulties caused by irregular sales.[126]

26.138 The ALRC notes the approach of the United States and the United Kingdom. Given the approach of the courts to assessing factors such as capacity to pay, it suggests there is no compelling reason at this time to have a separate penalty regime for small business in Australia.

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123 These are '(1) corrective action within a reasonable period including payment of outstanding duties etc; (2) no previous history of enforcement action by Customs; (3) the violation did not involve criminal or wilful conduct or fraud or gross negligence; (4) the violation did not pose a serious health, safety or environmental threat and (5) the violation occurred despite the entity's good faith effort to comply with the law': United States Customs Service, *Policy Statement Regarding Violations of 19 U.S.C. §1592 by Small Entities*, <www.customs.gov/news/fed-reg/notices/sbrefa.htm> 21 May 2002.

124 The *Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000* (UK) specify that a business with a worldwide turnover of less than £20 million has a limited immunity from Chapter I penalties and a business with a worldwide turnover of less than £50 million has a limited immunity from Chapter II penalties. The immunity can be withdrawn and it does not affect a third party making a claim for damages.

125 *Australian Competition and Consumer Commission v ABB Transmission and Distribution Limited (No 2)* [2002] FCA 559, para 50.

126 National Farmers' Federation, *Consultation*, Canberra, 4 September 2002.

27. Non-Monetary Penalties

Contents

Introduction

27.1 The types of penalties currently in use in Australian federal regulation were considered in chapter 2. In that chapter, penalties were characterised according to the nature of the process by which they are imposed — criminal, civil or administrative. In this chapter, penalties are categorised according to whether they impose a direct financial burden (monetary penalties) or not (non-monetary penalties). This chapter also considers the extent to which the purpose of the penalty — retribution, social condemnation, specific or general deterrence, protection, reparation or compensation — might inform the type of penalty chosen to be imposed. These purposes were considered in detail in chapter 3.

27.2 Chapter 26 considered how monetary penalties are set in legislation and chapter 29 considered whether universal criteria can be developed and applied to assist in determining the appropriate amount of a monetary penalty in a particular case. This

chapter considers the options for increasing the use of non-monetary penalties in order to enhance the ability of the decision maker to tailor the penalty to suit the particular circumstances of the case, taking into account matters such as the nature of the contravention, the characteristics of the offender, and the presence of any aggravating or mitigating factors. This chapter also considers why non-monetary penalties are desirable and the circumstances in which they might be preferable to monetary penalties. Expanding the range of civil penalties by increasing the availability of non-monetary penalties is considered. It examines whether a range of non-monetary penalties should be generally available as penalties for both individual and corporate defendants.

27.3 The range of non-monetary penalties available in various federal regulatory schemes is extensive. Imprisonment is available for criminal offences. Probation and community service orders may be made in relation to both criminal offences (under the *Crimes Act 1914* (Cth)) and non-criminal contraventions (under the *Trade Practices Act 1974* (Cth) (TPA) and *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act)). Information disclosure and corrective advertising may be ordered, and adverse publicity orders may be made, under the TPA and ASIC Act. Banning orders may be made under the *Corporations Act 2001* (Cth).[1]

27.4 Arguments in favour of non-monetary penalties include the:

- potential to tailor the penalty to suit the particular offender and what that particular offender needs to do to comply with the law in the future;
- potential to direct a penalty towards internal reorganisation of a corporation — to facilitate the behavioural change necessary for compliance;
- ability to better align the penalty with its purpose; and
- fact that they survive the offender's bankruptcy.

27.5 Arguments against non-monetary penalties include the:

- potential for lack of consistency in sentencing for similar contraventions (if the penalty is tailored to the circumstances of the particular offender rather than the nature of the contravention);
- problem that non-monetary penalties may require external supervision or audit (for example, community service orders and compliance programs); and
- difficulty of assessing parity of penalties (without undertaking a costing exercise for the non-monetary penalty).

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1 Although it should be noted that, on one view, banning orders are not penalties. However, in the context of this Report, they have been treated as a form of quasi-penalty. See discussion in ch 2 at para 2.147–2.148.

27.6 The advantages of allowing a broader range of non-monetary penalties include the ability to avoid the 'deterrence and retribution trap'[2] or the possibility of penalty 'overspill' where, for example, the impact of a monetary penalty imposed on a corporation may adversely affect employees, shareholders and consumers through retrenchments, reduced share values or increased prices. If, after considering the circumstances of the case including the financial circumstances of the offender, the court considered that recovery of a monetary penalty would be unlikely, or that a monetary penalty would not achieve the desired purpose (for example, because its impact would either not be noticed or would be excessive) it should be open to the court to impose a non-monetary order in addition to, or substitution for, a monetary penalty. This may improve the prospect of 'recovery' of the penalty as, although any penalty (even a non-monetary one) is likely to have some financial impact, the impact of a non-monetary penalty is likely to be indirect and so more easily absorbed by a 'cash-poor' offender. Another advantage includes the ability to give effect to the concept of restorative justice by making the penalty for public harm involve an action to benefit the public good. Non-monetary penalties also allow for the expression of moral disapproval through public shaming by way of an adverse publicity order or a specific disclosure order.

Limitations on the use of monetary penalties

27.7 While monetary penalties can be flexible around the nature of the offence, they can be criticised for their perceived lack of equity[3] and deterrence value and for not responding to the nature of the offender. A monetary penalty of $10,000 may affect an individual but hardly register with a large corporation with the result that some legislation has very high maximum penalties for corporations, for example, $10 million for a breach of Part IV of the TPA. Conversely, very large penalties may impact on the behaviour of big business but be meaningless to smaller players. For example, the ALRC has been told that some members of the small business sector prefer provisions that have large monetary penalties because they know that if they get caught they will receive only 'a slap on the wrist' as they cannot afford a $10 million penalty.[4] However, it is also important to note in relation to these comments that courts rarely impose maximum penalties in civil penalty proceedings. Indeed, it is part of the sentencing process for the court to take into account the ability of the party to pay (see chapter 30).

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2 Brent Fisse notes that 'the deterrence or retribution trap … arises when the wealth of a corporation places an upper limit on monetary punishment and this upper limit is less than the amount required to deter or compensate for the crime': B Fisse, 'Sentencing Options against Corporations' (1990) 1(2) *Criminal Law Forum* 211, 230. See also J Coffee, '"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79(3) *Michigan Law Review* 386; C Wells, *Corporations and Criminal Responsibility* (2nd ed, 2001) Oxford University Press, Oxford, 31–34.

3 Although courts will take account of the capacity of the offender to pay the penalty.

4 Australian Compliance Professionals Association, *Consultation*, Brisbane, 15 February 2001.

Choice of penalty

27.8 Penalty choice for non-criminal contraventions is circumscribed by the primary legislation that creates the contravention. For example, the penalty for most non-criminal contraventions is generally a pecuniary penalty subject to a specified maximum. In addition to monetary penalties, penalties in the form of injunctions or other orders may also be available. For non-criminal contraventions there is generally little option to choose from a range of monetary and non-monetary penalties[5] and courts are bound by what is put to them by the parties to the case. Courts are also bound by general principles such as the need for any order to be sufficiently certain as to be enforceable and that an order requiring ongoing supervision by the court is undesirable.[6] Unlike for federal criminal offences (see discussion below), general sentencing principles for non-criminal contraventions are not presently provided in any generally applicable legislation.

27.9 Provisions that allow for the conversion of penalties from one form to another, for example, conversion of a non-monetary penalty into a monetary one and vice versa, are one option for tailoring penalties to the circumstances of the individual offender. Legislative prescription of *maximum* monetary penalties, allowing individual penalties to be assessed at different points in the range, rather than legislation prescribing *specific* penalty amounts, does provide some opportunity to tailor penalties to individual offenders. However, monetary penalties *per se* assume a 'one size fits all' approach and an inherent 'capacity to pay' for all offenders. In reality, many offenders may not have the immediate access to cash necessary to satisfy a monetary penalty.[7] It also assumes that a monetary penalty will always have an impact on the person penalised. This may not necessarily be the case. Where the offender is a corporation, it may be possible that the monetary penalty will have little noticeable impact if it can be spread across the business and does not directly affect any one individual. If a monetary penalty can be diffused in this way, its imposition may be meaningless if measured against the intended purpose of the penalty.

27.10 If a monetary penalty is so small that it is no burden for the offender to pay, it is unlikely that it could achieve a retributive or deterrent purpose. Alternatively, if a business is 'cash poor' then any monetary penalty imposed may be too onerous and may trigger what has been described as the 'deterrence and retribution trap'. On this analysis, the monetary penalty becomes meaningless as a form of deterrence because it

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5 A notable exception to this is the penalty options recently introduced into the TPA and the ASIC Act. See discussion below at para 27.26–27.29.

6 For example, in *Rural Press Ltd v Australian Competition & Consumer Commission* [2002] FCAFC 213, the Full Court of the Federal Court refused to grant an injunction requiring the offending corporation to undertake a trade practices compliance program because 'it would have obliged Rural Press and Bridge Printing to implement a program that had not yet been developed and which was, in any event, to be approved by a person appointed by Rural Press with "expert knowledge of trade practices law". The Court should not delegate to a third person the task of specifying the obligations that are the subject of injunctive orders': para 173.

7 This point was made by the National Farmers' Federation, who suggested that the option to pay a penalty by instalments was desirable: National Farmers' Federation, *Consultation*, Canberra, 4 September 2002.

is so large that its imposition has the effect of forcing the offender out of business (and preventing the recovery by the state of the penalty if the offending corporation becomes insolvent).[8] Alternatively, if it does not actually force the offender to become insolvent, it may be so large that its effect becomes retributive when its intended purpose was deterrence and thus become disproportionate to the wrong committed.

Legislative framework required

27.11 This section considers what legislative framework is necessary to support and encourage creative sentencing. Regulatory contraventions have been characterised by the ALRC as being either criminal or non-criminal.[9] Penalties for federal criminal offences are generally specified in the primary legislation as either imprisonment or a fine consisting of a certain number of penalty units. Penalty units are defined in s 4AA of the *Crimes Act* and are currently worth $110 per penalty unit. However, most federal criminal offences are prosecuted in state and territory courts and therefore the actual administration of the criminal sentence is subject to state and territory sentencing law. Sentences must be imposed in accordance with Part 1B of the *Crimes Act*, but the actual sentence will be administered by the relevant state or territory authority (unlike the United States, which has a separate federal prison system).

27.12 The legislative framework supporting sentencing for federal criminal offences has three components:

- the penalty form is *specified* in the primary legislation;
- the penalty actually *imposed* is determined in accordance with general principles in the *Crimes Act* which apply to all federal criminal offences; and
- the penalty is *administered* in accordance with the relevant state and territory legislation.

27.13 Penalties imposed for non-criminal contraventions do not follow the same process. Non-criminal penalties are specified in the primary legislation. Principles for determining the actual penalty to be imposed are either specified in the primary legislation (for example, *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 481; TPA, s 76) or are derived from caselaw (for example, 'French factors' relevant to TPA penalties as specified in *TPC v CSR Ltd*[10]). To the extent that general sentencing principles apply, they are derived from the common law. There is no general legislative statement of sentencing principles for non-criminal contraventions. This raises the question as to whether there is a need for general sentencing principles for non-criminal penalties.

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8 The effect of insolvency on the recovery of monetary penalties is considered in ch 32.

9 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, ch 2, and in ch 2 of this Report.

10 *Trade Practices Commission v CSR Ltd* (1991) 13 ATPR ¶41–076.

27.14 Non-criminal penalties are generally specified in the primary legislation creating the contravention. This has the advantage of ensuring that the legislature turns its mind towards the most appropriate penalty when deciding to label certain activity as a 'contravention'. However, it also has the disadvantage of limiting the opportunity for consistency between penalties for similar contraventions, where the contraventions are created in separate pieces of legislation. Whilst this approach enables internal consistency within a regulatory scheme, it does not promote consistency across regulatory schemes.

27.15 In DP 65, the ALRC identified consistency, proportionality and parity as issues in setting penalties.[11] Consistency demands that individual penalties imposed for regulatory contraventions in particular cases should be appropriate when compared with penalties imposed for the same contravention in other cases. Consistency requires that, where the circumstances of the case are similar, the penalty imposed should be similar to that imposed in other cases. Proportionality refers to the relationship between the penalty imposed and the harm caused.[12] Generally, the more harm caused, the greater the penalty. Methods of achieving proportionality include directly linking the amount of the penalty to the harm caused or the gain unlawfully obtained, for example, by way of turnover penalties.[13] Parity may be expressed by the principle that 'like contraventions should attract like penalties where the purpose of the regulatory provisions is similar'.[14] This means that, in principle, a penalty for misleading or deceptive conduct should be the same regardless of the primary legislation creating the specific contravention. However, the same conduct may have more serious consequences in different contexts, win which case more severe penalties should apply.[15]

27.16 Increasing the use of non-monetary penalties may make it more difficult to assess whether the aims of consistency, proportionality and parity are being met. Monetary penalties have the advantage of being specifically quantifiable and comparable to other monetary penalties. If penalties have regularly been imposed in a range from $200,000 to $250,000, then it is easy to say that a penalty of $230,000 is consistent with the previous penalties. But what can be said of an order to develop and implement a compliance program? To artificially impose a value by making an order directing an offender to spend a specified amount on developing and implementing a compliance program is just another way of imposing a monetary penalty. But if no dollar value is attached, how is consistency with previous monetary penalties to be assessed? It may be that consistency can only be measured against 'like' penalties, in which case it will not be until a sufficient jurisprudence develops concerning the imposition of non-monetary penalties that consistency can realistically be a factor in determining a non-monetary penalty.

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11 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, ch 18.

12 Ibid, para 18.47–18.52.

13 See discussion in ch 26 at para 26.100–26.118.

14 See discussion in ch 26, especially at para 26.30–26.37.

15 Parity between penalties was considered in detail in Parliament of Australia Senate Scrutiny of Bills Committee, *Scrutiny of Bills Eighth Report of 1998: The Appropriate Basis for Penalty Provisions in Legislation Comparable to the Productivity Commission Bill 1996* (1998), Parliament of Australia.

27.17 The goal of proportionality raises similar problems. Moves to link the penalty more closely with the harm caused or benefit unlawfully obtained have focussed on assessing harm/benefit in financial terms and imposing a penalty of similar magnitude.[16] However, there is no reason why harm cannot be assessed in non-monetary terms — for example, consumers were given misleading information or competition in X market was substantially lessened. Attaching precise dollar values to these types of harm is extremely difficult, if not impossible, and any attempt to do so is likely to result in arbitrary assessments at best. But if a broader approach is taken then it is not so difficult to devise a non-monetary penalty to address the harm caused. In the consumer example, an appropriate non-monetary penalty might be one directed towards improving consumer education. If a creative approach is taken, ensuring the proportionality of non-monetary penalties does not seem to be unachievable.

Expanding the range of civil penalties

27.18 This section considers methods by which the range of civil penalties available may be expanded. In particular, it considers the utility of:

- provisions allowing for penalty conversion;
- including additional civil penalty powers in primary legislation or a generally applicable Regulatory Contraventions Statute; and
- combining penalties (including combining court-imposed penalties with enforceable undertakings).

Penalty conversion

27.19 In relation to criminal penalties for federal offences, s 4B(2) of the *Crimes Act* provides that where the penalty for conviction of an offence is imprisonment

> the court may, if the contrary intention does not appear and the court thinks it appropriate in all the circumstances of the case, impose, instead of, or in addition to, a penalty of imprisonment, a pecuniary penalty not exceeding the number of penalty units calculated using the formula:
>
> Term of Imprisonment × 5
>
> where:
>
> > *Term of Imprisonment* is the maximum term of imprisonment, expressed in months, by which the offence is punishable.

27.20 Section 4B allows the court to exercise its discretion to tailor a penalty (choosing between imprisonment and a monetary penalty) taking into account the circum-

16 See for example the discussion of turnover penalties in ch 26 at para 26.100–26.118.

stances of the offence and of the individual offender. Sections 16A and 16C of the *Crimes Act* provide criteria that must be taken into account by a court when determining the sentence and specifically the appropriate level of monetary penalty to impose on an offender.[17] Whilst the ability for a court to have the option of imposing a non-monetary penalty rather than a monetary penalty is attractive, and supported by the ALRC, there would be difficulties in seeking to achieve this aim by providing for the conversion of civil penalties in a manner similar to s 4B of the *Crimes Act*.

27.21 It is relatively simple to convert a term of imprisonment into a fine. As both penalties have the purpose of punishing the offender, the only issue is whether the conversion process maintains proportionality. Civil penalties may often be imposed for several different purposes; assessing relativities between penalties imposed for different purposes is inherently difficult. It would not be an easy task to devise a formula to convert, for example, a pecuniary penalty into an adverse publicity order or an order that information be disclosed to shareholders.

27.22 Even the deceptively straightforward option of converting a pecuniary penalty into a community service order (by using a formula similar to s 4B of the *Crimes Act*) has major difficulties. A pecuniary penalty imposed on a corporation does not necessarily affect any particular individual; community service, in the traditional sense, must impact on a particular individual as it entails the performance of some task by an individual. How would a court decide which individual should perform the community service on behalf of the corporation? And, if the court left it to the discretion of the corporation to nominate an individual, how could 'scapegoating' or inappropriate delegation be guarded against? For these reasons, the ALRC does not recommend inclusion in the Regulatory Contraventions Statute of a provision similar to s 4B of the *Crimes Act*.

General alternative orders for criminal offences

27.23 Criminal penalties for federal offences are enforced in accordance with state and territory law.[18] Section 20AB of the *Crimes Act* provides that alternative sentencing orders may be made where it is within the power of a court in the relevant state or territory to do so.[19] An order made under s 20AB is not strictly a penalty conversion, as the power to make an alternative sentencing order is in addition to, not in substitution for, the power to order payment of a fine.[20] The types of orders that may be made include 'a community service order, a work order, a sentence of periodic detention, an attendance centre order, a sentence of weekend detention or an attendance order'.[21] The meaning of these terms is not defined in the *Crimes Act* and therefore depends on the meaning given by the state or territory law in the relevant jurisdiction.

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17 Criteria for determining monetary penalties in particular cases are discussed in detail in ch 29 and 30.
18 See ch 31.
19 This provision applies generally to federal offences. Specific powers are given in Div 9 in respect of sentencing of persons with mental illnesses or intellectual disabilities.
20 *Crimes Act 1914* (Cth), s 20AB(4).
21 Ibid, s 20AB(1).

27.24 In New South Wales, for example, a 'community service order' is defined in s 3 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) to include an order made under s 8(1) of that Act 'directing the offender to perform community service work for a specified number of hours'. 'Community service work' is defined in s 3 of the *Crimes (Administration of Sentences) Act 1999* (NSW) as 'any service or activity approved by the Minister, and includes participation in personal development, educational or other programs'.[22] In Victoria, the purpose of a community service condition attached to a community-based order is to 'allow for the adequate punishment of an offender in the community'.[23] In the Northern Territory, the purpose of a community work order is stated to be to ensure that the offender 'makes amends to the community for the offence by performing work that is of benefit to the community'.[24] In these three jurisdictions, therefore, a community service order has different meanings. In New South Wales, a community service order appears to be directed towards providing opportunities for rehabilitation of the offender. In Victoria, it refers to an order that work be undertaken as 'adequate punishment' of the offender. In the Northern Territory, it refers to an order that work be undertaken for a specific purpose, 'the benefit of the community'. The differences between the sentencing laws of each State and Territory create the potential for inconsistency in the penalties imposed in different jurisdictions for the same federal offences. This was commented upon in several consultations.[25] In one consultation it was noted that consistency in criminal sentencing across jurisdictions is a problem.[26]

27.25 Section 20AB of the *Crimes Act* is an example of a provision which applies generally across federal criminal offences. Its location in the *Crimes Act* allows it to be easily amended and provides for some level of consistency across a range of legislative schemes. As already noted, at present, there is no general source of sentencing power or principles for non-criminal contraventions. Instead, penalties are determined case-by-case on the basis of penalties specified in the relevant primary legislation. If this trend continues, in order to provide the sentencing flexibility for non-criminal contraventions afforded by s 20AB of the *Crimes Act* for federal criminal offences, it would be necessary to separately amend each piece of primary legislation to introduce alternative penalty powers. This was the approach taken in the TPA and ASIC Act (discussed briefly below and in detail in chapter 28).

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22 In Queensland and Western Australia, 'community service' is also any activity declared to be so by a designated person: *Corrective Services Act 2000* (Qld), s 194; *Sentencing Act 1995* (WA), s 4.

23 *Sentencing Act 1991* (Vic), s 39(1).

24 *Sentencing Act* (NT), s 33A.

25 Attorney-General's Department, *Consultation*, Canberra, 10 September 2002; Australian Government Solicitor, *Consultation*, Sydney, 27 August 2002; Custom Brokers and Forwarders Association, *Consultation*, Brisbane, 29 August 2002.

26 Attorney-General's Department, *Consultation*, Canberra, 10 September 2002.

Additional civil penalty powers

27.26 Amendments made to the TPA and the ASIC Act in 2001 introduced several new types of orders as an alternative to fines or pecuniary penalties.[27] Section 86C of the TPA (and s 12GLA of the ASIC Act) introduced four new non-punitive orders[28] — a community service order; a probation order for a period of no longer than 3 years; an order requiring the person to disclose specified information; and an order requiring the person to publish a specified advertisement.[29] Section 86D of the TPA (and s 12GLB of the ASIC Act) also introduced a new punitive order — an adverse publicity order.[30] The Explanatory Memorandum to the Trade Practices Amendment Bill (No 1) 2000 stated:

> These proposed amendments would enable a Court to make an order directing a contravening party to inform the public of their unlawful conduct, correct the harm that they have inflicted upon the community as a result of their contravention, or engage in activities that are aimed at altering the internal business operations of the contravening party. Orders of this nature would be regarded as putting in place mechanisms to foster an environment of legislative compliance by changing incorrect business practices and correcting the misallocation of resources brought about by and evident in the breach.[31]

27.27 The power to make an alternative penalty order under the TPA and ASIC Act is in addition to the court's power to impose a monetary penalty.[32] That the power is additional (and therefore that a combination of monetary and non-monetary penalties might be ordered), is made clear in the Explanatory Memorandum to the Trade Practices Amendment Bill (No. 1) 2000 which states that s 86C (and s 86D) are *additional* to the powers to order a fine (under s 79) or pecuniary penalty (under s 76).[33]

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27 The TPA was amended by the *Trade Practices Amendment Act (No. 1) 2001* (Cth), which commenced on 26 July 2001, and the ASIC Act was amended by the *Financial Services Reform (Consequential Provisions) Act 2001* (Cth), which commenced on 11 March 2002.

28 Although described as 'non-punitive', under both the ASIC Act and the TPA these orders may be made in relation to either criminal offences or non-criminal contraventions.

29 A court's power to make an order requiring the person to disclose specified information, and an order requiring the person to publish a specified advertisement, on the application of ASIC has been available under s 1324B of the *Corporations Act 2001* (Cth) (previously s 1324B of the *Corporations Law*) since its introduction by the *Corporate Law Economic Reform Program Act 1999* (Cth). Similar powers were also available under s 12GE of the ASIC Act and s 80A and 151CB of the TPA. Section 12GLA replaced s 12E of the ASIC Act and s 86C replaced s 80A of the TPA. See discussion in ch 28 at para 28.41–28.45.

30 An adverse publicity order may only be made in relation to a criminal offence under the ASIC Act (s 12GLB), but may be made under the TPA in relation to either a non-criminal contravention, if a pecuniary penalty has been ordered under s 76, or a criminal offence (s 86D).

31 Explanatory Memorandum to the Trade Practices Amendment Bill (No 1) 2000 (Cth), 5.

32 In the ASIC Act the orders are available in relation to breaches of the provisions in Div 2 concerning unconscionable conduct and consumer protection in relation to financial services. These provisions substantially replicate Parts IVA, V and VC of the TPA. They provide a mix of criminal offences and non-criminal contraventions.

33 Explanatory Memorandum to the Trade Practices Amendment Bill (No 1) 2000 (Cth), 15. A similar statement was made in the Explanatory Memorandum to the Financial Services Reform (Consequential Provisions) Bill 2001 (Cth).

> The orders do not prevent the Court from imposing the traditional sanctions currently available under the Act, but address the needs of a changing judicial culture. The new orders indicate to the Court that they have additional powers to be used in appropriate circumstances.[34]

27.28 These additional penalty powers are not replicated in other federal legislation, outside the corporations and trade practices context.[35] It is clear that the powers provide greater scope to tailor penalties than reliance on monetary penalties alone. The powers may be used in addition to the power to impose a monetary penalty and it will be interesting to see whether courts will use the powers to impose a combination of monetary and non-monetary penalties.[36] Arguably, such a mix is necessary if it is desired that any penalty imposed serve multiple purposes. If, as suggested earlier, the task of the court is to decide what penalty will encourage a particular offender to comply with the law in the future, then it is essential that penalty choice is not unduly restricted. To tailor a penalty to the particular offender, and arguably have the best chance of giving effect to the underlying purpose of the penalty, the court needs the flexibility to select from a range of orders.

27.29 The ALRC recommends the inclusion of another civil penalty power in the Regulatory Contraventions Statute — the power to make an order disqualifying a person from entering into contracts with the government.[37] This penalty is already available under the *Equal Opportunity for Women in the Workplace Act 1999* (Cth). In chapter 28, the ALRC notes that this is an example of an administratively imposed sanction as it is the responsibility of individual government departments and agencies to 'boycott' contracting with non-compliant corporations. Introduction of this penalty was also considered by the ALRC in its *Sentencing* inquiry.[38] The ALRC noted that the 'advantages of [disqualification] include the fact that the sanction would provide law abiding corporations with a competitive advantage, and thereby reward compliance'.[39] A possible outcome of the introduction of disqualification from government contracts as a specific penalty for corporations might be that a corporation which might otherwise have succeeded on the merits, will be ineligible to tender for work or contract with government. In any event, as noted above, the enforcement of this penalty would be a matter for individual government departments and agencies who would need to ensure that offers to tender included requirements that the person tendering for the work disclose if it were subject to the penalty and that contracts included specific warranties that the corporation had not been penalised in this way.

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34 Explanatory Memorandum to the Trade Practices Amendment Bill (No 1) 2000 (Cth), 15.

35 Note that power to order disclosure of information or publication of an advertisement is also available under s 1324B of the *Corporations Act* and s 151CB of the TPA.

36 As the powers only apply to offences or contraventions occurring after the commencement of the provisions, the ALRC has found no cases that have yet been concluded in which these powers were available. Prior to their introduction, the ACCC used undertakings given under s 87B to achieve similar results.

37 See Recommendation 27–1(a).

38 Australian Law Reform Commission, *Sentencing: Penalties — Discussion Paper*, DP 30 (1987), Australian Law Reform Commission, Sydney.

39 Ibid, para 293.

Consultations and submissions

Support for non-monetary penalties

27.30 Consultations and submissions revealed support for expansion of the range of non-monetary penalties available as penalties for non-criminal contraventions.[40]

27.31 ASIC's submission stated that:

> ASIC is interested in the proposal for a wider range of sanctions against corporations designed to facilitate compliance with applicable rules by the corporation in the future. Community service orders are now available for certain offences in the *ASIC Act* for which ASIC has responsibility.[41]
>
> The availability of such orders would enable a court to tailor a specific sanction to meet the needs of each case and would allow the sanction to operate on a wider level, taking into account future conduct and compliance.
>
> At the same time, ASIC thinks that there ought to be scope for the court to impose a financial penalty in addition to a tailored sanction so that the overall result, if appropriate, can include a measure of specific and general deterrence.[42]

27.32 The availability of a range of tailored penalties was also supported by the ATO, who noted that criminal penalties already provide for a range of non-monetary penalties in addition to fines. The ATO supported 'flexibility in tailoring the sanction to the particular situation'.[43]

27.33 The AGS considered the introduction of non-monetary penalties to be unnecessary on the basis that the level of monetary penalties available was sufficient. Enforceable undertakings were said to provide an appropriate way for a regulator to use alternative penalties.[44]

27.34 The ABA supported the introduction of non-monetary penalties, noting that:

> In the ABA's view, its ability to ensure compliance with the codes of practice would be greatly enhanced by a range of civil penalties, such as a penalty that would enable the ABA to direct the broadcast of a corrective statement or to approach the court for injunctive type relief, requiring the publication of corrective material or apologies by the offending licensee. Such a penalty would be consistent with the current ABA power to issue notices to the national broadcasters recommending specific action, including action to broadcast an apology or retraction.[45]

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40 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002; Australian Taxation Office, *Submission CAP 16*, 17 September 2002; B Dee, *Consultation*, Melbourne, 4 September 2002; M Murray, *Submission CAP 10*, 31 August 2002; The Victorian Bar Association, *Consultation*, Melbourne, 4 September 2002; K Yeung, *Submission CAP 20*, 9 October 2002; Australian Broadcasting Authority, *Submission CAP 23*, 14 October 2002.

41 See ASIC Act, s 12GLA.

42 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 60.

43 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.260.

44 Australian Government Solicitor, *Consultation*, Sydney, 27 August 2002.

45 Australian Broadcasting Authority, *Submission CAP 23*, 14 October 2002, 8.

Form of non-monetary penalties

27.35 The specific form that a non-monetary penalty might take was discussed in several consultations.[46] The Victorian Bar favoured community service or other 'educative' orders directed at encouraging future compliance. It noted that monetary penalties were a 'blunt instrument' and that a more tailored penalty, in particular, an educative penalty is more constructive and can have a greater deterrent effect than publicity by the regulator of the size of a monetary penalty obtained. The example given was of a company being required to develop and fund an education program in relation to a known workplace hazard such as working on platforms without a safety harness. The prospect of a corporation being unable to tender for government work as a consequence of a criminal conviction was noted in one consultation as being significant for a corporation.[47] The National Farmers' Federation opposed the availability of a penalty in the form of a community service order on the basis that it was a more damaging penalty than a monetary penalty as it forced a person to spend time away from their business. It stated that its members would be 'happier to pay a fine'.[48]

27.36 The ABA advocated the introduction of enforceable undertakings (into the *Broadcasting Services Act 1992* (Cth)) and the ability to ban an offender from operating a broadcasting service for a period as 'better directed to achieving compliance than criminal penalties'.[49] The ABA also noted that advertising free periods were available as penalties in several countries. Although the effect of such a penalty would be financial 'because one of the main objectives of commercial broadcasting is to maximise revenue from the sale of advertising time', the ALRC would classify it as a non-monetary penalty because the amount of the penalty is not specified in financial terms. As the ABA also noted, 'this form of monetary penalty has the advantage that it is sensitive to current advertising rates'.[50]

27.37 The use of publicity as a penalty was specifically commented on in several consultations and submissions.[51] The Attorney-General's Department commented that it was a 'distinct unregulated remedy'.[52] In another consultation it was noted that publicity is a 'potent weapon'.[53] It was considered that corporations were very concerned about maintaining a good public image and reputation.[54] The Victorian Bar considered

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46 Australian Government Solicitor, *Consultation*, Sydney, 27 August 2002; B Dee, *Consultation*, Melbourne, 4 September 2002; National Farmers' Federation, *Consultation*, Canberra, 4 September 2002; The Victorian Bar Association, *Consultation*, Melbourne, 4 September 2002; Attorney-General's Department, *Consultation*, Canberra, 10 September 2002.

47 The Victorian Bar Association, *Submission CAP 22*, 14 October 2002.

48 National Farmers' Federation, *Consultation*, Canberra, 4 September 2002.

49 Australian Broadcasting Authority, *Submission CAP 23*, 14 October 2002, 7.

50 Ibid, 9.

51 B Dee, *Consultation*, Melbourne, 4 September 2002; The Victorian Bar Association, *Consultation*, Melbourne, 4 September 2002; Attorney-General's Department, *Consultation*, Canberra, 10 September 2002; Australian Broadcasting Authority, *Submission CAP 23*, 14 October 2002.

52 Attorney-General's Department, *Consultation*, Canberra, 10 September 2002.

53 B Dee, *Consultation*, Melbourne, 4 September 2002.

54 Ibid; The Victorian Bar Association, *Consultation*, Melbourne, 4 September 2002.

that the prospect of being required to make disclosure to shareholders was an important factor for a corporation.[55] The stigma of a criminal conviction was stated to be significant for corporations and it was noted that

> most corporations will be more concerned to avoid the stigma of conviction than they will be about the level of the fine. This is driven in part by a genuine commitment to occupational health and safety, and in part to concern about corporate good name, and concern about the prejudicial effect of a conviction when tendering for future business.[56]

27.38 The ABA noted that 'the ABA has few tools for ensuring compliance with the codes. In practice, its most powerful tools are its power of persuasion and its power to publish unfavourable investigation reports about breaches of the codes'.[57]

Conclusion

27.39 Expressly providing for this flexibility by specifying alternative penalty powers in the primary legislation is one approach. Elsewhere in this Report, the ALRC has recommended the enactment of a Regulatory Contraventions Statute of general application (see Recommendation 6–7) that would include broad guidelines for the courts to use when setting civil penalties (see Recommendation 29–1). Providing criteria to be considered in each case when determining the appropriate quantum of any monetary penalty goes some way towards increasing the level of consistency in sentencing for non-criminal contraventions. The ALRC considers that if additional civil penalty powers were to be given to courts to allow greater use of non-monetary penalties, it is desirable that this be done by inclusion of a provision in the Regulatory Contraventions Statute to allow those powers to be used across all non-criminal penalty schemes (unless expressly excluded) and to avoid the need for each piece of primary legislation that creates a non-criminal contravention to be individually amended.

27.40 The advantages of a general provision are that:

- it would not be necessary to amend each piece of primary legislation separately;
- it allows for consistency across regulatory schemes; and
- it could be expressly excluded or modified by primary legislation where it was desired to create a unique scheme applying to one area of regulation.

27.41 The ALRC therefore recommends that additional civil penalty powers be available under the Regulatory Contraventions Statute as penalties for both individuals and corporations. In some circumstances it may also be appropriate to provide for additional non-monetary penalties for individuals. This option is considered below at para 27.46.

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55 The Victorian Bar Association, *Consultation*, Melbourne, 4 September 2002.
56 The Victorian Bar Association, *Submission CAP 22*, 14 October 2002, 3.
57 Australian Broadcasting Authority, *Submission CAP 23*, 14 October 2002, 8.

Recommendation

Recommendation 27–1. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, a court may impose a non-monetary penalty in addition to, or in substitution for, a monetary penalty for an offence or contravention, including:

(a) orders disqualifying the person from government contracts;

(b) probation orders (as defined in s 86C of the *Trade Practices Act 1974* (Cth));

(c) community service orders (as defined in s 86C of the *Trade Practices Act 1974* (Cth));

(d) information disclosure orders (as defined in s 86C of the *Trade Practices Act 1974* (Cth));

(e) orders to publish an advertisement (as defined in s 86C of the *Trade Practices Act 1974* (Cth));

(f) adverse publicity orders (as defined in s 86D of the *Trade Practices Act 1974* (Cth)).

27.42 Although the result of this Recommendation would be that a wider range of non-monetary penalties was available to a court when imposing sentencing orders for non-criminal contraventions, each type of penalty would still need to be separately sought. This perpetuates the problem that the flexibility of the court in making its sentencing order is limited to what is specifically requested by the person bringing the action, and if a particular order were not sought, that form of penalty would be unavailable.

27.43 A better approach might be to supplement the additional civil penalty powers with a provision allowing the court to make a sentencing order as it thought appropriate in the case, comprising a combination of monetary and non-monetary penalties. This form of provision would operate in a way similar to s 20AB of the *Crimes Act* by giving a court the power to make alternative sentencing orders for non-criminal contraventions *at the discretion of the court* provided it was within the power of the court to do so. This option is considered further below.

Penalty combination

27.44 Combining monetary and non-monetary penalties in sentencing orders is common in the criminal sphere. For example, under state sentencing law a person might be required to enter a good behaviour bond (a monetary penalty) and perform

community service (a non-monetary penalty).[58] This combination of penalties may be imposed by the court exercising its general criminal sentencing power; the prosecution is not required to separately request each option in reliance on specific statutory provisions. In contrast, many statutes creating federal criminal offences, make specific provision for different sentencing orders (which must be separately sought by the prosecution). Penalties available for corporations law offences provide examples. Under the *Corporations Act* a person may be both fined (under s 1311) and ordered to disclose information or publish an advertisement in relation to the offending conduct (under s 1324B), or be fined and disqualified from managing a corporation as an automatic consequence of conviction (under s 206B), or be fined and subject to an injunction restraining specified conduct or directing that particular action be taken (under s 1324).

Conclusion

27.45 The same legislative structure applies generally to federal non-criminal contraventions. Application for a civil penalty must be made under specific statutory provisions and, where more than one penalty order is sought; an application must be made separately in reliance on each provision. It is, therefore, possible for a court to make multiple penalty orders in respect of the same non-criminal contravention, including combinations of monetary and non-monetary penalties provided that each penalty is specifically sought. A more flexible way to achieve the same result would be to allow a court to select as it thought fit from a range of monetary and non-monetary penalties, without the need for each separate penalty to be individually sought. There seems no reason for courts to have this discretion in criminal cases but be limited in civil penalty cases. The ALRC therefore recommends that courts be given the power to select from a range of penalty options at the court's discretion to impose an order that combines a number of different types of penalty. However, a court will be obliged to ensure that any combination of penalties is appropriate and not excessive in relation to the offending conduct.[59]

Recommendation

Recommendation 27–2. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, a court may make an order imposing a penalty that combines a number of different types of penalty.

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58 See for example, a woman sentenced in relation to social security overpayments by the ACT Magistrates Court who received a 12 month suspended prison sentence, a $1000 three-year good behaviour bond, and 208 hours community service in addition to payment of reparation: 'Suspended Sentence for Two on Fraud Charges', *The Canberra Times*, 11 July 2002, 4.

59 Known as the totality principle. See discussion of these issues in ch 30.

Additional non-monetary penalties for individuals

27.46 A more flexible approach might be to allow the court to choose from a mix of monetary and non-monetary penalties depending on the circumstances of the particular case and of the individual offender. For some businesses, a penalty that deprives senior executives of time rather than the corporation of money may have a more noticeable effect and may be more likely to achieve the purpose for which the penalty was imposed.[60] Singling out an individual for sanction may be a very effective way to achieve the purpose for which a penalty is imposed, especially if that person is able to influence the future conduct of the offending corporation. The effectiveness of assigning liability for corporate misconduct to individuals is considered further in chapter 8.

27.47 As well as penalising individuals by requiring them to undertake particular activities (eg, community service), it is also possible to impose additional constraints on individuals by restricting or prohibiting them from undertaking particular activities by imposing a banning order, although this might be formally regarded as a step protecting the public rather than a penalty strictly so-called. The possible additional impositions individuals include banning orders in the form of:

- management disqualification orders (already available in Australia on a limited basis under the *Corporations Act*); or
- occupational bans (already available in Australia on a limited basis under the *Corporations Act*).[61]

Management disqualification orders

27.48 Under s 206B of the *Corporations Act*, a person is automatically disqualified from managing corporations upon conviction for certain criminal offences. In addition, an application may be made by ASIC to the court under s 206C requesting that a person be disqualified from managing corporations if:

> (a) a declaration is made under section 1317E (civil penalty provision) that the person has contravened a corporation/scheme civil penalty provision; and
>
> (b) the Court is satisfied that the disqualification is justified.[62]

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60 Community service orders may be one way to do this.

61 In this chapter the ALRC has used the term 'management disqualification order' to refer to an order made by the court or ASIC that a person be disqualified from managing corporations (made under Part 2D.6 of the *Corporations Act*); and the term 'occupational ban' to refer to order made by the court or ASIC under Div 8 of Part 7.6 which has the effect of disqualifying a person from providing a financial service (described as a 'banning order' in the *Corporations Act*), and to any other form of restriction placed on a person in relation to a particular activity such as a licence condition. The ALRC notes that both forms of order under the *Corporations Act* are commonly referred to as 'banning orders'. Elsewhere in this Report, the term 'banning order' has been used to refer generally to a restriction placed on a person, disqualifying them from either holding a particular position or engaging in particular activities.

27.49 Section 206C only applies to non-criminal contraventions of the *Corporations Act*, but there appears to be an ability for the court to disqualify a person for criminal offences other than those specified in s 206B in reliance on the power given in s 206E to disqualify a person from managing a corporation on the basis of repeated contraventions of the *Corporations Act*.[63] Management disqualification orders are a well-established enforcement tool under the *Corporations Act*. In 2001–02, 20 people were disqualified from managing corporations either by an order of the court or administratively by ASIC.[64] It should be noted, however, that management disqualification orders may only be imposed for breaches of the *Corporations Act*.

27.50 The advantage of a management disqualification order is that it has a very real impact on the person penalised as it directly affects their livelihood. The purpose of a management disqualification order has been stated by Australian courts to be protective, rather than punitive.[65] In deciding whether, and for how long, to impose a management disqualification order the court must balance the public interest in protection of investors and others who deal with the company against the private interest of the person concerned to be able to make a living. This balancing of interests was considered in *ASIC v Adler*:[66]

> The public protective purpose must clearly be paramount. That precludes a simple balancing exercise. While the disqualification order should not be disproportionate to the public protective purpose it is intended to serve, for that indeed would be punitive, it would subvert that public purpose if private interest considerations were to prevail or preclude an order which went no further than necessary to serve that public purpose. A lesser period of disqualification than that, designed to serve a private interest consideration, would thus sacrifice the public interests to be protected.[67]

27.51 In *Adler*, it was argued that the protective purpose could be achieved by imposing a management disqualification order in respect of the management of public corporations while still allowing Adler to be involved in the management of private, family corporations. The Court rejected this submission (and imposed a 20-year 'ban' on Adler in relation to the management of *all* corporations):

> Here, concededly, Mr Adler will be impeded in his field of activity, which includes financial consultancy and investment, including joint ventures, but that is the very area where he has committed the relevant contraventions. That puts in stark relief the need to make the public protective purpose paramount over Mr Adler's private inter-

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62 *Corporations Act 2001* (Cth), s 206C(1).

63 The term 'contravention' is not given a specific meaning in the *Corporations Act*. Section 1311(1) of the Act provides that a person is guilty of an offence when that person 'does an act or thing that the person is forbidden to do by or under a provision of this Act; or does not do an act or thing that the person is required or directed to do by or under a provision of this Act; or otherwise *contravenes* a provision of this Act' [emphasis added]. This provision suggests that any breach of the Act constitutes a contravention. On this analysis, the term 'contravention' used in s 206E may be taken to include both criminal offences and contraventions of civil penalty provisions.

64 Australian Securities & Investments Commission, *Annual Report 2001–2002*, Australian Securities & Investments Commission, 29–30.

65 See *Australian Securities Commission v Kippe* (1996) 67 FCR 499: discussed in ch 3 at para 3.17–3.19.

66 *ASIC v Adler* [2002] NSWSC 483.

67 Ibid, para 80.

> ests, though it be the case that disqualifying him may require him to be a passive investor with no seat on the board or role in management. Whether that of itself prevents him investing is a matter for him and not a matter for the court to enter into. To the extent that Adler Corporation and its wholly-owned subsidiaries are already engaged in ongoing financial or business activity, should a disqualification order be made against Mr Adler he will simply have to find others to carry on that activity or manage it, independently of him, on the basis that he *must*, in the public interest, be excluded wholly from that activity. That is, at least until such time as a court is persuaded to grant leave pursuant to s 206G, if it be so persuaded in light of the then known facts.[68]

27.52 In addition to the management disqualification order, Adler was ordered to pay a pecuniary penalty of $450,000 and compensation of $7,928,112. The Court acknowledged that 'the pecuniary penalty has a punitive character, but it is principally a personal and general deterrent to prevent the corporate structure from being used in a manner contrary to commercial standards. The penalty should be no greater than is necessary to achieve this object'.[69] This case is an example of a court combining a monetary and non-monetary penalty and of imposing different penalties for different purposes — the management disqualification order for protection, the pecuniary penalty for deterrence, and the compensation to repair the harm caused.

27.53 *Adler's* case makes it clear that monetary penalties alone will not always be sufficient to achieve the purpose of the penalty. In *Adler*, the banning order was crucial in ensuring that the overall purpose of the penalties — redressing past harm and preventing future harm — could be achieved. If the Court's power had been limited to the imposition of monetary penalties a critical objective, protection of the public would not have been met. If a court is to have the power to choose between a monetary and non-monetary penalty on a case-by-case basis, consideration must be given to the legislative framework necessary to support such flexibility. In *Adler*, each penalty was imposed in accordance with a particular provision of the primary legislation and each was specifically, and separately, sought by ASIC. This is an example of primary legislation providing a range of penalty options in the form of separate provisions.

27.54 Under recent proposals in the United Kingdom, the Office of Fair Trading (OFT) would have the power to apply to the court for a disqualification order banning a director who has been involved in a competition law contravention from being involved in the management of a corporation for a period of up to 15 years.[70] The OFT would also be able to accept a disqualification undertaking from a person, voluntarily

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68 Ibid, para 87.

69 Ibid, para 126.

70 Known as a 'competition disqualification order'. The *Enterprise Act 2002* (UK), amended s 9A–9E of the *Company Directors Disqualification Act 1986* (UK) to provide this power.

agreeing not to take part in the management of a corporation.[71] The proposed maximum period of an undertaking is 15 years.

27.55 The OFT has published draft guidance on how it might exercise these powers.[72] The guidance sets out the criteria which will be considered by the OFT when deciding whether to apply for a disqualification order in three types of cases — particularly serious, serious, and less serious cases. In particularly serious cases, 'the OFT considers that it is very likely to apply for a Competition Disqualification Order (CDO) against a director'.[73] The level of involvement of the director in the conduct comprising the contravention will be critical. 'The key consideration is whether the director had an active role in causing his or her company to carry out or agree to carry out the activity constituting the breach'.[74]

27.56 Lack of knowledge that the activity constituted a contravention will not be a bar to an application for a CDO, but may be considered as a mitigating factor. Other mitigating factors might include that the corporation acted under severe external pressure or duress or that the director objected to the proposed activity and voted against any involvement.[75] Aggravating factors that might also be relevant include past involvement in competition contraventions, destruction of evidence, and lack of cooperation with an investigation.[76]

Occupational bans

27.57 In the United States, a similar power to a management disqualification order, known as an occupational ban, exists. This type of order, however, is not limited to the management of companies and might apply to participation in a variety of activities. For example, a person might be banned from engaging in the marketing of particular services.[77] An occupational ban is enforced through a court order and is generally re-

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71 The ALRC notes that enforceable undertakings given under s 93AA of the ASIC Act may, and often do, include a commitment by an individual not to take part in the management of a corporation for a specified period. The ALRC considers that enforceable undertakings given under other legislation should be permitted to include a commitment that a person will not take part in the management of a corporation or be involved in specified activities of the corporation which are relevant to the alleged or admitted breach (for example, sales or marketing if the breach related to misleading or deceptive conduct). In effect, this would allow a person to voluntarily agree to an occupational ban that could be enforced by the court if it were not complied with. The ALRC considers that existing powers to accept enforceable undertakings would permit the inclusion of voluntary occupational bans. See ch 16 for a discussion of acceptable terms in enforceable undertakings.

72 Office of Fair Trading (UK), *Competition Disqualification Orders - Consultation Paper* (2002).

73 Ibid, para 4.12.

74 Ibid, para 4.12. This is similar to the 'no influence' threshold test for deeming corporate officers liable for the conduct of a corporation. See discussion of this concept in ch 8.

75 Ibid, para 4.28.

76 Ibid, para 4.27.

77 See *FTC v CRA Champion Credit Inc* (No C-98-0585 WD Wash), where a ban on future marketing of credit services was entered as part of a settlement: cited in D Valentine, 'Regulating in a High-Tech Marketplace; The Import of Remedies' (Paper presented at Penalties; Policy, Principles & Practice in Government Regulation, Sydney, 8-9 June 2001).

served for 'a narrow subset of egregious cases where a defendant's past conduct demonstrates a particularly high likelihood of future violations absent a ban'.[78]

27.58 Occupational bans also exist in Australia in both the form of a 'permission' to undertake an activity (for example, by prohibiting a person from undertaking an activity unless licensed or accredited to do so) and in the form of a 'prohibition' (for example, by specifically prohibiting a person from undertaking an activity they would ordinarily be able to pursue. This might take the form of a restriction on a licence or an outright ban). Under the *Corporations Act*, a person may be banned from providing a financial service by ASIC under s 920A or by the court (on the application of ASIC) under s 921A. The circumstances in which a banning order may be made under s 920A include that the person has not complied with a financial services law or ASIC has reason to believe that the person will not comply with a financial services law.[79] In 2001–02, banning orders were made (by ASIC or the court) against 35 people, prohibiting them from offering financial services. Of these, 17 people were banned for life.[80]

Consultations and submissions

Non-monetary penalties for individuals

27.59 One submission commented on the use of non-monetary penalties for individuals as one option for ensuring that bankruptcy does not affect the person's liability for the penalty.

> Finally, while bankruptcy can have a negative impact on penal law, so too can straight impecuniosity, whether resulting in formal insolvency or not. Penal law has to acknowledge that not all fines can be paid. Hence, its purposes may be served in those cases by use of non-financial impositions, for example by community service orders. …
>
> Other approaches, in respect of individuals, would be to allow recognition of the benefits of other types of penalties than the financial, by way of imposing community service orders, attendance at training programs, and the like. Bankruptcy would have no effect on a person's obligations under such orders.[81]

27.60 The option of non-monetary penalties for individuals was also specifically discussed in one consultation.[82] Support was expressed for management disqualification orders as an effective enforcement response. It was noted that whilst monetary penalties can have a deterrent effect, focussing on putting an individual 'out of action' by way of a management disqualification order might be more effective. The possibility of

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78 Ibid, 7.
79 *Corporations Act 2001* (Cth), s 920A(1)(e)–(f).
80 Australian Securities & Investments Commission, *Annual Report 2001–2002*, Australian Securities & Investments Commission, 29.
81 M Murray, *Submission CAP 10*, 31 August 2002, para 8, 68.
82 B Dee, *Consultation*, Melbourne, 4 September 2002.

personal liability, it was stated, is a very effective way to focus the attention of senior management on compliance issues.[83]

27.61 The ALRC also reviewed submissions made to the Dawson Committee on the utility of non-monetary penalties for individuals. In its submission to the Dawson Committee, law firm Allens Arthur Robinson noted that

> the ACCC has other penalties available including community service and probation, both of which have considerable potential for inconvenience and embarrassment to senior executives, which it has not yet sought in penalty proceedings.[84]

27.62 In the context of outlining the benefits of criminal sanctions, the ACCC stated that:

> Imposing sanctions on individuals, as opposed to companies, involved in a breach will not affect innocent parties. Appropriate sanctions could include pecuniary, custodial or alternative penalties, such as banning orders … However, they must promote deterrence and instill confidence in the legal system. … for some individuals, these may be a more effective deterrent than pecuniary penalties.[85]

27.63 RK Evans submitted to the Dawson Committee that the TPA should be amended to provide that a court, on the application of the ACCC, has the power to make an order disqualifying a person from being involved in the management of any corporation generally or involved in the management of a company beyond a certain level of seniority.[86] He envisaged that such an order could be made for a specified period of time or for life.

> In my view, the use of pecuniary penalties and banning orders is preferable to the incarceration of executives for contraventions which may turn on the subjective assessments which comprise economic evidence.[87]

Conclusion

27.64 As noted earlier in this chapter, in many cases courts would benefit from having the flexibility to choose from a mix of monetary and non-monetary penalties depending on the circumstances of the particular case and of the individual offender. Singling out an individual in addition to, or in place of, a corporation for sanction by imposing a banning order may be a very effective way to achieve the purpose for which a penalty is imposed, particularly if the purpose of the penalty is specific deter-

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83 Ibid.

84 Allens Arthur Robinson, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/162_Submission_AAR.pdf>, 6 August 2002, 50.

85 Australian Competition & Consumer Commission, *Submission to the Review of the Trade Practices Act 1974*, <www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P1.pdf, www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P2.pdf, www.tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P3.pdf>, 13 August 2002.

86 R Evans, *Submission to the Review of the Trade Practices Act 1974*, <http://tpareview.treasury.gov.au/content/subs/030_submission_evans.pdf>, 4 July 2002.

87 Ibid.

rence, and especially if that person is able to influence the future conduct of the offending corporation.

27.65 In order to provide greater opportunity for a court to impose a meaningful penalty, the ALRC considers that it may be desirable to expand the availability of management disqualification orders beyond the *Corporations Act* to other regulatory schemes in which the ability of an individual to control the conduct of the corporation has been central to the criminal offence or non-criminal contravention. The ALRC recommends that where it is appropriate to the aims of the regulatory scheme, a court should have the power to make a management disqualification order, on the application of the DPP or the relevant regulator, in response to a criminal offence or non-criminal contravention if the court is satisfied that the disqualification is justified. The power would be substantially similar to that available under s 206C of the *Corporations Act*. The power should be available in addition, or as an alternative, to any penalty which might be imposed (on the corporation or the individual) for the offence or contravention and should be available regardless of whether the individual is directly liable for the breach, is indirectly liable as an accessory, or is deemed to be liable where legislative provisions allow for managerial liability.[88]

27.66 The ALRC has not recommended that this power be included in the Regulatory Contraventions Statute as the ALRC recognises that management disqualification may in some circumstances be a disproportionate response to a breach and to an individual's involvement in that breach. It is better that this power be considered for inclusion in particular regulatory schemes, on a case-by-case basis.

Recommendation

Recommendation 27–3. Where appropriate, the legislation that establishes a civil penalty scheme should allow a court to make a management disqualification order in respect of an individual in addition, or as an alternative, to a penalty where:

(a) the individual has been convicted of a criminal offence or held by a court to be liable for a non-criminal contravention;

(b) an application for a management disqualification is made by the DPP or relevant regulator; and

(c) the court is satisfied that the disqualification is justified.

88 The forms of liability of individuals for the conduct of corporations — direct, indirect and deemed — are considered in detail in ch 8.

Combining court-imposed penalties with enforceable undertakings

27.67 Whilst it is not unusual for a court to order a combination of penalties, it is more unusual for court-based penalties to be combined with non-court based remedies. In trade practices cases, the consequences of a breach of the TPA might include both court orders for monetary penalties (if court proceedings are brought by the ACCC) in addition to separately provided s 87B undertakings. This combination of remedies is also possible under s 93AA of the ASIC Act. The ACCC's guide to enforceable undertakings specifically notes the possibility of both an undertaking and a court-ordered penalty:

> While in most circumstances acceptance of a s. 87B undertaking will be the resolution of the matter, there may be circumstances in which the Commission negotiates and accepts an undertaking while continuing to investigate with a view to possible legal proceedings in relation to past or associated conduct.[89]

27.68 Dr Karen Yeung noted this potential to combine court and non-court based remedies in her review of enforcement of competition law.[90] She said that s 87B undertakings

> have not been used solely as a substitute for litigation to secure the termination of suspected contravening conduct. The Commission has also accepted s. 87B undertakings to supplement litigation (usually encompassing assurances by the offender to undertake a comprehensive trade practices compliance program) and also as a way to settle court proceedings rather than proceed to final hearing.[91]

27.69 For example, in *ACCC v Colgate-Palmolive Ltd*,[92] the Court noted the fact that Colgate had given the ACCC an undertaking under s 87B to maintain a compliance program for three years when imposing a pecuniary penalty of $250,000 (the maximum possible penalty was $10 million).

27.70 In contrast, it seems unlikely that a combination of a court penalty and an undertaking would arise under corporations law, as ASIC's Practice Note 69 states that an undertaking may be accepted by ASIC

> *instead* of taking proceedings for a civil order from a Court (eg an award of damages or compensation, or an injunction) or taking administrative action (eg imposing conditions on a licence) or referring a matter to other bodies (eg to the Companies Auditors

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89 Australian Competition & Consumer Commission, *Section 87B of the Trade Practices Act: A Guideline on the Australian Competition and Consumer Commission's Use of Enforceable Undertakings* (1999), Australian Competition & Consumer Commission, Canberra, 5.

90 K Yeung, *The Public Enforcement of Australian Competition Law* (2001), Australian Competition and Consumer Commission, Canberra.

91 Ibid, 19–20.

92 *Australian Competition and Consumer Commission v Colgate Palmolive Pty Ltd* [2002] FCA 619 (15 May 2002). See also for example *ACCC v Tyco Australia Pty Ltd* (2001) ATPR ¶41–810; *Australian Competition and Consumer Commission v SIP Australia Pty Ltd* (1999) ATPR ¶41–702.

> and Liquidators Disciplinary Board or Corporations & Securities Panel) [emphasis added].[93]

27.71 Prior to the introduction into the ASIC Act of the additional penalty powers described above, enforceable undertakings were an important method for obtaining tailored remedies. As noted by ASIC:

> [I]t is more versatile than any of those [court or administrative] remedies, and may be used to achieve outcomes which might not be available by those means, and which are more focused (eg adoption of a compliance regime, restriction of a person's securities business or practice as an auditor).[94]

27.72 Undertakings given under s 87B of the TPA and s 93AA of the ASIC Act have been used to secure commitments to:

- develop and implement compliance programs;
- pay compensation to consumers or investors;
- refund money to consumers or investors;
- provide accurate information to consumers or investors;
- publish corrective advertising;
- publish notices in newsletters or on websites;
- refrain from specified activities; and
- fund consumer education programs.

27.73 The commitments listed above could each be obtained using the additional civil penalty powers recommended by the ALRC for inclusion in the Regulatory Contraventions Statute (see Recommendation 27–1 above). The ALRC acknowledges that prior to the introduction of these powers, enforceable undertakings were the only way that many of these remedies could have been obtained. The ALRC will be interested to see whether enforceable undertakings continue to be used in this way, or whether more matters will be brought before the courts now that the courts have more flexible sentencing powers.

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93 Australian Securities & Investments Commission, *Practice Note 69: Enforceable Undertakings*, Australian Securities & Investments Commission, <www.cpd.com.au/asic/pn/>, 20 December 2001, para PN 69.5.

94 Ibid, para PN 69.5.

Conclusion

27.74 The ALRC considers that the combination of court-imposed penalties with the use of enforceable undertakings is acceptable provided that the court is aware of the nature and extent of any current or proposed enforceable undertaking so that it may take the terms of the enforceable undertaking into account when imposing civil penalties to ensure that the total obligations imposed on the offender, by the penalty and enforceable undertaking, are not disproportionate to the contravention and do not offend the totality principle. The ALRC therefore recommends that courts be permitted to combine court and non-court based penalties. This power should apply to penalties for both individuals and corporations.

Recommendation

Recommendation 27–4. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, before imposing a penalty for a criminal offence or non-criminal contravention, a court must take into account any enforceable undertaking given by the offender in relation to the conduct alleged to constitute the offence or contravention, in addition to any other matters that the court is required or permitted to take into account.

28. Tailored Penalties for Corporations

Contents

Introduction

28.1 The difficulty in devising appropriate penalties for corporations has been discussed by numerous commentators[1] and considered previously by the ALRC.[2] These difficulties relate both to the particular characteristics of the corporation as a legal person (in particular, its lack of a physical body which might be imprisoned) and to the

1 See for example B Fisse, 'Recent Developments In Corporate Criminal Law and Corporate Liability to Monetary Penalties' (1990) 13 (1) *University of New South Wales Law Journal* 1; A Freiberg, 'Sentencing White-Collar Criminals' (Paper presented at Fraud Prevention and Control Conference, Surfers Paradise, 24–25 August 2000); B Fisse and J Braithwaite, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1988) 11 *Sydney Law Review* 468.

2 See Australian Law Reform Commission, *Sentencing: Penalties — Discussion Paper*, DP 30 (1987), Australian Law Reform Commission, Sydney, para 283–307; Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), Australian Law Reform Commission, Sydney, para 10.2–10.29.

disparate nature of corporations (which vary enormously in size, purpose and financial viability) as a group.

Monetary penalties

28.2 Corporations do not have a physical body that can be imprisoned. Monetary penalties (fines or civil pecuniary penalties) are therefore the most common form of sanction imposed for corporate regulatory offences.

28.3 The differential treatment of individuals and corporations in relation to monetary penalties is provided for either in the primary legislation[3] or, where the primary legislation is silent and the breach is a criminal offence, by s 4B of the *Crimes Act 1914* (Cth), which provides that a court may 'impose a pecuniary penalty [on a body corporate] not exceeding an amount equal to five times the amount of the maximum pecuniary penalty that could be imposed by the court on a natural person convicted of the same offence'.[4]

28.4 Professor Celia Wells is critical of the heavy reliance on monetary penalties as the dominant form of corporate sanction, arguing that it is a 'common misconception' indicative of the 'individualist bias in criminal justice discourse'.[5] She is critical of the way monetary penalties have been imposed:

> With corporate defendants … no attempt is generally made to investigate their background or their assets; fines do not seem to be related to the corporation's means nor necessarily related to the severity of the harm caused.[6]

28.5 Wells favours an approach where corporate monetary penalties take into account both the 'gravity of the offence' and 'the means of the offender', including the 'reality of corporate finances rather than to assume that the same limits should apply to business enterprises as to individuals'.[7] She notes the potential difficulty in imposing a monetary penalty large enough to be meaningful to a corporation but not so large as to

> make the enterprise unworthwhile. Because, unlike a human person, a corporation cannot be threatened with imprisonment in default of payment, a wealth boundary or 'deterrence trap' limits the impact of fines.[8]

28.6 In its report, *Compliance with the Trade Practices Act* (ALRC 68),[9] the ALRC argued that imposing monetary penalties (both criminal and civil) on corporations had a number of limitations.[10] These included that:

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3 That is, the legislation which creates the criminal offence or the non-criminal contravention. An example of this is s 76 of the *Trade Practices Act 1974* (Cth), which specifies different maximum penalties payable by individuals and bodies corporate — $500,000 and $10 million, respectively.

4 *Crimes Act 1914* (Cth), s 4B(3).

5 C Wells, *Corporations and Criminal Responsibility* (2nd ed, 2001) Oxford University Press, Oxford, 31.

6 Ibid, 32.

7 Ibid, 33–34.

8 Ibid, 34.

9 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), Australian Law Reform Commission, Sydney.

- large monetary penalties do not necessarily result in corporate offenders taking internal disciplinary action against responsible officers and that, as a consequence, internal controls are often not revised to prevent further contraventions;
- the burden of large monetary penalties may be borne by shareholders, workers or consumers rather than the responsible officers of the offending corporation;
- monetary penalties may convey the impression that offences are purchasable commodities or a cost of doing business;
- a large monetary penalty may force a corporation into liquidation. The court could be faced with the choice between putting the company into liquidation or imposing a penalty that does not reflect the gravity of the offence; and
- monetary penalties are prone to evasion through the use of incorporated subsidiaries and other avoidance techniques such as asset stripping.[11]

Utility of non-monetary penalties

28.7 The difficulties associated with setting appropriate monetary penalties in individual cases are discussed in chapter 30. In particular, the almost complete reliance on monetary penalties as sanctions for corporations has been widely criticised.[12] The problems identified by various commentators fall into three main categories:

- there is no necessary connection between a monetary penalty and internal change in the corporation — that is, there is no guarantee of behavioural change;
- a monetary penalty might be viewed as just another business cost — that is, there is a risk that the penalty becomes the 'price' of non-compliant behaviour; and
- the difficulty in imposing a meaningful penalty, that is, balancing avoiding a penalty which is so low as to merely be a 'slap on the wrist' against imposing one which is so onerous that it runs the risk of penalty 'overspill', or threatens the overall solvency of the business — known as the 'deterrence and retribution trap'.

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10 A number of alternative penalties to fines were suggested in ALRC 68 including community service orders (discussed below at para 28.32–28.40) and publicity orders (para 28.46–28.51). Many of the recommendations made in ALRC 68 were adopted by the Government in the *Trade Practices Amendment Act (No. 1) 2001* (Cth), including allowing courts to impose non-monetary penalties such as community service orders, probation orders and adverse publicity orders for both criminal and non-criminal contraventions of the TPA.

11 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), Australian Law Reform Commission, Sydney, para 10.3. Brent Fisse identified similar disadvantages in B Fisse, 'Recent Developments In Corporate Criminal Law and Corporate Liability to Monetary Penalties' (1990) 13 (1) *University of New South Wales Law Journal* 1, 7–9.

12 See Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, para 18.73–18.79.

28.8 In summary, the problems all relate to the same thing — how can a penalty imposed on a corporate offender be devised to ensure the greatest likelihood that it will give effect to the underlying purpose of the penalty? As has been noted previously, the main purpose of civil penalties is often stated by courts and regulators to be deterrence.[13] Deterrence is closely related to what has been stated to be the overriding purpose of regulation — to encourage compliance with regulation in order 'to maximise benefit or convenience to society'.[14] Regulation aims to 'promote desired behaviour',[15] therefore, the main aim of regulatory penalties might be seen to be two-fold — deterring future non-compliance and encouraging future compliance.

28.9 If the main aim of regulation is to promote compliance, then penalties that have punishment as their main purpose have less importance in the regulatory scheme (therefore the fact that a corporation lacks a physical body which might be imprisoned may not be as critical an issue as some commentators suggest). Many penalties for substantive breaches of federal laws are not criminal and therefore theoretically the purpose of these penalties should not be punishment. The task then is to seek to impose a penalty that has the greatest chance of promoting compliance. This suggests that the main questions to ask are — how will *this penalty* encourage *this offender* towards compliance? And how might *this penalty* encourage *others* to comply?

> It is well established that the principal purpose of a pecuniary penalty is to act as a personal deterrent and a deterrent to the general public against a repetition of like conduct (*ASC v Donovan* (supra); *Trade Practices Commission v CSR Limited* [1991] ATPR 52-135). In *Donovan*, the court said:
>
> 'If compliance with the appropriate standards of commercial conduct within the management of corporations by deterrents is the objective, then any penalty should be no greater than is necessary to achieve this objective. Otherwise severity above that figure would be oppressive'.[16]

28.10 If finding an appropriate level of deterrence is the main task in setting penalties then it is self-evident that allowing the court to select from a range of penalties will facilitate this. It is also self-evident that any penalty imposed should take account of the particular characteristics of the offender. A related question is whether a monetary or non-monetary penalty is the best choice in the circumstances of the case.

Tailored penalties

28.11 In the ALRC's 1987 discussion paper, *Sentencing: Penalties*, the issue of whether corporate offenders should be treated as a special category of federal offenders with tailored penalties different from those imposed on individual offenders was con-

13 Ibid, para 3.4.
14 Ibid, para 4.8.
15 Ibid, para 3.4.
16 *ASIC v Adler* [2002] NSWSC 483, para 125.

sidered in detail.[17] The ALRC was critical of the almost exclusive reliance on monetary penalties as sanctions for corporate offenders.

28.12 In its *Sentencing* inquiry, the ALRC considered the utility of a variety of tailored corporate penalties (both monetary and non-monetary):[18]

- equity fines (stock dilution);
- dissolution;
- disqualification from government contracts;
- supervisory or probation orders;
- community service orders; and
- adverse publicity orders.

Equity fines and turnover penalties

28.13 An equity fine involves three stages:

- transfer of shares from the corporation to the state criminal compensation fund;
- disposal of the shares by the fund; and
- distribution of the assets to persons affected by the conduct of the corporation.[19]

28.14 A similar type of fine (directed at the value and profitability of the corporation) is a penalty based on turnover. Turnover penalties are discussed in chapter 26.

Consultations and submissions

28.15 In DP 65, the ALRC asked:

> **Question 18-1.** Where a regulatory offence is concerned with market conduct, should the option of a monetary penalty expressed as a percentage of turnover of the corporation be available?

28.16 Very few comments were made in submissions or consultations on the issue of equity fines or turnover penalties. In one consultation support was expressed for the in-

17 Australian Law Reform Commission, *Sentencing: Penalties — Discussion Paper*, DP 30 (1987), Australian Law Reform Commission, Sydney.

18 Ibid. The issue was considered again by the ALRC in 1994 in relation to corporate penalties for contraventions of the TPA: Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), Australian Law Reform Commission, Sydney.

19 Equity fines, which operate through stock dilution, were first proposed by Professor John Coffee: see J Coffee, '"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79(3) *Michigan Law Review* 386.

troduction of turnover penalties.[20] One submission stated that turnover penalties were not appropriate to all regulatory schemes.

> ASIC considers that the modified equity fine would be of little value in setting appropriate penalties for contraventions of the market manipulation provisions contained in the Corporations Act.
>
> The market offences in the Corporations Act apply to both natural persons and companies. For the most part, ASIC takes enforcement action against the natural persons who are responsible for the contraventions. On a practical level, the modified equity fine approach, using turnover as a relevant calculator, is not suitable for natural persons.
>
> Further, a contravention of the Corporations Act provisions does not have the same economic consequences that typically flow from contraventions of the market manipulation provisions in the TPA.
>
> For these reasons, ASIC considers that the modified equity fine proposal would be of little value in setting appropriate penalties for contraventions of the market manipulation provisions in the Corporations Act.[21]

28.17 Another submission proposed that

> the TPA should be amended so that the maximum penalty for a contravention would be the greater of $10 million or three times the value of any commercial gain from the contravention. The ACCC also submits that it would be appropriate for the courts to have the power to substitute a percentage of turnover if it is difficult to quantify the commercial gain from the contravention.
>
> The ACCC proposes 10 per cent of the firm's Australian turnover for the duration of the infringement for a maximum of three years.[22]

Conclusion

28.18 This issue is discussed in more detail in chapter 26. In light of the lack of comment on the specific issue of equity fines (as opposed to turnover penalties), the ALRC considers that there is no reason to depart from the recommendation made in ALRC 68 that equity fines not be made available as penalties under the TPA,[23] and, that in fact, that recommendation should be expanded. For these reasons, the ALRC recommends that it is not appropriate to introduce equity fines as a penalty for corporations.

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20 Australian Government Solicitor, *Consultation*, Sydney, 27 August 2002.
21 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 55.
22 Australian Competition & Consumer Commission, *Submission CAP 24*, 15 October 2002, 19.
23 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), Australian Law Reform Commission, Sydney, para 10.27.

Recommendation

Recommendation 28–1. As a general matter, legislation that establishes a civil or administrative penalty scheme should not provide for equity fines as a penalty.

Dissolution

28.19 Dissolution or deregistration of the corporation is sometimes referred to as 'corporate capital punishment'.[24] Whilst there are advantages in having the threat of such a drastic sanction, there would be difficulties in imposing such a penalty. Dissolution has the potential to be used as a mechanism to avoid monetary penalties or payment of restitution or compensation to third parties adversely affected by the corporate wrong. Dissolution may also result in 'overspill' to 'innocent third parties including shareholders, employees and consumers'.[25]

Consultations and submissions

28.20 No comments were made in submissions or consultations on whether dissolution should be a penalty for corporations. The ALRC notes that the effect of the proceeds of crime legislation[26] may be that a corporation is deprived of all of its assets and it is not intended that this be changed. The ALRC also notes that under s 461(1)(k) of the *Corporations Act 2001* (Cth), ASIC may apply to the court for an order that a company be wound up on 'just and equitable' grounds. The ALRC is aware that this power has been used in one case on the basis that, because of repeated breaches of the *Corporations Law*, it was in the public interest that the companies be wound up in order to protect investors.[27] The ALRC's proposal that dissolution not be generally available as a penalty for corporations is not intended to remove the court's power to wind up a company where it is in the court's opinion 'just and equitable that the company be wound up' under s 461(1)(k).

Conclusion

28.21 In the context of the current Inquiry, the ALRC sees no need to introduce dissolution as a specific penalty for corporations.

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24 J Coffee, '"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79(3) *Michigan Law Review* 386.

25 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), Australian Law Reform Commission, Sydney, para 292. The potential use of corporate insolvency to avoid payment of monetary penalties is considered in ch 32 of this Report. There is also the potential for those involved in the management of the company to start a new company, a so-called 'phoenix company'.

26 *Proceeds of Crime Act 1987* (Cth).

27 *ASIC v Barrack Mortgage Managers Pty Limited; ASIC v Credit Alliance Pty Limited; ASIC v W. G. Herle Pty Limited* [1999] NSWSC 272 (30 March 1999).

Recommendation

Recommendation 28–2. As a general matter, legislation that establishes a civil or administrative penalty scheme should not provide for the dissolution of a corporation as a penalty.

Disqualification from government contracts

28.22 Disqualification from government contracts is a potential penalty available for breaches of regulatory legislation. An example of the use of such action is found in the *Contract Compliance Policy in Support of Equal Opportunity for Women in the Workplace* in relation to organizations that have failed to comply with the legislative requirements for reporting their workforce profile.

> The Federal Government will not do business with organisations which fail to comply with the *Equal Opportunity for Women in the Workplace Act 1999*. From 1 January 1993 all organisations covered by the Act have been required to comply with the Act's reporting requirements as a condition for:
>
> - qualifying to supply to government; and
> - receiving designated industry assistance.[28]

28.23 This is an example of an administratively imposed sanction as it is the responsibility of individual government departments and agencies to 'boycott' contracting with non-compliant corporations. In addition, the *Commonwealth Procurement Guidelines* require that 'those who seek to do business with the government' recognise and comply with the '*Workplace Relations Act 1996* and relevant Government policy on workplace relations'.[29]

28.24 Introduction of this penalty was considered by the ALRC in its *Sentencing* inquiry.[30] The ALRC noted that the 'advantages of [disqualification] include the fact that the sanction would provide law abiding corporations with a competitive advantage, and thereby reward compliance'.[31] A possible outcome of the introduction of disqualification from government contracts as a specific penalty for corporations might be that a corporation which might otherwise have succeeded on the merits, will be ineligible to tender for work or contract with government. In any event, as noted above, the enforcement of this penalty would be a matter for individual government departments and

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28 Equal Opportunity for Women in the Workplace Agency, *Contract Compliance Policy in Support of Equal Opportunity for Women in the Workplace; Operational Details of the Contract Compliance Policy*, Equal Opportunity for Women in the Workplace Agency, <www.eowa.gov.au/compliance/non_compliance/index.html>, 21 June 2001.

29 Department of Finance & Administration, *Commonwealth Procurement Guidelines*, <www.finance.gov.au/ctc/publications/purchasing/cpg/commonwealth_procurement_guide.html>, 10 January 2002.

30 Australian Law Reform Commission, *Sentencing: Penalties — Discussion Paper*, DP 30 (1987), Australian Law Reform Commission, Sydney.

31 Ibid, para 293.

agencies who would need to ensure that offers to tender included requirements that the person tendering for the work disclose if it were subject to the penalty and that contracts included specific warranties that the corporation had not been penalised in this way.

Consultations and submissions

28.25 The prospect of a corporation being unable to tender for government work as a consequence of a criminal conviction was noted in one consultation as being significant for a corporation.[32]

Conclusion

28.26 The ALRC notes that this form of penalty is already available on a limited basis and sees no reason why its availability should not be extended. In chapter 27, the ALRC recommended the introduction of disqualification from government contracts as an additional civil penalty power. The ALRC considers it is appropriate that this power apply to corporations and reaffirms Recommendation 27–2(a) that the additional civil penalty power of an order disqualifying a person from government contracts should apply to both corporations and individuals. See Recommendation 28–3 below.

Supervisory or probation orders

28.27 Supervisory or probation orders were considered by the ALRC in DP 30 to have 'advantages in terms of achieving changes in corporate conduct or "rehabilitation"'.[33] The types of supervisory orders considered by the ALRC were:

- internal discipline orders;
- organisational reform orders; and
- punitive injunctions.

Internal discipline orders

28.28 The use of internal disciplinary mechanisms of the corporation has been strongly advocated by Professor John Braithwaite and Brent Fisse.[34] Braithwaite supports enforced self-regulation as a sanction for corporate wrongdoing.[35] Enforced self-regulation involves the appointment by the corporation of a compliance director who is required to report periodically to the relevant regulator on the compliance strategies

32 The Victorian Bar, *Submission CAP 22*, 14 October 2002.

33 Australian Law Reform Commission, *Sentencing: Penalties — Discussion Paper*, DP 30 (1987), Australian Law Reform Commission, Sydney, para 295.

34 See for example: B Fisse, 'Recent Developments In Corporate Criminal Law and Corporate Liability to Monetary Penalties' (1990) 13 (1) *University of New South Wales Law Journal* 1; A Freiberg, 'Sentencing White-Collar Criminals' (Paper presented at Fraud Prevention and Control Conference, Surfers Paradise, 24–25 August 2000); B Fisse and J Braithwaite, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1988) 11 *Sydney Law Review* 468.

35 See J Braithwaite, 'Enforced Self-Regulation; A New Strategy for Corporate Crime Control' (1982) 80 *Michigan Law Review* 1466.

implemented by the corporation.[36] Failure to report would lead to criminal penalties or punishment for contempt. To ensure that community standards are adhered to, Braithwaite proposes that the rules to be followed by corporations be approved by the regulator after public comment. Minimum standards for behaviour could be set by the legislature.

28.29 Braithwaite argues that this form of sanction involves less cost to the state and allows greater depth of inspection and audit as internal compliance officers will have more time, better training, specialised knowledge and know where to look for problems. A possible limitation of this approach would be ensuring that management implements recommendations made by the compliance officer.

Organisational reform orders

28.30 Organisational reform orders take the form of 'a court order that requires a company's organisation and methods to be reviewed, under court scrutiny, in order to avoid a repetition of the offence in issue'.[37] This type of sanction implies that development and implementation of a compliance program is desirable. Compliance programs are discussed in chapters 7 and 29. Courts have been reluctant to make orders requiring the development and implementation of compliance programs because of the difficulty in formulating an order with sufficient specificity. Enforceable undertakings, which are negotiated between the regulator and the alleged offender, often take the form of a prohibition on specified conduct coupled with a promise to develop and implement a compliance program designed to prevent further breaches of legislation.[38]

Punitive injunctions

28.31 Punitive injunctions are a form of corporate probation order. The punitive element might be that the reforms need to be undertaken within a short period of time or a requirement that particular members of senior management be actively involved. In ALRC 68, the ALRC noted that 'while it is clear that, because corporations are not natural persons and cannot, therefore, be imprisoned, alternative penalties are needed, the Commission is not convinced of the need to introduce punitive injunctions under the TPA at this stage. Corporate probation will achieve much the same impact as punitive injunctions'.[39] The ALRC's view on this issue — that there is no need to introduce punitive injunctions as a penalty for corporations — has not changed.

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36 The role of compliance programs is discussed in ch 7 and 29.

37 Australian Law Reform Commission, *Sentencing: Penalties — Discussion Paper*, DP 30 (1987), Australian Law Reform Commission, Sydney, para 297.

38 See Australian Competition & Consumer Commission, *Section 87B of the Trade Practices Act: A Guideline on the Australian Competition and Consumer Commission's Use of Enforceable Undertakings* (1999), Australian Competition & Consumer Commission, Canberra, 6–8.

39 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), Australian Law Reform Commission, Sydney, para 10.24.

Community service orders

28.32 Community service orders were proposed by the ALRC as 'a useful sentencing option for corporate offenders' in its *Sentencing* report[40] and again in its 1994 report ALRC 68, *Compliance with the Trade Practices Act 1974*.[41]

28.33 The ALRC noted the advantages of community service orders (and probation orders) as including:

- flexibility — as they can be crafted to suit the particular circumstances;
- the promotion of individual accountability;
- providing an incentive for organisational change to avoid a repetition of the offending conduct; and
- avoidance of the 'deterrence or retribution' trap.[42]

28.34 Fisse favours probation as a sanction for corporate non-compliance, arguing that corporate probation is a much better targeted sanction than monetary penalties as it encourages individual accountability within an organisation, allowing persons responsible for the offending conduct to be singled out for remedial attention, and can require the implementation of 'organizational reform responsive to the conditions underlying the criminal conduct'.[43] It also avoids the potential to pass liability onto 'innocent' parties such as consumers, employees and shareholders, which is one of the shortcomings of a monetary penalty.

28.35 Probation also addresses the moral blameworthiness of the corporation as it

> clearly signals the socially unacceptable nature of corporate crime. The message is that corporate offences may not be dismissed as mere business expenses but constitute deprivations of important personal and social values that society will prevent by forcible restraint upon corporate decisionmaking.[44]

Probation and community service orders under the TPA and the ASIC Act

28.36 Formal organisational reform orders (probation and community service orders) were introduced as penalties into the *Trade Practices Act 1974* (Cth) (TPA) and the

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40 Australian Law Reform Commission, *Sentencing: Penalties — Discussion Paper*, DP 30 (1987), Australian Law Reform Commission, Sydney, para 301.

41 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), Australian Law Reform Commission, Sydney.

42 Ibid, para 10.9. Fisse notes that 'the deterrence or retribution trap … arises when the wealth of a corporation places an upper limit on monetary punishment and this upper limit is less than the amount required to deter or compensate for the crime': B Fisse, 'Sentencing Options against Corporations' (1990) 1(2) *Criminal Law Forum* 211, 230. See also J Coffee, '"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79(3) *Michigan Law Review* 386; C Wells, *Corporations and Criminal Responsibility* (2nd ed, 2001) Oxford University Press, Oxford, 31–34.

43 B Fisse, 'Sentencing Options against Corporations' (1990) 1(2) *Criminal Law Forum* 211.

44 Ibid.

Australian Securities and Investments Act 2001 (Cth) (ASIC Act) in 2001.[45] Section 86C of the TPA (and s 12GLA of the ASIC Act) introduced four new non-punitive orders[46] — a community service order; a probation order for a period of no longer than 3 years; an order requiring the person to disclose specified information; and an order requiring the person to publish a specified advertisement.[47]

> Probation, community service and corrective advertising orders were seen as one way in which the Court may be able to further the objectives of the Act, to provide protection for consumers and a remedy where the Act has been breached. The orders allow the Court to tailor a remedy to redress either some or all of the harm that was suffered in the community as a result of the contravention and serve to instruct the contravening parties to change their practices to ensure future compliance with the Act. The orders reflect the unacceptability of a breach of the TPA.[48]

> These proposed amendments would enable a Court to make an order directing a contravening party to inform the public of their unlawful conduct, correct the harm that they have inflicted upon the community as a result of their contravention, or engage in activities that are aimed at altering the internal business operations of the contravening party. Orders of this nature would be regarded as putting in place mechanisms to foster an environment of legislative compliance by changing incorrect business practices and correcting the misallocation of resources brought about by and evident in the breach.[49]

28.37 These statements demonstrate an awareness of the shortcomings of monetary penalties when there are several purposes motivating the imposition of a penalty. The legislature has acknowledged that deterrence may not be the sole purpose of a penalty, and that a penalty directed at protecting the public by ensuring that they are properly informed or redressing harm already caused or guarding against future harm might be more appropriate in the circumstances of the case.

28.38 Under s 86C of the TPA and s 12GLA of the ASIC Act, a community service order means 'an order directing the person to perform a service that is … for the benefit of the community or a section of the community'.[50] Examples of community service activities given in the TPA and the ASIC Act include making a training video or con-

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45 These orders were introduced into the TPA by the *Trade Practices Amendment Act (No. 1) 2001* (Cth), which commenced on 26 July 2001, and into the ASIC Act by the *Financial Services Reform (Consequential Provisions) Act 2001* (Cth), which commenced on 11 March 2002. In the TPA the orders are widely available in relation to breaches of Part IV, IVA, IVB, V or VC and s 75AU and 75AYA. In the ASIC Act the orders are available in relation to breaches of the provisions in Div 2 concerning unconscionable conduct and consumer protection in relation to financial services. These provisions substantially replicate Part IVA, V and VC of the TPA. They provide a mix of criminal offences and non-criminal contraventions.

46 Although described as 'non-punitive', under both the ASIC Act and the TPA these orders may be made in relation to either criminal offences or non-criminal contraventions.

47 Power for a court to make an order requiring the person to disclose specified information and an order requiring the person to publish a specified advertisement on the application of ASIC has been available under s 1324B of the *Corporations Act 2001* (Cth) (previously s 1324B of the *Corporations* Law) since its introduction by the *Corporate Law Economic Reform Program Act 1999* (Cth). Similar powers were also available under s 12GE of the ASIC Act and s 80A and 151CB of the TPA. Section 12GLA replaced s 12E of the ASIC Act and s 86C replaced s 80A of the TPA.

48 Explanatory Memorandum to the Trade Practices Amendment Bill (No 1) 2000 (Cth), 15.

49 Ibid, 5.

50 *Trade Practices Act 1974* (Cth), s 86C(4); ASIC Act, s 12GLA(4).

ducting a community awareness program.[51] This definition emphasises that the work must 'benefit the community'. The purpose of such orders appears to be to give effect to notions of restorative justice by ordering a person to 'correct the harm that they have inflicted upon the community as a result of their contravention'.[52] However, a more pragmatic reason for such orders was also mentioned:

> For example, the Court may make a community service or adverse publicity order where it feels that a defendant's financial resources would prevent a fine from being recovered.[53]

28.39 A probation order means 'an order … for the purpose of ensuring that the person does not engage in the contravening conduct, similar conduct or related conduct during the period of the order'.[54] Examples of probation orders given in the TPA and the ASIC Act include establishing a compliance program, establishing an education and training program or revising the internal operations of the business. The purpose of this form of penalty is clearly deterrence or the prevention of future harm.

28.40 An example of an order directed towards providing benefit to the community affected by the contravention is the consent order obtained by ASIC against Combined Insurance Company of Australia in respect of the marketing by Combined of insurance policies to remote Aboriginal communities. As part of the consent order, Combined agreed to 'provide … funding for the preparation of community education material by ASIC'.[55] Whilst not formally made under s 12GLA of the ASIC Act, it is likely that this order provides some guidance on the types of orders which might be made in the future under that section.

Disclosure and corrective advertising orders

28.41 When the power to make community service and probation orders was introduced into the TPA and the ASIC Act, two further 'non-punitive' order powers were also introduced. Under both the TPA and the ASIC Act, a court may make an order requiring disclosure of specified information or an order requiring publication of a specified advertisement.[56] What is encompassed by these two powers is not defined in the legislation. However, the Explanatory Memorandum provides some guidance:

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51 The only other legislation at federal level to expressly refer to 'community service orders' is the *Family Law Act 1975* (Cth) (which is not relevant to the current Inquiry). The provisions in the TPA and the ASIC Act commenced in the second half of 2001 and early 2002 respectively and no cases have yet been decided applying them.

52 Explanatory Memorandum to the Trade Practices Amendment Bill (No 1) 2000 (Cth), 5.

53 Explanatory Memorandum to the Financial Services Reform (Consequential Provisions) Bill 2001 (Cth), para 3.14; Explanatory Memorandum to the Trade Practices Amendment Bill (No 1) 2000 (Cth), 11.

54 *Trade Practices Act 1974* (Cth), s 86C(4).

55 Australian Securities & Investments Commission, 'Insurance Selling in Aboriginal Community Leads to Further Court Orders', *ASIC Media Release 01/408*, 20 November 2001.

56 Note that power to order disclosure of information or publication of an advertisement had previously been available under s 12GE of the ASIC Act (which was replaced by s 12GLA) and s 80A of the TPA (which was replaced by s 86C). Similar powers are available under s 1324B of the *Corporations Act* and s 151CB of the TPA.

> An order requiring the disclosure of information requires a person who has contravened [the] Act to disclose information in relation to the contravention that they may have in their possession, or may have access to. An order requiring the disclosure of information is directed at redressing the harm caused by a contravention of the Act by providing information to business and consumers.[57]

28.42 The 'information disclosure' order power is similar to the previous s 80A power in the TPA to order disclosure of information or publication of an advertisement.[58] This power was used to order corrective advertising in several cases.[59] It has been noted that 'the power to order corrective advertising is one to be used protectively and not by way of punishment'.[60]

> The purpose of such advertising is to bring the outcome of the proceedings to the attention of the public as consumers, although not as such merely to announce a win for the ACCC, but rather as an aid in the enforcement of the primary orders and to prevent repetition of the conduct in question. His Honour expressed a doubt as to whether an appropriate purpose of such an order would be solely the education of the public.[61]

28.43 The power to order corrective advertising may be distinguished from the power to make an adverse publicity order on the basis that the purpose of each penalty is different.[62] As a punitive order, the clear purpose of adverse publicity is to punish the offender; protection of the public though providing education or raising awareness, if it occurs, is a by-product, outside the intended purpose of the order. On the other hand, corrective advertising is clearly aimed at protecting the public by 'correcting' the harm caused by the offending conduct. Corrective advertising is a particularly useful remedy where the harm caused has involved making false representations or misleading and deceptive conduct. An example of corrective advertising used in this context was the *Target* case.[63] In that case, Target was ordered to make and cause to be broad-

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57 Explanatory Memorandum to the Trade Practices Amendment Bill (No 1) 2000 (Cth), para 7, 14.

58 Section 80A was replaced by s 86C.

59 See for example, orders made under s 80A of the TPA in *TPC v Annand & Thompson Pty Ltd* (1978) 19 ALR 730; *ACCC v On Clinic Australia Pty Ltd* (1996) ATPR ¶41–517; *ACCC v Hungry Jack's Pty Ltd* (1996) ATPR ¶41–538; *ACCC v Optell Pty Ltd* (1998) ATPR ¶41–640; *ACCC v Target Australia Pty Ltd* (2001) ATPR ¶41–840; and consideration of s 12GE of the ASIC Act in *Cassidy v Medibank Private Ltd* [2002] FCA 315 (21 March 2002); *Cleary v Australian Co-operative Foods (No. 2)* [1999] NSWSC 991 (12 October 1999).

60 *Australian Competition and Consumer Commission v Real Estate Institute of Western Australia* (1999) ATPR ¶41–179 quoting Morling J in *Hospitals Contribution Fund of Australia Ltd v Switzerland Australia Health Fund Pty Ltd* (1987) 78 ALR 438, para 46; *Janssen Pharmaceutical Pty Ltd v Pfizer Pty Ltd* (1986) ATPR ¶40–654; *Makita (Australia) Pty Ltd v Black and Decker (Australasia) Pty Ltd* (1990) ATPR ¶41–030, 51,477 and *ACCC v On Clinic Australia Pty Ltd* (1996) ATPR ¶41–517. See also J Zylstra, 'Corrective Advertising' (2000) 16(6) *Australian & New Zealand Trade Practices Law Bulletin* 56.

61 *Cassidy v Medical Benefits Fund of Australia (No. 2)* [2002] FCA 1097, para 87.

62 But note that in CLERP 9 the power to order an advertisement to be published (under s 1324B of the *Corporations Act*) is described as allowing an adverse publicity order to be made: Treasury, *CLERP 9: Corporate Disclosure — Strengthening the financial reporting framework*, <www.treasury.gov.au/contentitem.asp?pageId=&ContentID=403>, 18 September 2002, 144.

63 *ACCC v Target Australia Pty Ltd* (2001) ATPR ¶41–840.

cast television advertisements 'explaining how earlier ads breached the *Trade Practices Act*'.[64] In *Target*, the court noted:

> The purpose sought to be achieved by corrective advertising is to raise public awareness — both for consumers and competitors — as to the type of conduct that may contravene the Act, and as to the outcome of the particular litigation [reference omitted]. Corrective advertising may be a particularly appropriate remedy where the conduct that breached s 52 consisted of media advertisements. Matters to be considered in the present case were that the advertisements were broadcast nationally, and repetitively, to a large number of consumers. The nature and prominence of the advertisements presents the inference that a number of people may have been misled or deceived, such people being unaware the conduct was misleading or deceptive and being unaware of their right to a remedy [references omitted].[65]

28.44 In *MBF*,[66] the court found that television and print advertisements that created the impression that the usual waiting periods for health insurance had been waived, failed to adequately disclose that certain waiting periods still applied and were, therefore, misleading and deceptive. Lee J noted:

> The question then is whether it is appropriate in the interest of consumer protection, although not punishment, to order corrective advertising having regard to the scope of people likely to have been affected by the misleading or deceptive representations.
>
> It was submitted on behalf of MBF that the conduct had occurred now a considerable time ago and was 'stale'. The initial effect of the advertising had, it was said, evaporated. The time for it had passed. Indeed there was some risk, it was suggested, that the advertising would rather increase MBF's business than protect consumers.
>
> On the whole I think there is utility in requiring MBF to publish both on television and in newspapers circulating in the area where the television advertising was screened an advertisement which will not merely remind the public that MBF had engaged in conduct which was misleading but also alert consumers to the importance of questioning advertisements and the insurance industry of the importance that their advertising not mislead or deceive consumers. Such advertising will, also, make consumers aware, if they themselves were induced to purchase insurance on reliance of the advertisements, that they might have some remedy.[67]

28.45 *Target*[68] is another example of the ability of the court to order a corporation to publish corrective advertising. In July 2001, the major retailer, Target, was ordered to publish corrective advertising 'explaining how earlier ads breached the *Trade Practices Act*'.[69] It may sometimes be difficult to distinguish between an order for corrective advertising and an adverse publicity order. In practice the results might be very similar — an advertisement explaining that the law has been breached and correcting any earlier inaccuracies. However, the underlying purpose of each penalty is quite distinct — corrective advertising has a protective purpose; adverse publicity is punitive.

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64 At Last, Truth in Advertising', *The Sydney Morning Herald*, 9 July 2001, 31.
65 *ACCC v Target Australia Pty Ltd* (2001) ATPR ¶41–840, para 19.
66 *Cassidy v Medical Benefits Fund of Australia (No. 2)* [2002] FCA 1097.
67 Ibid, para 89–91.
68 *ACCC v Target Australia Pty Ltd* (2001) ATPR ¶41–840.
69 See for example 'At Last, Truth in Advertising', *The Sydney Morning Herald*, 9 July 2001, 31; *ACCC v Target Australia Pty Ltd* (2001) ATPR ¶41–840.

Adverse publicity orders

28.46 In both the *Sentencing* inquiry and the inquiry into *Compliance with the Trade Practices Act 1974,* the ALRC recommended the introduction of 'a formal court-ordered punitive sanction of adverse publicity'.[70] The ALRC considered that 'adverse publicity can have a significant impact and deterrent effect on a corporation'.[71]

28.47 Coffee favours adverse publicity as a corporate sanction because of the public invisibility of much corporate wrongdoing.[72] Fisse also supports this form of sanction as

> publicity orders can be directed primarily toward the diminution of corporate prestige; hence, they are likely to influence [the] important non-financial value in organizational decision making and can be used 'to signal the socially undesirable nature of serious corporate offenses.'[73]

Adverse publicity orders under the TPA and the ASIC Act

28.48 Section 86D of the TPA (and s 12GLB of the ASIC Act), introduced a new power to make a punitive order requiring adverse publicity. Introduction of a specifically punitive penalty power is interesting. In the ASIC Act, its application is limited to criminal offences, which is consistent with the general principles that punishment should be reserved as a penalty for criminal offences. In the TPA, the power extends to non-criminal contraventions (where a pecuniary penalty has been ordered under s 76), in addition to criminal offences under Part VC. This is unusual as the power is explicitly punitive and therefore potentially extends punishment as a permitted penalty purpose beyond the criminal sphere. Courts have for some years acknowledged that monetary penalties imposed for breach of the TPA, whilst primarily aimed at deterrence, may incorporate a punitive element.[74]

> Section 86D allows the Court to make an Adverse Publicity order, which is a Punitive order, where a person has contravened the Act and has been ordered to pay a pecuniary penalty under section 76 or is guilty of an offence under section 79.
>
> An adverse publicity order requires a person to disclose information that they have in their possession, or have access to, and publish at their own expense, an advertisement. An example of an adverse publicity order is that the corporation is ordered to publicise the fact that it has breached the TPA, and details of what it has been ordered

70 Australian Law Reform Commission, *Sentencing: Penalties — Discussion Paper*, DP 30 (1987), Australian Law Reform Commission, Sydney, para 304; Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), Australian Law Reform Commission, Sydney, para 10.21.

71 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), Australian Law Reform Commission, Sydney, para 10.21.

72 J Coffee, '"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79(3) *Michigan Law Review* 386. An example of 'public invisibility' might be the effect of price fixing or market sharing.

73 B Fisse, 'Sentencing Options against Corporations' (1990) 1(2) *Criminal Law Forum* 211, 241–2.

74 See cases discussed in para 18.62 (fn 51) of Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney and in this Report in ch 29 and 30.

> to do. The order is punitive in nature, and is aimed at deterring future contraventions and encouraging compliance.[75]

28.49 This form of order is an example of a penalty aimed at 'shaming' the offender by requiring a public confession of wrongdoing. Whilst s 86D and s 12GLB are unique at federal level,[76] the power to make an adverse publicity order has been a feature of some state regulatory schemes for some time. For example, under state and territory environmental legislation[77] an offending company may be ordered to publish at its own expense and in specified media (for example, metropolitan daily newspapers) a notice outlining its conduct, explicitly stating that its conduct breached the relevant legislation, and giving details of the penalty imposed.[78]

28.50 This form of penalty is likely to be useful where the offending conduct has caused harm to an unidentified group of people as it may serve to inform them of the offending conduct, which might then result in civil claims being made by affected individuals.[79] The benefits of adverse publicity were noted in the CLERP 9 proposals as including the 'potential for damage to both the entity's reputation and its future costs of equity capital'.[80] CLERP 9 also noted:

> While adverse publicity can be expected to accompany the imposition of a financial penalty, it may also be appropriate as a penalty in its own right, particularly in relation to less serious contraventions of the regime. …
>
> Financial penalties and adverse publicity are characterised by a higher degree of flexibility and may therefore be tailored to fit the circumstances of a much wider

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75 Explanatory Memorandum to the Trade Practices Amendment Bill (No 1) 2000 (Cth), 15.

76 Although it should be noted that CLERP 9 states that an adverse publicity order may be made under s 1324B of the ASIC Act: Treasury, *CLERP 9: Corporate Disclosure — Strengthening the financial reporting framework*, <www.treasury.gov.au/contentitem.asp?pageId=&ContentID=403>, 18 September 2002, 144.

77 See for example: *Environment Protection Act 1997* (ACT), s 157; *Protection of the Environment Operations Act 1997* (NSW), s 250; *Environment Protection Act 1993* (SA), s 133; *Environmental Management and Pollution Control Act 1994* (Tas), s 63; *Environment Protection Act 1970* (Vic), s 67AC; *Environmental Protection Act 1986* (WA), s 99ZA. See also *Occupational Health and Safety Act 2000* (NSW), s 115.

78 Orders have been made under s 67AC of the *Environment Protection Act 1970* (Vic) in a number of cases to require defendants (with or without a conviction being recorded), in addition to payment of a fine and payment of money for environmental works, to publish details of the conviction, the contravention and the penalty in the defendant's annual report and in specified newspapers. For example, in January 2002 Nestle Australia Ltd was required to publish a notice stating: 'On 22 January 2002 Nestle Australia Ltd pleaded guilty to an air pollution charge brought by the EPA relating to the discharge of an odour from the wastewater treatment plant at the company's milk product factory at Dennington near Warrnambool in the South West of Victoria between 26 August 2000 and 2 September 2000. The Warrnambool Magistrates' Court convicted Nestle and ordered that it pay $25,000 towards an agreed environmental enhancement project approved by the Warrnambool City Council. The Court also ordered publication of this notice'. The notice was ordered to be published in the *Warrnambool Standard*, *The Australian*, *The Herald Sun* and the *Australian Financial Review*: EPA Victoria, *Alternative Sentencing — Better Results for Those Affected by Pollution*, EPA Victoria, <www.epa.vic.gov.au/news/articles/e4a3.htm>, 11 November 2002.

79 This potential effect was also noted by the court in *Cassidy v Medical Benefits Fund of Australia (No. 2)* [2002] FCA 1097, a case in which a corrective advertising order, rather than an adverse publicity order was made. See discussion of *Cassidy* at para 28.44.

80 Treasury, *CLERP 9: Corporate Disclosure — Strengthening the financial reporting framework*, <www.treasury.gov.au/contentitem.asp?pageId=&ContentID=403>, 18 September 2002, 143.

> range of contraventions. They are therefore more likely to operate as a credible deterrent against a wide range of contraventions of the regime.[81]

28.51 It should be noted that the power to make an adverse publicity order is a specific penalty, not to be confused with the general practice of regulators of publicising the outcomes of court proceedings including the form and amount of penalty imposed.[82] The use of the media and publicity by regulators is considered in chapter 16.

Preliminary view

28.52 In DP 65, the ALRC asked:

> **Question 18–9.** Should sentencing guidelines be developed for corporate offenders to ensure that a range of tailored penalties is generally available? These penalties might include, but not be limited to:
>
> (a) probation orders;
>
> (b) community service orders; and
>
> (c) adverse publicity orders.

Consultations and submissions

28.53 As noted in chapter 27, the ALRC received support in consultations and submissions for the introduction of non-monetary penalties.[83] ASIC, in particular, commented:

> ASIC is interested in the proposal for a wider range of sanctions against corporations designed to facilitate compliance with applicable rules by the corporation in the future. Community service orders are now available for certain offences in the *ASIC Act* for which ASIC has responsibility.[84]
>
> The availability of such orders would enable a court to tailor a specific sanction to meet the needs of each case and would allow the sanction to operate on a wider level, taking into account future conduct and compliance. At the same time, ASIC thinks that there ought to be scope for the court to impose a financial penalty in addition to a tailored sanction so that the overall result, if appropriate, can include a measure of specific and general deterrence.[85]

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81 Ibid, 143.

82 Done in reliance on general powers of regulators to provide 'guidance' or make 'information' available to the public: see for example *Trade Practices Act 1974* (Cth), s 28.

83 Australian Broadcasting Authority, *Submission CAP 23*, 14 October 2002; Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002; Australian Taxation Office, *Submission CAP 16*, 17 September 2002; B Dee, *Consultation*, Melbourne, 4 September 2002; Environment Australia, *Submission CAP 26*, 24 October 2002; M Murray, *Submission CAP 10*, 31 August 2002; The Victorian Bar, *Submission CAP 22*, 14 October 2002; K Yeung, *Submission CAP 20*, 9 October 2002.

84 See section 12GLA of the ASIC Act.

85 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 60.

28.54 The ABA noted:

> In the ABA's view, its ability to ensure compliance with the codes of practice would be greatly enhanced by a range of civil penalties, such as a penalty that would enable the ABA to direct the broadcast of a corrective statement or to approach the court for injunctive type relief, requiring the publication of corrective material or apologies by the offending licensee. Such a penalty would be consistent with the current ABA power to issue notices to the national broadcasters recommending specific action, including action to broadcast an apology or retraction.[86]

Conclusion

28.55 As noted in chapter 27, the powers to order community service, probation, information disclosure, corrective advertising and adverse publicity have only recently been introduced into the TPA and the ASIC Act[87] and therefore the way in which they will be used by the courts is not yet clear. In general, the ALRC favours the availability of non-monetary penalties as a method for providing greater flexibility in sentencing and the opportunity to more closely align the form of the penalty with its purpose. The ALRC considers that these penalties can be tailored to suit both the nature of the contravention (for example, corrective advertising where the offending conduct consisted of misleading and deceptive conduct) and the circumstances of the offender (for example, a 'cash poor' corporation is still likely to be able to perform community service or develop and implement a compliance program). These penalties have advantages over monetary penalties as:

- they can be tailored to avoid the deterrence and retribution trap;
- they can be tailored to avoid penalty overspill to third parties;
- they can be specifically directed towards behavioural change within the corporation;
- not being directly monetary in nature, they cannot be factored into company financials as a 'cost' of non-compliant behaviour.

28.56 For these reasons, the ALRC considers that these penalties are particularly suited to corporate offenders.[88]

28.57 In ALRC 68 the ALRC stated that 'there seems to be no reason why such orders would not also be appropriate in respect of contraventions of other federal legislation. The ALRC suggests that consideration be given to making these penalties widely available'.[89] Whilst noting that these penalties have been introduced into the TPA and the ASIC Act, the ALRC reaffirms its view expressed in ALRC 68 that these penalties

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86 Australian Broadcasting Authority, *Submission CAP 23*, 14 October 2002, 8.

87 In response to recommendations made by the ALRC in Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), Australian Law Reform Commission, Sydney.

88 Although the ALRC also notes their utility as penalties for individuals. See Recommendation 27–1.

89 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), Australian Law Reform Commission, Sydney, para 10.29.

should be 'widely available' as penalties for corporations and recommends that these penalty powers be included in the Regulatory Contraventions Statute as generally available penalties for corporations for both federal criminal offences and non-criminal contraventions.

28.58 In chapter 27, the ALRC recommends the introduction of additional civil penalty powers to allow a court to impose a probation order, a community service order, an information disclosure order, an order to publish an advertisement and an adverse publicity order. The ALRC considers it is appropriate that these powers apply to corporations. The ALRC, therefore, reaffirms Recommendation 27–1(a)–(f) that the additional civil penalty powers should apply to both corporations and individuals.

Recommendation

Recommendation 28–3. The additional civil penalty powers referred to in Recommendation 27–1 should be available when a court imposes penalties on a corporation.

29. Guidelines for Setting Penalties

Contents

Introduction

29.1 The Terms of Reference for this Inquiry direct the ALRC to report on the 'principles for determining penalties in particular cases'. This chapter considers legislative guidelines and guidelines outside legislation, that is, guidelines issued by regulators and guidelines developed by the courts for use when penalties are being set. The chapter notes the limitations on the use of guideline judgments in federal regulation. Guidelines for use by the regulator in setting administrative penalties are also discussed. Chapter 30 examines the factors considered by the courts when setting penalties in particular cases.

29.2 Proposal 18–2 of DP 65 suggested that legislation that provides for monetary penalties should provide guidelines or criteria to assist in determining the amount of the penalty in particular cases, such as those set out in s 76 of the *Trade Practices Act 1974* (Cth) (TPA), s 481(3) of the *Environment and Biodiversity Conservation Act 1999* (Cth)[1] (EPBC Act) and those outlined by French J in *TPC v CSR Ltd*.[2] There are two main approaches to penalty guidelines in Australia: within legislation or by judi-

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1 Section 481(3) states: 'In determining the pecuniary penalty, the Court must have regard to all relevant matters, including: (a) the nature and extent of the contravention; and (b) the nature and extent of any loss or damage suffered as a result of the contravention; and (c) the circumstances in which the contravention took place; and (d) whether the person has previously been found by the Court in proceedings under this Act to have engaged in any similar conduct'.

2 *Trade Practices Commission v CSR Ltd* (1991) 13 ATPR ¶41–076.

cial statements within caselaw. A third approach is for the regulator to issue guidelines as to what it, as prosecutor, will put before the court.[3]

29.3 Legislative guidelines may be within a specific statute such as the EPBC Act or included in a general statute such as the *Crimes Act 1914* (Cth) that sets out general sentencing principles for federal crimes. Section 16A of the *Crimes Act* requires courts to make 'an order that is of a severity appropriate in all the circumstances of the offence'[4] and to take account of specific circumstances about the offence, the victim and the offender.[5]

29.4 The factors stated within legislation may be either broad or there may be considerable detail. Those stated within the EPBC Act, for example, are broad. They provide some guidance in that they indicate that the penalty should reflect factors such as loss or damage caused as well as the circumstances of the contravention and previous breach history. But a factor such as the 'circumstances in which the contravention took place' is not, by itself, very illuminating. More is needed. There are two possible approaches: expansion of the factors in the manner of s 16A(2) of the *Crimes Act* or leaving it to the courts to set out the relevant factors in detail.

29.5 Guidelines generally seek to assist a court to consider sentencing from the dual perspectives of the seriousness of the offence and the individual circumstance of the offender.[6] Without guidelines, courts must rely on information provided by the prosecution as to sentencing patterns for similar offences. Reference to sentencing patterns, while assisting with parity and consistency, can also help entrench penalty levels that might not have the necessary deterrent effect. Where an offence is one that is rarely prosecuted, and this applies to some regulatory contraventions,[7] there may be little in the way of guidance unless the legislation is of assistance. In a submission to this Inquiry, Environment Australia suggested that 'the development of principles for the calculation of penalties by a court would be valuable'.[8]

29.6 Within caselaw, there are sub-categories: guidelines enunciated by an appellate court in the nature of guideline judgments[9] and those, such as the 'French factors'[10] which, because of their clarity and comprehensiveness, become influential.[11] In

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3 This approach was adopted in the United States prior to the US Sentencing Commission Guidelines and the ACCC has now issued some guidelines (discussed below at para 29.49–29.50).

4 *Crimes Act 1914* (Cth), s 16A(1).

5 Ibid, s 16A(2). These include matters such as the nature and circumstances of the offence; the personal circumstances of the victim and any injury, loss or damage resulting from the offence; whether contrition has been shown by the offender; whether the offender pleaded guilty; degree of cooperation with law enforcement agencies in the investigation; deterrent effect; need to ensure adequate punishment; personal circumstances of the offender; effect on the offender's family and prospects for rehabilitation.

6 *R v McDonnell* [1997] 1 SCR 948, 989 (McLaughlin J).

7 For example, there have been few proceedings under the EPBC Act.

8 Environment Australia, *Submission CAP 5*, 22 January 2002.

9 See, for example, *R v Jurisic* (1998) 45 NSWLR 209. In the United Kingdom, the Court of Appeal in *R v Howe & Son (Engineers) Ltd* [1999] 2 All ER 249 set out guidelines for the determination of fines for health and safety offences.

10 Discussed in more detail at para 30.11.

the federal sphere, guideline judgments may be problematic.[12] DP 65 discussed the role of guideline judgments for criminal penalties and noted that, while this approach had not been used for individual regulatory penalties, arguably there was not a need in most areas because the number of regulatory penalties in most categories was small and they are normally imposed at either the Federal Court or Supreme Court level.[13] However, DP 65 suggested that there may be a case for detailed penalty guidelines in relation to penalties for breaches of certain provisions of corporations laws and in the trade practices area.[14]

29.7 In the Customs area too, there is a significant number of penalty decisions in state and territory courts, and at the magistrates' level, and this provides an additional argument for the development of detailed guidelines. As suggested in *Wong and Leung*,[15] the fact that penalties for contraventions of federal law are frequently determined in state and territory courts is a likely source of inconsistency. The Australian Customs Service commented that there were often inconsistencies in penalty decisions for similar contraventions.[16]

29.8 Given the difficulty, discussed below, with guideline judgments in the federal sphere, and given the increasing use of agreed penalties, courts should provide detailed reasons for their decisions to set a particular penalty and there could be assistance from regulator-issued guidelines especially where agreed penalties are put to the court. Agreed penalties are discussed in chapters 16 and 30, and regulator-issued guidelines are discussed in chapter 16.

Hierarchical approach

29.9 This Report suggests there is value in a hierarchical approach to guidelines.

29.10 Broad but comprehensive factors governing all civil penalties should be included in the proposed Regulatory Contraventions Statute.

29.11 In the absence of a general statute, each statute providing for federal civil penalties, should include the broad criteria stated in Recommendation 29–1.

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11 In *ASIC v Adler* [2002] NSWSC 483, para 56, Santow J acknowledged that the eight criteria governing the exercise of the court's powers of disqualification set out in *Commissioner for Corporate Affairs v Ekamper* (1987) 12 ACLR 519 have been influential.

12 See discussion below at para 29.39–29.46.

13 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, para 18.69.

14 The ALRC sought submissions on the use of guideline sentencing judgments in relation to federal civil penalties: see ibid, Question 18–6.

15 *Wong v the Queen; Leung v the Queen* (2001) 185 ALR 233.

16 Australian Customs Service, *Consultation*, Canberra, 4 September 2002.

29.12 Where it is appropriate to provide further factors to meet the objectives of specific legislation or parts of it, legislation should contain that detail, without being so prescriptive that the courts' discretion is unduly fettered.

29.13 In addition to legislation stating the criteria to be adopted, clear statements by courts of the principles applied in a particular case would assist with parity among cases.

29.14 The ALRC recommends that regulators too publish guidelines on the principles that will be used by them when negotiating penalties to be put before the court. The purpose of such guidelines should be to inform the regulated community of the principles used in making penalty recommendations. This would also provide the courts with guidance as to factors that the regulator considers relevant to the determination of a penalty, would allow for consistency in approach and provide any party involved in negotiating a penalty with the regulator details that might assist with determining the penalty amount. See Recommendation 16–1.

29.15 Although there are problems under federal law with guideline judgments, clear statements of reason for penalty decisions especially by a superior court, that articulate the principles underlying the decision and the factors considered, can improve consistency and provide guidance to lower courts and the regulated community. In particular, courts should set out the factors considered relevant and the weight given to those factors.

Legislative guidelines

29.16 As noted above, Proposal 18–2 suggested that legislation that provides for civil pecuniary penalties should provide guidelines or criteria for determining the amount of the penalty, such as those set out in s 76 of the TPA, s 481(3) of the EPBC Act and the factors outlined by French J in *TPC v CSR Ltd.* In a submission to the ALRC, Environment Australia suggested

> it may be more productive for the Commission to develop a set of principles to guide legislators rather than attempting to formulate model provisions.[17]

29.17 The TPA,[18] the *Telecommunications Act 1997* (Cth)[19] and the EPBC Act[20] share four criteria for assessing a penalty. These are:

- the nature and extent of the contravention (called 'act or omission' in the TPA);
- any loss or damage suffered as a result of the contravention;
- the circumstances in which the contravention took place; and

17 Environment Australia, *Submission CAP 5*, 22 January 2002.
18 Section 76.
19 Section 570.
20 Section 481.

- whether the person has previously been found by the Court in proceedings to have engaged in any similar conduct.

Consultations and submissions

29.18 There was considerable support for a statutory list of factors as suggested by Proposal 18–2.[21]

29.19 ASIC considered that the factors found in s 481(3) of the EPBC Act may provide a useful basis for imposing civil penalties, although it cautioned against the list being exhaustive because of the wide range of contraventions involved and the varying regulatory objectives.[22] In particular, ASIC suggested that the factors outlined by French J would be of limited application to many contraventions under the *Corporations Act* 2001 (Cth) because they are often committed by natural persons rather than companies. However, it suggested the inclusion of two additional criteria: the attitude of the offender and the degree to which the offender has cooperated with the regulator.[23]

29.20 The ATO supported guidelines and criteria for determining the amount of a penalty because it provides certainty and clarity in a regulatory regime. However, it thought that, in the context of the taxation laws, it may not be appropriate for these guidelines to be provided in legislation.[24] The penalties under the taxation laws are, in general, administrative penalties. These are discussed in chapter 2.

29.21 The Australian Compliance Professionals Association, in a consultation with the ALRC, suggested that the 'French factors', with the exception of the degree of power of the corporation as evidenced by market share and ease of entry into the market, but together with the financial position of the respondent and the deterrent effect of the penalty, 'represent a code for the quantification of penalties across the board'.[25]

29.22 As noted above, Environment Australia supported broad guidelines. Dr Karen Yeung also expressed support for the proposal.[26]

Conclusion

29.23 Given the support for Proposal 18–2, the ALRC has made a recommendation along the lines of s 481(3) of the EPBC Act, together with some additional factors

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21 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002; Australian Taxation Office, *Submission CAP 16*, 17 September 2002; Environment Australia, *Submission CAP 5*, 22 January 2002; M Adams, *Submission CAP 12*, 5 September 2002.

22 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002.

23 Ibid.

24 Australian Taxation Office, *Submission CAP 16*, 17 September 2002

25 Australian Compliance Professionals Association, *Consultation*, Brisbane, 14 December 2000.

26 K Yeung, *Submission CAP 20*, 9 October 2002.

drawn from the cases. There is value too in stating the purpose of the penalty in the guidelines. The ALRC supports the inclusion of the additional factor suggested by ASIC — the attitude of the offender — where a natural person is charged with a contravention. Not all the 'French factors' nor some suggested by the Australian Compliance Professionals Association have been recommended because they may not be relevant across all regulatory areas. Those relevant to specific regulatory areas can be included in their governing legislation.

29.24 The aim of the legislative guidance is to assist the courts to assess the penalty from the dual perspectives of the seriousness of the contravention and the culpability of the offender.

29.25 The factors are neither exhaustive nor prescriptive and do leave room for the exercise of judicial discretion.

29.26 In relation to corporate respondents, two further criteria were considered:

- where in the organisation the contravening conduct occurred, that is, was it at the level of senior management or otherwise; and
- whether the corporation has a compliance program in place or, more broadly, a corporate culture conducive to compliance. [27]

29.27 While the former has been included, the latter is not for the reasons discussed below.

Compliance programs

29.28 The presence of a corporate compliance program to minimise contraventions, is normally treated as a mitigating factor in cases where corporate or management liability is at issue.[28] It is particularly important in non-revenue regulatory areas where harm or damage (broadly defined) to others may occur: areas such as the environment, health and safety, areas requiring a licence such as broadcasting,[29] aged care and aviation and in trade practices. The presence of a corporate compliance program is one of the factors nominated by French J in *TPC v CSR Ltd*[30] to be considered in the determination of a penalty under the TPA. As discussed below, the mitigating effect of a compliance program can be nullified if it is shown to be ineffective.[31] There is little argument that an effective compliance program can be a significant factor in ensuring a corporation meets its legislative obligations. However, an issue is whether the exis-

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27 Both are 'French factors'.

28 C Parker and O Conolly, 'Is there a Duty to Implement a Corporate Compliance System in Australian Law?' (2002) 30(4) *Australian Business Law Review* 273.

29 The importance of compliance programs in determining penalties in contempt cases in broadcasting was discussed in *Attorney-General (NSW) v Radio 2UE & Laws* [1998] NSWSC 28.

30 *Trade Practices Commission v CSR Ltd* (1991) 13 ATPR ¶41–076, 52,152–52,153.

31 *Australian Competition and Consumer Commission v George Weston Foods Ltd* (2000) ATPR ¶41–763. See also *Attorney-General (NSW) v Radio 2UE & Laws* [1998] NSWSC 28.

tence of a compliance program should be included within legislation as a factor for consideration by the courts when determining the amount of a penalty.

29.29 The fact of a breach suggests a compliance program that has not been fully effective and therefore the question arises whether the existence of one should be given any weight when setting a penalty. The US Sentencing Guidelines do take account of the presence of effective compliance programs.[32] However, as US academic Stephen Calkins says, 'the case for substantially reducing corporate penalties for an "effective" compliance program that happened to have failed seems less than overwhelming'.[33]

29.30 The *Criminal Code* adopts the concept of 'corporate culture' and indirectly suggests that the absence of a compliance program is a factor to be considered. Section 12.3 of the Code provides that the existence of a corporate culture which 'directed, encouraged, tolerated or led to non-compliance' or the failure 'to create and maintain a corporate culture that required compliance' will be relevant to determining corporate responsibility.[34] See discussion in chapter 7.

29.31 The Australian cases demonstrate that the mitigating effect of a compliance program can be nullified if it is shown to be ineffective.[35] Goldberg J in *ACCC v George Weston Foods Ltd* applied a two-stage test to determine whether having a compliance program was a factor to be taken into account in mitigation. He noted:

> The existence of a compliance program is a matter which a Court should take into account in mitigation of a penalty, but its significance is diminished where it has failed.[36]

29.32 Given the problematic nature of compliance programs when there has been a breach, the ALRC does not recommend including compliance programs, *per se*, within general legislative criteria for assessing penalties, but acknowledges there will be individual cases where the existence of a corporate compliance program is a factor to be considered by the court as a mitigating circumstance.

29.33 However, a factor such as 'whether due diligence had been exercised' is broader and, while it would encompass factors such as the existence of a compliance program, its focus is not on whether there was a program in place, but whether, and

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32 US Sentencing Commission, *Federal Sentencing Guideline Manual*, US Sentencing Commission, <www.ussc.gov/2001guid/tabcon01_2.htm>, 12 December 2001, § 8C2.5(f), (g) (1991) (amended 1995). In the United Kingdom, a compliance program may be taken into account as a mitigating factor when determining penalties under the *Competition Act 1998* (UK), however, the efforts of management to ensure the program has been properly implemented are considered: Office of Fair Trading, *Competition Act 1998 – Penalties*, <www.oft.gov.uk/Business/Legal+Powers/ca98+penalties.htm>, 22 November 2002.

33 S Calkins, 'Corporate and the Antitrust Agencies Bi-Modal Penalties' (1997) 60 *Law and Contemporary Problems* 127, 147.

34 *Criminal Code* , s 12.3 (2)(c)–(d).

35 *Australian Competition and Consumer Commission v George Weston Foods Ltd* (2000) ATPR ¶41–763.

36 Ibid, para 50.

what, active steps had been taken to prevent the contravention. Further, while the ALRC believes there is much merit in formal corporate compliance programs, it may well be that 'due diligence' being a broader concept would encompass more informal steps taken by small business, for example. As discussed in chapter 4 the ALRC is not recommending 'due diligence' be made a general defence — although it may be a defence for specific contraventions — but the ALRC believes there is much merit in the courts taking it into account.

29.34 In addition, 'corporate culture' has been included, a concept drawn from the *Criminal Code*.

29.35 Compliance programs are also discussed in chapter 7.

Recommendation

Recommendation 29–1. The Regulatory Contraventions Statute should include broad guidance for the courts when setting civil penalties. Unless unsuitable to a particular provision, in determining the amount of a civil penalty, the courts should take account of all relevant factors, including:

(a) the deterrent effect of the penalty;

(b) the nature and extent of the contravention;

(c) any loss or damage suffered, or gain made, as a result of the contravention;

(d) the circumstances in which the contravention took place, including the deliberateness of the conduct and the period over which it extended;

(e) whether professional advice had been obtained in relation to the contravention, prior to the breach;

(f) whether the person has previously been found by a court to have engaged in any related or similar conduct;

(g) the degree of cooperation with the authorities; and

(h) in the case of a natural person, the attitude of the offender.

Where the respondent is a body corporate, the courts should also consider:

(i) at what level in the organisation the contravening conduct occurred;

(j) whether the corporation exercised due diligence; and

(k) whether it has a corporate culture conducive to compliance.

29.36 While the ALRC considers these factors are broad enough for inclusion in a general Regulatory Contraventions Statute, further detailed guidance may be needed. As discussed above, a factor such as 'the circumstances in which the contravention took place' allows for a large range of factors to be considered. Legislation could contain more specific criteria as suitable to its purposes or the details may be left to the courts. There is some danger in legislation being too prescriptive and there is benefit in the courts having the flexibility to consider any matter relevant to the contravention.

29.37 Further, a factor relevant to some breaches may not be relevant to others even within the same legislation. For example, in relation to the TPA, the size of the corporate respondent and its degree of market power[37] or market share may be relevant in relation to assessing a penalty for Part IV contraventions, but market share would be less relevant to Part V breaches, for example. These factors may be of no, or at best, marginal relevance in relation to other regulatory regimes.

29.38 The issue then arises as to whether more detailed guidance is needed.

Guideline judgments

29.39 Question 18–6 in DP 65 asked whether the courts should deliver guideline sentencing judgments in relation to federal civil penalties and if so, in what areas of law and on what basis should any judgments be issued.

29.40 Guidelines judgements are statements of principle of general application laid down formally by a superior court. In New South Wales, the Court of Criminal Appeal began issuing guidelines judgments in *R v Jurisic*.[38] Its approach to guideline judgments was examined by the High Court in *Wong and Leung*[39] which involved prosecutions brought in a state court for breaches of federal legislation: s 235(2)(c)(ii) of the *Customs Act 1901* (Cth). The guidelines concerned the quantum of sentences appropriate for couriers and others with a minor role in the importation of heroin. However, the guidelines did not apply to the defendants, who had a more substantial role. The majority in the High Court held that the guidelines, which provided a table of sentence ranges based on the weight of heroin imported, were not permissible as they reduced the sentencing discretion to a mathematical calculation rather than outlining principles to guide the discretion.

29.41 Gaudron, Gummow and Hayne JJ held that the articulation of such a guideline, based on only one factor, was contrary to the requirements of s 16A of the *Crimes*

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37 In *TPC v Prestige Motors Pty Ltd* (1994) 16 ATPR ¶41–359, Lee J took account of the respondent's position of influence and leadership in the retail motor vehicle trade in assessing the penalty.

38 *R v Jurisic* (1998) 45 NSWLR 209. They were also issued in, for example, *R v Henry* (1999) 46 NSWLR 346 and *R v Thomson* (2000) 49 NSWLR 383.

39 *Wong v the Queen; Leung v the Queen* (2001) 185 ALR 233.

Act, which sets out a number of factors, all of which must be taken into account by the sentencing judge.[40] They said:

> Section 16A obliges the sentencer to take *all* of them into account and effect must be given to that legislative command.
>
> In those circumstances, while s 16A takes the form it now does, it would be wrong to produce some numerical guideline system of a kind similar to that adopted in some jurisdictions in the United States under which presumptive sentences are fixed by reference to a classification of the gravity of an offence and the seriousness of the offender's previous criminal history. To do so would obviously depart from the legislative command of Pt 1B of the Commonwealth *Crimes Act* if only because it fastens upon only some of the factors that are mentioned in the Act. Yet that is what the Court of Criminal Appeal's tabulation of sentences does. It offers a grid against which future sentences are to be judged and it is a grid which is founded entirely on gravity of the offence as measured only by the weight of narcotic concerned.[41]

29.42 Their Honours rejected the 'two-stage approach' of determining an 'objective sentence' that is then adjusted by some mathematical value according to factors such as whether there was a plea of guilty or whether there had been cooperation, in favour of 'the instinctive synthesis approach'.[42] Their Honours expressed the view that the table of guidelines, which was not relevant to the matter actually before the Court[43] and departure from which would be a matter for scrutiny by the Court of Appeal, 'at least begins to pass from the judicial to the legislative'.[44]

29.43 A further fundamental problem was identified by the majority as being:

> In the words of s 5D(1) of the *Criminal Appeal Act,* the Court's powers were to 'vary the sentence and impose such sentence' on the *particular* offenders as was proper. It had jurisdiction in the matter which concerned the sentence passed on those particular offenders. It had no jurisdiction in respect of sentences passed or to be passed on others. The publication of a table of future punishments was neither to vary the sentence that was passed nor to pass a new sentence. It is not within the jurisdiction or the powers of the Court to publish such a table because, to adopt constitutional terms, that is not directed to the quelling of the only dispute which constitutes the matter before the Court. Nothing in s 12 of the *Criminal Appeal Act* gave the Court any relevant additional jurisdiction or power.[45]

29.44 Kirby J, agreeing with Gaudron, Gummow and Hayne JJ on most issues, paid particular attention to the constitutional and federal aspects of the case. The table of sentences for a crime under federal legislation applied only to New South Wales, al-

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40 Under s 16A(2), the court must take into account a range of matters including the nature and circumstances of the offence; other offences that are required or permitted to be taken into account; personal circumstances of any victim of the offence; any loss or damage resulting from the offence; any contrition shown; a plea of guilty; cooperation with law enforcement agencies; deterrent effect on the person; adequate punishment; background of the offender; prospects of rehabilitation and the impact on the offender's family or dependants.

41 *Wong v the Queen; Leung v the Queen* (2001) 185 ALR 233, para 71–72 (Gaudron, Gummow, Hayne JJ).

42 Ibid, para 76 (Gaudron, Gummow, Hayne JJ).

43 Ibid, para 83 (Gaudron, Gummow, Hayne JJ).

44 Ibid, para 80 (Gaudron, Gummow, Hayne JJ).

45 Ibid, para 84 (Gaudron, Gummow, Hayne JJ).

though his Honour considered this a problem that could have been overcome.[46] The exercise of creating specific categories solely by reference to quantity of the drug imported 'imposed on the statutory scheme a gloss that went beyond permissible judicial elaboration'.[47] It was the fact of stepping outside the limits of judicial power that made the set of 'guidelines' unacceptable.

Consultations and submissions

29.45 ASIC indicated it was interested in guideline judgments for the imposition of sanctions under Part 9.4B of the *Corporations Act*.[48]

Conclusion

29.46 Given the High Court's decision in *Wong and Leung*, Chapter III of the Constitution poses considerable difficulties for the development of guideline judgments in relation to federal offences. However, given the value of detailed guidelines in promoting consistency of decision-making, the ALRC believes there is merit in courts, especially superior courts, providing detailed reasons for penalty decisions including the factors considered, and the weight given to those factors, in reaching a particular pecuniary amount. Additionally, as discussed in chapter 16, the ALRC believes there is merit in regulators developing and publicising the criteria it uses when reaching agreed penalties to be put before the courts.

Statement of principle

> Given the value of detailed guidelines in promoting consistency of decision-making, there is merit in courts, especially superior courts, providing detailed reasons for penalty decisions including the factors considered, and the weight given to those factors.

The US approach — 'grid sentencing'

29.47 The United States, through its Sentencing Commission,[49] has now established comprehensive sentencing policies and practices, 'grid sentencing', for the prosecution of people charged with federal crimes in federal courts.[50] As discussed in

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46 Ibid, para 118–24 (Kirby J).

47 Ibid, para 129.

48 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002

49 The US Sentencing Commission is an independent agency within the Department of Justice.

50 US Sentencing Commission, *Federal Sentencing Guideline Manual*, US Sentencing Commission, <www.ussc.gov/2001guid/tabcon01_2.htm>, 12 December 2001. As discussed in DP 65, para 18.58, the range of possible sentences is determined by allocating to offences a range of levels according to gravity. Sentences above the base level are awarded for aggravating circumstances such as the degree of loss or

DP 65, the US approach requires vast resources and constant updating for penalties under criminal law, and would encounter still greater difficulties applying the approach to the range of regulatory offences. The Council of Europe did not favour this approach suggesting that consistency of approach 'is the goal, rather than the arithmetical consistency of outcomes'.[51] US commentator, Michael Tonry, described the Guidelines as 'the most controversial and reviled sentencing reform initiative in United States history'.[52]

29.48 The ALRC does not recommend a 'grid sentencing' approach for civil and administrative penalties.

Regulator-issued guidelines

29.49 As discussed in chapter 16, the ALRC recommends that regulators develop and publish guidelines on the basis on which they will negotiate and agree penalty-related settlements and the factors they take into account in reaching a penalty figure to put to the courts.

29.50 The ACCC's *Cooperation Policy for Enforcement Matters* is an example of such guidelines. They are the factors that the ACCC uses in determining whether to reach an agreement with a party on penalties[53] and on what that penalty should be. The factors are:

- whether the company or individual has cooperated with the Commission
- whether the contravention arose out of the conduct of senior management, or at a lower level
- whether the company has a corporate culture conducive to compliance with the law
- the nature and extent of the contravening conduct
- whether the conduct has ceased
- the amount of loss or damage caused
- the circumstances in which the conduct took place
- the size and power of the company

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damage suffered by the victim, or premeditation and planning by the offender. Sentences are also adjusted according to an offender's criminal history.

51 Council of Europe, Explanatory Memorandum to Recommendation No R (92) 17 of the Committee of Ministers to Member States Concerning Consistency in Sentencing, 1992, para 13, <http://cm.coe.int/ta/rec/1992/92r17.htm > 1 August 2002.

52 M Tonry, 'Judges and Sentencing Policy The American Experience' in C Munro and M Wasik (eds) *Sentencing, Judicial Discretion and Training* (1992) Sweet and Maxwell, London, 139–40 quoted by D Brown, 'The Politics of Law and Order', (2002) 40 *Law Society Journal*, 64, 68.

53 See discussion on agreed penalties in ch 16.

- whether the contravention was deliberate and the period over which it extended.[54]

29.51 Other regulators may identify factors specific to their regulatory area.

United States' approach

29.52 In the United States, prior to the issuing of comprehensive guidelines by the US Sentencing Commission, the Department of Justice issued *Recommendations for Sentencing in Antitrust Felony Cases*.[55] The Department indicated that the guidelines were 'designed to serve as a tool to enable our attorneys to make reasoned and consistent sentencing recommendations'. The Department indicated there were several reasons for issuing guidelines:

- consistency over time and across the country;
- use of their expertise to assist judicial understanding;
- the degree of cooperation, an important mitigating factor, was peculiarly within their knowledge; and
- authority to speak to the court fell within Federal Rules of Criminal Procedure.[56]

29.53 This approach is somewhat akin to that of the prosecutor providing information to the court but, rather than being done on a case-by-case basis, the published guidelines provide information to the courts and the public generally. Such an approach commends itself where there are factors highly specific to a regulated area and where there are few cases such that the courts have few precedents to guide them in the specific area. It has the added benefit that, if a regulator is negotiating penalties with a party to put to the court, the respondent has criteria to assess whether the potential penalty is likely to fall outside a range which the court itself might award utilising similar criteria.

The courts and penalty guidelines

29.54 Ultimately of course it is courts that make decisions on civil penalties in the federal regulatory area. In some areas it will be the Federal Court, but there is considerable use of state and territory courts at all levels. In the trade practices area, as discussed elsewhere, the judgment of French J in *TPC v CSR Ltd*[57] has been especially

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54 Australian Competition & Consumer Commission, *Cooperation Policy for Enforcement Matters*, 1 July 2002. This policy is discussed further in ch 17.

55 US Department of Justice Guidelines, 'Recommendations for Sentencing in Antitrust Felony Cases,' (1977) *CCH Trade Regulation Reports Part II*, Chicago.

56 Ibid, 4.

57 *Trade Practices Commission v CSR Ltd* (1991) 13 ATPR ¶41–076.

influential and shows the merits of courts providing detailed guidelines and discussion about the factors they have taken into account.

29.55 Discussion about particular principles to be used by courts is in chapter 30.

Guidelines for setting administrative penalties

29.56 In those jurisdictions utilising administrative penalties with a discretionary element, the relevant regulator may issue guidelines. It is common now to find these available on the internet. In the United Kingdom, s 38(1) of the *Competition Act 1998* (UK) requires the Director-General of Fair Trading[58] to prepare and publish guidelines as to the appropriate amount of any penalty.[59] Similarly, s 69 and 210 of the *Financial Services Act 2000* (UK) requires the regulator, the Financial Services Authority, to issue statements of policy about the imposition of penalties. In the case of Customs penalties imposed for non- or under- payment of duty, HM Customs and Excise has published clear guidelines for these administrative penalties. The penalty figure is determined from a starting point of 100% of the duty evaded but deductions are allowed for three reasons:

- An early and truthful explanation as to why the arrears arose and the true extent of them — up to 40%;
- Cooperation in establishing the true amounts of the arrears — up to 25%;
- Attending interviews and producing records and information as required — up to 10%.[60]

29.57 The guidelines note therefore that 75% is usually the maximum reduction obtainable although they state that, in exceptional circumstances, there could be a further reduction where a person has made a full and unprompted voluntary disclosure. The value of the UK approach is twofold: clear indication to the regulated community as to how penalties are determined and a financial incentive to encourage cooperation. Unless very carefully worded, and leaving no room for discretion, a similar approach to administrative penalties of this nature could not be adopted in the federal jurisdiction in Australia because of the implications of Chapter III of the Constitution for imposing a penalty other than by a judicial officer.

29.58 Canada utilises an Administrative Monetary Penalty System (AMPS) under various statutes. The Canada Customs and Revenue Agency, for example, has recently implemented an AMPS system to replace much of the seizure and forfeiture provisions

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58 Regulators of specific sectors: telecommunications, gas and electricity, water and sewerage and railway services, have concurrent powers (set out in Schedule 10 to the Act) and operate under the same guidelines.

59 The Director-General determines penalties under s 36 of the *Competition Act 1998* (UK) according to a five step approach discussed at para 26.104.

60 HM Customs and Excise, *Statement of Practice Notice 210*, <www.hmce.gov.uk/forms/notices/210.htm> 21 May 2002. The Practice Note indicates that while Customs will not normally prosecute for duty evasion, they reserve the right to do so.

under Customs and related legislation that had existed for technical infractions. Under the system monetary penalties will be imposed in proportion to the type, frequency and severity of the breach and they are graduated to take account of the history of the client. For example, the penalties for failure to report the commercial importation of goods valued at C$1600 or more are:

> 1st infraction — $2000 or 20% of value for duty whichever is greater;
>
> 2nd infraction — $4000 or 40% of value for duty whichever is greater; and
>
> 3rd infraction — $6000 or 60% of value for duty whichever is greater.[61]

29.59 Apart from those penalties that are specifically linked to duty, most penalties are small, as little as C$100 up to C$25,000.[62]

29.60 The Canadian *Agriculture and Agri-Food Administrative Monetary Penalties Act 1995* provides for maximum penalties of C$2000 for a violation committed by an individual not in the course of a business and not for financial benefit and for all other violations, penalties are set according to the seriousness of the breach — C$2000 for a minor violation, C$10,000 for a serious violation and C$15,000 for a very serious violation.[63] The statute makes provision for the Minister to make regulations covering the criteria for reductions or increases in a penalty[64] and requires the Minister to include in such criteria the degree of intention or negligence by the perpetrator; the harm done by the breach; and the history of the perpetrator up to five years.[65]

Australian position

29.61 The offender's previous regulatory history is a factor that could be taken into account in Australian federal administrative penalties,[66] and penalties could therefore be set at varying defined levels to reflect factors such as the history of the person facing the penalty. However, guidelines that operate in other jurisdictions to guide discretionary matters such as seriousness of a breach or fault, are not apt for federal administrative penalties because of Chapter III of the Constitution. The use of factors that would require the exercise of discretion to determine the penalty level is an action that is judicial.

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61 Canada Customs and Revenue Agency, The Administrative Monetary Penalty System, 4, <www.ccra-adrc.gc.ca/customs/general/amps/snapshot-e.pdf>, 6 August 2002.

62 See <www.ccra-adrc.gc.ca/customs/general/amps/mpd-e.pdf>, 14 August 2002.

63 *Agriculture and Agri-Food Administrative Monetary Penalties Act 1995* (Can), s 4(2).

64 Ibid, s 4 (1).

65 Ibid, s 4 (3).

66 On the basis of a scheme such as first offence, second offence, third or more. The issue of a regulator keeping 'compliance histories' is also relevant to infringement notice schemes: see ch 12.

30. Penalties in Individual Cases

Contents

Introduction

30.1 The Terms of Reference for this Inquiry direct the ALRC to report, *inter alia*, on the level of administrative and civil penalties, including 'the principles for determining penalties in particular cases'. This chapter considers the factors taken into account by the court when determining monetary penalties in individual cases. It considers how the factors identified in chapter 29 would be taken into account, and discusses further factors that have been identified by some courts. The chapter also considers aspects of agreed penalties.

30.2 The factors used by a judge in determining a civil pecuniary penalty are similar in many respects to those guiding the imposition of a fine under criminal law. The

ALRC has previously examined means of guiding judicial discretion in relation to federal criminal penalties.[1]

30.3 As discussed in DP 65 at para 18.17–18.18, Professors Richard Fox and Arie Freiberg have described three major categories of information taken into account in sentencing:

- the general aims of the penalty, to achieve one or more of the following: to exact retribution; deter others from committing similar offences; rehabilitate the offender; denounce the action; and protect the community;
- the particular circumstances of the offence such as: its gravity compared to others in the same category; social danger; harm actually done; the prevalence of the type of offence; and the degree to which the offender was responsible for the offence; and
- the characteristics of the offender that may mitigate his or her culpability for the offence or indicate the likelihood or otherwise of re-offending.[2]

30.4 Not all are relevant to the fixing of civil penalties for regulatory contraventions. As has been discussed, in the first category deterrence is the most important factor. The role of retribution is contentious.[3] Neither rehabilitation nor protection plays a significant role in civil penalty setting (although protection may be a factor in related orders such as banning orders). Factors in the second category do play a major role in assisting the courts to set a particular penalty and they help to account for significant differences in the size of penalties for breaches of the same provision of law. Likewise, there is a role for mitigating factors in civil penalties although likelihood of re-offending appears to play little part in the setting of a pecuniary penalty, except to the extent that the penalty amount may be set at a level that takes account of what may achieve specific deterrence.

30.5 DP 65 also noted the argument of Dr Karen Yeung that, although the primary purpose of regulatory penalties is to deter, the imposition of individual penalties can and should be guided by a wider range of purposes including punishment and that, most importantly, the aim of deterrence must be modified by requirements of fairness, culpability and proportionality.[4]

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1 Australian Law Reform Commission, *Sentencing of Federal Offenders (Report No 15, Interim)* (1980), AGPS, Canberra, ch 11 and Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), AGPS, Canberra, ch 6.

2 A Freiberg, 'Sentencing White-Collar Criminals' (Paper presented at Fraud Prevention and Control Conference, Surfers Paradise, 24–25 August 2000), 7 citing R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (1999) Oxford University Press, Sydney, 181.

3 See discussion in *Australian Competition and Consumer Commission v ABB Transmission & Distribution Ltd* (2001) 23 ATPR ¶41–815, para 6. In *Australian Competition and Consumer Commission v ABB Transmission and Distribution Limited (No 2)* [2002] FCA 559, para 17, Finkelstein J indicated that in anti-trust cases 'retribution has no real role to play'.

4 K Yeung, 'Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective' (1999) 23(2) *Melbourne University Law Review* 440, 461–2. See Australian Law Reform Commission,

30.6 Some of the principles enunciated by the courts are relevant whether or not the penalty is imposed following criminal or civil penalty proceedings. A fundamental principle is that the penalty should be no greater than is necessary to achieve the aims of deterrence[5] and that the size of a penalty is a matter for the discretion of the court[6] taking into account all the relevant circumstances. The determination of a penalty in most individual cases, therefore, follows a path similar to that of determining criminal sentences: first, identification of the range or maximum penalty for the contravention (indicating the gravity of the offence); then an examination of the particular circumstances of the contravention; and finally an examination of the culpability of the offender.

30.7 As noted in DP 65 at para 18.45, the application of these three steps can lead to what Freiberg described, in the context of corporate crime, as 'sentencing paradoxes'. For example, although white-collar criminals may have defrauded a large number of people of large amounts of money, their sentence may be mitigated by their lack of previous convictions and stable social circumstances (the 'bad crimes/good people' paradox).[7] This led Finkelstein J in *ACCC v ABB Transmission and Distribution Ltd (No 2)* to say:

> While I do not accept … that the individual offender's characteristics are irrelevant, they should be relegated in importance in light of the goal to be achieved; that goal being to deter future contraventions … The last point, and perhaps the most important, is the need to avoid the erosion of public confidence in the administration of justice that would occur if it is perceived that the law will be applied discriminatorily as regards white collar and blue collar offenders. The court must be vigilant to ensure that there is absolutely no justification for the view, which often finds expression in the popular press, that there is one law for the rich and another for the poor.[8]

30.8 Other factors taken into account in some circumstances include the degree of loss or damage caused; the profit made as a result of the contravention, steps taken by the offender to minimise or repair the damage, or to prevent it happening again and the degree of cooperation with the regulator, including bringing the contravention to the attention of the regulator. These factors are sometimes specified in legislation and sometimes adverted to by judges as matters of general principle.

Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation, DP 65 (2002), ALRC, Sydney, para 18.44.

5 *Australian Securities Commission v Donovan* (1998) 28 ACSR 583, 608.

6 Ibid, 608.

7 A Freiberg, 'Sentencing White-Collar Criminals' (Paper presented at Fraud Prevention and Control Conference, Surfers Paradise, 24–25 August 2000), 7. For further discussion of the issue see *R v Laws* (2000) 116 ACrimR 70 and *Attorney-General (NSW) v Radio 2UE & Laws* [1998] NSWSC 28.

8 *Australian Competition and Consumer Commission v ABB Transmission and Distribution Limited (No 2)* [2002] FCA 559, para 28.

Factors to be considered

30.9 From the cases — substantially involving trade practices or corporations law, given the dearth of cases outside these areas where significant pecuniary penalties have been imposed — it is possible to discern some principles that have general application. French J detailed many of these principles in *TPC v CSR Ltd*,[9] as did Santow J in *ASIC v Adler*.[10]

Quantifying penalties — the contravention

30.10 The focus of the 'French factors' is on the conduct of the respondent and the impact of the contravention. Each assists to determine how seriously a contravention should be treated.

30.11 The nine (non-exhaustive) 'French factors' are:

1. The nature and extent of the contravening conduct.
2. The amount of loss or damage caused.
3. The circumstances in which the conduct took place.
4. The size of the contravening company.
5. The degree of market power it has, as evidenced by its market share and ease of entry into the market.
6. The deliberateness of the conduct and the period over which it extended.
7. Whether the contravention arose out of conduct of senior management or at a lower level.
8. Whether the company has a corporate culture conducive to compliance with the Act, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention.
9. Whether the company has shown a disposition to cooperate with the authorities responsible for the enforcement of the Act in relation to the contravention.[11]

30.12 As noted at para 29.21, it was suggested to the ALRC that the 'French factors' are relevant to other regulatory schemes and they

> apart from factor 5, but together with the financial position of the respondent and the deterrent effect of the penalty, … represent a code for the quantification of penalties across the board.[12]

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9 *Trade Practices Commission v CSR Ltd* (1991) 13 ATPR ¶41–076, 52,152–3.
10 *ASIC v Adler* [2002] NSWSC 483, para 125–141.
11 *Trade Practices Commission v CSR Ltd* (1991) 13 ATPR ¶41–076, 52,152–3.
12 Australian Compliance Professionals Association, *Consultation*, Brisbane, 14 December 2000.

30.13 These factors were discussed in chapter 29 and most are the subject of a recommendation in chapter 29 proposing general legislative criteria.[13] Some are relevant in relation to specific legislation.

30.14 In *ASIC v Adler*, Santow J listed factors considered by the courts when determining where on the penalty scale to place various contraventions of the corporations legislation in relation to directors' duties.[14]

30.15 Factors considered important in a finding at the lower end of the range ($4000 to $5000) were:

- Remorse and contrition shown
- Efforts to repay misappropriated funds
- Acted upon the advice of professionals
- Did not contest the proceedings, or sought to save costs in proceedings
- Tended to not involve dishonesty, but negligence or carelessness
- Previous unblemished character
- Further contraventions unlikely.[15]

Factors leading to the order of a penalty in the range of $20,000 to $40,000 included:

- Defendant was aware of impropriety of actions
- No intention to deprive company permanently of funds
- Amounts in question not large
- No deliberate falsification of accounts
- Cases classed as being serious misconduct, but not worst cases.[16]

30.16 Broadly, therefore, the factors to be considered include level of honesty, motive, awareness, professional advice, level of care, contrition, cooperation, size of gain/loss and history of the respondent. Other factors, not included in the list but relevant to conduct occurring over time, include the time period involved and amount of repetition of conduct.

30.17 In *ACCC v Rural Press Ltd*,[17] Mansfield J considered a range of factors before concluding that the breach was at the lower end of the scale. These factors were:

> the size of the relevant market, the extent of the planned and actual participation in the market by [a respondent] … and the nature and extent of the detriment to the public by reason of the contraventions.[18]

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13 Recommendation 29–1.
14 *ASIC v Adler* [2002] NSWSC 483, para 126.
15 Ibid, para 126(x) citing *Australian Securities Commission v Donovan* (1998) 28 ACSR 583, 609; *Australian Securities Commission v Spencer* (1997) 25 ACSR 143, 144–145.
16 *ASIC v Adler* [2002] NSWSC 483, para 126(ix), citing *Re Tasmanian Spastics Association*; *ASC v Nolan* (1996) 23 ACSR 743, 752 and *Australian Securities Commission v Donovan* (1998) 28 ACSR 583, 609.
17 *Australian Competition and Consumer Commission v Rural Press Ltd* [2001] FCA 1065.
18 Ibid, para 43.

30.18 Some of these factors are specific to breaches of Part IV of the *Trade Practices Act 1974* (Cth) (TPA); others, such as the extent of the detriment, are relevant to all contraventions and are included in the recommended legislative guidelines.

30.19 The courts use additional principles to arrive at a final penalty. Some of these seek to assess the respondent's conduct against external factors such as the purpose of the penalty and penalties in like cases.

Quantifying penalties — deterrence

30.20 This is not one of the 'French factors' *per se* but it is clearly the chief purpose for imposing penalties in regulatory legislation and its importance was recognised by French J in *TPC v CSR*.[19] This factor is applicable to all civil and administrative penalties and Recommendation 29–1 suggests its inclusion in the legislative guidelines.

30.21 If deterrence — both specific and general — underpins civil penalties then it follows that the amount of the penalty, both within legislation (as discussed above) and in relation to individual cases, must be set at a level to achieve this objective.[20] As discussed in chapter 25, the aim of deterrence is partly to 'price' the breach, to make the gains made not worth the price of the penalty. Accordingly, where there have been significant profits made then the penalty should reflect that. As discussed at para 26.86 in this Report, in the *Roche Vitamins* case,[21] the $15-million penalty against one of the respondents was meant, in part, to take account of profits made through illegal price fixing.

30.22 Where the nature of the contravention is something that may be particularly difficult to detect, the size of the penalty may also need partially, at least, to reflect this. Finkelstein J adverted to this in *ACCC v ABB Transmission and Distribution Ltd (No 2)* when he said:

> The object of general deterrence is to prevent future harmful conduct and should be seen as a fundamental goal of sentencing. For that reason general deterrence justifies the imposition of what might otherwise be regarded as a harsh penalty (that is a penalty that takes into account not only the offender's conduct, but the criminal propensity of others) for the individual concerned, to bring about a greater benefit for society as a whole. In a very real sense competition depends upon voluntary compliance with the law, because the regulatory agencies do not have the capacity to monitor the behaviour of every company in every industry, and so the risk of detection is not high.[22]

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19 *Trade Practices Commission v CSR Ltd* (1991) 13 ATPR ¶41–076, 52,153.

20 See for example, *Australian Securities Commission v Donovan* (1998) 28 ACSR 583 and *Trade Practices Commission v CSR Ltd* (1991) 13 ATPR ¶41–076.

21 *Australian Competition & Consumer Commission v Roche Vitamins Australia Pty Ltd* (2001) ATPR ¶41–809, para 41.

22 *Australian Competition and Consumer Commission v ABB Transmission and Distribution Limited (No 2)* [2002] FCA 559, para 16. Taking account of the likelihood of detection in assessing a penalty is one of the features of the 'optimal deterrence approach' discussed in ch 25. Finkelstein J in fact noted that the theory had not been widely accepted and that he rejected the approach.

30.23 His Honour also observed that:

> My own experience suggests that the penalties on individuals have not had significant deterrent effect. This indicates that the quantum of those penalties should be re-examined.[23]

Quantifying penalties — proportionality

30.24 Under this principle there should be proportionality between the penalty and the facts of the contravention.[24] In criminal law, the High Court in *Veen v The Queen*[25] and *Veen v The Queen (No 2)*[26] held that proportionality is the most important factor in sentencing. Proportionality overlaps with 'seriousness'. Section 16A(1) of the *Crimes Act 1914* (Cth) requires that 'a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence'.

30.25 Yeung says

> the requirement of proportionality provides the central role in determining the quantum of punishment because the severity of the punishment communicates the degree of blame attributed to the crime. Hence, punishments should be ordered according to the degree of blameworthiness of the conduct — the more serious the conduct, the more severe the punishment.[27]

30.26 Proportionality requires the court to balance all the factors and reach a penalty that is no more than the contravention requires.

Quantifying penalties — consistency

30.27 Under this principle, different offenders who have committed similar contraventions and who otherwise have similar characteristics, ought to receive a substantially similar penalty. Consistency is at the heart of justice or as Spigelman CJ said, 'inconsistency offends the principle of equality before the law and is a manifestation of injustice'.[28]

30.28 But there is a risk that adopting a consistent approach can assist to entrench low penalties. In *TPC v Sony (Australia) Pty Ltd*, Pincus J said:

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23 *Australian Competition and Consumer Commission v ABB Transmission & Distribution Ltd* (2001) 23 ATPR ¶41–815, para 27.

24 I Potas, *Sentencing Manual: Law, Principles and Practice in New South Wales* (2001) Judicial Commission of New South Wales and Law Book Company, Sydney, 20.

25 *Veen v The Queen* (1979) 143 CLR 458.

26 *Veen v The Queen (No 2)* (1988) 164 CLR 465.

27 K Yeung, 'Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective' (1999) 23(2) *Melbourne University Law Review* 440, 451–452 citing Andrew von Hirsch, 'Doing Justice: the Principle of Commensurate Deserts' in Hyman, Gross and von Hirsch (eds), *Sentencing*, (1981), 243.

28 *R v Jurisic* (1998) 45 NSWLR 209, 216.

> Were it not for the desirability of setting penalties conforming to the level found in the authorities … I should have been inclined to assess penalties at higher sums than have in fact been fixed.[29]

30.29 Consistency in the amount of the penalty can also be problematic with civil penalties where it reflects the damage sustained or the profit gained. It may be that a penalty for essentially the same breach may be far higher with one offender than another, not because their conduct was necessarily worse, but because they made a far greater gain or caused a much bigger loss. The potential size of the pecuniary penalties for breaches of Part IV of the TPA ($10 million) or for some breaches of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) ($5.5 million) illustrates the issue. It is not expected that the maximum penalty would be ordered except in those cases where the gain made or damage caused has been particularly significant.

30.30 In chapter 29, the ALRC suggested a principle of sentencing that courts should provide detailed reasons for penalty decisions including the factors considered and the weight given to those factors in reaching a particular penalty amount. The purpose of this is to assist to bring about consistency in the application of principles, not consistency in the size of penalties.

30.31 Comparison of penalties for apparently similar contraventions in different legislation is even more difficult. As was discussed in chapter 26, an apparently similar contravention, such as failure to keep accurate records, might have very different significance in different legislative schemes, which could account for different penalty levels in different legislation.

30.32 However, to the extent that a contravention is similar and the circumstances of the offender are similar, there ought to be consistency in the penalties. This does not mean that penalties will necessarily be identical. As Santow J said in *ASIC v Adler:*

> The principles of parity which guide the exercise of judicial discretion do not produce any neat arithmetic algorithm from other cases though the earlier propositions … give some guidance. I would adopt what is said by Hill J in *ACCC v Universal Music Australia Pty Limited (No. 2)* [2002] FCA 192 at [34] where, in the analogous context of the *Trade Practices Act* he says:
>
> 'Hence, while pecuniary penalties imposed in one case provide a guide, that guide will seldom if ever be able to be used mechanically.'[30]

Quantifying penalties — parity

30.33 Under the parity principle where

> other things are equal persons concerned in the same crime should receive the same punishment; and where other things are not equal a due discrimination should be made.[31]

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29 *Trade Practices Commission v Sony (Australia) Pty Ltd* (1990) ATPR ¶41–053 51,690.
30 *ASIC v Adler* [2002] NSWSC 483, para 70.

30.34 Parity is an aspect of consistency and, as indicated above, it applies in cases of co-offenders whose circumstances are comparable. Where there are corporate respondents in particular, there may be very significant differences in their power and size and hence in their capacity to pay, which may result in considerable differences in a penalty for the same contravention. In *ACCC v ABB Transmission and Distribution Ltd (No 2)*, Finkelstein J assessed penalties for the several corporate respondents balancing the parity principle with their differences.

> In the instant case a comparison of the corporate respondents discloses important differences. Most importantly, the offending corporations are different in their size and scale of operations. Two are private companies whose shares are tightly held. The third is a subsidiary of a large international public company. While I am not imposing a punishment on the parent, the size of the parent cannot be ignored when assessing the penalty that should be imposed upon its subsidiary. If the position were otherwise, corporations could easily organise their affairs so that if found guilty of criminal conduct, the penalty would be kept to a minimum. …
>
> Here it would not be right to impose the same penalty on each corporation, although there is not much in the conduct in which they engaged that distinguishes them. A penalty that would be quite significant for the two small corporations will be relatively inconsequential to the third. Put differently, the parity principle should not prevent the court from carefully assessing the significance of a particular penalty for a particular corporation. And in the case of a contravention of antitrust legislation where deterrence is the main object of the penalty, that object would not be achieved if a small penalty was imposed on a large corporation just because that penalty was imposed on a co-offender. It would be equally inappropriate to use the parity principle to impose a crushing penalty on a small corporation.[32]

30.35 Parity and agreed penalties can be a particular problem. This is discussed in detail below.

Quantifying penalties — seriousness

30.36 The *Corporations Act 2001* (Cth) provides that a court is not to make an order for a pecuniary penalty unless a contravention is a serious one.[33] This principle was also applied in *Australian Communications Authority v Viper Communications Pty Ltd* where Mathews J said:

> I accept, as the respondents' counsel have suggested, that something more than a mere contravention of the legislative provisions must be shown. A consideration of the matters referred to in s 570(2) [of the Act] must show a contravention which is in some degree culpable. Alternatively, and probably more importantly, there must be material to suggest that the imposition of pecuniary penalties will have a real deterrent effect

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31 *R v Tiddy* (1969) SASR 575, 577.

32 *Australian Competition and Consumer Commission v ABB Transmission and Distribution Limited (No 2)* [2002] FCA 559, para 40.

33 Or it materially prejudices the interests of the corporation or scheme or members or materially prejudices the ability of the corporation to pay its creditors: *Corporations Act 2001* (Cth), s 1317G.

> upon others who are or might be in contravention of the Act. Neither of these features have been demonstrated here. [34]

30.37 Not all legislation providing for civil penalties states that the contravention be regarded as serious, though regulatory resources may dictate that this be the case.

30.38 Where a regulatory scheme provides for the use of infringement notices, these have the potential to be used for minor or technical breaches, leaving court proceedings for more serious breaches.[35]

30.39 An assessment of the degree of seriousness is a factor that also goes to the size of the penalty: the more serious the contravention, generally the higher the penalty — subject to mitigating factors and factors such as capacity to pay.

Quantifying penalties — the size of corporate respondents

30.40 The size of a contravening corporate offender is one of the 'French factors', but it can be problematic. A respondent company may be a small subsidiary of a large corporate group, as was adverted to by Finkelstein J.[36] A question therefore arises as to whether the corporate veil can be lifted to take account of the size of the group when assessing the penalty.

30.41 The ACCC in *ACCC v Universal Music Australia Pty Ltd (No 2)* argued that the Court should take note that the corporate respondents were wholly owned subsidiaries of large multinational corporations. Hill J rejected that argument saying

> it is difficult to see why the size of a parent company should be relevant in determining the penalty payable by its subsidiary … It would be different if the conduct complained of involved an international arrangement between an Australian company and its overseas parent as was the case in *Australian Competition and Consumer Commission v Roche Vitamins Australia Pty Ltd* (2001) ATPR 41-809 when the relationship would be germane to the actual offence.[37]

30.42 Officers of the Australian Government Solicitor (AGS) suggested in consultation that being part of a global group was a very important factor and had led to anomalies. It was suggested there were problems with courts looking at net profits of subsidiary companies, as these were often low although their revenue might be large. Small profits resulted in penalties being set at a low level. They suggested that anomalies arose when the company could plead as part of its defence that it was a related company, but that the fact of being part of a global company was not a factor when setting the penalty. The AGS officers suggested that if a company could rely on being part

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34 *Australian Communications Authority v Viper Communications Pty Ltd* [2001] FCA 355, para 50.
35 The use of infringement notices is considered in detail in ch 12.
36 See para 30.34 above.
37 *Australian Competition and Consumer Commission v Universal Music Australia Pty Limited (No 2)* [2002] FCA 192, para 22.

of a global group in defence, then the court should be able to take account of that when setting the penalty and, if not, then the defence ought not to apply either.[38]

30.43 The 'volume of commerce' approach as used in the US *Sentencing Guidelines* is one way of avoiding the issues raised by the AGS, who supported consideration of such an approach or turnover penalties.[39] See discussion of turnover penalties at para 26.100–26.118.

Mitigating factors

30.44 Mitigating factors serve to cut back the size of a penalty. It does not follow that the absence of a mitigating factor will serve to increase it. In *ACCC v George Weston Foods Ltd*, the ACCC unsuccessfully sought to argue that failure of a compliance program should be a factor in aggravation of a penalty.[40]

30.45 Contrition and remorse are important mitigating factors in criminal law. An issue is whether their absence results in an increase in a penalty. In criminal law this is not the case.[41] In *ASIC v Adler*, Santow J drew a distinction between the absence of contrition in relation to the setting of a pecuniary penalty — where its effect was not to increase the penalty — and its absence in relation to a management disqualification order, where it did have an effect on the length of the order being an indication of whether a person might re-offend.[42]

30.46 There is a further issue in those statutes that allow criminal and civil proceedings to be undertaken simultaneously or sequentially in respect of the same breach. Will an expression of contrition have an impact on a decision to bring criminal proceedings or, if they are brought following civil proceedings, will an expression of contrition in the earlier proceeding result in an increased likelihood of a conviction?

30.47 Both issues arose in *ASIC v Adler*.[43] Santow J considered 'it difficult to see the likelihood' that possible future criminal proceedings 'would be enhanced by an expression of contrition'.[44] He also noted the provisions of s 1317Q of the *Corporations Act* that preclude evidence of information given being admissible in such criminal proceedings if previously given in proceedings for a pecuniary penalty order. This is discussed further in chapter 11.

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38 Australian Government Solicitor, *Consultation*, Sydney, 27 August 2002.

39 US Sentencing Commission, *Federal Sentencing Guideline Manual*, US Sentencing Commission, <www.ussc.gov/2001guid/tabcon01_2.htm>, 12 December 2001, §2R1.1.

40 *Australian Competition and Consumer Commission v George Weston Foods Ltd* (2000) ATPR ¶41–763, para 45.

41 *R v Power* [1999] NSWCCA 25 (5 March 1999).

42 *ASIC v Adler* [2002] NSWSC 483, para 104. See also *ASIC v Whitlam* [2002] NSWSC 718, para 16.

43 *ASIC v Adler* [2002] NSWSC 483.

44 Ibid, para 101.

30.48 Cooperation with the regulator is an important mitigating factor. This covers cooperation in the investigation, giving evidence against others involved in the contravention, admission of a contravention and reaching an agreement on penalties[45] but not, it would seem, only cooperation in relation to the conduct of a hearing. This issue arose in *Rural Press Ltd v ACCC*, where the Full Court of the Federal Court held that a penalty ought not be discounted because of cooperation in a hearing, but that such cooperation might have an impact on a costs order.[46]

30.49 Cooperation with a regulator, such as revealing details of price-fixing arrangements, can have a significant effect on a penalty. This is discussed in more detail in chapter 17 and, in relation to agreed penalties, at para 30.81.

Capacity to pay

30.50 This is an established principle in the setting of penalties and applies to both individuals and corporations.[47] It was discussed by Finkelstein J in *ACCC v ABB Transmission and Distribution Ltd (No 2)*.[48] His Honour took account of the size and profitability of one of the defendant companies in assessing the penalty to ensure that the penalty would not affect its capacity to trade. In the trade practices area, this is particularly important because it is hardly an aid to competition for the impact of a penalty to be such that it forces a company out of business. In the absence of a regulatory policy directed towards small business,[49] capacity to pay is an important consideration for the courts.

30.51 The principle was also applied in *ASC v Forem-Freeway Pty Ltd*[50] where Madgwick J noted that other orders were likely to severely impair the capacity of the third respondent (sole director of the respondent corporation) to engage in business activities and find work. He noted that, while the matter would normally be a case for a severe penalty, the respondent director, being bankrupt, had no capacity to pay and any penalty order would survive bankruptcy.[51]

30.52 The ALRC suggests capacity to pay is an important factor in the regulatory area in the determination of individual and corporate penalties. Where compensation is also payable, there are additional issues about the size of a penalty.

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45 For example, *Australian Competition and Consumer Commission v Colgate Palmolive Pty Ltd* [2002] FCA 619.

46 *Rural Press Ltd v Australian Competition & Consumer Commission* [2002] FCAFC 213, para 166.

47 In the criminal area, *Crimes Act 1914* (Cth), s 16C states that 'before imposing a fine on a person for a federal offence, a court must take into account the financial circumstances of the person, in addition to any other matters that the court is required or permitted to take into account'.

48 *Australian Competition and Consumer Commission v ABB Transmission and Distribution Limited (No 2)* [2002] FCA 559.

49 See discussion concerning the US and UK approaches at para 26.134–26.138.

50 *Australian Securities Commission v Forem-Freeway Enterprises Pty Ltd* (1999) 30 ASCR 339, 351 (Madgwick J).

51 The effect of bankruptcy on the recovery of penalties is considered in ch 32.

Double counting

Penalties and compensation

30.53 The money raised by a monetary penalty goes to general revenue. In some legislation there is also provision for compensation orders. Private actions for compensation by persons affected by contravening conduct are separate actions.[52] The potential for a penalty to be coupled with compensation raises several issues.

30.54 DP 65 raised the potential for double counting or double penalising if a penalty is set to reflect the size of the loss or damage caused and the loss is also compensated through a compensation order or otherwise through private legal actions.[53] This can occur under s 82 or 87 of the TPA and under s 1317H of the *Corporations Act* where, as well as making a civil penalty order, the court can order the person who committed the contravention to pay compensation equal to the amount of the loss or damage. Similarly, in determining the pecuniary penalty, under s 481 of the EPBC Act the court must have regard, *inter alia*, to the extent of any loss suffered and, under s 500, the court may order compensation to be paid for any loss suffered.

30.55 A sizeable penalty paid prior to compensation could mean, in some circumstances, that there is little left to pay the compensation. However, the potential impact of this is mitigated where the legislation prefers compensation to a penalty in the event of inability to pay both. This occurs, for example, under s 79B of the TPA. However, s 79B applies only where there has not already been an order for a pecuniary penalty. Any compensation claim would need to have been made at the time of the action for a penalty.[54]

30.56 As noted above, in *ASC v Forem-Freeways Pty Ltd*, Madwick J did not make a penalty order against the respondent director because of his lack of capacity to pay.[55] However, he left open the possibility of the regulator applying for a penalty at a later date should the director come into funds. His Honour suggested that any penalty that might be ordered at that time could be 'considerably moderated by voluntary compensation that he might make for the benefit of the retail customers'.[56]

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52 In some areas, despite legislation permitting private actions, there have been few claims. Round says that although s 82 of the TPA permits private actions for compensation, there have only been four such actions for Part IV contraventions suggesting that the market itself could provide an additional layer of deterrence and buyer protection: D Round, 'Consumer Protection: At the Merci of the Market for Damages' (Paper presented at Current Issues in Regulation: Enforcement and Compliance, Melbourne, 2–3 September 2002), 3.

53 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, para 18.53.

54 *Trade Practices Amendment Act (No. 1) 2001* (Cth), Sch 1, cl 15.

55 *Australian Securities Commission v Forem-Freeway Enterprises Pty Ltd* (1999) 30 ASCR 339, para 52.

56 Ibid, para 55. The circumstances of the case included likely bankruptcy of the offender: it would not be usual for a penalty order to be postponed in this way.

30.57 The Advisory Committee for this Inquiry agreed that a defendant's payment of compensation ought to be taken into account when setting a penalty but only if the compensation had actually been paid.[57]

30.58 This approach helps alleviate double counting. However, this is not to say that loss or damage caused should be excluded altogether from calculating the penalty where there may be related compensation. If the penalty order effectively requires the offender to disgorge any profits made from the illegal activity, this provides a clear signal that there is little to be gained from the activity provided there is an appreciable risk of detection and prosecution. Additionally, it is important not to confuse the purpose of the actions. Civil penalties are a tool of regulators to seek compliance and to deter generally: private compensation actions focus on the damage caused to individuals.

30.59 In those circumstances where a significant monetary penalty may deplete the funds available to pay private compensation claims, courts should consider the use of non-monetary penalties, if that option is available. See discussion on expanding the range of penalties in chapter 27.

30.60 Professor David Round suggests that judges should take account of the impact of a penalty on the capacity of an entity to pay in any future private actions and suggests that one solution would be 'for a certain portion of the penalty to be held in abeyance by the court up to the period of limitation for private actions'.[58] He suggests 'a more radical proposal would be that the whole penalty determined by the judge as socially appropriate would be reserved for damages claims'.[59] This latter suggestion would ensure that there has not been a depletion of funds to pay the penalty such that there is nothing left to pay compensation, and would avoid double counting as the penalty would take account of loss and further compensation. However, this suggestion might mean the collectivist aims of the penalty were lost, with the focus falling on those individuals able and willing to make a claim for damages.

30.61 The ALRC has not made a recommendation along the lines suggested by Round. There was no opportunity for consultation and submissions on the point. However, we have given some recognition to the importance of compensation in the following recommendation.[60]

Recommendation

Recommendation 30–1. Where a monetary penalty may deplete the funds available to pay private compensation claims, courts should consider the use of non-monetary penalties, if that option is available.

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57 Advisory Committee members, *Advisory Committee meeting*, 17 October 2002.

58 D Round, 'Consumer Protection: At the Merci of the Market for Damages' (Paper presented at Current Issues in Regulation: Enforcement and Compliance, Melbourne, 2–3 September 2002), 30.

Penalties and banning orders

30.62 In those regulatory areas where a banning or disqualification order may be made in addition to a pecuniary penalty[61] (eg, under the *Corporations Act*) there is an issue whether this is a factor that might have bearing on the size of the pecuniary penalty, particularly where the banning, disqualification or loss of licence will have serious financial consequences.[62]

30.63 In *ASC v Kippe*, the Federal Court held that the purpose of a banning order under the *Corporations Law* was protective and neither a penalty nor punishment.[63] Nevertheless, while the purpose of a banning order may be chiefly protective, for the individual banned its effect may be punitive: the loss of a potential livelihood. In *ASC v Donovan*, the court found that a purpose of a banning order is general deterrence[64] and a number of courts have found that an objective of banning is also personal deterrence, although it is not punitive.[65] These suggest some overlap with the purpose of the penalty even though each serves a different prime purpose.

30.64 In *ASIC v Adler,* Santow J noted the finding of the court in *Re Tasmanian Spastics Association* as to the effect of a banning order on a pecuniary penalty:

> If the making of such an order has significant consequences, that may operate as a factor in favour of a lesser penalty. Where the disqualification order does not have significant consequences for the defendant, the prohibition order is likely to be only marginally relevant.[66]

Recommendation

Recommendation 30–2. In assessing a penalty for an individual under legislation where there may be related quasi-penalties, such as banning orders, the court should consider the impact of the related order both on the capacity of the person to pay and in the light of the total penalty.

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59 Ibid, 30.
60 See also discussion on the use of non-monetary penalties in chapter 27.
61 Ch 27 considers the use of such orders as non-monetary penalties for individuals.
62 *Re Tasmanian Spastics Association; ASC v Nolan* (1996) 23 ACSR 743, 751–752.
63 *Australian Securities Commission v Kippe* (1996) 67 FCR 499. See also *ASIC v Adler* [2002] NSWSC 483 and *ASIC v Whitlam* [2002] NSWSC 718.
64 *Australian Securities Commission v Donovan* (1998) 28 ACSR 583, 603.
65 *Re Magna Alloys & Research Pty Ltd* (1975) ACLR 203, 205; *ASIC v Pegasus Leveraged Options Group P/L* [2002] NSWSC 310; *Australian Securities Commission v Donovan* (1998) 28 ACSR 583, 607; *Re Tasmanian Spastics Association; ASC v Nolan* (1996) 23 ACSR 743, 751.
66 *ASIC v Adler* [2002] NSWSC 483, para 126(iv).

Individual and corporate penalties

30.65 Where a penalty is imposed on a company substantially owned by an individual also liable to a penalty for involvement in the same contravention, a large penalty imposed on the corporation may have the effect of being a penalty in fact on the individual. This ought to be taken into account when determining the individual's penalty. In *ASC v Forem-Freeway Pty Ltd*, the court took account of factors including the personal hardship to the respondent and unintended punitive consequences of other orders.[67] In *ACCC v ABB Transmission and Distribution Ltd*,[68] Finkelstein J noted that the penalty imposed on one of the corporate respondents would ultimately be borne by one of the individual respondents meaning his ultimate penalty would be far greater than the $100,000 penalty imposed on him. But his Honour said this was 'as it should be' on the basis that '[h]aving regard to [the individual respondent's] financial position, if he does not suffer serious punishment, the punishment will have little deterrent value'.[69] In *ACCC v ABB Transmission and Distribution Ltd (No 2),* Finkelstein J took into account that, in imposing a penalty on the company of which one of the respondents was the principal shareholder, allowance should be made for this as otherwise that principal shareholder would, in effect, 'be punished twice over'.[70]

30.66 In *APRA v Holloway*, Mansfield J said:

> I have had regard to the fact that Mr Holloway is in reality the alter ego of Holloway & Co. I think it is relevant to recognise that monetary penalties imposed on Holloway & Co are for conduct which is essentially, although not entirely, the conduct of Mr Holloway and that it is his state of mind which is the state of mind of Holloway & Co.
> …
>
> The role of Mr Holloway, and his relationship to Holloway & Co, are matters which, in my view, justice requires that I have regard to in fixing monetary penalties for the contraventions. [71]

30.67 Nevertheless, the mere involvement of an individual, who is facing liability as an accessory in the ownership of a corporation which is also facing a penalty is not a reason for cutting back the penalties of either.[72] What is needed is the 'alter ego' approach adopted by Mansfield J and Finkelstein J. The liability of an individual as an accessory to a breach by a corporation is discussed in more detail in chapter 8.

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67 *Australian Securities Commission v Forem-Freeway Enterprises Pty Ltd* (1999) 30 ASCR 339, 351–352.

68 *Australian Competition and Consumer Commission v ABB Transmission and Distribution Limited (No 2)* [2002] FCA 559.

69 *Australian Competition and Consumer Commission v ABB Transmission & Distribution Ltd (No 2)* [2002] FCA 558, para 7.

70 *Australian Competition and Consumer Commission v ABB Transmission and Distribution Limited (No 2)* [2002] FCA 559, para 45. See also *Australian Competition and Consumer Commission v Dimmeys Stores Pty Ltd* [1999] FCA 1175; *Australian Competition & Consumer Commission v Commercial and General Publications Pty Ltd (No 2)* [2002] FCA 1349.

71 *Australian Prudential Regulation Authority v Holloway* (2000) 35 ACSR 276, para 28–29.

72 In *ASIC v Adler*, Santow J said 'Adler Corporation is not to be taken as simply the alter ego of Mr Adler, though he is concededly in effective control of it': *ASIC v Adler* [2002] NSWSC 483, para 133.

Recommendation

Recommendation 30–3. In assessing a penalty for an individual in circumstances where a corporation which is the alter ego of that individual has been ordered to pay a penalty for a related contravention, the court should consider the impact on that individual of the penalty on the corporation.

Multiple contraventions and the 'totality principle'

30.68 Civil pecuniary penalties are often expressed in terms of a penalty for 'each act or omission'.[73] This raises questions as to the correct approach to the assessment of the penalty for continuing and repeat contraventions. Some type of breach may occur many times: price fixing under the TPA; many pollution offences under environmental statutes; many breaches of occupational health and safety laws; and failure to comply with continuous disclosure regimes in the corporations area. Issues can arise as to whether a series of contravening acts constitutes a single default or whether they are separate contraventions. Clearly this can have a very significant impact on the overall size of a penalty order. However, the cases are not always clear on what constitutes separate acts. A further significant issue concerns the size of the penalty for multiple breaches.

30.69 There are two issues for the court which are frequently related:

- when do continuing acts involve separate contraventions; and
- what is the impact of the 'totality principle' on an individual penalty.

30.70 Some legislation deals explicitly with continuing breaches. For example, in Parts XIB and XIC of the TPA, the penalty is described as a maximum for the initial breach with a further cumulative penalty for each day of the continuing breach. The ACCC may issue a Telecommunications Competition Notice that exposes a recipient to a penalty of $10 million plus $1 million per day of default.[74] This approach is not, however, the usual one.

30.71 More typically, there will be an issue for the courts as to whether conduct amounts to a single breach or multiple contraventions. In *ACCC v George Weston Foods Ltd*,[75] the ACCC unsuccessfully argued that conduct in which the respondent

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73 See, for example, *Trade Practices Act 1974* (Cth), s 76 (1A) and (1B). Under (1A) the pecuniary penalty for a body corporate is not to exceed: '(a) for each act or omission to which this section applies that relates to section 45D, 45DB, 45E or 45EA—$750,000; and (b) for each other act or omission to which this section applies—$10,000,000'.

74 For example, *Trade Practices Act 1974* (Cth), s 151BX.

75 *Australian Competition and Consumer Commission v George Weston Foods Ltd* (2000) ATPR ¶41–763.

had attempted to involve two retailers in price fixing amounted to separate contraventions. Goldberg J indicated he was satisfied that two phone calls, one to each retailer who was involved in the price fixing attempt, should be treated as a single attempt to induce the making of a single price fixing agreement.[76] But with different facts, in *TPC v Simpson Pope Ltd,* Franki J said

> different acts of a supplier, each of which is a contravention of s 48 because it falls within one or more of the categories of acts set out in s 96(3), which take place at different times and in relation to three different customers, are not to be regarded as 'the same conduct' within s 76(3). The words 'the same conduct' in s 76(3) must be more limited in scope than the words 'any similar conduct' which appear at the end of s 76(1).[77]

30.72 Section 76(3) of the TPA provides:

> If conduct constitutes a contravention of two or more provisions of Part IV, a proceeding may be instituted under this Act against a person in relation to the contravention of any one or more of the provisions but a person is not liable to more than one pecuniary penalty under this section in respect of the same conduct.

30.73 The effect of s 76(3) is that multiple penalties cannot be imposed for the same conduct.

30.74 If conduct involves separate contraventions, then this may raise the totality principle. The 'totality principle' seeks to ensure that an overall penalty is appropriate and not excessive in relation to the totality of the conduct. It was described by Goldberg J in *ACCC v Australian Safeway Stores Pty Limited*:

> The totality principle is designed to ensure that overall an appropriate sentence or penalty is appropriate and that the sum of the penalties imposed for several contraventions does not result in the total of the penalties exceeding what is proper having regard to the totality of the contravening conduct involved: *McDonald v The Queen* (1994) 48 FCR 555. But that does not mean that a Court should commence by determining an overall penalty and then dividing it amongst the various contraventions. Rather the totality principle involves a final overall consideration of the sum of the penalties determined. In *Mill v The Queen* (1988) 166 CLR 59 the High Court accepted the following statement as correctly describing the totality principle:
>
> > 'The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is "just and appropriate". The principle has been stated many times in various forms: "when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong"; "when ... cases of multiplicity of offences come before the court, the court must not content itself by doing the

76 Ibid, 40,984.
77 *Trade Practices Commission v Simpson Pope Ltd* (1980) 30 ALR 544, 556.

> arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences"'. [78]

30.75 The effect of the principle may mean, depending on the facts of the case, that there is little difference in the end result between an application of s 76(3) or the totality principle. In *ACCC v Rural Press Ltd*, a case concerning breaches of s 45 and s 46 of the TPA, Mansfield J imposed a single penalty upon each respondent stating that

> the level of pecuniary penalty which I impose would not alter whether the s 45 and s 46 contraventions had to be treated as part and parcel of the one set of conduct by reason of s 76(3) or were capable of being treated as separate contraventions.[79]

30.76 In *TPC v TNT Australia Pty Ltd*, Burchett J drew an analogy with the approach in criminal cases:

> The adoption of such an approach … is consistent with that adopted in the criminal law … where a court imposing penalties for a number of related offences does not allow the total penalty to exceed what is proper for the entire criminality involved: the totality principle.[80]

30.77 Accordingly, his Honour said the correct approach was to select only certain of the contraventions as the basis of the penalties, and while taking the others into account, not impose penalties in respect of them.[81]

30.78 In *ACCC v Rural Press Ltd*, Mansfield J held that applying a single penalty for all contraventions by the one respondent was the correct approach.[82] Finkelstein J in *ACCC v ABB Transmission and Distribution Ltd (No 2)* followed *Rural Press* on the matter of multiple contraventions and, in relation to the totality principle, said:

> One approach is to determine the appropriate total penalty and then divide that penalty by the number of offences to produce a penalty for each separate offence. The problem with this approach is that it may result in inappropriate individual penalties. In a criminal case, when sentencing an offender to a term of imprisonment, the problem is avoided by cumulation or concurrency orders. If the penalty is pecuniary, it is not possible to manipulate the sentence in this way. In *CPSU, the Community and Public Sector Union v Telstra Corporation Ltd* (2001) 108 IR 228, I said that in such

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78 *Australian Competition and Consumer Commission v Safeway Stores Pty Ltd* (1997) 145 ALR 38, 53.
79 *Australian Competition and Consumer Commission v Rural Press Ltd* [2001] FCA 1065, para 19.
80 *Trade Practices Commission v TNT Australia Pty Ltd* (1995) 17 ATPR ¶41–375, 40,169.
81 Ibid, 40,169.
82 *Australian Competition and Consumer Commission v Rural Press Ltd* [2001] FCA 1065. In an appeal by Rural Press, the Full Court of the Federal Court upheld the penalties imposed at trial (which were substantially below those sought by the ACCC) but did so after holding that one of the bases of liability, under s 46, did not apply and after providing that the discount given for cooperation in the hearing was not a relevant factor: *Rural Press Ltd v Australian Competition & Consumer Commission* [2002] FCAFC 213.

> a case it was permissible to use the division method, even if it produced inappropriate individual penalties.[83]

30.79 In *ASIC v Adler*, Santow J applied the totality principle in reaching a decision to impose an aggregate total penalty of $450,000 on each of the Adler Corporation and Rodney Adler. His Honour said:

> I have concluded that pecuniary penalty orders should be substantial. They should reflect that there were in reality four sets of transactions as I have earlier identified. I have sought to apply the totality principle in a way that would act as a personal and general deterrent but is not oppressive, bringing to bear what the High Court has referred to in sentencing as an 'instinctive synthesis' of relevant factors; see *Wong v R* (2002) 185 ALR 233 at 252, para [75]… In articulating how that total figure is arrived at beyond the 'instinctive synthesis' earlier referred to, I should simply say this. One might reasonably characterise the circumstances as involving four sets of transactions which unbundled, produces nine in all. Each gave rise to multiple contraventions. An appropriate outcome in totality is to impose pecuniary penalties aggregating as I have done.[84]

Consultations and submissions

30.80 The Advisory Committee suggested that any recommendation on the totality principle adopt the approach of s 4K of the *Crimes Act 1914* (Cth) which permits a court to aggregate a penalty where a person is convicted of two or more offences founded on the same facts or where they form part of a series of offences of the same character.[85]

Recommendation

Recommendation 30–4. The Regulatory Contraventions Statute should provide that, where a person is found to have committed two or more breaches of the same provision of law, the court may impose one penalty in respect of both or all of those breaches. However, the final penalty order should take account of the 'totality principle' such that the penalty ordered is sufficient to act as a personal and general deterrent but not be so large as to be oppressive. The penalty should not exceed the sum of the maximum penalties that could be imposed if a separate penalty were imposed in respect of each breach.

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83 *Australian Competition and Consumer Commission v ABB Transmission and Distribution Limited (No 2)* [2002] FCA 559, para 39. The Full Court of the Federal Court in *Rural Press Ltd v ACCC* said 'we find ourselves substantially in agreement' with the trial judge's analysis of the penalties 'other than on the two issues we have identified' but they noted it was not an appropriate occasion for a thorough review of the authorities particularly as the argument on penalties took place without knowledge of the Court's conclusion on liabilities, *Rural Press Ltd v Australian Competition & Consumer Commission* [2002] FCAFC 213, para 168.

84 *ASIC v Adler* [2002] NSWSC 483, para 140–141.

85 Advisory Committee members, *Advisory Committee meeting*, 17 October 2002.

Agreed penalties

30.81 Chapter 16 described the use of agreed penalties and also noted some of the issues and criticisms that have arisen surrounding the use of agreed penalties in relation to dealings between regulators and the regulator. This chapter considers some issues that arise in relation to agreed penalties before the courts.

30.82 As discussed in chapter 16, prior to the finalisation of proceedings in court, the regulator and the respondent may agree on the quantum of penalties to be presented to the court for its approval and conversion into formal orders. A court will ordinarily accept the penalty put to it if it is within the range of penalties that the court itself would order.[86] However, courts frequently emphasise that despite the fact of penalties being put to the court in a joint submission, 'it does not at any stage abdicate the role of determining the appropriate penalties to be imposed'.[87]

30.83 In reaching its decision whether to accept the submission on a penalty, the court is guided by the same factors as it is in determining a penalty.[88] Two propositions are particularly relevant in this area:

- the penalty must be sufficient to act as a deterrent; and
- the parity principle — similar contraventions should attract a similar penalty.

Parity

30.84 The impact of agreed penalties on deterrence and the parity principle was highlighted in *ACCC v Ithaca Ice Works Pty Ltd*.[89]

30.85 In that case, the trial judge sanctioned an agreed penalty of $25,000 against one company (QIS) involved in a price fixing arrangement following assistance by its director in disclosing the price fixing arrangement and cooperation with the ACCC. The penalty for the other company (Ithaca) was not agreed and the trial judge ordered a penalty of $100,000 taking account of its larger size.[90]

30.86 On appeal, the ACCC submitted that $300,000 was at the lowest end of the range of the penalties that should be imposed on Ithaca. The Full Court of the Federal

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86 See *Trade Practices Commission v TNT Australia Pty Ltd* (1995) 17 ATPR ¶41–375, *NW Frozen Foods v Australian Competition & Consumer Commission* (1996) 71 FCR 285 and R Steinwall, 'Disclosure and Procedure on Agreed Penalties' (2002) 17(10) *Trade Practices Law Bulletin* 103.

87 A Allgrove, 'The Assessment of Penalties Under the Trade Practices Act for Breaches of the Competitive Conduct Rules' (1996) 4(3) *Trade Practices Law Journal* 104, 106.

88 R Steinwall, 'Disclosure and Procedure on Agreed Penalties' (2002) 17(10) *Trade Practices Law Bulletin* 103, 103.

89 *Australian Competition and Consumer Commission v Ithaca Ice Works Pty Limited* (2001) ATPR ¶41–816.

90 *Australian Competition & Consumer Commission v Ithaca Ice Works Pty Ltd* [2001] FCA 1716.

Court dismissed the appeal saying it would be unjust, in determining the penalty to be imposed on Ithaca, not to take into account the penalties imposed on QIS, even though the penalty was one agreed with the ACCC. The ACCC sought a penalty that was 12 times the penalty agreed with QIS. The Full Court said that a penalty of $300,000 against Ithaca would be totally disproportionate to the $25,000 agreed penalty for QIS that had been accepted by the trial judge for essentially similar conduct.

30.87 A number of factors contributed to this outcome:

- The QIS case was heard before the Ithaca matter. The court acknowledged that this, and the low level of the agreed penalty, made it likely that the Ithaca penalty would be lower than would otherwise be the case.[91]

- The ACCC did not disclose to the trial judge the process by which the penalty against QIS was discounted for its cooperation in exposing the price-fixing. On appeal, the ACCC submitted that the $25,000 represented a discount of $155,000. The Court said that, had the level of discount been disclosed, the trial judge would have been able to assess the agreed penalty without cooperation and make an appropriate discount for the level of cooperation provided by QIS.[92]

30.88 The case has been criticised for undermining the ACCC's enforcement role and its leniency and immunity policy. As was noted by Alan Ducret of the ACCC:

> Those who cooperate with the ACCC should receive the benefit of a lower penalty…
>
> On the other hand, those who do not cooperate should not receive any reduction and their penalties will accordingly be more severe.[93]

30.89 Ray Steinwall, says the case raised a number of issues:

- a difficulty in being satisfied that the agreed penalty was within an acceptable range for the type of offence;

- whether a discount of some 700% is appropriate for cooperation especially given the level of QIS's involvement in the price fixing arrangement.[94]

30.90 Steinwall suggested that an agreed penalty ought not be finalised with some respondents while the case against others is yet to be heard because it may result in a much lower penalty for the other respondents than is warranted particularly taking into account the need for the penalty to be a deterrent.[95]

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91 Ibid, para 54.
92 Ibid, para 56.
93 A Ducret, 'Courts — Their Role in Regulatory Arrangements' (Paper presented at Penalties; Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001), 4.
94 R Steinwall, 'Disclosure and Procedure on Agreed Penalties' (2002) 17(10) *Trade Practices Law Bulletin* 103, 104.
95 Ibid, 104.

Conclusion

30.91 The ALRC agrees with the Full Court of the Federal Court that, as a penalty has broader public interest implications and precedent value, regulators should disclose the process, and arguably all the relevant factors, that result in a discounted penalty. This accords with the process that a court undertakes in imposing a penalty. As discussed in chapter 16, the ACCC says that it puts thorough submissions to the courts when seeking agreed penalties. The ALRC agrees that this ought to be the approach, and with Steinwall's conclusion that, where there are multiple respondents, there are arguments for not putting an agreed penalty submission to the court ahead of other proceedings.

Agreed penalties and claims for compensation

30.92 Section 82 of the TPA provides for claims for compensation by a person who has suffered loss or damage as a result of a breach of Part IV of the Act. Under s 83, a finding of fact by a court becomes prima facie evidence of that fact so that a claimant seeking compensation under s 82 can use a previous penalty hearing to assist their case. However, there is some doubt whether claimants can rely on agreed statements of facts presented to the court by the ACCC and statements as to mutually acceptable penalties when pursuing an action under s 82.[96]

30.93 This was adverted to by Finkelstein J in *ACCC v ABB Transmission and Distribution Ltd (No 3)*,[97] a case concerning an application by a non-party who may have been affected by contraventions of s 45 and 45A. The non-party sought access to the statements of agreed facts and submissions submitted jointly by the ACCC and some of the parties to an agreed penalty hearing.

30.94 In his reasons for decision in relation to the agreed penalty, Finkelstein J in *ACCC v ABB Transmission and Distribution Ltd (No 2)* expressed concerns that 'it is not clear that a judge who acts on formal admissions is making findings of fact'.[98] However, in *ACCC v ABB Transmission and Distribution Ltd (No 3)* he indicated that 'it would have little practical utility if [the non-party] were to be denied access to the documents which founded the order'.[99]

30.95 The policy behind s 83 is to allow victims of contravening conduct to take advantage of the findings of a court without being required to prove the same facts. If it were otherwise the plaintiff would be required to carry a large evidentiary burden.

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96 D Round, 'Consumer Protection: At the Merci of the Market for Damages' (Paper presented at Current Issues in Regulation: Enforcement and Compliance, Melbourne, 2–3 September 2002), 27.

97 *Australian Competition and Consumer Commission v ABB Transmission and Distribution Limited (No 3)* [2002] FCA 609.

98 *Australian Competition and Consumer Commission v ABB Transmission and Distribution Limited (No 2)* [2002] FCA 559, para 51.

99 Ibid, para 9.

There seems little basis for a distinction between the use of material that has formed the basis of findings in contested hearings, and material that has formed the basis of a joint submission by a regulator and a party to an agreed penalty. If s 83 were to have that effect, there is an argument for it to be amended.[100]

Recommendation

Recommendation 30–5. Legislation such as s 83 of the *Trade Practices Act 1974* (Cth) should be amended to remove any doubts that formal admissions put to the courts for the purposes of a hearing on an agreed penalty may be used by other parties in private civil proceedings.

100 See too D Round, 'Consumer Protection: At the Merci of the Market for Damages' (Paper presented at Current Issues in Regulation: Enforcement and Compliance, Melbourne, 2–3 September 2002), 28.

Part F

Recovery of Penalties

31. Recovery of Monetary Penalties

Contents

Introduction

31.1 The Terms of Reference for this Inquiry require the ALRC to report on the 'enforcement' of civil and administrative penalties. The ALRC takes this to refer to the recovery of monetary penalties that have been imposed by one of the various enforcement action options available to regulators. The ALRC is directed specifically to report on any limitations that apply or should apply to the use of State and Territory infringement notice enforcement procedures. Infringement notice procedures are discussed in chapter 12. This chapter outlines conventional mechanisms used to recover criminal and non-criminal monetary penalties imposed for breaches of federal laws.

Enforcement options

31.2 For most regulators, the imposition of monetary penalties will be by way of court action (either civil action taken by the regulator itself or criminal prosecution by the DPP). The imposition of a penalty for criminal offences and most non-criminal contraventions involves a court process following the investigation by the regulator or specialist investigation agencies such as the AFP of the alleged breach. In the case of administrative penalties, the regulator controls the entire enforcement process. Some

penalties (for example, quasi-penalties) might be described as 'self-enforcing'. If the regulator pays money to the regulated (for example, by way of tax refunds or social security benefits), enforcement is facilitated by the regulator's powers to withhold or reduce payments or seek offset.[1]

Enforcement of criminal penalties

31.3 Fines and imprisonment are the most common penalties for federal criminal offences. Criminal penalties imposed for offences against Commonwealth laws are generally enforced under state or territory law.[2]

Imprisonment

31.4 Part 1B of the *Crimes Act 1914* (Cth) provides guidance on sentencing and imprisonment for federal offences, including factors to be taken into account when setting sentences[3] or fines.[4] In addition, s 4B of the *Crimes Act* provides for the conversion of a term of imprisonment into a pecuniary penalty not exceeding the number of penalty units calculated by multiplying the maximum term of imprisonment (expressed in months) by five.[5] For example, under s 197 of the *Social Security (Administration) Act 1999* (Cth), the penalty for failing to comply with a requirement to give information or produce a document is imprisonment for a term not exceeding 12 months — if s 4B were applied, this penalty might be converted to a fine of 60 penalty units (or $6600). This section may be used 'if the contrary intention does not appear and the court thinks it appropriate in all the circumstances of the case'. A pecuniary penalty calculated in accordance with s 4B may be imposed in addition to, or in substitution for, a term of imprisonment. Section 20AB of the *Crimes Act* specifies that, where a state or territory court has power, a range of alternative sentencing orders may be made in respect of federal offences, including community service orders and periodic or weekend detention orders.

Recovery of fines

31.5 Section 15A(1) of the *Crimes Act* provides that:

> A law of a State or Territory relating to the enforcement or recovery of a fine imposed on an offender applies to a person convicted in the State or Territory of an offence against a law of the Commonwealth. The law applies:
>
> (a) so far as it is not inconsistent with a law of the Commonwealth;
>
> (b) with the modifications made by or under this section.

1 See for example *Social Security Act 1991* (Cth), s 1230C.
2 In relation to imprisonment see the Constitution, s 120. *Judiciary Act 1903* (Cth), s 68 provides that proceedings for federal criminal offences shall be in accordance with state and territory laws.
3 *Crimes Act 1914* (Cth), s 16A.
4 Ibid, s 16C.
5 Section 4B is in Part 1A of the *Crimes Act*.

31.6 Thus, the remedies available for recovery of fines under the relevant state or territory law are available to enforce fines for federal offences.[6] In 1998 and 1999, s 15A of the *Crimes Act* was amended to clarify the range of State and Territory processes that might be used to enforce fines imposed in respect of federal offences.[7] The changes aimed to 'ensure that states and territories can employ the procedures used in the enforcement of fines against state or territory offenders, in enforcing fines against federal offenders'.[8] In particular, the amendments made fine enforcement options such as the suspension or cancellation of a vehicle registration or a driver's licence available in respect of fines imposed by a court for federal offences.

31.7 The 1998 amendment limited the exercise of federal jurisdiction in respect of fine enforcement to magistrates. The 1999 amendment allows court officers other than magistrates to exercise federal jurisdiction in respect of fine enforcement by excluding the operation of s 39(2)(d) of the *Judiciary Act 1903* (Cth).[9] One limitation on this amendment was that the exercise of power by a court officer other than a magistrate must be able to be appealed to or reviewed by a magistrate. The reasons for allowing court officers to enforce federal fines were stated to be:

> Firstly, the 'fine enforcement' burden imposed on busy magistrates will be eased. Secondly, many rural and regional areas have a court officer in permanent residence whereas a magistrate may only visit periodically on circuit. In these areas, federal fine enforcement will be easier and more timely if court officers can impose relevant penalties.
>
> Finally, fine enforcement systems in a number of states and territories rely heavily on court officers to impose penalties for fine default. In these states and territories the ability to use court officers in federal cases will allow federal cases to be dealt with more efficiently within the state or territory fine enforcement system.[10]

Fine recovery procedures

31.8 Each State and Territory has its own fine recovery procedure.[11] All schemes are limited to the enforcement of monetary penalties imposed for criminal offences[12]

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6 See for example *Chief Executive Officer of Customs v Rota Tech Pty Ltd* (1999) 201 LSJS 390.

7 Section 15A(1AA)–(1AD) were inserted by the *Crimes Amendment (Enforcement of Fines) Act 1998* (Cth) and the *Crimes Amendment (Fine Enforcement) Act 1999* (Cth).

8 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 22 June 1998, 5075 (D Williams (Attorney-General)), 5076.

9 Sections 4AAA and 4AAB were inserted into the *Crimes Act 1914* (Cth) to further give effect to this.

10 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 30 June 1999, 7865 (P Slipper), 7865.

11 See *Magistrates Court Act 1930* (ACT), Part 9, Div 9.2; *Fines Act 1996* (NSW), Part 4; *Fines and Penalties (Recovery) Act 2002* (NT), Part 5; *State Penalties Enforcement Act 1999* (Qld); *Criminal Law (Sentencing) Act 1988* (SA), Part 9; *Sentencing Act 1991* (Vic); *Fines Penalties and Infringement Notices Enforcement Act 1994* (WA), Part 4, Div 3.

12 See, for example s 4 of the *Fines Act 1996* (NSW), which limits the definition of fines to monetary penalties imposed for 'offences'; s 34 of the *State Penalties Enforcement Act 1999* (Qld), which limits enforcement to 'an order fining a person for an offence'; and s 28 of the *Fines Penalties and Infringement Notices Enforcement Act 1994* (WA), which limits fines to monetary penalties imposed in criminal proceedings. See also *Transport Workers' Union of Australia New South Wales Branch v Australian Document Exchange Pty Ltd trading as Grace Couriers* [2000] NSWIRComm 74, which considered whether proceedings in respect of offences under the *Industrial Relations Act 1996* (NSW) were civil or criminal.

emphasising the significance of the distinction between criminal and non-criminal penalties. Most schemes allow for a combination of civil enforcement action (including seizure and sale of land or property, registration of a charge on land, garnishee of debts, bank accounts, wages or salary) and other methods of enforcement (including suspension or cancellation of driver's licences or vehicle registration,[13] community service or work orders,[14] and imprisonment — either directly in default of payment of the fine[15] or in default of performance of community service or other work[16]). The extent to which such State and Territory enforcement processes have been used to enforce fines for federal offences is unclear because published data does not distinguish between state and federal offences.[17]

Preliminary question

31.9 In DP 65, the ALRC asked:

> **Question 11–1.** To what extent can or should State and Territory administrative fine enforcement schemes be used to enforce criminal fines or non-criminal pecuniary penalties imposed by courts exercising federal jurisdiction? To what extent are they being so used?

Consultations and submissions

31.10 Several submissions commented on this question.[18] The ATO noted that

> inconsistency exists between the States in relation to the enforcement of criminal fines imposed by the courts for taxation offences. The extent to which the courts or enforcement agencies enforce unpaid fines differs from State to State depending on the legislation in each State, as do the procedures adopted by the courts or agencies, the cost of recovery action, (recovery action may possibly not be undertaken for small amounts) and the priority given to collection of penalties by state authorities.[19]

31.11 The ATO also expressed concern that:

It was concluded that the proceedings were criminal and, therefore, that any fines imposed would be recoverable in accordance with the *Fines Act 1996* (NSW).

13 Except in Queensland (where this enforcement option is only available for an unpaid penalty for a 'vehicle-related offence') and Victoria (where this enforcement option is only available for an unpaid infringement notice penalty).

14 Except in the Australian Capital Territory, where this is not an option. In Queensland, community service is only available under a 'fine option order', which is an order made at the request of the person owing the fine. In Western Australia this is known as a 'work and development order'.

15 In the Australian Capital Territory, Queensland and Victoria.

16 In New South Wales, the Northern Territory, South Australia, Victoria and Western Australia.

17 For example, the annual report published by the Attorney-General's Department of New South Wales, does not provide the level of detail necessary to distinguish between fines imposed for state compared to federal offences. The aggregate amount of fines, penalties and enforcement costs recovered in 2000–01 was $90.1 million: Attorney-General's Department (NSW), *Annual Report 2000–2001* (2001), Attorney-General's Department of New South Wales, Sydney, 61. At the time of writing, the 2001–02 annual report of the Attorney-General's Department of New South Wales was not available.

18 I Brown, SM, *Submission CAP 6*, 12 June 2002, Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, Australian Taxation Office, *Submission CAP 16*, 17 September 2002.

19 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.139.

> In respect of the majority of fines imposed in relation to taxation offences, the States and Territories undertake fine enforcement and the ATO has no say in the strategy they employ for collection in a particular case. Accordingly, there is a risk that the State or Territory will use a strategy that is inappropriate for the person's position on the Compliance Model.
>
> The majority of fines will be imposed for relatively minor offences such as failure to lodge returns. Whether the use of strategies such as suspension of the person's drivers licence is an appropriate action for improving compliance in these circumstances is open to question. For these type of offences there is a real risk that such intrusive behaviour in relation to collection of the fines may have a negative rather than a positive impact on compliance behaviour. On the other hand, the impact of prosecution is somewhat diminished if the penalties imposed by the courts are not collected.[20]

31.12 ASIC commented that it used state fine enforcement schemes 'to recover fines of up to $500 each for failure to lodge a company's annual return'.[21] They also stated that:

> ASIC supports the availability of a broad range of recovery processes, and enforcement options to facilitate the payment of penalties such as the suspension or cancellation of a vehicle's registration or a driver's licence.[22]

31.13 No submissions specifically dealt with the issue that non-criminal monetary penalties cannot be recovered through these procedures, nor with the enforcement of non-monetary penalties.[23]

Conclusion

31.14 Whilst the suggestion that the levels of fine recovery under the current systems need to be assessed, the way in which such an assessment might be made is a matter outside the scope of the current Inquiry and appears to be an issue to be resolved between the Commonwealth and the various States and Territories. In other respects, the use of state and territory enforcement procedures to recover fines for federal offences does not appear to be generally problematic. The problems identified relate to the efficiency of the procedures in particular states, rather than the overall desirability of utilising state enforcement processes. The ALRC, therefore, sees no need to recommend any significant changes to the present systems in use to recover criminal monetary penalties for contraventions of federal laws.

Recovery of civil pecuniary penalties

31.15 Civil penalties are usually described in legislation as a 'debt due' by the offender 'to the Commonwealth'[24] or an amount payable to the Commonwealth.[25] En-

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20 Ibid, para 2.135–2.136.

21 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 39.

22 Ibid, 39.

23 Although one submission commented that as bankruptcy affects the ability to recover a monetary penalty, there may be reasons to consider the use of non-monetary penalties: M Murray, *Submission CAP 10*, 31 August 2002.

24 See for example: *Customs Act 1901* (Cth), s 243B; *Proceeds of Crime Act 1987* (Cth), s 26; *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth), s 101A;

forcement of civil penalties is by way of civil debt recovery action taken through the normal court process.[26] Legislation may prescribe who has standing to pursue an outstanding civil penalty; for example, s 77 of the *Trade Practices Act 1974* (Cth) (TPA) provides that the ACCC may take civil action for recovery of a penalty imposed under s 76 of that Act.

31.16 The usual process involves seeking an order for a judgment debt from a state or territory court, then using appropriate debt collection procedures through the same courts. Debt collection activities may include recovery from a person's bank accounts, garnisheeing wages or other payments (including social security) and seeking to seize and sell property. Civil recovery of debts provides a more limited array of enforcement options than the State and Territory fine enforcement procedures (described above), which allow, for example, for a driver's licence or motor vehicle registration to be suspended or cancelled in the event of non-payment of the criminal monetary penalty.

Imprisonment in default of payment

31.17 If imprisonment in default of payment of a fine is available under the sentencing laws of the State or Territory in which it is sought to recover the fine, fine defaulters may be imprisoned, even if imprisonment was not a penalty available for the primary offence.[27] Generally, the term of imprisonment will be calculated in accordance with the applicable state or territory sentencing law. However, federal legislation may specify the method of calculation. For example, s 12GC of the *Corporations Act 2001* (Cth) specifies that

> the term of a sentence of imprisonment imposed by an order under a law of a State or Territory applied by section 15A of the *Crimes Act 1914* in respect of a fine shall be calculated at the rate of one day's imprisonment for each $25 of the amount of the fine that is from time to time unpaid.[28]

Corporations Act 2001 (Cth), s 1317G, which provides that a pecuniary penalty is a 'civil debt payable to ASIC on the Commonwealth's behalf'.

25 See, for example, TPA, s 76.

26 Note, however, that recovery of civil penalties may be affected by a party's concurrent liability to pay compensation to third parties. Section 79B of the TPA specifically prefers payment of civil compensation over payment of fines or pecuniary penalties. A similar provision was inserted into the *Australian Securities and Investments Commission Act* (s 12GCA) by the *Financial Services Reform (Consequential Provisions) Act 2001* (Cth).

27 *Crimes Act 1914* (Cth), s 15A(3); *Ducret v Colourshot Pty Ltd* (1981) 35 ALR 503; *Hollis v Clark* (1981) 40 ALR 179; but note *Reardon v Nolan* (1983) 74 FLR 309 in which imprisonment was not ordered by Fisher J of the Federal Court on the basis that: 'If the fixing of a term of imprisonment can in no way assist the enforcement of payment of fines, there would appear to be no ground for imposing it except as an alternative punishment for the main offence. In my opinion because this alternative form of punishment is expressly denied, I must pay regard only to the question of encouraging or aiding the payment of the fine': 313. In one consultation with the ALRC, the observation was made that often what the public perceives to be imprisonment for taxation offences is actually imprisonment for non-payment of the penalty, not the original offence: Australian Taxation Office, *Consultation*, Sydney, 17 September 2002.

28 The same wording is used in s 79A of the TPA. Note, however, that s 79A incorrectly refers to s 18A, rather than s 15A, of the *Crimes Act*.

31.18 Chapter 17 of DP 65 raised the issue of imprisonment for non-payment of civil penalties. Even though there are no federal statutes that now permit imprisonment as a possible civil penalty,[29] non-payment of a civil penalty in some States could lead to a prison term.[30] While the ALRC knows of no case where a person has been imprisoned in recent years for non-payment of a civil penalty, DP 65 noted the comments of McMurdo P in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd*[31] that the possibility of imprisonment for failure or neglect to pay a penalty was one factor leading to the conclusion that Customs prosecutions should be treated as at least quasi-criminal.[32] In DP 65, the ALRC suggested that

> in the interests of fairness, any legislation permitting proceedings in state or territory courts for federal non-criminal regulatory contraventions be amended to indicate that, where civil proceedings have been used, imprisonment not be permitted if there is a default in the payment of any penalty imposed. This would also provide consistency of approach across all States and Territories in relation to federal laws.[33]

31.19 DP 65 foreshadowed a recommendation to this effect in Proposal 17–1.

31.20 The Council of Europe's Recommendation No. R(92) 17 states that:

> custody should be avoided as far as possible in cases of inability to pay, in view of the fact that the original offence was considered insufficiently serious for imprisonment or because such a penalty was inappropriate for other reasons.[34]

Preliminary view

31.21 In DP 65, the ALRC proposed that:

> **Proposal 17–1.** State or territory legislation that permits imprisonment in default of [payment of] any non-criminal penalty should be amended to exclude imprisonment in relation to penalties for federal non-criminal regulatory contraventions.

Consultations and submissions

31.22 The ALRC received strong support for its proposal that there be no place for imprisonment for non-payment of civil penalties.[35] In one consultation it was noted

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29 Until 1957, s 258 of the *Customs Act 1901* (Cth) allowed a court to imprison a person liable to pay a pecuniary penalty pending payment of the penalty or the giving of a security and, until 1982, s 242 of the *Customs Act 1901* (Cth) permitted a court to imprison a person previously convicted of a similar offence.

30 Under legislation which permits imprisonment of debtors who have the means to pay but refuse or neglect to make payments, and of debtors about to leave the jurisdiction ('absconding debtors'). See, for example, *Debtors Act 1871* (WA), s 3; *Supreme Court Act 1995* (Qld), s 94–96. Imprisonment of civil debtors is discussed in B Kercher, B Weule and R Brading, *Consumer Debt Recovery Law* (2002) The Federation Press, Annandale, 130–141.

31 *CEO of Customs v Labrador Liquor Wholesale Pty Ltd* (2001) 162 FLR 230. The ACS was granted special leave to appeal to the High Court in this matter on 26 June 2002.

32 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, para 17.42.

33 Ibid, para 17.43.

34 Council of Europe, *Recommendation No R (92) 17 of the Committee of Ministers to Member States Concerning Consistency in Sentencing: B7ii*, <http://cm.coe.int/ta/rec/1992/92r17.htm>, 1 August 2002.

that imprisonment for failure to pay a fine or penalty was for contempt of court, not the underlying debt.[36] The ALRC accepts that the ability to order imprisonment as a penalty for contempt of court is important and should be maintained. The ALRC acknowledges that it may be difficult to determine when imprisonment is ordered for failure to pay a monetary penalty as opposed to when imprisonment is ordered for contempt of court, as, on one view, any failure to pay a penalty is contempt of court, as it is a failure to comply with an order made by the court (requiring payment of the penalty). The ALRC, therefore, considers that a useful method of distinguishing the two situations may be on the basis that if imprisonment is not available as a primary sentencing option (that is, is not specified in the primary legislation as a possible penalty for the offence), then imprisonment in default of payment of a fine or other monetary penalty should not be available. It is not intended to change the law by removing the possibility of imprisonment for contempt of court.

Conclusion

31.23 The ALRC recognises that there are problems with requiring differential treatment of offenders in State and Territory courts depending on whether they have contravened a State, Territory or federal law.[37] The ALRC has sought to balance the competing issues of equality of treatment (particularly in relation to an issue as fundamental as liberty) with the desire not to unduly complicate the administration of justice. It recommends that the law not permit imprisonment for non-payment of civil penalties for contraventions of Commonwealth legislation except where non-payment amounts to contempt of court.

Recommendation

Recommendation 31–1. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, where imprisonment is not available as a sentencing option for a criminal offence or non-criminal contravention in the legislation creating the criminal offence or non-criminal contravention, imprisonment in default of payment of a fine or other monetary penalty should not be available, unless failure to pay is held by a court to be contempt of court.

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35 Attorney-General's Department, *Submission CAP 14*, 9 September 2002; Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002; M Adams, *Submission CAP 12*, 5 September 2002.

36 Attorney-General's Department, *Consultation*, Canberra, 10 September 2002.

37 Under the *Crimes Act 1914* (Cth), s 15(1AC) there is a special rule for federal offenders. Under some state or territory laws, fine defaulters may have orders for penalties such as community service or imprisonment imposed on the order of a justice of the peace or an administrative agency. Chapter III of the Constitution does not allow the exercise of judicial power, including the making of such orders, except by a court exercising federal judicial power. An amendment to s 15A of the *Crimes Act 1914* (Cth) in 1999 overcame that problem by conferring jurisdiction to make such orders on a court of summary jurisdiction of a State or Territory. See Commonwealth of Australia, *Parliamentary Debates*, House of Representa-

Recovery of administrative penalties

31.24 The ALRC's review of administrative penalties identified two types of financial administrative penalties — quasi-penalties involving the withholding of a financial benefit (for example, social security activity test and administrative breach penalties) and true administrative penalties where the amount is specified in the legislation and is imposed by operation of the legislation (for example, taxation penalties). In the case of monetary quasi-penalties, the regulator controls the entire enforcement process and recovery is facilitated by powers to withhold payments. True administrative penalties take effect as a debt due to the Commonwealth[38] and may be recovered using ordinary debt recovery processes. The ATO noted that it 'makes extensive use of civil courts to recover tax-related liabilities and generally finds this effective'.[39] No other comments were received on this issue, apart from an observation by Michael Murray that recovery of civil and administrative penalties might be affected because the 'issue of recompense may prevail over deterrence'.[40]

Problems with recovery of penalties

31.25 The Terms of Reference specifically require the ALRC to report on issues surrounding the 'enforcement' (or recovery) of civil and administrative penalties. The ALRC's research in this area has not revealed any problems associated with conventional recovery processes that relate particularly to civil and administrative penalties. Indeed, the information available does not allow any real analysis of actions for the recovery of penalties as opposed to the primary actions for the imposition of penalties. Although the speed and cost of litigation are matters of general concern, there is no suggestion that any problems in this regard are in some way specific to civil and administrative penalties.

Preliminary question

31.26 In DP 65, the ALRC asked:

> **Question 11–2.** Does experience indicate that there are any problems with conventional enforcement and recovery processes in relation to civil and administrative penalties, for example, with respect to the speed and cost of litigation? Are any such problems specific to civil and administrative penalties or simply a manifestation of the way in which such procedures operate generally?

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tives, 22 June 1998, 5075 (D Williams (Attorney-General)) and Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 30 June 1999, 7865 (P Slipper).

38 See for example *Taxation Administration Act 1953* (Cth), sch 1, part 4–15, s 255–5 and *Telecommunications Act 1997* (Cth), s 73 and 468.

39 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.144.

40 M Murray, *Submission CAP 10*, 31 August 2002. On this point, note the preference given in s 79B of the TPA and s 12GCA of the ASIC Act to the payment of compensation before the payment of pecuniary penalties: see ch 11, fn 17 in DP 65 and para 31.15, fn 26 of this Report.

Consultations and submissions

31.27 Anecdotal evidence was given in some consultations that fine recovery in some states was difficult and recovery rates low, in particular in New South Wales.[41] This may, however, not be an ongoing issue as the 2000–01 Annual Report of the NSW Attorney General's Department noted a large increase in the amount of fines collected — from $61.6 million in 1999–2000 to $90.1 million in 2000–01.[42] Another submission noted that offenders might have accumulated fines over several years and no action taken other than to continue suspension of the person's driving licence.[43]

31.28 The inconsistency in the levels of recovery of penalties between different states and territories was also raised in several consultations.[44] Agencies consulted noted that collection levels in some States were low — around 30% — and that this was an administrative problem. In two consultations the option of expanding the Federal Magistrates' Service or introducing federal sheriffs to provide for collection of penalties was briefly discussed.[45] No person consulted by the ALRC had any proposal to address the issue of inconsistent collection rates, but two submissions proposed that, to identify any problems, States and Territories should be required to report annually to the Commonwealth on fine recovery rates in respect of federal offences.[46]

> An annual audit of recovery performance should be done to examine what the actual success rate is with the current system.[47]
>
> Attention to financial accountability should require details of actual recovery of penalties, or their proper write off or other such accounting treatment. In the absence of that information, it is difficult to assess whether there are any problems with existing recovery processes. This issue may be of greater significance in the case of civil and administrative penalties where issue of recompense may prevail over deterrence.[48]

31.29 As these proposals would require State and Territory co-operation it is obviously an issue for negotiation by the Commonwealth with each State and Territory and outside the scope of this Inquiry.

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41 Australian Government Solicitor, *Consultation*, Sydney, 27 August 2002; Australian Customs Service, *Consultation*, Canberra, 4 September 2002.

42 Attorney-General's Department (NSW), *Annual Report 2000–2001* (2001), Attorney-General's Department of New South Wales, Sydney, 61. It is not possible to calculate how much of this amount represents fines in relation to federal offences. This recent increase in recoveries in NSW was noted in one consultation: Attorney-General's Department, *Consultation*, Canberra, 10 September 2002. Amounts recovered in 2001–02 are unknown, as at the time of writing, the 2001–02 annual report of the NSW Attorney-General's Department was not available.

43 I Brown, SM, *Submission CAP 6*, 12 June 2002.

44 Australian Government Solicitor, *Consultation*, Sydney, 27 August 2002; Australian Customs Service, *Consultation*, Canberra, 4 September 2002; Australian Taxation Office, *Consultation*, Sydney, 17 September 2002.

45 Australian Government Solicitor, *Consultation*, Sydney, 27 August 2002; Australian Customs Service, *Consultation*, Canberra, 4 September 2002.

46 I Brown, SM, *Submission CAP 6*, 12 June 2002, M Murray, *Submission CAP 10*, 31 August 2002.

47 I Brown, SM, *Submission CAP 6*, 12 June 2002, 2.

48 M Murray, *Submission CAP 10*, 31 August 2002, para 71.

31.30 The ALRC notes that the States and Territories presently recover fines imposed in respect of federal offences on behalf of the Commonwealth without receiving any direct compensation for this activity. If there are particular difficulties with using state and territory fine recovery processes, the Commonwealth has the option of establishing its own fine recovery processes and recovering fines imposed in respect of federal offences using those processes, rather than relying on the co-operation of the States and Territories. This Inquiry has not revealed any problems that would appear to justify pursuing this option.

Speed and cost of litigation

31.31 No comments were received about the impact of the speed and cost of litigation. The ALRC concludes that the speed and cost of litigation do not have a significant impact on the recovery of civil and administrative penalties and, therefore, proposes that no changes to the law are required.

Payment by instalments

31.32 Comments were made in one consultation about the disparity between the general right to request that a fine or monetary penalty imposed by a court be paid by instalments and the lack of a general right to request this option in respect of a monetary administrative penalty or an amount specified as payable in an infringement notice.[49] The National Farmers' Federation proposed that there should be an option for a person to request that payment of a monetary administrative penalty be made by instalments. The ALRC considers that this suggestion has merit as it eliminates the inconsistent treatment of monetary penalties imposed by a court and those that are imposed administratively or arise by operation of legislation. The ALRC notes that some legislation provides this option,[50] but that it is not universally available.[51] The ALRC, therefore, recommends that there should be an option to request that an administrative penalty be paid by instalments. The ALRC has made a similar recommendation with respect to an amount specified as payable in an infringement notice. See Recommendation 12–8(m).

Recommendation

Recommendation 31–2. Legislation under which monetary administrative penalties arise or may be imposed should provide an option for the person penalised to request that the amount be paid in instalments if the amount payable is more than two penalty units.

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49 National Farmers' Federation, *Consultation*, Canberra, 4 September 2002.

50 See for example, in relation to an amount specified as payable in an infringement notice, the *Airports (Building Control) Regulations 1996* (Cth); *Airports (Environment Protection) Regulations 1997* (Cth); *Education Services for Overseas Students Regulations 2001* (Cth) and *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth).

51 For example, it is not an option under the infringement notice scheme in the *Customs Act 1901* (Cth).

32. Insolvency

Contents

Introduction

32.1 The Terms of Reference for this Inquiry require the ALRC to report on the enforcement of administrative and civil penalties, including the effect of insolvency[1] upon a liability to pay an administrative or civil penalty. The key issues identified by the ALRC are the disparity of treatment of civil and criminal penalties in personal bankruptcy and corporate insolvency schemes, the lack of clarity in relation to the status of certain penalties imposed administratively, and whether insolvency proceedings are being misused to improperly avoid payment of penalties.

32.2 A major theme of the ALRC's recommendations in relation to this Inquiry generally is the need for greater consistency — both legislative consistency in the treatment of various aspects of the imposition and recovery of civil and administrative penalties, and regulatory consistency and transparency in relation to the overall parameters within which regulators operate. The need for consistency is pertinent to the area of insolvency. Firstly, the current law accords inconsistent treatment to the recovery of civil and criminal penalties. Secondly, incongruous treatment is given to the recoverability of some civil penalties over others, without any apparent justification. Thirdly, individuals and corporations are treated disparately by virtue of the different outcomes flowing from personal and corporate insolvency.

32.3 An in-depth analysis of all aspects of personal and corporate insolvency is beyond the scope of this chapter, which will examine the particular aspects of personal and corporate insolvency that may affect the ability of a person to pay a monetary penalty or the imposition of such a penalty at all. Further, as will become evident later in the chapter, some of the issues that have arisen are beyond the scope of this Inquiry but warrant further inquiry, preferably within the context of a comprehensive review of insolvency law.

Outline of insolvency legislation

32.4 To understand the issues explored by the ALRC, it is helpful to start by considering the different policy objectives, and the basic structuring, of personal and corporate insolvency schemes.

32.5 Insolvency is regulated at federal level by two distinct but related legislative schemes. Personal insolvency is regulated by the *Bankruptcy Act 1966* (Cth), corporate insolvency by specific provisions in the *Corporations Act 2001* (Cth), which includes reference to both general principles and specific provisions of the *Bankruptcy Act*.

Personal insolvency — *Bankruptcy Act*

32.6 The general purposes of bankruptcy law are to provide a protective and ordered process in the event of financial distress; to facilitate the equal access by credi-

1 In this chapter, the term 'insolvency' is used to refer generally to the inability of legal persons — individuals or corporations — to pay their debts. The term 'bankruptcy' is used to refer to personal insolvency, and 'corporate insolvency' is used to refer to the inability of a corporation to pay its debts.

tors to a debtor's property in order to compensate them for their loss; and to allow individuals who find themselves in financial difficulties to be given a fresh start, freed from the financial obligations that were the subject of the bankruptcy.[2]

32.7 The scheme established by the *Bankruptcy Act* was developed from a long history of laws concerning the treatment of debtors and the consequences for an individual of an inability to pay his or her debts. The two principles underlying modern bankruptcy law are the fair distribution of the property of a bankrupt person to his or her creditors and, once the distribution of property has been made, the discharge of the bankrupt person from further liability to those creditors.

32.8 The basic components of the legislative bankruptcy scheme are these:

- A petition seeking a declaration that a person is bankrupt is filed in court. The petition may be presented by a creditor seeking a sequestration order or by the debtor on his or her own motion.
- A sequestration order or a declaration of bankruptcy is made, at which time the property of the bankrupt vests in the trustee in bankruptcy.
- The available property of the bankrupt is realised and the proceeds distributed by the trustee proportionately to those creditors who are able to prove debts in the bankruptcy, subject to a ranking of priorities.
- The bankrupt is ultimately discharged, either after three years by operation of law or earlier upon acceptance of an application by the bankrupt for early discharge.[3]

Corporate insolvency — *Corporations Act*

32.9 The general policy objective of the insolvency provisions in the *Corporations Act* is to allow for the orderly winding up and ultimate deregistration of insolvent companies — dignified death. The basic components of the legislative corporate insolvency scheme are these:

- If a corporation cannot pay its debts as and when they fall due (that is, the corporation is insolvent),[4] an application may be made to the Court to appoint a liquidator. The application may be made by a creditor, the corporation, a director or member of the corporation, ASIC or a liquidator.[5]
- Once the liquidation has commenced, the directors no longer manage the affairs of the corporation; the liquidator manages them. The liquidator is the only per-

2 A Keay and M Murray, *Insolvency: Personal and Corporate Law and Practice* (4th ed, 2002) Law Book Company, 17–18, cited in M Murray, *Submission CAP 10*, 31 August 2002, 2.

3 See discussion at para 32.117–32.120 below in relation to recent amendments to bankruptcy law which abolish early discharge provisions and strengthen trustee powers to object to the discharge of uncooperative bankrupts after the standard three year period.

4 *Corporations Act 2001* (Cth), s 95A.

5 Ibid, s 459P.

son empowered to dispose of company property. A corporation in liquidation is given some protection — creditors cannot enforce any judgments or orders they may have obtained[6] and other legal proceedings may not be brought or pursued against the corporation without the leave of the court.[7]

- The assets of the corporation are realised and the proceeds distributed by the liquidator proportionately to those creditors who are able to prove debts in the corporate insolvency.[8]

- Once the creditors have been paid, the surplus assets of the corporation (if any) are distributed to its members, also on a proportional basis.[9]

- On completion of the winding up, the corporation is deregistered (ie, ceases to have any legal existence) either after application by the liquidator in an involuntary winding up,[10] or after the lapse of a specified period of time by operation of law in a voluntary winding up.[11]

32.10 People survive insolvency; corporations do not. These contrasting outcomes influence the liability for payment of penalties by an insolvent entity: individual or corporation.

General principles for recovery in insolvency

32.11 The general principle for recovery of debts in insolvency is the same in both personal and corporate insolvency. For a debt to be recoverable it must be 'provable in bankruptcy'[12] in personal insolvency or 'admissible to proof' in corporate insolvency.[13]

Provable debts: bankruptcy

32.12 To prove a debt, the creditor must lodge a proof of debt with the trustee of the bankruptcy in accordance with the procedure set out in s 84 of the *Bankruptcy Act*. The trustee is required to determine whether the proof of debt will be admitted or rejected in accordance with s 102 of the Act. If the debt is admitted, the creditor is entitled to be paid from the proceeds of the bankruptcy. Usually, there are insufficient funds realised in the bankruptcy to pay each creditor in full. In these circumstances, 'all debts proved in a bankruptcy rank equally and, if the proceeds of the property of the bankrupt are insufficient to meet them in full, they shall be paid proportionately'.[14] Creditors are paid

6 Ibid, s 468(4) and 500(1).
7 Ibid, s 471B and 500(2).
8 In certain circumstances, some creditors may be granted priority. Priority payments are specified in ibid, s 556.
9 Subject to any provisions in the constitution of the corporation that may provide for preferential treatments of certain classes of shareholders.
10 *Corporations Act 2001* (Cth), s 480.
11 The statutory period is three months after the completion of the winding up: ibid, s 509.
12 *Bankruptcy Act 1966* (Cth), s 82.
13 *Corporations Act 2001* (Cth), s 553B.
14 *Bankruptcy Act 1966* (Cth), s 108.

on a proportional basis subject to rules about priority payments set out in s 109 of the *Bankruptcy Act*.

32.13 A debt that is not provable can be paid by the debtor out of 'non-divisible' property, which is broadly property that bankruptcy law recognises should not be subject to creditors' claims (for example, compensation for personal injury[15]) and any property bought with such compensation proceeds.

Provable and discharged

32.14 Most civil debts are provable in bankruptcy and discharged through the bankruptcy.

32.15 Section 82(1) of the *Bankruptcy Act* provides:

> Subject to this Division, all debts and liabilities, present or future, certain or contingent, to which a bankrupt was subject at the date of the bankruptcy, or to which he or she may become subject before his or her discharge by reason of an obligation incurred before the date of the bankruptcy, are provable in his or her bankruptcy.

32.16 Section 153(1) of the *Bankruptcy Act* provides:

> Subject to this section where a bankrupt is discharged from a bankruptcy, the discharge operates to release him or her from all debts (including secured debts) provable in the bankruptcy, whether or not, in the case of a secured debt, the secured creditor has surrendered his or her security for the benefit of creditors generally.[16]

32.17 As stated by Michael Murray, the wide category of debts that are provable and discharged reflects the important policy of bankruptcy law of allowing a bankrupt a fresh start on discharge.[17]

Exceptions to the general rules

32.18 Exceptions to the general rule in s 82(1) include, generally, demands for unliquidated damages,[18] penalties or fines imposed by a court in respect of an offence against a law,[19] and certain civil penalties imposed under the *Corporations Act.*[20]

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15 Ibid, s 116(2)(g).

16 Exceptions to the general rule that a provable debt is discharged in bankruptcy are provided for in Ibid, s 153(2) which provides that the discharge of a bankrupt from bankruptcy does not release the bankrupt from a number of liabilities including any liability under a pecuniary penalty order or interstate pecuniary penalty order.

17 M Murray, *Submission CAP 10*, 31 August 2002.

18 *Bankruptcy Act 1966* (Cth), s 82(2). In *Australian Competition & Consumer Commission v Kritharas* (2000) 105 FCR 444, Katz J held that an amount awarded under s 87 of the *Trade Practices Act 1974* (Cth) as compensation in a claim made by the ACCC on behalf of five franchisees who had suffered loss or damage as a result of the conduct of the respondent fell within s 82(2) and was therefore not provable in the bankruptcy. Claims for damages under s 82 of the *Trade Practices Act* have also been held to be within the scope of s 82(2) of the *Bankruptcy Act*: see *Fielding v Vagrand Pty Limited (In liquidation)* (1992) 39 FCR 251; *Reid v Interarch Australia Pty Ltd* [2000] FCA 1328; and *CCA Systems Pty Ltd v Communications & Peripherals (Australia) Pty Ltd* (1989) 15 ACLR 720, in which the NSW Supreme Court considered the state equivalent of the *Trade Practices Act*.

19 *Bankruptcy Act 1966* (Cth), s 82(3).

32.19 An exception to the general rule specified in s 153(1) of the *Bankruptcy Act* is that

> the discharge of a bankrupt from bankruptcy does not release the bankrupt from a debt incurred by means of fraud or a fraudulent breach of trust to which he or she was a party or a debt of which he or she has obtained forbearance by fraud.[21]

32.20 In *Tarea Management (North Shore) Pty Ltd (In liq) v Glass*,[22] the Federal Court held that compensation ordered to be paid by a director of a company in relation to misappropriation of company cheques to the director's own purposes was a debt which survived discharge of bankruptcy as it was a debt incurred by means of fraud or a fraudulent breach of trust.[23] Murray cites overpayment of a social security benefit resulting from a failure to disclose income as an example of a debt incurred by fraud.[24] However, Murray has stated:

> Debts incurred by fraud are difficult to define and the phrase is unclear. Also, a creditor would need a judgment in respect of such a debt to found a bankruptcy notice; in that respect, it appears to be that once such debt is the subject of civil judgment, the fraud 'merges' with the judgment and ceases to be of effect; hence such a debt subject to judgment may be discharged by bankruptcy.[25]

Provable and not discharged at all

32.21 Pecuniary penalty orders under the *Proceeds of Crime Act 1987* (Cth) are provable but not discharged.[26] See discussion of this exception at para 32.83–32.91 below.

Provable and not discharged except by leave

32.22 Debts under a maintenance agreement or order under the *Family Law Act 1975* (Cth) are provable but are not discharged except by leave of the court.

32.23 Section 153(2A) of the *Bankruptcy Act* provides that:

> The Court may order that the discharge of a bankrupt from bankruptcy shall operate to release the bankrupt, to such extent and subject to such conditions as the Court thinks fit, from liability to pay arrears due under a maintenance agreement or maintenance order.

32.24 Section 153(2)(c) of the *Bankruptcy Act* provides that the discharge of a bankrupt from bankruptcy does not release the bankrupt from any liability under a mainte-

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20 Ibid, s 82(3AA).
21 Ibid, s 153(2)(b).
22 *Tarea Management (North Shore) Pty Ltd (In liq) v Glass* (1991) 28 FCR 93.
23 Ibid, para 22. Note, however, that the Court stayed proceedings for enforcement of payment of the compensation by exercising its discretion under the *Bankruptcy Act 1966* (Cth), s 60(1)(b).
24 M Murray, 'Bankruptcy's Impact on "Innocent" Parties' (2000) 10(2) *New Directions in Bankruptcy* 30.
25 M Murray, *Submission CAP 10*, 31 August 2002, 17.
26 *Bankruptcy Act 1966* (Cth), s 82(3A) and s 153(2)(d).

nance agreement or maintenance order; subject to any order made by the court under s 153(2A).

Not provable and hence not discharged

32.25 Penalties or fines imposed by a court in respect of an offence against the law are not provable and hence are not discharged by the bankruptcy, with some exceptions. Liability to pay these criminal fines survives the bankruptcy. See discussion of this exception at para 32.31–32.36. Certain civil penalties imposed under the *Corporations Act* are also not provable and hence are not discharged. This exception is discussed at para 32.38–32.40.

32.26 Legislation expressly provides that some other debts with no penal qualities are not provable in bankruptcy.[27] These provisions preserve the right to pursue recovery of overpayment of benefits under the social security system irrespective of bankruptcy by providing that the 'right of the Commonwealth or of the corporation to bring an action or other proceeding against the person in respect of the debt is not affected by the bankruptcy'.[28] However, Murray has stated that provisions such as s 12ZW of the *Student Assistance Act 1973* (Cth) and s 1061ZZFR of the *Social Security Act 1991* (Cth) remain subject to the limitations of civil penalty orders in that they may disentitle the Commonwealth to bring bankruptcy proceedings to recover the debt, or retrieve assets through bankruptcy.[29]

Provable debts: corporate insolvency

32.27 Section 553 of the *Corporations Act* specifies the debts and claims that will be admissible to proof against a company in a winding up. Section 553(1) provides:

> Subject to this Division, in every winding up, all debts payable by, and all claims against, the company (present or future, certain or contingent, ascertained or sounding only in damages), being debts or claims the circumstances giving rise to which occurred before the relevant date, are admissible to proof against the company.

32.28 This wording is similar to s 82(1) of the *Bankruptcy Act*. Section 553(2) expressly provides that an amount payable under an order made under s 91 of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) is admissible to proof against the company. Section 91 of the ASIC Act allows ASIC to make an order for payment of its expenses of investigating a contravention of the legislation. The right to recover the costs of an investigation is discussed in chapter 33.

Exceptions to the general rules about provable debts

32.29 Special conditions apply to the admissibility of debts owed to members and shareholders of corporations.[30] Penalties or fines imposed by a court in respect of an

27 *Social Security Act 1991* (Cth), s 1061ZZFR; *Student Assistance Act 1973* (Cth), s 12ZW.
28 Ibid, s 1061ZZFR(2); *Student Assistance Act 1973* (Cth), s 12ZW(3).
29 M Murray, *Submission CAP 10*, 31 August 2002, 17.
30 *Corporations Act 2001* (Cth), s 553A, 553AA.

offence against the law are generally not provable in insolvency[31] and will therefore be extinguished if the insolvency results in the winding up and deregistration of the corporation. What is meant by 'penalties or fines imposed by a court' is considered below.[32]

32.30 The recovery of certain classes of pecuniary penalties as part of the insolvency process is expressly protected by statute.[33] The special treatment given to penalties relating to recovery or confiscation of the proceeds of crime is outlined at para 32.83–32.91.

Recovery of criminal penalties

32.31 In most cases, 'penalties or fines imposed by a court in respect of an offence against a law, whether a law of the Commonwealth or not, are not provable in bankruptcy'[34] or in a corporate insolvency.[35]

32.32 Use of the term 'offence' limits this exemption to criminal offences.[36] In *Re Curtis*,[37] Stanley J of the Queensland Supreme Court discussed the different treatment of criminal and civil penalties under bankruptcy law and held that monetary penalties awarded in civil proceedings were provable debts (even though imprisonment in default of payment of the penalty was available). He held that imprisonment did not extinguish the right to seek payment of the monetary penalty, which was therefore a provable debt in the bankruptcy.

32.33 Punishment has also been considered to be an essential element of the 'penalties' referred to in s 82(3) of the *Bankruptcy Act*. Costs awarded in criminal proceedings have been accepted as penalties on the basis that they are 'but components of a total sum which has a punitive character'.[38]

32.34 This restriction of s 82(3) to criminal penalties is significant as it gives special status to criminal penalties compared to civil and administrative penalties.

32.35 The policy underlying the non-provability of criminal penalties was explained by the ALRC in its report, ALRC 45, *General Insolvency*, as follows:

> The basic policy underlying this position is that a fine is imposed for a breach of the law and should be paid in full, not simply at the proportionate rate which would apply if it ranked equally with all other debts in an insolvency.[39]

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31 Ibid, s 553B(1).
32 See para 32.31–32.36, 32.48–32.55 and 32.64–32.65.
33 *Corporations Act 2001* (Cth), s 553B(2).
34 *Bankruptcy Act 1966* (Cth), s 82(3).
35 *Corporations Act 2001* (Cth), s 553B.
36 *He Kaw Teh v The Queen* (1985) 157 CLR 523; *Cheng v The Queen* (2000) 175 ALR 338. See also the *Criminal Code,* s 2.1.
37 *Re Curtis; Ex parte Deputy Commissioner of Taxation* [1951] QSR 246.
38 See *Re Higgins; Ex parte Higgins* (1984) 4 FCR 533, 537 cited with approval in *Marshall v Western Australia* (1998) 84 FCR 363, 366.
39 Australian Law Reform Commission, *General Insolvency Inquiry*, ALRC 45 (1988), Canberra, para 787.

32.36 Murray also notes a secondary policy aim:

> The reason that severe or criminal fines or penalties are not generally provable in bankruptcy is that ordinary creditors of the bankrupt should not be prejudiced in diminution of their dividend by the criminal or quasi-criminal conduct of the bankrupt. The same applies in company insolvency under section 553B of the *Corporations Law*, although there, the penalty against the company is foregone altogether, as the company then suffers ultimate deregistration after liquidation. But a bankrupt 'survives' bankruptcy to live on, and thus a further reason for the policy in bankruptcy is that a penalty is seen as a matter of personal responsibility that the bankrupt should retain for the sake of society's need for retribution, compensation and deterrence, as with any criminal conduct.[40]

Recovery of civil penalties

32.37 Monetary penalties imposed by a court in respect of non-criminal contraventions will generally be provable in insolvency (as civil debts). If not met out of the distribution of the proceeds of the insolvency, they are extinguished on discharge of the bankruptcy in the case of an individual, or become unrecoverable once the corporation has been wound up and deregistered in the case of corporate insolvency.

Exceptions for certain civil penalties

32.38 Whilst civil penalties are generally provable in bankruptcy, the law accords special treatment to certain types of civil penalties without providing transparent justification. One exception to the general rule is that 'an order made under section 1317G of the *Corporations Act* is not provable in bankruptcy'.[41] Section 1317G is a civil penalty provision which provides:

> (1) A Court may order a person to pay the Commonwealth a pecuniary penalty of up to $200,000 if:
>
> (a) a declaration of contravention by the person has been made under section 1317E; and
> (b) the contravention:
> (i) materially prejudices the interests of the corporation or scheme, or its members; or
> (ii) materially prejudices the corporation's ability to pay its creditors; or
> (iii) is serious.
>
> (2) The penalty is a civil debt payable to ASIC on the Commonwealth's behalf. ASIC or the Commonwealth may enforce the order as if it were an order made in civil proceedings against the person to recover a debt due by the person. The debt arising from the order is taken to be a judgment debt.

32.39 Section 1317E of the *Corporations Act* allows the Court to make a declaration that a person has breached a civil penalty provision of that Act. Civil penalty provi-

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40 M Murray, 'Fines and Penalties — Provable in Bankruptcy?' (2000) 10(3) *New Directions in Bankruptcy* 13, 13–14.

41 *Bankruptcy Act 1966* (Cth), s 82(3AA). *Corporations Act 2001* (Cth), s 1317G refers to pecuniary penalty orders made by a court in respect of certain contraventions of the Act specified in s 1317E.

sions include provisions regulating directors' duties, insider trading, continuous disclosure and insolvency. A breach declaration is necessary before ASIC can seek a pecuniary penalty under s 1317G. A director cannot be indemnified for liability arising under s 1317G — the director will be personally liable.

32.40 The effect of the above exception is that the individual's liability to pay the pecuniary penalty survives the discharge of bankruptcy. No explanation is available for the special treatment given to these types of pecuniary penalties. Section 82(3AA) was inserted into the *Bankruptcy Act* by the *Corporate Law Reform Act 1992* (Cth). The reason for the amendment was not stated in the Explanatory Memorandum to the Bill or in the parliamentary debates.

Recovery of penalties imposed administratively

32.41 Criminal penalties that are not imposed by a court are not covered by s 82(3) of the *Bankruptcy Act* or s 553B of the *Corporations Act*.[42]

32.42 The ability to recover an administratively imposed penalty from an insolvent entity depends on two issues:

- whether it can be characterised as a penalty imposed by a court in respect of an offence; and
- if it cannot, whether it can be characterised as a civil debt.

32.43 If it satisfies the first test, it will not be a provable debt in insolvency; it cannot be recovered as part of the insolvency. In respect of individuals, the right to recover the penalty will be unaffected by the bankruptcy. In respect of corporations, the right to recover the penalty will be nugatory as the corporation ceases to exist upon conclusion of the insolvency.[43]

32.44 If it satisfies the second test, it will be a provable debt in insolvency and may be recovered as part of the insolvency, but the right to recovery (and the amount actually recovered) will be limited by the amount available for distribution to creditors.

32.45 Murray notes the general rule:

> On bankruptcy, if a person has unpaid fines that were not imposed by a court, those fines will be provable in, and extinguished by, the bankruptcy. If the fines have been imposed by a court, either initially or in default of payment, then these will not be provable and will not be extinguished.[44]

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42 At federal level, criminal fines may only be imposed by a court because Chapter III of the Constitution prohibits non-judicial officers from imposing punishment. The same restrictions do not apply at state and territory level, where many criminal penalties are imposed administratively, often by way of infringement notices (eg, parking and traffic fines).

43 See para 32.106–32.109, however, for a discussion of reinstatement of deregistered corporations for the purposes of civil penalty proceedings.

44 M Murray, 'Fines and Penalties — Provable in Bankruptcy?' (2000) 10(3) *New Directions in Bankruptcy* 13, 13.

32.46 Grant Webster argues that PERIN court fines are likely to be provable in bankruptcy.[45] He states that 'there is certainly scope for doubting that an administratively (in contrast to judicially) imposed "fine" is a "penalty or fine" for the purposes of s 82(3)'.[46] Webster notes that 'PERIN Court fines are prescribed for all cases, in advance, by the legislation creating the offence. In many cases the offence, and the penalty, is created by subordinate legislation, in other words, administratively'.[47]

32.47 Murray contends that liability to pay 'on-the-spot' fines (that is, those issued under infringement notices such as PERIN fines) will be subject to, and extinguished by, the bankruptcy.[48] If this is correct, a broad range of criminal penalties imposed administratively (either by government agencies or by operation of the relevant legislation) will be adversely affected by the bankruptcy of the person penalised.

When is a penalty or fine imposed by a court in respect of an offence?

32.48 Webster argues that it is important to maintain a distinction between fines imposed by a court as a sentencing order and PERIN fines.[49] He notes that before a fine may be imposed as a sentencing order, there must have been a finding as to the guilt of the person to be fined and relevant sentencing guidelines must be taken into account when determining the quantum of the penalty to be imposed. In contrast, fines imposed in infringement notices, such as PERIN fines, are prescribed in advance by legislation. Webster considers that this distinction between the judicial and administrative derivation of the penalty is a critical determinant of its status as a 'fine imposed by a court' for the purposes of insolvency proceedings.

32.49 Webster also considers that PERIN fines fail to meet the required tests under the *Bankruptcy Act* because the person fined under an infringement notice is not taken to have been convicted of an offence.

> PERIN court fines may be described as liability *sui generis* imposed by state legislation. They are not fines in the generally accepted sense of being imposed by a sentencing order of a court exercising judicial consideration.[50]

32.50 Webster also argues that the deeming of PERIN fines as orders that have the same effect and status as orders of the Magistrates' Court is not sufficient to satisfy the requirements of s 82(3) of the *Bankruptcy Act*:

> I believe the better view is that the exclusion of a liability from being proved in bankruptcy pursuant to s 82(3) requires the liability to be a fine or penalty imposed by a judicial body exercising judicial authority and discretion.[51]

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45 G Webster, 'PERIN Court Fines: Provable in Bankruptcy?' (1998) 72(7) *Law Institute Journal* 53. The PERIN scheme in Victoria is described in ch 12.
46 Ibid, 54.
47 Ibid, 54.
48 M Murray, 'Bankruptcy's Impact on "Innocent" Parties' (2000) 10(2) *New Directions in Bankruptcy* 30, 30.
49 G Webster, 'PERIN Court Fines: Provable in Bankruptcy?' (1998) 72(7) *Law Institute Journal* 53.
50 Ibid, 55.
51 Ibid, 55.

32.51 In *Mansfield v State of Victoria*,[52] Ms Mansfield, a bankrupt, failed to pay outstanding penalties and costs amounting to $14,755.30 in respect of 72 parking infringement notices. She contended that the amounts payable by her were provable debts under s 82(1) of the *Bankruptcy Act* and, in accordance with the scheme established by the Act, her debts would be discharged when she was discharged from bankruptcy. The State of Victoria contended that the amounts owing in respect of the parking infringements were penalties imposed by a court in respect of offences against state law and therefore not provable debts in accordance with s 82(3).

32.52 Merkel J found that fines imposed under Victoria's PERIN scheme were provable debts in bankruptcy and that they had not been *imposed* by a court. He stated that a court order for payment of an existing statutory debt is not an order 'imposing' a liability for a penalty or fine for the purpose of s 82(3) of the *Bankruptcy Act*, or extinguishing the previously existing statutory liability in respect of those fines and penalties. The orders were more appropriately to be regarded as orders enforcing payment of a pre-existing liability.[53]

32.53 Ms Mansfield contended that the PERIN process was essentially administrative and did not involve any judicial consideration as to whether an offence had been committed. Merkel J said that those contentions could be accepted without leading to the conclusion that there was no 'court order' in relation to the penalty. He observed:

> It is plain from s 99 of the *Magistrates Court Act* and Sch 7 to that Act that, for the purpose of the PERIN enforcement procedure, the Magistrates Court is to be constituted, by a registrar for the purpose of making an enforcement order … Thus, if and insofar as a penalty is 'imposed' by an enforcement order the imposition is 'by a court' for the purpose of s 82(3) of the *Bankruptcy Act.*[54]

32.54 He noted that the PERIN procedure was a means of *enforcing* payment of the debts rather than *ordering* their payment. His Honour rejected the State of Victoria's argument that the liability to pay parking infringement penalties only arises upon a court order being made, saying:

> If there is no liability to pay a penalty prior to a court order being made then it would appear to follow that payment of the penalty before an order is made is a payment in the nature of a gratuity. There is nothing in the statutory scheme, or the terms of an infringement notice or a courtesy letter served pursuant to the scheme, that supports the respondent's argument. The liability to pay the penalty is contingent upon the owner not electing to have the matter dealt with by a court or not filing a statutory declaration identifying the driver.[55]

32.55 Murray has submitted that the decision in *Mansfield v State of Victoria* is correct.[56]

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52 *Mansfield v State of Victoria* [2002] FCA 1175.
53 Ibid, para 34–35.
54 Ibid, para 29.
55 Ibid, para 22.
56 M Murray, *Submission CAP 21*, 9 October 2002.

Does an administrative penalty create a civil debt?

32.56 The debts considered by Murray and Webster, and by Merkel J in *Mansfield v State of Victoria*,[57] are penalties imposed under infringement notice schemes at state level in respect of criminal offences. The practical implications at federal level are likely to be far less than at state level as infringement notices under federal legislation do not take effect as a penalty imposed by a court or as a debt due to the Commonwealth. The status of an amount specified as payable in an infringement notice at federal level is considered in detail in chapter 12. Other administrative penalties, such as taxation penalties and social security overpayments, take effect as a debt due to the Commonwealth[58] and will therefore be treated in the same way as other debts (that is, they will be debts provable in the insolvency).

Consultations and submissions

32.57 In DP 65 the ALRC asked whether the status of administrative penalties needed to be clarified in relation to personal and corporate insolvency proceedings and, if so, what status they should be given.[59]

32.58 ASIC submitted that administrative penalties should be given the same status as criminal and civil penalties,[60] and that the law would be simpler and more consistent if each form of penalty were treated in the same manner. ASIC saw no grounds for distinguishing the position of administrative penalties from penalties imposed by a court.[61]

32.59 The ATO stated that administrative penalties imposed by taxation laws are debts due to the Commonwealth and become provable debts in an insolvency administration. It submitted that this was the appropriate status for such penalties. However, the ATO noted that a policy rationale would have to be developed to draw a legislative distinction between 'primary tax', which is a provable debt, and 'additional tax', which is not provable and outlives the insolvency process.[62]

32.60 Professor Michael Adams submitted that some clarification of the status of administrative penalties was desirable. He said that:

> Generally speaking, administrative penalties should be allowed no better claim against the residual assets of an insolvent person (whether corporate or natural) than any creditor or employee to whom the person may owe payments.[63]

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57 *Mansfield v State of Victoria* [2002] FCA 1175.

58 *Taxation Administration Act 1953* (Cth), sch 1, s 255-5; *Social Security Act 1991* (Cth), s 1223, 1229A.

59 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Question 14–2.

60 ASIC's submission in relation to the treatment of civil and criminal penalties is discussed at para 32.138–32.139 below.

61 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 43.

62 Australian Taxation Office, *Submission CAP 16*, 17 September 2002.

63 M Adams, *Submission CAP 12*, 5 September 2002.

32.61 Murray said that he did not express any view in relation to this particular question.[64] However, he did submit that the wording of s 82 was not clear and that the meaning of the words 'penalty or fine imposed by a court' should not be left unclear. He recognised that the difficulty in providing clarity was that while Commonwealth legislation may seek to impose clarity through common wording, state legislation, where most penal law is found, 'often goes its own way'.[65]

32.62 The Insolvency and Trustee Service Australia expressed the view that any proposed amendment to the *Bankruptcy Act* should serve to clarify exactly which criminal penalties are subject to s 82(3).[66]

Conclusion

32.63 In view of the limited number of submissions received in relation to the status of administrative penalties generally, the ALRC makes no recommendation in relation to the general status of administrative penalties. For example, apart from the submission of the ATO referred to above, the treatment of taxation penalties and social security overpayments as debts due to the Commonwealth was not the subject of any remarks in consultations and submissions, adverse or otherwise.

32.64 However, whilst the ALRC makes no general recommendation in relation to the status of administrative penalties, it believes there is a need for clarification of the meaning of 'imposed by a court' as referred to in s 82(3) of the *Bankruptcy Act* and s 553B of the *Corporations Act*. This phrase should be defined with greater precision. In coming to this view, the ALRC has had particular regard to the views expressed by Webster which are discussed above, and to Merkel J's comments in *Mansfield v State of Victoria* in relation to the construction of the word 'impose' for the purposes of s 82(3). The ALRC does not agree with ASIC's submission that there is no basis for distinguishing penalties imposed administratively from those imposed by a court. There should be, as argued by Webster, a distinction between penalties imposed following the exercise of judicial discretion by a court, and penalties imposed mechanistically by the operation of legislation. In this regard, the ALRC recommends that the *Bankruptcy Act* and the *Corporations Act* should be amended to make it clear that the reference to criminal penalties as 'penalties or fines imposed by a court in respect of an offence against the law' is limited to penalties which are imposed as a sentencing order of a court following a finding as to guilt of the person to be fined, and excludes enforcement of a pre-existing statutory liability, even where enforcement is by order of a court.

32.65 The phrase 'imposed by a court' referred to in s 82(3) of the *Bankruptcy Act* and s 553B of the *Corporations Act* appears in the context of providing that such criminal penalties are not provable in personal bankruptcy or corporate insolvency. As

64 M Murray, *Submission CAP 10*, 31 August 2002, 18. However, in another submission he did express the view that fines and penalties not imposed by a court should be provable but not discharged, unless by court order: M Murray, *Submission CAP 21*, 9 October 2002.

65 M Murray, *Submission CAP 10*, 31 August 2002, 10.

66 Insolvency and Trustee Service Australia, *Submission CAP 13*, 29 August 2002, 2.

will become apparent later in this chapter, the ALRC has made recommendations to alter the status of these penalties: see Recommendation 32–2. Accordingly, the ALRC's recommendation to clarify the definition of 'imposed by a court' provided in these sections is to be read subject to its recommendation as to how such criminal penalties are to be treated in personal bankruptcy and corporate insolvency.

Recommendation

Recommendation 32–1. Subject to Recommendation 32–2, the *Bankruptcy Act 1966* (Cth) and the *Corporations Act 2001* (Cth) should be amended to make it clear that the reference to criminal penalties in the *Bankruptcy Act 1966* (Cth), s 82(3) and the *Corporations Act 2001* (Cth), s 553B as 'penalties or fines imposed by a court in respect of an offence against a law' is limited to penalties which are imposed as a sentencing order of a court following a finding as to guilt of the person to be fined and excludes the enforcement by court order of pre-existing statutory liabilities.

Different treatment for individuals and corporations

32.66 The right to recover a criminal fine or criminal penalty imposed on an individual will be unaffected by the bankruptcy of the person penalised and will survive discharge of the bankruptcy. Where the criminal fine or penalty has been imposed on a corporation, however, insolvency proceedings will dramatically affect the ability to recover the penalty as the ultimate aim of corporate insolvency is to wind up the corporation. A penalty cannot be pursued against or paid by an entity that has ceased to exist.

32.67 As penalties or fines imposed by a court are not provable in bankruptcy or insolvency, what then is the effect of the insolvency of the bankrupt person on his or her liability to pay the penalty? Murray argues that these 'bankrupts remain personally liable for these debts during and after bankruptcy'.[67] Whilst this may be feasible in respect of penalties imposed on an individual, it does not address the situation where it is a corporation that is liable to pay the penalty and that corporation has been wound up as part of the insolvency proceedings.

32.68 In its report ALRC 45, *General Insolvency Inquiry*,[68] the ALRC recommended that 'fines imposed before or after the commencement of a winding up with respect to offences committed before the commencement of the winding up should be admissible in a corporate insolvency'.[69] The ALRC stated:

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67 M Murray, 'Bankruptcy's Impact on "Innocent" Parties' (2000) 10(2) *New Directions in Bankruptcy* 30, 30. See also discussion of s 12ZW of the *Student and Youth Assistance Act 1973* (Cth) in *Deputy Commissioner of Taxation v Kavich* (1996) 68 FCR 519, 528 (Lee J), where it is noted that 'the right of the Commonwealth to bring a proceeding against the student in respect of the debt is not affected by that bankruptcy'.

68 Australian Law Reform Commission, *General Insolvency Inquiry*, ALRC 45 (1988), Canberra.

69 Ibid, para 790.

> The penalty or fine should be claimable. Once the company is dissolved, there is no longer any entity against which the penalty may be enforced.[70]

32.69 The rationale for this recommendation was stated in the Explanatory Memorandum to the Corporate Law Reform Bill 1992 (Cth) to be 'that in relation to a corporate insolvency a fine should be admissible because, after the company has been wound up, there is no-one against whom the fine may be claimed and the fine is a claim by the community as a whole'.[71]

32.70 This recommendation was not adopted in the revisions made to corporations laws subsequent to the ALRC's inquiry.[72] The reason for not adopting the recommendation was stated to be

> that although the fine may be a claim by the community, fines are by their nature generally intended to be a deterrent. In the case of a corporate insolvency, it is difficult to justify 'penalising' creditors for a wrong committed by the company.[73]

32.71 Whether directors of an insolvent corporation should be held individually liable for penalties outstanding against a corporation after its deregistration was an issue raised for discussion in DP 65.[74] The inconsistency between the effect of bankruptcy and corporate insolvency is not adequately explained by the policy objectives of each type of insolvency. If the policy aim of bankruptcy is to allow an individual to make a fresh start, free from debt, then to continue to hold that individual liable for payment of monetary penalties is inconsistent with that policy aim. If the absolute removal of liability for payment of monetary penalties by a corporation (or its officers) after corporate insolvency continues to be protected, then there is ongoing incentive for corporations faced with liability for large monetary penalties to go into voluntary liquidation and an incentive for regulators to take action against individuals rather than corporations. The potential use of serial insolvency to avoid penalties is discussed further at para 32.110–32.135.

32.72 One argument against any attempt to impose liability on individual directors for payment of penalties imposed on the corporation is that, in many circumstances, the regulator which sought to impose the penalty had a discretion to seek orders against individuals in addition to the corporation at the time that the contravention proceedings were brought.[75] If the regulator decided not to seek penalties against individual directors, there may be an issue as to the fairness or reasonableness of attempting to seek to impose sanctions at a later date purely in response to the corporate insolvency.

32.73 Support for seeking to impose liability on directors was expressed in one consultation:

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70 Ibid, para 787.

71 Hansard, *Parliamentary Debates*, House of Representatives, (Mr Duffy); Explanatory Memorandum to the Corporate Law Reform Bill 1992 (Cth), para 854, 170.

72 Most of the ALRC's recommendations were implemented by the Corporate Law Reform Bill 1992 (Cth).

73 Explanatory Memorandum to the Corporate Law Reform Bill 1992 (Cth), para 854, 170.

74 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, para 14.45.

75 See for example, Part IV of the *Trade Practices Act*.

> In cases where companies are dead or not an on-going concern, there is no point imposing penalties as this only affects liquidators, creditors and shareholders. With dead companies, the regulator needs to bring responsibility home to the individuals eg, director's duties. In cases like One.Tel and HIH, the companies are in liquidation so you go after the director.[76]

32.74 Murray notes that it may often be the case that directors are sued separately in any event, along with their insolvent company. He stated that to the extent that there is no separate liability, there may be a case for stating that

> penalties are in a particular category, that they should be provable; and to the extent that they are not paid from the liquidation, the directors should pay them, or that there be a discretion only exercisable by a court, to excuse the directors.[77]

32.75 No other comments were made in consultation, or submissions received in relation to the issue of holding directors personally liable for penalties of a deregistered corporation. Accordingly, the ALRC is not in a position to make any recommendation on this issue, save to suggest that, along with other issues identified later in this chapter, it should be subject to further inquiry in the context of a comprehensive review of insolvency law. In particular, prior to the making of any recommendations in this regard, the views of company directors of corporations of varying sizes should be sought.

32.76 The difficulty in obtaining meaningful penalties where both the corporation and the directors are insolvent was considered by Dr George Gilligan, Helen Bird and Professor Ian Ramsay in their study of the use of civil penalty provisions by ASIC. They noted ASIC staff comments that:

> Civil penalties offer little if the person alleged to have breached a civil penalty provision is bankrupt. This is because the two civil penalty sanctions are a pecuniary penalty and/or a management banning order. Imposing a pecuniary penalty upon a person who is already bankrupt and who may be assumed unable to pay the penalty serves no purpose. In addition, a person who is bankrupt is automatically prohibited from managing a corporation under s 229 of the *Corporations Law* so that resort to a civil penalty action is not needed to achieve this objective.[78]

32.77 The changes made to the *Bankruptcy Act* to ensure that bankruptcy is not misused to avoid payment of selected debts may address this issue in part as they allow the Court to set aside a bankruptcy that is an 'abuse of process'. These changes are addressed in the discussion at para 32.117–32.120 below.

32.78 There is merit in courts giving consideration, in appropriate circumstances, to imposing non-monetary penalties on individuals, as opposed to monetary penalties. As stated by Murray, bankruptcy would have no effect on non-monetary penalties, such as

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76 M Gething, *Consultation*, Sydney, 12 June 2001.

77 M Murray, *Submission CAP 10*, 31 August 2002, 14.

78 G Gilligan, H Bird and I Ramsay, 'Civil Penalties and the Enforcement of Directors' Duties' (1999) 22(2) *University of New South Wales Law Journal* 417, 438. The study noted that management banning orders were the preferred enforcement action by ASIC 'with phoenix companies because "they take the offenders out of the action"': 449.

community service orders or attendance at training programmes.[79] Non-monetary penalties are discussed in chapter 27.

Distinction between criminal, civil and administrative penalties

32.79 Criminal penalties (with the exception of penalties imposed to ensure forfeiture of the proceeds of crime) are not debts provable in insolvency — they survive bankruptcy and the individual remains liable for their payment after discharge of the bankruptcy. They do not survive corporate insolvency in any meaningful way as the penalised entity ceases to exist upon the winding up (and consequent deregistration) of the corporation.

32.80 Civil penalties (with the exception of specified *Corporations Act* penalties) are debts provable in insolvency but do not enjoy any preferential status — they will be paid in accordance with the general distribution of assets made to unsecured creditors of the insolvent entity and, if not paid in full, will be extinguished by discharge of the personal bankruptcy or by deregistration of the penalised corporation.

32.81 Administrative penalties will be debts provable in insolvency if they take effect as a 'debt due' to the Commonwealth. If they do not create any such liability (and at federal level, most appear not to) they will not be provable debts recoverable as part of the insolvency. As at federal level they are not penalties imposed by a court as a sentencing order after a finding of liability has been made, they will also not be recoverable after the insolvency.

32.82 The different status given in insolvency to penalties imposed for criminal offences compared with civil penalties highlights again the need to ensure that there is a clear distinction made in legislation between liability for a criminal offence as opposed to a non-criminal contravention and between the penalties imposed. See the Statement of Principle in chapter 2 at para 2.50 and the discussion in chapter 4 in relation to the distinction between criminal and non-criminal penalty actions. However, the different treatment of civil and criminal penalties in insolvency is itself the subject of a recommendation in this Report. See Recommendation 32–2 below.

Special treatment for certain penalties

Proceeds of crime

32.83 As stated above, pecuniary penalty orders under the *Proceeds of Crime Act 1987* (Cth) are provable but not discharged.

32.84 The *Bankruptcy Act* expressly creates a right to enforce a remedy against a bankrupt, or any property of the bankrupt that has not vested in the trustee of the estate of the bankrupt, for payment of certain pecuniary penalties. Section 58(5A) of the *Bankruptcy Act* provides that:

79 M Murray, *Submission CAP 10*, 31 August 2002, 15.

> Nothing in this section shall be taken to prevent a creditor from enforcing any remedy against a bankrupt, or against any property of a bankrupt that is not vested in the trustee of the bankrupt, in respect of any liability of the bankrupt under:
>
> (a) a maintenance agreement or maintenance order (whether entered into or made, as the case may be, before or after the commencement of this subsection); or
>
> (b) a pecuniary penalty order or interstate pecuniary penalty order.

32.85 A 'pecuniary penalty order' and an 'interstate pecuniary penalty order' are defined in s 5 of the *Bankruptcy Act* to have 'the same meaning as in the *Proceeds of Crime Act 1987*'. The *Proceeds of Crime Act 1987* (Cth) defines a pecuniary penalty as an amount payable to the Commonwealth by way of penalty calculated by reference to 'benefits derived by a person from the commission of an offence'.[80] In general, the penalty amount will equal the value of the benefit,[81] subject to any reduction on account of property forfeited, tax paid or any other fine, restitution, compensation or damages payable in relation to the offence.[82] A relevant pecuniary penalty order is limited to one made by a court under s 26 of the *Proceeds of Crime Act*.

32.86 An 'interstate pecuniary penalty order' is defined in s 4 of the *Proceeds of Crime Act* as 'an order that is made under a corresponding law and is of a kind declared by the regulations to be within this definition'. The *Proceeds of Crime Regulations 1987* (Cth) refer to orders or declarations made under numerous State and Territory Acts directed at confiscation of criminal assets and profits.[83]

32.87 Section 58(5A) of the *Bankruptcy Act* and associated provisions were inserted by the *Proceeds of Crime (Miscellaneous Amendments) Act 1987* (Cth). The purpose of expressly providing that pecuniary penalty orders relating to confiscation of the proceeds of crime be provable in bankruptcy was stated in the second reading speech to be

> to ensure that artificial devices cannot be used to defeat the operation of the legislation. One such artificial device which has the potential for defeating the operation of pecuniary penalty orders made against offenders is the mechanism of bankruptcy. During the currency of the bankruptcy all property of the bankrupt vests in the trustee of the bankruptcy and can therefore, in the absence of special provisions, be put beyond the reach of the Commonwealth and effectively laundered when the surplus property is returned to the bankrupt after the risk of confiscation proceedings has passed.[84]

32.88 Similar provisions to those in the *Bankruptcy Act* exist in the *Corporations Act*, providing that both a 'pecuniary penalty order' and an 'interstate pecuniary penalty order' is 'admissible to proof against an insolvent company'.[85] These orders are

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80 *Proceeds of Crime Act 1987* (Cth), s 26(1).
81 Ibid, s 26(2).
82 Ibid, s 26(3)–(5).
83 *Proceeds of Crime Regulations 1987* (Cth), reg 4.
84 Second Reading Speech for the Proceeds of Crime (Miscellaneous Amendments) Bill 1987: Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 30 April 1987, 2317 (L Bowen (Attorney-General)).
85 *Corporations Act 2001* (Cth), s 553B(2)

defined in the same way as in the *Bankruptcy Act*, that is, by reference to the *Proceeds of Crime Act*.

Limits on definition of 'pecuniary penalty order'

32.89 The definition of 'pecuniary penalty order' is limited in several ways:

- It is restricted to an order made under Commonwealth, state or territory legislation which has a specific policy objective — to ensure that criminals do not profit from their crimes;
- It is restricted to an order that has already been made by a court, not an order which is pending; and
- It is limited to 'the amount that a person is liable to pay the Commonwealth under the order'.[86]

Priority of pecuniary penalty orders

32.90 In a bankruptcy[87] or winding up[88] 'all debts and claims … rank equally' and, if the property of the company or bankrupt 'is insufficient to meet them in full, they must be paid proportionately'.

32.91 In the provisions which provide for priority to be given to specified payments,[89] 'pecuniary penalty orders' are not included. A 'pecuniary penalty order' will, therefore, have the same priority as any other debt or claim proved in the bankruptcy or winding up. Amounts payable to the Commonwealth (or a State or Territory) do not rank as priority payments as the priority historically enjoyed by the Crown was abolished with effect from 1 July 1982 by the *Crown Debts (Priority) Act 1981* (Cth). Issues of priority are considered further at para 32.176–32.184.

Recovery of certain taxation penalties and taxation debts

32.92 In certain circumstances, taxation penalties (for example, for late payment of tax) may also be recoverable in insolvency proceedings. In addition, unpaid tax may be collected as a form of 'secured debt' if a notice is issued by the Commissioner of Taxation under s 218 of the *Income Tax Assessment Act 1936* (Cth).[90]

Certainty of amounts payable by way of taxation

32.93 In *Kavich v Official Trustee in Bankruptcy*,[91] the Court held that the liability to pay an amount of additional taxation payable by way of a penalty under s 207(1) of the

86 *Proceeds of Crime Act 1987* (Cth), s 4.
87 *Bankruptcy Act 1966* (Cth), s 108.
88 *Corporations Act 2001* (Cth), s 555.
89 *Bankruptcy Act 1966* (Cth), s 109; *Corporations Act 2001* (Cth) , s 556.
90 Note, however, that taxation penalties are excluded from recovery from directors in a claim by the Commissioner of Taxation under *Corporations Act 2001* (Cth), s 588FGA.
91 *Kavich v Official Trustee in Bankruptcy* (1995) 58 FCR 82.

Income Tax Assessment Act was not sufficiently certain to permit it to be a debt provable in bankruptcy.

Section 218 notices: Income Tax Assessment Act[92]

32.94 The Commissioner of Taxation may issue a s 218 notice to a person who owes money to a taxpayer directing that person to pay the money owed to the taxpayer to the Commissioner in order to satisfy a tax debt of the taxpayer. Section 218 acts to give the Commissioner the 'preferential status of a secured creditor'.[93] 'Service of a notice creates a s 218 statutory charge in favour of the Commissioner'.[94]

32.95 The Commissioner will be entitled to preference in the distribution of the assets of the insolvent taxpayer *provided* that a s 218 notice was validly issued prior to the declaration of bankruptcy or the commencement of the winding up.

> 12.3.4 Garnishee notices confer upon the Commissioner not merely the negative right to prevent the ATO debtor from accepting payment of the debt or disposing of it but positive rights. Garnishee notices issued by the ATO have a striking similarity to a garnishee order made by the Court and thus for the purposes of bankruptcy law, the effect of a garnishee notice issued by the ATO is to charge the debt owed to the ATO debtor preventing the debtor from paying it and obliging him to pay it to the Commissioner. Accordingly a garnishee notice issued by the ATO has the effect of making the Commissioner a secured creditor for the purposes of bankruptcy law. (The latter requires consideration when voting at creditors meetings) (*DFC of T v Donnelly & Ors 89 ATC 5071; Macquarie Health Corp Ltd v FC of T 2000 ATC 4015*).
>
> 12.3.5 For insolvency law purposes, a garnishee notice will only be effective if it is served before the date of commencement of bankruptcy or winding up of the ATO debtor. An effective notice creates a statutory charge over any debts then due by these debtors to the ATO debtor at the date of service of the notice. Any debts coming into existence after the date of service of the notice but before the date of bankruptcy or liquidation are similarly affected. Payments received under effective garnishee notices are not characterised as voidable transactions or unfair preferences and as such need not be disgorged by the Commissioner. (*DFC of T v Donnelly & Ors 89 ATC 5071; Macquarie Health Corp Ltd v FC of T 2000 ATC)* (see Chapter 'Voidable Transactions' for further details).[95]

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92 From 1 July 2000, subdivision 260-A (s 260-5 to 260-20) of the *Taxation Administration Act 1953* (Cth) replaced s 218 of the *Income Tax Assessment Act* as the source of power for the Commissioner to 'redirect' monies owed by third parties to a taxpayer.

93 J Marshall, 'The Impact on Insolvencies of s 218 Notices under the Income Tax Assessment Act — A Case for Law Reform' (2001) 1(6) *Insolvency Law Bulletin* 93, 96.

94 Australian Taxation Office, *TR 98/18 Taxation Ruling — Income Tax; Section 218 Notices and Sales of Secured Property*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/view.htm?basic=TR%2098/18&&docid=TXR/TR9818/NAT/ATO/00001>, 12 September 2001, para 9.

95 Australian Taxation Office, *ATO Receivables Policy*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/browse.htm?toc=03:ATO%20Guidelines%20and%20Policy:ATO%20Receivables%20Policy>, 12 September 2001, para 12.3.4–12.3.5.

32.96 This re-establishes to a limited extent the priority of tax debts abolished in 1993 following recommendations by the ALRC in its report ALRC 45, *General Insolvency Inquiry*.[96] This re-establishment of Crown priority has been criticised:

> The decision by Parliament in 1993 to abandon the priority previously enjoyed by the Crown and the Commissioner was taken for good reasons and is consistent with basic insolvency law principles which generally aim to treat all creditors equally. The continued existence of this de facto priority is inconsistent with Parliament's approach and offends these general principles.[97]

32.97 The validity of the creation of a statutory charge in favour of the Commissioner of Taxation upon issue of a s 218 notice was confirmed in *Macquarie Health Corporation v Commissioner of Taxation*.[98] At first instance, the Federal Court (Emmett J) found that s 468(4), 471B and 474 of the *Corporations Law* did not affect the rights created by a s 218 notice and that, upon commencement of a winding up, those rights were not reduced to the right to lodge a proof of debt, and the right to seek payment was unaffected. The Full Court of the Federal Court confirmed the decision of Emmett J.

32.98 The Full Court of the Federal Court, however, acknowledged that the creation of a statutory charge giving preference over unsecured creditors may not have been the intended effect of s 218:

> If this result is anomalous, in that it allows the Commissioner by his or her own enforcement actions, to acquire the preferential status of a secured creditor, the anomaly should be corrected by Parliament, or by the High Court should it choose to revisit the question.[99]

32.99 ATO policy acknowledges the effect that a s 218 notice has in relation to the rights of other creditors and directs that the interests of other creditors be considered before issuing a s 218 notice. In the Debt Collection section of the *ATO Receivables Policy*,[100] the ATO notes that:

> An effective notice elevates the Commissioner to the status of secured creditor. This means that the ATO would not be required by law to disgorge monies collected under such a notice in the event that the ATO debtor becomes bankrupt or is liquidated. Accordingly, where the ATO debtor's financial situation is known to the ATO, serious consideration needs to be given at the outset to any adverse consequences that a garnishee notice may have on the ATO debtor's business as well as other creditors.[101]

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96 Australian Law Reform Commission, *General Insolvency Inquiry*, ALRC 45 (1988), Canberra.

97 J Marshall, 'The Impact on Insolvencies of s 218 Notices under the Income Tax Assessment Act — A Case for Law Reform' (2001) 1(6) *Insolvency Law Bulletin* 93, 97.

98 *Macquarie Health Corp Ltd v Commissioner of Taxation* (1999) 96 FCR 238.

99 Ibid, 258. An application for special leave to appeal to the High Court was refused.

100 Australian Taxation Office, *ATO Receivables Policy*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/browse.htm?toc=03:ATO%20Guidelines%20and%20Policy:ATO%20Receivables%20Policy>, 12 September 2001.

101 Ibid, para 12.4.5.

Stay of proceedings for recovery of certain pecuniary penalties

32.100 Section 60(1)(b) of the *Bankruptcy Act* allows for a stay of proceedings for the recovery of certain pecuniary penalties.[102] The section provides that:

> (1) The Court may, at any time after the presentation of a petition, upon such terms and conditions as it thinks fit:
>
> …
>
> (b) stay any legal process, whether civil or criminal and whether instituted before or after the commencement of this subsection, against the person or property of the debtor:
>
> (i) in respect of the non-payment of a provable debt or of a pecuniary penalty payable in consequence of the non-payment of a provable debt; or
>
> (ii) in consequence of his or her refusal or failure to comply with an order of a court, whether made in civil or criminal proceedings, for the payment of a provable debt; …

32.101 Since its introduction the section has been used several times.[103] The critical issue is the meaning of 'pecuniary penalty payable in consequence of the non-payment of a provable debt'.[104] This phrase has been considered in several cases. It has been held to encompass an order to make restitution,[105] to pay compensation under the New South Wales *Companies Code*,[106] and to pay compensation in the nature of restitution to the victim of a crime.[107] However, it has been held to exclude an order to pay a fine and costs of the prosecution[108] on the basis that a fine to be paid to consolidated revenue was not a provable debt and that costs ordered to be paid in connection with a criminal prosecution

> were components of a total sum which has a punitive character, in that non-payment is visited with imprisonment. The costs were therefore properly characterised as pen-

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102 Section 471B of the *Corporations Act* gives similar protection against the commencement or continuation of proceedings 'against the company or in relation to property of the company' during corporate insolvency.

103 The validity of this section as a law relating to bankruptcy and insolvency was challenged soon after its introduction on the basis that it was, in fact, a law relating to imprisonment — an issue for state legislation only. The section's constitutional validity was affirmed by the High Court in *Storey v Lane* (1981) 147 CLR 549.

104 Note that the reference to 'pecuniary penalty' is not limited by the definition of 'pecuniary penalty order' applicable to s 58(5A) of the *Bankruptcy Act 1966* (Cth).

105 *Re Lenske; ex parte Lenske* (1986) 9 FCR 532 concerning payment of restitution to a former employer.

106 *Tarea Management (North Shore) Pty Ltd (In liq) v Glass* (1991) 28 FCR 93 concerning the misuse of company cheques by a director.

107 *Re Lattouf* (1994) 52 FCR 147 concerning compensation ordered to be paid for fraudulent conversion of a motor vehicle; *Re Keogh; Ex parte Keogh v Director of Public Prosecutions (NSW)* (1995) 61 FCR 591 concerning repayment of money obtained by false pretences (dishonoured cheques); and *Tatt v Director of Public Prosecutions (NSW)* [1998] FCA 957 concerning compensation payments ordered to be paid for the theft of a truck.

108 *Marshall v Western Australia* (1998) 84 FCR 363 concerning a fine imposed for contraventions of Western Australian occupational health and safety legislation.

> alties imposed by a court in respect of an offence for the purposes of subsection 82(3), and thus not provable debts.[109]

32.102 Use of this reprieve is, however, at the discretion of the Court. In *Re Lenske; ex parte Lenske*,[110] this discretion was exercised in favour of the bankrupt. The bankrupt, Lenske, had been convicted under the *Queensland Criminal Code* for several offences of stealing as a servant and ordered to serve community service and pay restitution to his former employer. Imprisonment was ordered in default of payment of restitution. In 1985, Lenske filed for, and was granted, bankruptcy. In 1986, warrants were issued for his arrest for failing to make the ordered restitution. The Federal Court held that s 60(1)(b) was applicable despite an order to make restitution not amounting to a pecuniary penalty or punishment. An order for restitution was characterised as an order to enforce payment of a debt. All that was required to enable the discretion to be available was that 'the underlying obligation which the stayed process is intended to enforce must be a provable debt'.[111]

Effect of insolvency on imposition of penalties

Deregistration of a corporation: effect on liability of individuals

32.103 Deregistration of a corporation prior to a court finding that the corporation has contravened a law does not affect the liability of 'persons involved in contraventions'.[112] This position is well established in Australian jurisprudence. In *ACCC v Black on White Pty Ltd*,[113] Spender J reviewed the relevant authorities, discussing the leading case on this issue, *Richardson & Wrench (Holdings) Pty Ltd v Ligon No 174 Pty Ltd*:[114]

> It was not disputed that an action may be maintained against individuals alleged to have been involved in a contravention of s 52 [of the *Trade Practices Act*], within the meaning of s 75B, although proceedings are not pursued against the corporation which is the principal party to the contravention.[115]

32.104 In the case under consideration, Spender J held that

> there is no reason in principle why the fact that a principal offender or contravenor ceases to exist, extinguishes the liability of a party that was, until that event, liable as a s 75B accessory. If a person aids, abets or is knowingly concerned in the commis-

109 Ibid, 366.
110 *Re Lenske; ex parte Lenske* (1986) 9 FCR 532.
111 Ibid, 534.
112 This is the usual expression of accessorial liability of persons who, under criminal law, could be said to have been accomplices. See *Criminal Code*, s 11.2.
113 *Australian Competition & Consumer Commission v Black on White Pty Ltd* (2001) 110 FCR 1.
114 *Richardson & Wrench (Holdings) Pty Ltd v Ligon No 174 Pty Ltd* (1994) 123 ALR 681, in which a claim for damages under s 82 of the *Trade Practices Act 1974* (Cth) (TPA) was made against a corporation and claims relating to involvement in the contravention were made against individuals under s 75B of the TPA. By the time the matter came to court, the corporation had been deregistered and the proceedings against it discontinued.
115 *Australian Competition & Consumer Commission v Black on White Pty Ltd* (2001) 110 FCR 1, 14.

> sion by a natural person of a crime, the accessorial liability of that person does not cease on the death of the principal offender.[116]

32.105 His Honour went on to hold that deregistration of Black on White Pty Ltd did not affect the potential liability of the individual respondents.

Reinstatement of a deregistered corporation

32.106 In April 2000, the NSW Supreme Court accepted an application by the ACCC for the reinstatement of a deregistered corporation.[117] The company had been deregistered by ASIC after a members' voluntary winding up. The ACCC was seeking to pursue claims against the company and associated companies relating to alleged breaches of the prohibitions of price fixing under s 45 of the *Trade Practices Act 1974* (Cth) (TPA). The ACCC was seeking pecuniary penalties and a declaration that the TPA had been breached.

32.107 In granting the ACCC's application for reinstatement, Austin J noted that although the company was likely to be prejudiced by reinstatement (as it became subject to potential pecuniary penalties):

> The Court may nevertheless conclude that it is just that the company's registration be reinstated, having regard (for example) to the strong public interest which is involved.[118]

32.108 The ACCC argued that deterrence of price fixing was in the public interest and that obtaining a pecuniary penalty against the company would serve as a specific deterrent (particularly in relation to other companies in the group). In addition:

> The ACCC also says that general deterrence will be achieved if [the company] is reinstated and is ordered to pay a penalty, because such an order would increase public awareness of the Act and of the consequences facing those who contravene it. In the ACCC's submission, the business community is likely to be made aware of such a decision through legal advisers, and the ACCC will be able to publicise the outcome in media releases and in other appropriate ways.[119]

32.109 Reinstatement of the company allowed it to be joined as a party in Federal Court proceedings instituted by the ACCC concerning the price fixing allegations.[120] Whilst acknowledging the likely futility of awarding a penalty against an insolvent party, the potential recovery of a penalty in these circumstances (presumably against either the members or the liquidator) was not ruled out by Austin J. By reinstating the

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116 Ibid, 14. See also the decision of Austin J in *Australian Competition and Consumer Commission v Australian Securities and Investments Commission* (2000) 174 ALR 688, where he said: 'It is not necessary to join the company in order to obtain relief against its officers by way of pecuniary penalty, injunction or declaration … since an independent cause of action arises in relation to each person who was relevantly involved in the contravention': 697.

117 Ibid.

118 Ibid, 693.

119 Ibid, 695.

120 The ACCC's case was originally instituted against 16 respondents (six corporations and 10 individuals). Some respondents have made admissions and been penalised: *Australian Competition and Consumer Commission v ABB Transmission & Distribution Ltd* (2001) 23 ATPR ¶41–815.

company, he left these matters to be considered by the Federal Court as part of the ACCC claim.

Misuse of insolvency

Serial bankruptcy

32.110 Bankruptcy laws are underpinned by the policy of providing the opportunity for a 'fresh start' to people who find themselves in serious financial difficulties. US academic Paul Lewis suggests that the fresh start concept is given effect in the United States through three legal components:[121]

- discharge of bankrupts coupled with an automatic injunction restraining 'post-bankruptcy collection efforts by pre-bankruptcy creditors';[122]
- exemption of designated assets from the bankruptcy; and
- prohibition on certain forms of discrimination against bankrupts.

32.111 Lewis argues that the incentives for serial bankruptcy include:

- 'a strong perception that there is a declining social stigma attached to filing for bankruptcy';[123]
- the ease of filing;
- the frequency of discharge;
- the exemption of designated assets from the bankruptcy; and
- the automatic injunction granted against proceedings.

Prevention of serial bankruptcy

32.112 Lewis also contends that the incentive for repeat filing is curtailed by provisions exempting certain debts from discharge and specific provisions in the US *Bankruptcy Code* designed to prevent 'abuse of process'.[124]

32.113 There are parallels in Australian law. Certain debts are not provable in bankruptcy and survive discharge of the bankruptcy. Section 149X of the *Bankruptcy Act* prohibits a bankrupt from being granted an early discharge where he or she has previously been bankrupt (in Australia or overseas) within 10 years of the current bank-

121 P Lewis, 'The Repeat Bankruptcy Filer; Some Economic Considerations' (2000) 10(2) *New Directions in Bankruptcy* 18. These components also exist in Australian law.

122 Ibid, 18.

123 Ibid, 21. Note that the UK White Paper on Insolvency states that 'reducing the stigma of failure' is one of the main aims of the proposed reform of United Kingdom bankruptcy law: United Kingdom Department of Trade and Industry, *Insolvency — A Second Chance*, The Stationery Office, <www.archive.official-documents.co.uk/document/cm52/5234/5234.htm>, 20 August 2001, para 1.21–1.24.

124 *Bankruptcy Act 1978* (USA), s 105(a).

ruptcy. The same restrictions do not apply to corporate insolvencies. Although a person is automatically disqualified from being a director of a corporation while an undischarged bankrupt,[125] after discharge there is no restriction on that person once again being a director.

32.114 The major disincentive to repeated corporate insolvency is the potential for the Court to order disqualification from being a director for up to 10 years because of involvement in two or more failed corporations within a seven year period, if the Court is satisfied that the way in which the corporations were managed contributed to their failure.[126] ASIC may disqualify a person from being a director for up to five years because of involvement in two or more insolvent corporations within a seven year period.[127]

32.115 Another disincentive might be the potential for reinstatement of the corporation where it has been voluntarily wound up for a fraudulent purpose (such as avoidance of a penalty or court proceedings).[128] Murray considers that 'such a deliberate tactic could be a basis for a court to allow an unravelling of a members' voluntary winding up so as to allow a proper claim against it to be heard'.[129]

32.116 Murray notes that any denial of bankruptcy protection to a 'serial bankrupt' also denies the penal creditor (being an agency on whose application an order for payment is obtained) access to bankruptcy processes.[130] He stresses that bankruptcy can provide protection to the debtor and recourse to recovery of assets for the creditor. Where the penal creditor is denied access to bankruptcy processes it has to pursue the debtor by means outside bankruptcy, as is presently the case with non-provable debts. This can be disadvantageous to the penal creditor but may prompt the penal creditor to take some recovery or other action. Murray states that an alternative may be to make such serial debts provable but not discharged unless by exercise of judicial discretion.[131]

125 *Corporations Act 2001* (Cth), s 206B(3).

126 Ibid, s 206D.

127 Ibid, s 206F. Sections 206D and 206F of the *Corporations Act* were introduced in 1999 by the *Corporate Law Economic Reform Program Act 1999* (Cth). The reason for introduction of the provisions was not given in either the Explanatory Memorandum to the Bill or in the parliamentary debates. Similar provisions were first proposed in the Second Corporations Law Simplification Bill in 1995 by the then Attorney-General, Michael Lavarch, but were not introduced prior to the change in government. The Law Reform Committee of the Parliament of Victoria considered the need for such provisions in its *Curbing the Phoenix Company* inquiry report: Parliament of Victoria Law Reform Committee, *Curbing the Phoenix Company: Third Report on the Law Relating to Directors and Managers of Insolvent Corporations* (1995), Victorian Government Printer, Melbourne.

128 See M Murray, 'Pursuit of a Claim after Winding Up' (2000) 1(3) *Insolvency Law Bulletin* 37; A Keay, 'Deregistration: The New End of the Road for Companies in Liquidation' (1999) 7 *Insolvency Law Journal* 87.

129 M Murray, 'Pursuit of a Claim after Winding Up' (2000) 1(3) *Insolvency Law Bulletin* 37, 39.

130 M Murray, *Submission CAP 10*, 31 August 2002, 17.

131 Ibid.

Changes to bankruptcy law to prevent misuse

32.117 In June 2001, the Bankruptcy Legislation Amendment Bill 2001 (Cth) was introduced into Federal Parliament to 'clamp down on people who try to use bankruptcy as a way of avoiding paying their debts'.[132] The proposed changes included:

- granting power to the Official Receiver to reject a debtor's petition if the debtor could pay all debts within a reasonable time and the petition is an abuse of the bankruptcy system;
- abolition of early discharge provisions;
- strengthened powers to object to automatic discharge after three years so that bankruptcy can be extended by two or five years;
- confirmation of the power for a court to annul a bankruptcy that is an abuse of process.

32.118 The Explanatory Memorandum to the legislation explained its purpose as follows:

> High-income debtors who are maintaining an expensive lifestyle and petition for bankruptcy with the aim of avoiding paying a particular creditor (eg, the ATO) will be among those targeted by this proposed amendment. If the court believes that the debtor could make arrangements to pay the creditor it could annul the bankruptcy as an abuse of process.[133]

32.119 The Bill lapsed with the dissolution of Parliament for the general election in November 2001. The Bankruptcy Legislation Amendment Bill 2002 was introduced into the Senate on 19 June 2002 and passed on 9 December 2002 as the *Bankruptcy Legislation Amendment Act 2002* (Cth). The Act is

> designed to prevent people using bankruptcy in a mischievous or improper way … and will also encourage people who can or should avoid bankruptcy to consider other options.[134]

32.120 Changes under the *Bankruptcy Legislation Amendment Act* include:

- The removal of early discharge provisions that have permitted some people to be bankrupt for only six months;
- An increase in the debt agreement income threshold by 50% to about $46,800, after tax, to encourage more use of debt agreements as an alternative to bankruptcy;

132 Commonwealth Attorney-General, 'Bankruptcy Reforms Legislation Package', *News Release*, 5 June 2001.
133 Explanatory Memorandum to the Bankruptcy Legislation Amendment Bill 2001, para 65.
134 The Hon Daryl Williams AM QC MP, *'Bankruptcy Crackdown'*, Media Release, 10 December 2002.

- A new discretion for Official Receivers to reject a debtor's petition where it appears that the debtor can afford to pay their debts and the petition is an abuse of process;
- The strengthening of trustee powers to object to the discharge from bankruptcy of uncooperative bankrupts after the standard three-year bankruptcy period; and
- The confirmation of the Court's power to annul a bankruptcy if the bankruptcy petition was an abuse of process, even if the debtor is insolvent.[135]

32.121 Arrangements under Part X of the *Bankruptcy Act* also impact upon penalties. Part X allows debtors to formally come to binding arrangements with their creditors without becoming bankrupt. The Federal Government has announced a comprehensive review of Part X of the *Bankruptcy Act* to 'investigate concerns that some debtors are abusing the arrangements'.[136] The review will be conducted by ITSA and the Attorney-General's Department, in consultation with the Bankruptcy Reform Consultative Forum. Presumably, ITSA will address any penalty-related issues arising from the abuse of Part X arrangements.[137]

Regulators' attitudes to insolvency

32.122 The ACCC has expressed concerns in relation to 'serial bankruptcy' and the survival of proceedings after the appointment of a liquidator.[138] It noted that under the *Corporations Act* once a liquidator is appointed, existing judgments or orders cannot be enforced against the company and other legal proceedings cannot be commenced without court leave. The ACCC stated that its experience was

> that sometimes investigations are neutered by the tactical use of bankruptcy procedures by a potential respondent. For example, in 1998, the ACCC was investigating the activities of Ice Creameries of Australia Pty Ltd for alleged contraventions of misleading and deceptive and exclusive dealing provisions of the TPA.
>
> Just as proceedings were filed in the Federal Court, the company placed itself into liquidation. Although the ACCC settled the matter shortly, thereafter, it was denied

135 Ibid.

136 Attorney-General (The Hon Daryl Williams AM QC MP), *Media Release: Review of Part X of the Bankruptcy Act*, 20 September 2002. An issues paper for public comment will precede a final report expected early in 2003. Note also that as part of CLERP 8 the Federal Government has announced its intention to adopt an international model law on cross border insolvency, developed by the United Nations Commission on International Trade Law: Senator The Hon Ian Campbell (Parliamentary Secretary to the Treasurer), *Media Release: CLERP 8 — Government Plans to Adopt International Insolvency Law*, 17 October 2002.

137 The ALRC has not addressed in any detail other personal insolvency administrations, including Part X arrangements, Part IX debt agreements and Part XI deceased estates under the *Bankruptcy Act 1966* (Cth) and the impact of such arrangements on penalties. It is the ALRC's views that these areas require further consideration in the context of a comprehensive review of insolvency law, which falls outside the scope of this Inquiry.

138 Australian Competition & Consumer Commission, *Submission CAP 24*, 15 October 2002, 29.

> the opportunity to recover compensation for franchisees who had suffered loss as a result of the conduct.[139]

32.123 The problem of the use of insolvency to avoid liabilities has been identified by the Commissioner of Taxation as an area of concern. In its Annual Report for 2001–2002 the ATO stated that it would be targeting phoenix companies who accumulate debt then go into liquidation to avoid payment, and then proceed to carry on business through a newly formed company.[140] In its Annual Report for 1999–2000, the Commissioner for Taxation noted that

> there are a number of individuals who often report high levels of income and who, on becoming bankrupt, leave the ATO as the sole or the most significant creditor. It is difficult to escape the conclusion that some of these people use insolvency to avoid their tax obligations to the Australian community. Some become bankrupt for a second or third time, owing hundreds of thousands of dollars in tax on each occasion.[141]

32.124 The Commissioner announced an increased 'focus on persistent tax debtors',[142] in particular the extension of a project commenced in 1997 scrutinising the legal profession to other professions. This move was supported by the Attorney-General and the Assistant Treasurer, who announced that:

> Procedures will be introduced to ensure that Commonwealth Departments and agencies do not engage barristers who use bankruptcy as a means of avoiding tax … the Commonwealth is committed to doing what it can to prevent abuse of the bankruptcy process.[143]

32.125 The particular focus of the ATO's project was the NSW Bar.

> In investigating the NSW group, [the ATO] identified 62 barristers with current practising certificates who had been bankrupt or entered into Bankruptcy Act Part X arrangements in the past decade. The ATO was the sole or principal creditor in 56 of these cases (90 per cent). These 56 individuals owed just over $20 million in tax.[144]

32.126 In 2000–01, the ATO referred the cases of 104 barristers to its in-house prosecution area[145] and identified 16 barristers who had been bankrupt more than once in the past decade.[146]

32.127 A joint task force, involving the Attorney-General's Department, the ATO, ITSA and the Treasury was set up by the Federal Government in March 2001 following reports that some barristers were misusing the law to avoid paying tax. The Task-

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139 In *Thompson v Ice Creameries of Australia* (1998) ATPR ¶41–611 — cited in Australian Competition & Consumer Commission, *Submission CAP 24*, 15 October 2002 — private action against the franchisor alleging breaches of the TPA was successful.

140 Commissioner of Taxation, *Annual Report 2001–2002* (2002), Australian Taxation Office, 98.

141 Australian Taxation Office, *Commissioner of Taxation Annual Report 1999–2000* (2000), Commonwealth of Australia, Canberra, 6.

142 Ibid, 7.

143 Commonwealth Attorney-General and Assistant Treasurer, 'Bankruptcy and Taxation Obligations', *Joint News Release*, 9 March 2001.

144 Commissioner of Taxation, *Annual Report 2000–2001*, Australian Taxation Office, 61.

145 Ibid, 63.

146 Ibid, Table 6.1, 62.

force has made a number of recommendations for amendments to the *Bankruptcy Act* and the *Family Law Act*, and in particular as to the interaction of the two pieces of legislation. An Issues Paper has been released to describe some of these proposed changes and to invite comments from stakeholders which will assist the Government in finalising its consideration of the issues.[147]

32.128 The Federal Government has initiated a number of changes to bankruptcy, tax and family law following consideration of the joint tax force's report on the issue to ensure that high-income earners meet their tax obligations.[148] The Government has stated that it is giving further consideration to an issue identified by the task force that secrecy provisions can restrict the ATO's provision of information to a trustee in bankruptcy and to professional associations. Further, it has stated that penalties in the *Taxation Administration Act 1953* (Cth) will also be reviewed to ensure that they continue to have a deterrent effect.[149]

32.129 In July 2001, the Standing Committee of Attorneys-General agreed to consider amending their laws to

> ensure that legal practitioners who become insolvent will be compelled to advise their professional association or face tough consequences, and that they will be assessed on whether they are a 'fit and proper person' to continue to practise.[150]

32.130 Company directors are also the focus of scrutiny by the ATO. Murray notes that company directors appear to be pursued more for civil liabilities by the ATO in respect of their companies' unpaid tax liabilities in insolvency, than for criminal liability.[151] The abolition of the priority of the ATO in insolvencies in 1993 was effectively replaced by a regime of imposing such personal liabilities on directors. Such a regime also applies in NSW in respect of certain taxes.[152]

32.131 The ATO's stated policy is that criminal charges will be pursued against company directors where 'there are indications the company's assets have been misappropriated by associated natural persons and/or the company's insolvency has been or is being engineered for the purpose of defeating creditors, in particular, the ATO'.[153] A decision by the NSW Supreme Court is consistent with this policy. In *R v Walters,*[154]

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147 Attorney-General's Department, *Use of Bankruptcy and Family Law Schemes to Avoid Payment of Tax-Issues Paper*, <http://152.91.15.12/www/legal servicesHome.nsf/Alldocs/0746790ADC20FB5ECA25>, 21 November 2002. Note that comments on the Issues Paper are sought by 20 February 2003.

148 Attorney-General (The Hon Daryl Williams AM QC MP) and Minister for Revenue and Assistant Treasurer (Senator the Hon Helen Coonan), *Joint News Release: Strengthening Laws to Prevent Tax Abuse*, 30 August 2002.

149 Ibid.

150 Commonwealth Attorney-General, 'Getting Tough on Lawyers Who Avoid Tax', *News Release*, 25 July 2001. This agreement was implemented in New South Wales by the *Legal Profession Amendment (Disciplinary Provisions) Act 2001* (NSW), which commenced on 27 July 2001.

151 M Murray, *Submission CAP 10*, 31 August 2002, 17.

152 M Murray, 'Payroll Tax — And Directors' Liabilities' (2001) 2(3) *INSLB* 48 cited in M Murray, *Submission CAP 10*, 31 August 2002, 17.

153 Australian Taxation Office, *ATO Prosecution Policy*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/index.htm>, 9 March 2001, para 11.2.1.

154 *R v Walters* [2001] NSWSC 640.

the NSW Supreme Court ordered the imprisonment of a man who had been convicted on 10 counts of having defrauded the Commonwealth by failing to remit group tax to the Commissioner of Taxation. The charges related to failure to make tax payments totalling over $7.3 million over nearly 10 years. The charges related to 10 separate companies that Walters had established and wound up during the period. Sully J noted

> that when a point was reached in the life of the particular company when it was clear that the company had no chance of paying its accumulated arrears of group tax, the company was wound down; and both its employees and its work in progress was simply transferred over to a new company. This approach entailed, of course, that the Commissioner of Taxation had no practical recourse against the remaining, asset-stripped, corporate shell.[155] …
>
> I am satisfied beyond reasonable doubt, and I infer that the jury was similarly satisfied, that, in the case of each of the ten relevant companies, it was well understood by the prisoner that he could not honestly and properly continue to fund his personal expenditures at the desired level, and meet simultaneously his group tax obligations; that he took the view that if something had to be sacrificed, it was not going to be a lifestyle to which he believed himself to be entitled by reason of his years of hard work in a dirty and demanding occupation; that if the upshot was that the Commissioner of Taxation did not get the group tax to which he was lawfully entitled, then that was too bad for the Commissioner; and that a dexterous corporate re-arrangement could neutralise effectively any adverse action by the Commissioner.[156]

32.132 Walters was sentenced to not less than 6 years imprisonment with a further parole period of 1 year and 8 months. Commenting on the decision in *Walters*, the ATO said:

> Company directors seeking to deliberately avoid their tax obligations by using Phoenix companies will be caught … The Tax Office is working closely with other law enforcement agencies to stamp out these tax avoidance activities.[157]

32.133 Murray notes, however, that the ability to be excused from the payment of debts is the purpose of bankruptcy law and so the use of bankruptcy to avoid payment of tax debts is not unusual:

> The use or abuse of bankruptcy as a means of writing off tax debts is one available under the *Bankruptcy Act* simply because that it is the effect of bankruptcy.[158]

32.134 There is obviously concern that insolvency may be being misused to avoid the payment of tax liabilities. The ATO submitted:

> Personal and corporate insolvencies designed to frustrate or defraud creditors are becoming an increasing problem for the ATO, through stripping of company assets and

155 Ibid, para 23.
156 Ibid, para 28.
157 Australian Taxation Office, *People Using Phoenix Companies Will be Caught: Media Release NAT 01/60, 27 July 2001*, <www.ato.gov.au/content.asp?doc=/content/Corporate/mr200160.htm>, 23 October 2001.
158 M Murray, 'The Commissioner of Taxation's Views on Bankruptcy' (2000) 1(5) *Insolvency Law Bulletin* 81, 81.

> shifting assets offshore, including to tax havens, and the prevalence of fraudulent transactions places the revenue at risk.[159]

32.135 In respect of penalties, however, the ALRC's research has not revealed any concern about the use of insolvency to avoid payment of penalties. Whilst this is undoubtedly implicit in the use of insolvency to avoid tax debts (as overdue tax debts incur late payment penalties and interest charges), it has not been raised as a particular issue.

Status of penalties

Preliminary view

32.136 In DP 65 the ALRC proposed that:

> The distinction in insolvency law between the status of criminal and civil penalties should be removed so that both criminal and civil penalties:
>
> (a) are provable in corporate insolvency proceedings;
>
> (b) are not provable in personal bankruptcy proceedings, with the result that they will persist after the offender's discharge from bankruptcy.[160]

Consultations and submissions

32.137 The ALRC received submissions on this issue from regulators, from ITSA, from the Victorian Bar, and from Michael Murray, an insolvency expert.

32.138 ASIC supported a simple and uniform approach whereby criminal and civil penalties were treated in the same manner in both corporate insolvency and personal bankruptcy proceedings.[161] It supported the proposal that criminal and civil penalties should be provable in corporate insolvency, stating that:

> A corporation should not be able to completely evade a punitive sanction imposed on behalf of the community by going into liquidation. In such cases, the Crown or the regulatory agency in question would have a discretion as to whether or not this debt should be pursued. Clearly a major consideration when exercising this discretion would be the extent to which the pursuit of this debt is likely to affect blameless parties including other creditors and the extent to which any deterrent effect is likely to be reduced by the circumstances of the insolvency.
>
> ASIC sees a difference between corporate and individual insolvencies in this regard as, in most cases, corporate insolvency is likely to lead to the deregistration of the company and thus the permanent extinguishment of the penalty debt.
>
> Some insolvency procedures, such as voluntary administration and deeds of company arrangements, may allow a company to survive insolvency. In cases where penalties

159 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.169.
160 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Proposal 14–1.
161 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 42.

> will survive the insolvency, there may be a disincentive for the directors to try and resurrect the company. This disincentive may be inappropriate.[162]

32.139 ASIC supported the proposal that criminal and civil penalties should not be provable in personal bankruptcy. It stated that if the penalty were provable, blameless third parties such as creditors were more likely to be affected than the offender whom it was designed to punish. ASIC submitted that the special nature of a penalty warranted an exception to the general rule that all debts should be provable in personal bankruptcy in order to give the bankrupt a clean start. It noted in this regard that civil penalty orders under s 1317G of the *Corporations Act*, unlike penalties in other legislation, are not provable in bankruptcy.[163]

32.140 The ATO stated that it would support any proposal that allowed for the recovery of criminal and civil penalties from an individual offender who has been discharged from bankruptcy. It said that its purpose in seeking to impose monetary penalties through the Court is to deter non-compliant behaviour of taxpayers. However, the ATO noted that with respect to corporate insolvencies, the deterrent effect is all but lost once liquidation occurs.[164]

32.141 The ACCC supported the general thrust of the ALRC's proposal, but stated that insolvency reform should address other regulatory concerns in order to genuinely enhance regulatory efficiency.[165] Those concerns are noted in the section above dealing with regulators' attitudes to insolvency.

32.142 ITSA made no submission in relation to the treatment of penalties in corporate insolvency. It submitted that there did not appear to be a sound justification for making civil penalties not provable in bankruptcy. It noted that one of the principal purposes of the *Bankruptcy Act* was to give debtors with overwhelming debts a fresh start. Accordingly, any exclusion of particular types of debts should be based on strong public policy considerations. It stated that the policy considerations justifying the exclusion of criminal penalties from bankruptcy, including that ordinary creditors should not be prejudiced in diminution of their dividend by the criminal conduct of the bankrupt, and that a criminal offender should not be able to use bankruptcy as a means of avoiding a criminal sanction, were not applicable to penalties imposed for non-criminal conduct. ITSA argued that civil and criminal penalties were justifiably treated differently in bankruptcy because there was a clear difference between the nature of the penalties. In opposing the ALRC's proposal, ITSA also relied on the apparent lack of prevalence of individuals using bankruptcy as a means of avoiding payment of civil penalties. It stated that it was unaware of this being raised as an issue within ITSA or on behalf of any of its stakeholders.[166]

32.143 The Victorian Bar expressed concern in relation to the ALRC's proposal. It submitted that the question of whether or not the distinction between criminal and civil

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162 Ibid, 42.
163 Ibid, 42–43.
164 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.167–2.168.
165 Australian Competition & Consumer Commission, *Submission CAP 24*, 15 October 2002, 29–30.
166 Insolvency and Trustee Service Australia, *Submission CAP 13*, 29 August 2002.

penalties ought to be removed in the context of corporate insolvency was worthy of detailed consideration, independent of the present Inquiry. It said that the part of the proposal dealing with the treatment of penalties in corporate insolvency

> must be seen in the context of the underlying logic in the *Corporations Law* concerning the external administration of corporations. The priority to be applied is set out in the law including s 556. The underlying premise is that administration in insolvency is for the benefit of creditors and, if their demands are satisfied, for the shareholders. The question of where criminal and civil monetary penalties should fit in that context requires careful and separate consideration. Such penalties, when recovered, do not find their way directly or indirectly back to those persons who have suffered in consequence of the insolvency of the corporation.[167]

32.144 The Victorian Bar expressed that it had similar, although less, concerns in relation to the ALRC's proposal dealing with the treatment of penalties in personal bankruptcy. It noted that criminal penalties traditionally have not had a bearing upon the estate of the bankrupt otherwise available for distribution amongst the bankrupt's creditors, and stated that the ALRC's proposal represented a substantive change:

> It would put those who have obtained civil penalties in a different substantive position than that in which they are currently placed. Those imposing the penalty would lose the ability to share in the property available to the wider class of creditors but on the other hand would be in a preferred position to those creditors because execution would not be restricted to the property of the bankrupt.[168]

32.145 The Victorian Bar said that to adopt the proposal would be to upset the existing balance between the position of unsecured creditors in bankruptcy and the right of regulators to recover penalties against bankrupts. It expressed the view that such a change should only be embarked upon following a considered inquiry of those particular issues, and that the present Terms of Reference were too wide to accommodate such an inquiry.[169]

32.146 Murray, an insolvency expert, provided the ALRC with a detailed submission on its proposal, which is canvassed below. In summary, he did not disagree with the proposal that the distinction between civil and criminal penalties be removed so that both are provable in corporate insolvency, but noted that separate consideration would need to be given as to how penalties should be treated in Part 5.3A administrations[170] and deeds of company arrangements. Murray submitted that penalties in bankruptcy should generally be provable and not discharged except on the exercise of judicial dis-

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167 The Victorian Bar, *Submission CAP 22*, 14 October 2002, 15.

168 Ibid, 16.

169 Ibid, 16–17.

170 *Corporations Act 2001* (Cth), Part 5.3A is broadly equivalent to *Bankruptcy Act 1966* (Cth), Part X. As noted by Murray the significant feature of Part 5.3A administrations is that the company can survive its insolvency and continue in operation. Creditors' claims can be stayed when a company enters voluntary administration under Part 5.3A pending consideration by creditors of the options available under s 439C of the Act. This may lead to the company entering a deed of company arrangement, compromising creditors' claims: M Murray, *Submission CAP 10*, 31 August 2002, 13.

cretion, which could be exercised according to the severity of the penalty, the nature of the offence and the conduct of the bankrupt.[171]

Murray's submission on bankruptcy

32.147 In his submission Murray explored the conflicting purposes of bankruptcy law and penal law. He stated that while relief from financial obligation is central to bankruptcy law; fulfilment of the obligation of providing deterrence, recompense and retribution was central to penal law.[172] He noted that there were two main reasons for most penalties not being provable in bankruptcy. The first is that creditors of the penal debtor should not suffer in the diminution of their dividend by having to share in the assets with the penal creditor.[173] In this regard, Murray observed that in practice, many bankruptcies fail to give any return to creditors so that the exclusion of the penal creditor from the pool of creditors to be paid does not have much financial impact on whatever dividend is paid.[174] The second reason is that as penalties are imposed for misconduct, they should not attract the general protection of bankruptcy and should therefore rightfully remain with the penal debtor.

32.148 Murray addressed each of the following four methods in which debts and penalties could be treated under the *Bankruptcy Act*, and assessed the suitability of the application of each method to penalties:

- provable and discharged;
- provable and not discharged at all;
- provable and not discharged except by court leave; and
- not provable and hence not discharged.

32.149 In relation to the category of debts that are provable and discharged, Murray noted that the emphasis was to allow a bankrupt a fresh start on discharge. However, he stated that if this category were applied to penalties it would be too lenient on the penal debtor, if penalties were to be regarded as being in a special category of debt that require application of principles of deterrence, retribution and recompense.[175] However, he noted that a factor in favour of allowing penalties to be provable and discharged is

> that it gives the penal creditor some certainty or 'completion' in its obligations to ensure penalties are paid, or, if not paid, that financial accountability obligations are

171 M Murray, *Submission CAP 10*, 31 August 2002, 18.
172 Ibid, 3.
173 Murray used the term 'penal debtor' in his submission to refer to the person (individual or corporation) who or which is ordered to pay a fine or penalty. He used the term 'penal creditor' in his submission to refer to the agency of the state on whose application an order for payment of a penalty is obtained: ibid, 1.
174 Ibid, 4.
175 Ibid, 8.

> properly discharged. Under some legislation, a penal creditor can be obliged to pursue debts unless those debts are written off or assessed as being unable to be recovered.[176]

32.150 Murray observed that the second category of debts, those that were provable and not discharged at all, were the second harshest on the penal debtor and the most beneficial to the penal creditor. The penal creditor was able to benefit from the asset recovery processes of bankruptcy and to the extent that it remained unpaid by way of dividend from the bankruptcy, it could continue to pursue the penal debtor, and conceivably pursue the debt through insolvency again.[177] Murray stated that the application of this category to penalties could be too harsh on the penal debtor if special circumstances warrant the penal debtor being released from an unpaid penalty.[178]

32.151 Murray noted that the third category of debts, those that were provable and not discharged except by court leave, was also harsh on the debtor but subject to the significant temperance of judicial discretion.[179] Murray observed that the court could either allow the law to operate harshly, as with the category of debts that were provable and not discharged at all, or it could act leniently, as with the category of debts that were provable and discharged.[180] Murray submitted that penalties should be treated in accordance with this third category as it provided the greatest flexibility. He said:

> It allows the penal creditor to share in the penal debtor's assets, gives some incentive to the penal debtor to ensure those assets are maximized or not diminished, allows judicial intervention if necessary, may be subject to consent of the penal creditor and the trustee, allows guidance and report to be given by the trustee and the penal creditor, can allow the penal debtor to be released, even if on condition, and makes the penal creditor subject to the regime of equal sharing imposed on all creditors.[181] It also allows a penal creditor access to the debt recovery processes of bankruptcy which may assist in speedier payment.[182]

32.152 Murray observed that the fourth category of debts, those that were not provable and not discharged can be harsh on the penal debtor, the penal creditor and other creditors. The harshness on the penal debtor is that he or she cannot be discharged except by payment, imprisonment or remission. Murray noted that there appeared to be unintended consequences flowing from the fact that penalties were not provable in bankruptcy. A penal creditor is unable to avail itself of the pro-creditor elements of

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176 *Financial Management and Accountability Act 1997* (Cth), s 47(1) requires the Chief Executive of an agency subject to the Act to 'pursue recovery of each debt for which the Chief Executive is responsible unless: (a) the debt has been written off as authorised by an Act; or (b) the Chief Executive is satisfied that the debt is not legally recoverable; or (c) the Chief Executive considers that it is not economical to pursue recovery of the debt.' It is suggested that this obligation extends to the recovery of penalties, in particular civil and administrative penalties where the regulator controls the enforcement process: M Murray, *Submission CAP 10*, 31 August 2002, 9.

177 M Murray, *Submission CAP 10*, 31 August 2002, 7.

178 Ibid, 8.

179 See *Re Stewart* (1995) 60 FCR 68 cited in M Murray, *Submission CAP 10*, 31 August 2002, 7 for an application of the discretion under *Bankruptcy Act 1966* (Cth), s 153(2A).

180 M Murray, *Submission CAP 10*, 31 August 2002, 7.

181 A consequences of any adoption of the third category would be that the *Bankruptcy Act 1966* (Cth) s 60(1)(b) would be available to protect a debtor in respect of any non-payment of any debt that is provable: see section above dealing with the stay of proceedings for recovery of certain pecuniary penalties.

182 M Murray, *Submission CAP 10*, 31 August 2002, 8.

bankruptcy, so for example, it could not have a bankruptcy notice issued based on a penal order and either have the benefit of payment of the debt or secure the benefit of an act of bankruptcy. Murray stated that

> bankruptcy provides probably the strongest array of mechanisms for recovery of assets of a person; in particular if that person has disposed of assets, or otherwise attempted to defeat the demands of creditors. Compulsory processes support these. Also, the commencement of bankruptcy processes can itself be a significant incentive for a debtor to make payment.
>
> A penal creditor standing outside bankruptcy is unable to avail itself of these benefits. For example, a debtor may dispose of assets in contemplation of a penalty; a penal creditor could not secure the processes of bankruptcy to set aside what may otherwise be a voidable transaction to retrieve these assets.[183]

32.153 A further potential unintended consequence of making penalties not provable, as identified by Murray, is that if the penal creditor secures payment of its debt before the bankruptcy of the debtor, in circumstances where that would otherwise constitute a voidable preference, then that payment is unable to be recovered by the trustee in bankruptcy. The penal creditor would be preferred in its recoupment of the debt, in priority to ordinary creditors. A debtor faced with payment of a penalty or payment of a civil debt out of assets insufficient to meet payment of both, may see benefit in paying the penal liability over the civil liability.[184]

32.154 Murray states that making penalties not provable can also disadvantage ordinary creditors as they are deprived of the benefits attached to the penal creditor, who often has greater resources, supporting and funding the trustee to take proceedings to recover assets to the benefit of all creditors who may not have the resources or capacity to provide such support.[185]

32.155 Finally, Murray submitted that there should be consistency in the treatment of penalties, or at the least the basis for any variance should be explained. He said:[186]

> As to consistency, at present, it is not abundantly clear what policy reasons justify the current regime in bankruptcy whereby:
>
> - A criminal penalty or fine is not provable in bankruptcy.
> - A civil penalty or fine may be provable.
> - A civil penalty order under the *Corporations Act* is not provable in bankruptcy.
> - A pecuniary penalty under the *Trade Practices Act* appears to be provable in bankruptcy.[187]

183 Ibid, 6.
184 Ibid, 6.
185 Ibid, 6–7.
186 Ibid, 10.
187 Murray states that this appears to be so because a pecuniary penalty under the *Trade Practices Act 1974* (Cth), s 76 is not imposed in respect of an 'offence' against the law, it is a civil debt (s 77), and, unlike a civil penalty order, it is not excluded by the *Bankruptcy Act 1966* (Cth) from being provable. However, in

- A pecuniary penalty order under the *Proceeds of Crime Act* is provable in bankruptcy.

- A penal creditor is specifically allowed to pursue non-divisible property of a bankrupt penal debtor only in respect of a pecuniary penalty order.[188]

Murray's submission on corporate insolvency

32.156 Murray submitted that a penal creditor was disadvantaged where penalties and fines were not provable and extinguished in corporate insolvency as

> the present law denies the penal creditor the ability to initiate debt recovery and insolvency processes by way of a statutory demand and winding up application, and to benefit from the use of insolvency processes to recover assets.[189]

32.157 He stated that creditors may be disadvantaged by the absence of a penal creditor with the resources to pursue recovery.

32.158 Murray also noted that although there is no equivalent in the *Corporations Act* to s 123(4) of the *Bankruptcy Act,*[190] it appears to be the case that if the penal creditor recovers its penalty from the company prior to liquidation, there is no ability for the liquidator to recover it from the penal creditor as a voidable transaction.[191]

32.159 Murray submitted that in light of the reality that a company does disappear after its winding up, a penal creditor should be able to prove a penalty in its liquidation while it continues to exist.[192] He said that:

> The regime suggested, of allowing penalties to be provable, allows the penal creditor to share in the penal debtor's assets, gives some incentive to the directors to ensure those assets are maximized or not diminished if their potential personal liability is in issue.[193]

Australian Competition and Consumer Commission v Australian Securities and Investments Commission (2000) 174 ALR 688, Austin J, in an *obiter* comment, said: 'it does seem that an amount payable under a pecuniary penalty made under s 76 of the *Trade Practices Act* is not admissible to proof against an insolvent company under s 553B(1) of the *Corporations Law,* since it is not a "pecuniary penalty order" as defined in the *Proceeds of Crime Act 1987* (Cth)'. Murray is of the view that this is incorrect: M Murray, *Submission CAP 10*, 31 August 2002, 10.

188 *Bankruptcy Act 1966* (Cth), s 58(5A).

189 M Murray, *Submission CAP 10*, 31 August 2002, 12.

190 *Bankruptcy Act 1966* (Cth), s 123(4) provides that 'Nothing in [the] Act invalidates a payment by a debtor, on or before the date on which he or she became a bankrupt, of, or in respect of, a penalty or fine imposed on him or her by a court in respect of an offence against a law, whether a law of the Commonwealth or not'.

191 M Murray, *Submission CAP 10*, 31 August 2002, 12. Note that *Corporations Act 2001* (Cth), s 588FA defines the requirements of a transaction necessary to found a preference, including that the transaction results in the creditor receiving more from the payment than if the transaction were set aside and the 'creditor were to prove for the debt in a winding up of the company'. Murray states that it may be as a result of that requirement that the payment of a fine or penalty cannot be a preference: M Murray, 'Penalties in Insolvency — Some Fine Points' (2002) 3(2) *Insolvency Law Bulletin* 25, 25.

192 M Murray, *Submission CAP 10*, 31 August 2002, 12.

193 Ibid, 13.

32.160 He noted that allowing a penalty to be provable could be disadvantageous to other creditors who may suffer from their dividend (if any) being lessened by sharing it with the penal creditor, thus suffering as a result of the penal debtor's misconduct. However, he acknowledged that in such cases creditors and employees may in fact have benefited from that conduct, prior to the liquidation, as was stated in DP 65.[194]

Conclusion on insolvency

32.161 Having considered the submissions, the ALRC has concluded that there is merit in its original proposal to remove the distinction between criminal and civil penalties so that both categories of penalties are provable in corporate insolvency proceedings. This will ensure that the return to the state is maximised before a company is deregistered and all prospect of recovery is lost. The ALRC's position is consistent with the view expressed by it in its report ALRC 45, *General Insolvency Inquiry*:

> The Commission considers that the situation in the case of companies is more clear cut. The penalty or fine should be claimable. Once the company is dissolved, there is no longer any entity against which the penalty may be enforced.[195]

32.162 In coming to this conclusion the ALRC has been mindful of the concerns expressed by the Victorian Bar. However, on balance, the ALRC prefers the views expressed by Murray.

32.163 The ALRC notes that the Working Group on Insolvency Law of the United Nations Commission on International Trade Law offered diverging views as to the treatment of fines and penalties in insolvency, and which types of claims should be excluded.[196] One view that received some support was that fines and penalties of a strict administrative or punitive nature (such as fines imposed for an administrative or criminal violation) were justifiably excluded, while fines and penalties having a compensatory nature should not be excluded from the insolvency process. Another view that was expressed was that there was no sound policy reason supporting the exclusion of fines and penalties in insolvency proceedings since, unless they were provable, they generally could not be collected. In answer to this, it was noted that exclusion might be justified for increasing the assets available for unsecured creditors.[197]

32.164 The ALRC remains of the view that the disparity in treatment between criminal and civil penalties is somewhat difficult to sustain. It is a little peculiar that the state should abandon all prospect of recovery of any criminal penalty that has been imposed on a company that has later gone into liquidation, yet can still pursue the notionally less severe civil penalties. Although there is an argument that bona fide creditors should not be disadvantaged by the insolvent company's illegal actions, some creditors of an insolvent company could well be the employees or officers responsible for the of-

194 See Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, para 14.100.

195 Australian Law Reform Commission, *General Insolvency Inquiry*, ALRC 45 (1988), Canberra, para 787.

196 See United Nations Commission on International Trade Law, *Report of the Working Group on Insolvency Law on the Work of its Twenty-Fourth Session (New York, 23 July–3 August 2001)* (2001), para 111.

197 Ibid, para 111.

fence (particularly with small companies). Murray has noted that 'even if a bona fide creditor is not implicated in the illegal actions of the company, for example, in non-payment of tax, it may well have enjoyed the fruits of the company's success through its illegal endeavours'.[198] Of course, a regulator can exercise its discretion in all cases as to whether it wishes to recover from the insolvent party to the possible detriment of bona fide creditors, particularly if it has the option to seek penalties against other parties.

32.165 As stated by Murray, separate consideration needs to be given as to how penalties should be treated in Part 5.3A administrations under the *Corporations Act*, and deeds of company arrangements. Murray did not offer any view as to whether a company should retain a liability for a penalty after a Part 5.3A deed is concluded, 'beyond suggesting that it may need to be a matter of judicial consideration in the context of the deed being approved, with the views of the penal creditor and the deed administrator being taken into account'.[199] The treatment of penalties in Part 5.3A administrations and deeds of company arrangement was not an issue that was otherwise raised or addressed in the context of this Inquiry. Clearly, it requires more detailed consideration and community consultation in the context of a comprehensive review of the law of insolvency, which falls outside the scope of this particular Inquiry.

Conclusion on bankruptcy

32.166 Having considered the submissions, and in particular the detailed submission of Murray which highlighted the negative consequences of making penalties not provable in bankruptcy, the ALRC concluded that its original proposal needed substantial modification. However, the ALRC remains of the view that in the interests of simplicity and consistency, the differential treatment accorded to criminal and civil penalties in bankruptcy should be removed. The difference in treatment between criminal and civil penalties is difficult to justify except, perhaps, on the basis that the persistence of a criminal fine after discharge from bankruptcy is one of the less obvious features of a criminal penalty that makes it harsher for an individual than an equivalent non-criminal penalty.

32.167 The ALRC gave consideration to Murray's submission that in bankruptcy civil and criminal penalties should be provable and not discharged except by court leave. One aspect of his proposal that appealed to the ALRC was the flexibility introduced by the exercise of judicial discretion, allowing the court to allow the law to operate harshly or leniently depending on the circumstances of particular cases. However, it appeared that two issues arose from Murray's proposal. The first was that there needed to be a time frame imposed upon the exercise of judicial discretion, otherwise the penal creditor would be denied any certainty in accounting for the non-payment of

198 M Murray, *Submission CAP 10*, 31 August 2002, 17. Murray also noted that current proposals to give employee entitlements priority over secured and unsecured creditors will give employees, as a group, a priority over penalties.

199 Ibid, 13. Murray notes by way of example that the deed may involve a change of company management from the personnel who were in control when the penalised conduct occurred, which may allow some consideration for remission of the penalty.

the penalty. Secondly, and perhaps more significantly, it appeared that, if the penalties were *not* discharged except by leave of the court, this would have the likely practical effect that the person on whom the penalty had been imposed would bear the onus of bringing an application to the court seeking discharge, when that person may not have the resources to do so. Of course, a regulator could bring an application to have the penalty discharged under the proposal but in reality there may not be much incentive for the regulator to do so, apart perhaps from wanting certainty for the purpose of accounting for the penalty.[200]

32.168 In order to address the above two issues, the ALRC has reformulated Murray's proposal, while retaining the essential concept underlying it in terms of allowing judicial discretion a role to play in the treatment of penalties in bankruptcy. The ALRC recommends that criminal and civil penalties be provable in bankruptcy and discharged with the option available for a regulator creditor to apply to the court prior to the discharge of the bankruptcy for an order that outstanding penalties not be discharged. Judicial discretion may be exercised according to the severity of the penalty, the nature of the offence, and the conduct of the bankrupt. This proposal places a time frame upon any application to the court, and places the onus on the regulator creditor, which in many cases will be comparatively better resourced than a bankrupt, to make any application to the court seeking not to have the penalties discharged.

32.169 One of the bases of the ALRC's original proposal to make penalties not provable in bankruptcy was that this would ensure that they were recoverable in principle after the offender's discharge from bankruptcy. The ALRC's recommendation still allows for the possibility of penalties being recoverable after an offender's discharge from bankruptcy, but only after the exercise of judicial discretion to prevent discharge of the penalty.

32.170 The ALRC's recommendation addresses Murray's fundamental concerns in relation to the negative consequences that flow from making debts not provable and not discharged. As the ALRC's recommendation allows the possibility for the recovery of penalties in bankruptcy following the exercise of judicial discretion it would appear that it would have the support of the ATO who submitted that it would support any proposal that allowed for the recovery of criminal and civil penalties from an individual offender who has been discharged from bankruptcy.[201] To the extent that the recommendation allows civil penalties to be provable in bankruptcy, it would appear to ameliorate the concerns expressed by ITSA that there was no basis for making civil penalties generally not provable in bankruptcy.[202]

32.171 The ALRC acknowledges that implementation of its recommendation would involve a substantial change in the treatment of criminal penalties, altering their status from not provable to provable. As noted by the ALRC in its report ALRC 45, *General Insolvency Inquiry*, while there is justification for the policy that penalties are not prov-

200 For example, by being able to 'write-off' the debt.
201 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.167.
202 Insolvency and Trustee Service Australia, *Submission CAP 13*, 29 August 2002.

provable, the application of that policy in bankruptcy must be weighed against the aim of rehabilitating the bankrupt.[203] The ALRC stated:

> That aim is thwarted by leaving outstanding a debt rather than including it in the insolvency process and discharging the debt with a 'clean slate'. However, even if the aim of rehabilitation were rejected in favour of the policy of ensuring payment of the full penalty for a breach of the law, that policy would be more effectively achieved by permitting the debt to be claimed in the bankruptcy but providing that the unpaid portion of the debt not be released on discharge.[204]

32.172 The ALRC's recommendation in this Report does not depart significantly from its position in its report ALRC 45, *General Insolvency Inquiry*. In both instances the ALRC calls for criminal penalties to be provable in bankruptcy. The point of departure is that while in 1988 the ALRC expressed the view that such penalties should not be discharged, the ALRC is now of the view that the penalties should be discharged with the option available for a regulator creditor to apply to the court to prevent discharge. The latter option presents more flexibility and allows for such matters as the individual circumstances of the bankrupt, the severity of the penalty, the conduct of the bankrupt and the nature of the offence to be taken into account.

32.173 The ALRC notes the views expressed by ITSA that a policy consideration justifying the exclusion of criminal penalties from bankruptcy is that a criminal offender should not be able to use bankruptcy as a means of avoiding a criminal sanction.[205] A few points can be made in answer to that proposition. The first is that it does not cater for the potential range of criminal offences leading to the imposition of criminal penalties. While the proposition may be compelling in its application to criminal penalties imposed for serious offences involving moral opprobrium, it would appear to hold less force in its application to penalties imposed for relatively minor criminal offences. Secondly, the ALRC's recommendation allows a regulator to apply to a court for an order that the penalty not be discharged. In exercising its discretion to disallow discharge from a criminal penalty the Court can have regard to such factors as the nature of the offence and the severity of the penalty. Finally, the *Bankruptcy Legislation Amendment Act 2002* (previously discussed at para 32.119–32.120) addresses issues arising from the deliberate use of bankruptcy to avoid payment of debts and penalties, including confirmation of a court's power to annul a bankruptcy that is an abuse of process.

32.174 The ALRC notes the concerns expressed by the Victorian Bar, and its views that the ALRC should not make any recommendation in this area.[206] However, on balance, the ALRC prefers the views expressed by Murray. Furthermore, while certain issues arising out of the Inquiry relating to the treatment of penalties in insolvency clearly require consideration by an inquiry outside these Terms of Reference, the par-

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203 The justification being, that 'a fine is imposed for breach of the law and should be paid in full, not simply at the proportionate rate which would apply if it ranked equally with all other debts in an insolvency': Australian Law Reform Commission, *General Insolvency Inquiry*, ALRC 45 (1988), Canberra, para 787.

204 Ibid.

205 Insolvency and Trustee Service Australia, *Submission CAP 13*, 29 August 2002, 2.

206 The Victorian Bar, *Submission CAP 22*, 14 October 2002.

ticular Term of Reference that requires the ALRC to report on the effect of insolvency upon a liability to pay an administrative or civil penalty justifies and indeed requires the ALRC to come to a conclusion in relation to the treatment of penalties in bankruptcy.

32.175 The special treatment given to civil penalties under the *Corporations Act* does not appear to be based on any transparent policy grounds. As stated by Murray, it is unclear on what basis the law presently provides for civil penalty orders under the *Corporations Act* not to be provable, while pecuniary penalties under the TPA appear to be provable, and pecuniary penalties under the *Proceeds of Crime Act* are provable. In the absence of compelling policy reasons justifying incongruous treatment, the ALRC is of the view that consistency is preferable. Accordingly, it recommends that civil penalty orders under the *Corporations Act* be treated in the same manner as the ALRC has recommended for civil and criminal penalties, that is they should be provable in bankruptcy and discharged with the option available for ASIC to apply to the court prior to the discharge from bankruptcy for an order that the penalties not be discharged. This recommendation also takes into account the policy reasons discussed above which militate against making penalties not provable in bankruptcy.

Recommendations

Recommendation 32–2. The distinction in corporate insolvency law and personal bankruptcy law between the status of criminal and civil penalties should be removed so that both criminal and civil penalties:

(a) are provable in corporate insolvency proceedings; and

(b) are provable in personal bankruptcy proceedings and discharged upon discharge of the bankrupt with the option available to a regulator creditor to apply to the court prior to the discharge of the bankrupt for an order that outstanding penalties not be discharged.

Recommendation 32–3. The *Bankruptcy Act 1966* (Cth) should be amended to provide that the recoverability of civil pecuniary penalty orders under the *Corporations Act 2001* (Cth) should be determined in accordance with Recommendation 32–2(b).

Issues concerning priority

Consultations and submissions

32.176 In DP 65 the ALRC asked whether criminal and civil penalties should be given priority in corporate insolvency proceedings.[207]

32.177 Only one submission, that from ASIC, expressed support for the proposition that penalties should be given priority. ASIC submitted:

> If criminal and civil penalties became provable in corporate insolvency and the Crown or relevant regulatory agency were given a discretion whether to pursue the debt, then the penalties should be given priority in the proceedings. The Crown and government agencies should give consideration to the priority that would be received and the impact that this would have on other creditors before deciding to pursue any debt. Alternatively, it may be appropriate for the Crown or regulatory agency to have the power to waive any right to priority.[208]

32.178 The balance of the submissions received in answer to this issue, were generally against granting priority to penalties in corporate insolvency. The ATO noted the position reflected in legislative amendments over a number of years that crown debts do not have priority over other debts. The ATO stated that it attempts to use other mechanisms to address persistent debtors, such as Mareva injunctions and garnishee powers, and did not consider that giving priority would significantly improve compliance.[209]

32.179 Professor Michael Adams opposed the granting of priority status to penalties in corporate insolvency proceedings. He stated that:

> Pecuniary penalties owed to the Commonwealth should not be allowed to usurp those more imperative interests of creditors. Public policy alone dictates that it would be inequitable for those people with direct dealings with an insolvent body, which give rise to claims on the residual assets, to have their claims thwarted by the Commonwealth government.[210]

32.180 Murray also expressed the view that penalties should not have priority, for the sake of creditor equity. He said that creditors should not be any more penalised by the wrongful conduct of the penal debtor than they already have been through their financial loss. He noted, however, that there was a valid argument that penalties should prevail over individual creditors in insolvency, as a penalty is payable for the benefit of society, and that such a priority could apply subject to the discretion of the penal credi-

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207 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, Question 14–1.

208 Australian Securities & Investments Commission, *Submission CAP 15*, 10 September 2002, 43.

209 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.170 and 2.172.

210 M Adams, *Submission CAP 12*, 5 September 2002.

tor not to invoke it.[211] Murray also observed that certain Commonwealth priorities apply in any event in insolvency.[212]

32.181 The ACCC stated that the wider issue of whether fines and penalties should receive preferential status in liquidations was of interest to it. However, it did not offer any views on the issue.[213]

Conclusion on issues concerning priority

32.182 Certainly the majority of the submissions received on this issue were opposed to the granting of priority to penalties in corporate insolvency proceedings, and were therefore in favour of penalties simply ranking *pari passu* with other unsecured and non-priority creditors.

32.183 Indeed, the ALRC in its report ALRC 45, *General Insolvency Inquiry*, recommended the abolition of the priority of tax debts. It stated that:

> As far as possible the fundamental principle of insolvency law which requires a rateable distribution among unsecured creditors should be reinforced. The existence in insolvency laws of a long list of priority creditors runs contrary to this principle.[214]

32.184 However, while the ALRC tends to the view that penalties should not be given priority, it is hesitant to make a recommendation in this regard, given the limited number of submissions it has received in answer to this issue, particularly from insolvency practitioners and experts in the field. The ALRC acknowledges policy reasons that support negative and affirmative answers to this question and is of the view that further community comment on this issue is appropriate. On balance, the ALRC's view is that the issue of priorities, as with a number of other aspects that arise in the context of insolvency, warrants further detailed consideration following a comprehensive review of the law of insolvency, which falls outside the scope of this Inquiry.

211 M Murray, *Submission CAP 10*, 31 August 2002, 9.
212 For a discussion of the priority of tax debts see para 32.94–32.99 above.
213 Australian Competition & Consumer Commission, *Submission CAP 24*, 15 October 2002, 12.
214 Australian Law Reform Commission, *General Insolvency Inquiry: Summary of Report* (1988), Australian Government Publishing Service, Canberra, para 152.

33. Costs of Investigation

Contents

Introduction

33.1 The Terms of Reference for this Inquiry require the ALRC to report on the enforcement of administrative and civil penalties including the limitations, if any, which exist or should apply with respect to the recovery of the costs of investigating contraventions of regulatory offence provisions.

33.2 This chapter looks at whether, and in what circumstances, a regulator has, or should have, a right to seek reimbursement from a regulated entity of the costs of investigating breaches of the law. It focuses on the expenses associated with the *investigation* of breaches and does not address in detail the award of costs made in litigation, except to the extent that allowances for the costs of investigation have been included in such awards. It also does not address issues concerning the responsibility of a person found to have breached legislation to pay the costs of remediation of the effects of that breach. Environmental protection legislation allows for recovery of expenses incurred by a government agency as a result of its participation in clean-up activities. This type of cost recovery is a matter for legislative policy and is outside the scope of this Inquiry.

General right to recover expenses of an investigation

33.3 Regulators have no general right to recover the expenses of an investigation from the person investigated. In specific circumstances, legislation expressly creates this right. The nature and extent of these rights is discussed below at para 33.6–33.14.

33.4 Although not central to the Terms of Reference, the growing number of partially and fully industry-funded regulators implicitly permits the costs of an investigation to be recovered by the regulator from the regulated community. Unlike direct cost recovery, however, these schemes allow recovery from the regulated community generally rather than a specific regulated entity, and are designed to cover more than just the direct enforcement or investigation costs of the regulator. They are generally designed to allow full cost recovery of the costs of administering the regulatory scheme.

33.5 The levy scheme of the Australian Prudential Regulation Authority (APRA) is an example of a fully industry-funded regulation scheme because the entire prudential regulation scheme is funded through levies collected under the *Financial Institutions Supervisory Levies Collection Act 1998* (Cth) and other legislation.[1] The consumer protection and market integrity functions of regulation of the Australian financial services sector are also industry-funded as the ATO and ASIC receive a proportion of the APRA levy to cover their costs of performing these functions. It is intended that gene technology regulation will ultimately be self-funding through payment of annual licence charges.[2] An annual licence charge scheme is already used in the telecommunications industry to allow the Australian Communications Authority (ACA) and ACCC to recover the costs directly attributable to their exercise of telecommunications functions and powers.[3] The indirect funding of investigations by cost-recovery from the regulated industry was discussed in DP 65 at para 13.61–13.80.[4] This issue is outside the scope of the Terms of Reference for the Inquiry and accordingly the ALRC makes no comments on the desirability (or not) of cost-recovery schemes.

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1 'The total net levies collected in 2001/02 were $69.2 million': Australian Prudential Regulation Authority, *Annual Report 2002*, Australian Prudential Regulation Authority, <www.apra.gov.au/AboutAPRA/Annual-Report-2002.cfm>, 29 October 2002, 53. A review of financial sector levies collected by APRA was announced on 29 October 2002: see Minister for Revenue and Assistant Treasurer (Senator The Hon Helen Coonan), 'Review of Financial Sector Levies', *Media Release C115/02*, 29 October 2002.

2 *Gene Technology (Licence Charges) Act 2000* (Cth). A licence charge may be set by regulation. At present, no charge is payable. The OGTR has commissioned a report into cost recovery options and sought public comment: Office of the Gene Technology Regulator, *KPMG Report — A model for cost recovery in the Office of the Gene Technology Regulator*, <www.health.gov.au/ogtr/pubform/kpmg.htm>, 25 November 2002.

3 *Telecommunications (Annual Licence Charges) Act 1997* (Cth), s 15. The annual licence charge is based on the costs of the ACA and ACCC and other factors.

4 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney.

Specific right to recover expenses of an investigation

Expenses of an investigation under the ASIC Act, s 91

33.6 Section 91 of the *Australian Securities and Investments Commission Act 2001* (Cth)[5] (ASIC Act) allows ASIC to recover some or all of the expenses of an investigation where a person has been convicted of an offence or a judgment has been awarded or a declaration or other order has been made against a person by a court.[6] The conviction, judgment, declaration or order must have been made as a result of an investigation by ASIC. In these circumstances, ASIC may make an order directing that person to:

- pay the whole, or a specified part, of the expenses of the investigation;
- reimburse ASIC to the extent of a specified amount of such of the expenses of the investigation as ASIC has paid; or
- pay, or reimburse ASIC in respect of, the whole, or a specified part, of the cost to ASIC of making the investigation, including the remuneration of a member or staff member concerned in the investigation.[7]

33.7 Failure to comply with an ASIC costs order is an offence punishable by payment of a penalty of 50 penalty units or imprisonment for one year, or both.[8] ASIC may recover as a debt due to ASIC so much of the amount payable under an order made under s 91 as remains unpaid.[9]

33.8 For s 91 to apply, the offenders must have been subject to court or tribunal proceedings and to have had a conviction recorded or other order made against them; that is, the investigation by ASIC must have resulted in a successful outcome.[10] Section 91 sets up an administrative procedure for payment of the costs of a *successful* investigation, which operates independently of any right to recover the costs of the litigation in accordance with the rules of the relevant court or tribunal. Costs assessed by ASIC under s 91 are, therefore, not subject to the same taxing assessment that applies to costs awarded by a court. This lack of independent scrutiny particularly in the context where ASIC is entitled to keep any monies recovered and is not required to pay them into consolidated revenue[11] causes the ALRC some concern as it may lead to a perception of impropriety by ASIC in its use of s 91.

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5 Section 91 appears to be unique in Australian federal legislation, but is similar to s 439 of the *Companies Act 1985* (UK) and s 94, 105 and 177 of the *Financial Services Act 1986* (UK).

6 The definition of court in s 5 includes 'a tribunal having power to require the production of documents or the answering of questions'.

7 *Australian Securities and Investments Commission Act 2001* (Cth), s 91(1)(c)–(e). This provision substantively re-enacts s 91 of the *Australian Securities Commission Act 1989* (Cth), which basically restated s 309 of the *Companies Act 1981* (Cth).

8 *Australian Securities and Investments Commission Act 2001* (Cth), s 91(3).

9 Ibid, s 91(4).

10 See *Boys v Australian Securities Commission* (1997) 24 ACSR 1, 31.

11 In 2001–02, ASIC recovered $366,000 in costs from 'court costs, investigations, professional fees, legal costs and prosecution disbursements': Australian Securities & Investments Commission, *Annual Report 2001–2002*, Australian Securities & Investments Commission, 96–97.

Meaning of 'expenses of an investigation'

33.9 Section 91 does not specify what items are encompassed within a permissible claim for ASIC's costs of investigation; it merely refers generally to the 'expenses of the investigation'. The Federal Court specifically considered the meaning of 'expenses of an investigation' in *Westpac Banking Corporation v ASC*.[12] In that case, Westpac was seeking reimbursement of the costs it incurred in complying with notices to produce documents to the Australian Securities Commission (ASC).[13] Westpac argued that its costs were 'expenses of an investigation' which, under s 90, should properly be borne by the ASC. This argument was rejected by Cooper J, who noted that:

> The word 'expenses' in the context of s 90 and s 91 bears its ordinary and natural meaning as being confined to monies expended by a person or an obligation incurred by the person. It does not include sums which the person claims a right to charge against others for his own services (*Parr v Australasian Asiatic Trading and Engineering Co Pty Ltd* [1958] VR 198 at 200–201; *Attorney-General for New South Wales v Hunter* [1983] 1 NSWLR 366 at 378–380).[14]

33.10 This definition was also applied in *Attorney-General for New South Wales v Hunter*[15] by the New South Wales Supreme Court when considering a provision similar to s 91 of the ASIC Act. Section 179(2) of the *Companies Act 1961* (NSW) permitted the Minister to make an order that 'the expenses of and incidental to an investigation [by the Corporate Affairs Commission] into affairs of a company' be reimbursed by the company. The company argued that the order for reimbursement of the expenses of the investigation should not properly include charges for:

- general overheads; and
- remuneration of special investigators (including employment on-costs).

33.11 The Court relied upon the definition of 'expenses' formulated by the Victorian Supreme Court in *Parr v Asiatic Trading and Engineering Co Pty Ltd*.[16] Lusher J held that overheads were not included in the term 'expenses'.[17]

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12 *Westpac Banking Corporation v ASC* (1997) 72 FCR 318. The provisions considered were s 90 and 91 of the *Australian Securities Commission Act 1989* (Cth), which were re-enacted without amendment as s 90 and 91 of the *Australian Securities and Investments Commission Act 2001* (Cth). The only other reported case in which an order was made under s 91 was *ASC v EBC Zurich AG* in which an order was made by the Federal Court directing EBC Zurich to pay the ASC's investigation costs assessed under s 91. The Court ordered that 'any proceeds of the sale of the Relevant Shares be applied to the payment of the ASC's costs (to the extent that they remain unpaid), including any investigation costs incurred under section 91 of the ASC Law and any costs of and incidental to the sale of the Relevant Shares, and then to the costs of Dome and the costs of National (to the extent that they remain unpaid)': *Australian Securities Commission v EBC Zurich AG* (Unreported, Federal Court of Australia, Sackville J, 14 December 1995), order 10. This order was made in addition to a general order that the costs of the proceedings be paid by EBC Zurich.

13 The ASC was the predecessor to ASIC.

14 *Westpac Banking Corporation v ASC* (1997) 72 FCR 318, 329–330.

15 *Attorney-General for New South Wales v Hunter* [1983] 1 NSWLR 366 (Lusher J).

16 *Parr v Asiatic Trading and Engineering Co Pty Ltd* [1958] VR 198 (Smith J) in which the meaning of the term 'expenses of and incidental to an investigation' used in s 136(1) of the *Companies Act 1938* (Vic) was considered.

Meaning of 'remuneration'

33.12 In *Hunter*, the provision expressly stated that amounts reimbursed could include 'the remuneration of any servant of the Crown concerned with the investigation'. Reimbursement was claimed for the salaries and 'on costs (holiday pay, long service leave etc) of special investigators and support staff'.[18] The company argued that the 'on costs' were not within the meaning of 'remuneration' and were, therefore, not properly included in the order for reimbursement. After reviewing English authorities, the Court noted that 'long service leave is not to be regarded as part of remuneration within the meaning of s 179(2)',[19] but did not address the holiday pay issue.

33.13 The general question of when remuneration could be properly described as having been paid to 'any servant of the Crown' was also considered in *Hunter*.[20] The Court held that in order for the remuneration of the special investigators and their support staff to be reimbursed they would have to have been 'servants of the Crown' at the relevant time. All officers and employees of the Corporate Affairs Commission were required by statute to be employed as 'public servants'.[21] As the special investigators and their support staff had been validly appointed as 'public servants', the Court held that they were properly to be regarded as 'servants of the Crown'.

33.14 Section 91(1)(e) of the ASIC Act refers to 'a member or staff member' of ASIC. The Governor-General appoints the members of ASIC.[22] ASIC staff members are defined in s 5 of the ASIC Act as including staff engaged under the *Public Service Act 1999* (Cth), staff engaged under written contracts (including consultants) and staff seconded from other agencies or authorities to assist ASIC.[23] In 2001–02, 47 consultants were employed under the ASIC Act 'for essential specialist services including investigatory, legal, corporate regulatory and accounting functions'.[24] Provided that people involved in investigations are properly appointed,[25] it seems clear that the costs of remunerating such staff would be recoverable by ASIC under s 91.

Implied right to recover expenses of an investigation

Costs under the ASIC Act, s 223

33.15 Section 223 of the ASIC Act gives the Companies Auditors and Liquidators Disciplinary Board (CALDB) power to make an award of costs in relation to a hearing concerning the cancellation or suspension (or other discipline) of a person as an auditor

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17 *Attorney-General for New South Wales v Hunter* [1983] 1 NSWLR 366, 380. But note that s 439 of the *Companies Act 1985* (UK) expressly provides that 'general staff costs and overheads' are recoverable.
18 *Attorney-General for New South Wales v Hunter* [1983] 1 NSWLR 366, 371.
19 Ibid, 382.
20 The ASIC Act refers to a 'member or staff member' of ASIC.
21 They were required to be employed under the *Public Service Act 1902* (NSW).
22 *Australian Securities and Investments Commission Act 2001* (Cth), s 9.
23 Ibid, s 5 referring to s 120–122.
24 Australian Securities & Investments Commission, *Annual Report 2001–2002*, Australian Securities & Investments Commission, 68.
25 Under ASIC Act, s 120(1), 120(3), 121(1) or 122. See definition of 'staff member' in ASIC Act, s 5.

or liquidator. This right is similar to the right of a court to award costs. A costs award may be made in favour of ASIC and may include 'costs of ASIC or APRA in relation to the hearing'.[26] A decision of the CALDB may be appealed to the Administrative Appeals Tribunal (AAT).[27]

33.16 Section 223(1)(d) was considered by the AAT in June 2000 in *Young v Companies Auditors and Liquidators Disciplinary Board*.[28] The proceedings before the AAT resulted from a decision of the CALDB that Young's registration as a liquidator should be suspended for eight months. The CALDB also ordered Young to pay ASIC's costs in accordance with s 223(1)(d). The costs order included the costs of ASIC's investigation into Young's conduct in three company administrations.

33.17 Young sought a reduction in the period of the suspension. In making his decision, McMahon DP considered that the number of failures involved and the gravity of the allegations supported a period of suspension as the appropriate penalty. He reduced the suspension period from eight months to six months, noting that the term suggested by the CALDB was 'not unreasonable'. However, he considered that the CALDB's period of suspension 'ought to be reduced to some extent because of the deterrence of its costs order when it is properly quantified'.[29]

33.18 This decision demonstrates that an order that a person pay the regulator's costs of an investigation can influence the severity of the penalty imposed for the substantive breach of the relevant legislation. This mitigation effect of a substantial award of costs is discussed further in chapter 30.[30]

Costs under the TPA

33.19 In its report ALRC 68, *Compliance with the Trade Practices Act 1974* the ALRC recommended 'that the TPA be amended to provide that the court may order a person who is found to have breached the TPA to pay the reasonable investigation costs of the TPC, as determined by the court'.[31]

33.20 The reason given for this recommendation was that:

> The [ALRC] considers that the TPC should be able to recover its reasonable investigation costs. There is no reason why the public purse should have to bear the full cost of investigating companies which contravene the TPA. The court has considerable expertise in determining whether or not costs are reasonable. The [ALRC] would expect the court to consider when deciding what investigation costs are recoverable whether a person was given an opportunity to cooperate with the TPC. Enhancing the

26 *Australian Securities and Investments Commission Act 2001* (Cth), s 223(1)(d).
27 *Corporations Act 2001* (Cth), s 1317B(1)(c).
28 *Young v Companies Auditors and Liquidators Disciplinary Board* (2000) 61 ALD 698.
29 Ibid, 714.
30 See also discussion in Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), ALRC, Sydney, para 13.57–13.58.
31 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), Australian Law Reform Commission, Sydney, para 11.24. The TPC, the Trade Practices Commission, was the predecessor of the ACCC.

> ability of the TPC to recover reasonable investigation costs will put it in a similar position to other regulators such as the ASC.[32]

33.21 The ALRC's recommendations were not acted upon and no right to recover costs was included in the *Trade Practices Act 1974* (Cth) (TPA).

33.22 The ALRC noted that it was 'already a common term of settlements involving the TPC that the contravening party will pay the TPC's investigation costs'.[33] It is not clear whether this continues to be the case. The ACCC's guide to enforceable undertakings states that the '[ACCC] will seek to ensure that s 87B undertakings and their development, implementation and monitoring are cost neutral to the [ACCC] and may require cost recovery for the [ACCC] as part of the undertaking'.[34] This potentially gives the ACCC an opportunity to recover the costs of an investigation on a broader basis than is available under a court award of the costs in a proceeding.

33.23 Undertakings have included commitments to pay the '[ACCC's] costs of and incidental to the proceedings' or 'to contribute to the '[ACCC's] costs'.[35] These undertakings were given as part of the settlement of proceedings commenced by the ACCC in respect of the contraventions. It is not clear whether the costs referred to are limited to the costs that might have been awarded by the court if the proceedings had continued (that is, legal costs) or whether they include a component for reimbursement of the ACCC's costs of investigating the contraventions of the TPA. In its submission to the Inquiry, the ACCC stated its continued support for the recommendation made by the ALRC in ALRC 68, that a regulator should be entitled to recover its costs of an investigation. See further discussion of the ACCC's submission at para 33.46–33.48.

Problems of direct recovery of expenses by regulators

Perception of impropriety

33.24 One area of concern in introducing a general right for a regulator to recover the costs of investigating an alleged contravention of a civil or administrative penalty provision is the potential for 'industry capture' of regulators. Any payment made by a regulated entity to the regulator in association with an investigation may raise the per-

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32 Ibid, para 11.24.

33 Ibid, para 11.24.

34 Australian Competition & Consumer Commission, *Section 87B of the Trade Practices Act: A Guideline on the Australian Competition and Consumer Commission's Use of Enforceable Undertakings* (1999), Australian Competition & Consumer Commission, Canberra, 13.

35 For example, *Undertaking to the Australian Competition and Consumer Commission Given Under Section 87B of the Trade Practices Act 1974 by Quickcat Cruises (QLD) Pty Ltd* (18 April 2001), <www.accc.gov.au/pubreg/d01_11657.pdf>, 30 August 2001; *Trade Practices Act 1974 – Section 87B Undertaking given by John Franklin Preece, Roy Ernest Tesch, Denis James Brett and Nigel Stephen Rehbock* (9 January 2001), <www.accc.gov.au/pubreg/87B_2001/d01_1074.pdf>, 30 August 2001; *Undertaking to the Australian Competition & Consumer Commission Given for the Purposes of Section 87B by Geoffrey Colin Clegg* (23 August 2000), <www.accc.gov.au/pubreg/87B_2000/d00_28491.pdf>, 30 August 2001 and *Trade Practices Act 1974 – Section 87B Undertaking given by John Barney, Brian Geoffrey Davies, David Wellmand Douyere and David William Kemp* (12 October 2000), <www.accc.gov.au/pubreg/87B_2000/d00_35677.pdf>, 30 August 2001.

ception of impropriety. An offer to pay the costs of the investigation may be appealing to the regulator for reasons including:

- the efficient use of resources as it allows for a direct relationship between costs incurred and available funding; and
- some reward for time and effort of the regulator, particularly in circumstances where proceedings in relation to the alleged contravention are not commenced or seem unlikely to result in any significant sanction being imposed.

33.25 For these reasons it may be tempting for regulators to make deals with entities under investigation or, at the very least, it raises public concerns that such deals might be made. In its submission, the ACCC noted that 'the maintenance of the public interest is inconsistent with regulatory objectives and regulatory strategies motivated by purely financial considerations'.[36]

33.26 The potential for a perception of impropriety to arise because of the acceptance by a regulator of a contribution towards investigation costs made by the person being investigated was recently demonstrated in Victoria. The Victorian Casino and Gaming Authority accepted $400,000 from a poker machine manufacturer to help offset expenses of an investigation by the Authority in relation to allegations that an associated company had engaged in 'bad corporate practices' in Turkey.[37] The acceptance of the money by the Authority was criticised and the matter referred to the Victorian Ombudsman for investigation.[38] The Ombudsman criticised the Authority's acceptance of the payment as an 'inappropriate and poorly judged decision',[39] and in September 2002, the Victorian Government announced that it intended to abolish the Victorian Casino and Gaming Authority and replace it with a Commissioner for Gambling Regulation:

> 'That will create more accountability, more streamlined processes, and people taking full responsibility for the decisions they make,' [Gaming Minister John Pandazopoulos] said.[40]

33.27 This incident clearly demonstrates the difficulties associated with allowing a regulator to recover and retain the costs of an investigation. At the very least, it emphasises the importance of regulator's acting in a transparent and accountable manner in order to retain the trust of the public and the respect of the regulated community.

Recovery of expenses as part of costs in litigation

33.28 It is not clear that an award of costs made in litigation may include a component representing reimbursement of the costs of an investigation, however, it seems

36 Australian Competition & Consumer Commission, *Submission CAP 24*, 15 October 2002, 20.
37 R Baker, 'Probe into Pokies Payment', *The Age* (Melbourne), 5 October 2001.
38 Victorian Ombudsman, *Report on Matters Arising from the Office of Gambling Regulation Investigation of International Gaming Technology*, Victorian Ombudsman, <www.ombudsman.vic.gov.au>, 1 June 2002.
39 Ibid.
40 R Baker, 'State to Abolish Gaming Watchdog', *The Age* (Melbourne), 20 September 2002, 7.

unlikely that this will be generally possible. This restriction arises from the rule that costs awarded in litigation must relate to professional legal expenses.

33.29 The general principles concerning the award of costs were considered in detail most recently by the High Court in *Cachia v Hanes*.[41] In *Cachia*, the High Court noted that the costs that might be awarded under Part 52, Rule 23 of the NSW Supreme Court Rules (a rule that is substantially similar to Order 62, Rule 19 of the Federal Court Rules) were limited to legal expenses and 'do not include time spent by a litigant who is not a lawyer in preparing and conducting his case. They are confined to money paid or liabilities incurred for professional legal services'.[42]

Costs 'necessary or proper for the attainment of justice'

33.30 Order 62, Rule 19 of the Federal Court Rules allows the Court to award costs that were 'necessary or proper for the attainment of justice'. This rule (and other rules using the same wording) has been considered in many cases. Although it is clear from the line of authorities considered by the High Court in *Cachia* that it is only professional legal costs that may properly be recovered in a court proceeding, it is not clear whether this definitively excludes recovery of costs relating to activities undertaken in advance of the proceedings.

33.31 In *Higgins v Nicol (No 2)*,[43] the recovery of certain costs incurred before the initial proceeding commenced was permitted by the Industrial Court under Order 71, Rule 74 of the High Court Rules, which provided that costs 'necessary or proper for the attainment of justice' were allowable.

33.32 The Court noted that:

> [I]t is a mistake to interpret those words ['necessary or proper for the attainment of justice'] as excluding the costs of work performed prior to the making of the decision to take the proceedings. Work relevant to the legal position of a potential claimant which is performed before the making of a decision to take proceedings may promote a decision not to take proceedings at all or to take proceedings. But if proceedings are taken, the mere fact that the work was performed before a decision to sue was made is not decisive of the question whether the work was necessary or proper for the attainment of justice in the proceedings.[44]

33.33 The Court proposed two bases on which a decision might be made as to whether costs incurred before proceedings commenced were necessary:

1. if the work were not done before, would it have been necessary to do it after proceedings had been commenced; and

2. was the work done to ascertain facts that were later proved in evidence?

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41 *Cachia v Hanes* (1994) 179 CLR 403.
42 Ibid, 409.
43 *Higgins v Nicol (No 2)* (1972) 21 FLR 34.
44 Ibid, 37 (Spicer CJ, Smithers J).

33.34 *Higgins* was followed in 2001 by the Federal Court in *Charlick Trading Pty Ltd v Australian National Railways Commission*,[45] which concerned whether the expenses of retaining interstate counsel and of interviewing interstate witnesses could properly be included in the award of costs in the proceedings. In reaching his decision, Mansfield J considered the meaning of 'necessary and proper' in Order 62, Rule 19 of the Federal Court Rules. He allowed travel expenses relating to the interview of interstate witnesses noting that:

> Given the complexity of the issues in this matter, in my view it was necessary or proper for those persons to have been interviewed at their location, or where their principal documentary resources were.[46]

Order to pay the ACCC's costs of investigating the conduct

33.35 Despite the High Court's observations in *Cachia* that costs in a proceeding are generally to be regarded as limited to fees and disbursements charged for professional legal services, there have been a few cases in which some or all of the costs of investigations undertaken by the regulator have been ordered by the court to be paid.

33.36 In *ACCC v Trayling*, an order was made with the consent of the parties by the Federal Court that 'the respondent [Trayling] pay the costs of the applicant, including the applicant's costs of investigating the conduct of the respondent ... which costs are to be taxed in default of agreement'.[47] The TPA has no provision equivalent to s 91 of the ASIC Act.

Order to pay investigation costs of Australian Federal Police

33.37 In *Irvine v Hanna-Rivero*,[48] the defendant was convicted of offences under the *Copyright Act 1968* (Cth) concerning infringing copies of computer software. The orders made against the defendant included fines under s 4K(4) of the *Crimes Act 1914* (Cth) and an order confiscating some of the seized hardware under s 133(4) of the *Copyright Act*. The Federal Court also made an order for costs. The prosecution sought to recover both legal fees and investigation costs. The investigation costs sought to be recovered included the airfares for two trips made by a member of the Australian Federal Police between Adelaide and Sydney and an amount based on an hourly rate for the time spent by the police officer on these trips. This amounted to $2148.50. The first trip was made before the charges were laid. On this trip, the police officer interviewed Australian distributors in order to obtain information about the copyright holders. The second trip was made after the charges were laid and a preliminary hearing had been held. This trip was made in order to obtain instructions for affidavit evidence. The Court held that the costs associated with the second trip were not recoverable as the af-

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45 *Charlick Trading Pty Ltd v Australian National Railways Commission* [2001] FCA 629.

46 Ibid, para 61. Travel and accommodation expenses for interstate counsel were also allowed.

47 *Australian Competition & Consumer Commission v Trayling* [1999] FCA 1133, order 5(ii). The order in *Trayling* was made by consent and so may not have much value as a precedent. Note, however, that s 172(1)(c) of the *Trade Practices Act 1974* (Cth) allows the Governor-General to make regulations 'for and in relation to the costs, if any, that may be awarded by the Court in proceedings before the Court under this Act'. No regulations have been made about costs.

48 *Irvine v Hanna-Rivero* (1991) 23 IPR 295.

fidavits were of little value in the proceedings and the instructions could have been obtained by telephone or facsimile. The full amount of the first trip was not allowed by the Court, which held that 'on a broad basis I consider that the investigation costs awarded against the defendant should be restricted to $1,000'.[49]

33.38 The costs awarded in the case relate to activities that appear to have been directly related to the legal proceedings. Although charges had not been laid at the time of the first trip, establishing the identity of the copyright holders was a necessary step in deciding whether charges should be laid. On this basis, this case fits within the principles set out in *Higgins*. It seems clear that the work undertaken before the proceedings commenced was necessary in making the decision whether to commence the proceedings or not.

33.39 As in *Young's* case,[50] the Court took the award of costs into account when deciding on the severity of the penalty to be imposed for the substantive contraventions.

> Before considering the monetary penalty which this Court should impose, it is necessary to consider the applications by the prosecutor for confiscation of the hardware seized from the defendant, and for an order for costs. Both of these matters will have a heavy impact on the defendant, and should be taken into account as part of the overall sentencing package.[51]

33.40 The Court held that:

> The impact on the defendant of the order for costs and the order for confiscation will be substantial. In my opinion if one fine is imposed pursuant to sub.s.4K(4) of the Crimes Act of $1,200, the overall package is one of appropriate severity.[52]

33.41 In neither *Young* nor *Hanna-Rivero* did the Court explicitly refer to any authority on which the award of costs of the *investigation* might be based (although in *Hanna-Rivero* these costs seem more clearly related to the decision to commence proceedings). It is quite possible that these decisions are anomalous and not indicative of any general trend to extend the meaning of costs that were 'necessary or proper for the attainment of justice' that may ordinarily be awarded in a proceeding under the costs jurisdiction of the Federal Court.

Preliminary view

33.42 In DP 65, the ALRC expressed the preliminary view that regulators should have no right to recover the costs of their investigations unless specifically conferred on them by the relevant legislation and, where necessary, the rules of court.

33.43 The ALRC proposed:

> **Proposal 13–1.** There should be no general right for a regulator to recover the costs of investigation from the person investigated unless:

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49 Ibid, 301.
50 See discussion at para 33.16–33.18.
51 *Irvine v Hanna-Rivero* (1991) 23 IPR 295, 300.
52 Ibid, 301. The Court could have awarded up to $11,500 in fines under s 133 of the *Copyright Act 1968*.

(a) This right is expressly provided in the relevant legislation and, where necessary, rules of court. The legislation or rules of court should specify clearly what items are encompassed within a permissible claim for a regulator's costs of investigation;

(b) An avenue for review, assessment or taxation of the regulator's claim for its costs of investigation is available, or the relevant statute or rules of court provide for a maximum amount recoverable by the regulator or a clear method of calculating that amount; and

(c) The recovery of a regulator's costs of investigation is limited to circumstances in which a contravention has been proved or admitted (even if not formally recorded).

Proposal 13–2. Any costs orders, whether relating to legal, investigative or other costs, should be taken into account when assessing the level of penalty to be imposed.

Consultations and submissions

33.44 Several submissions commented on the ALRC's proposal that there should be no general right for a regulator to recover the costs of an investigation from the person under investigation.[53] The ATO supported Proposal 13–1 in its submission, noting that:

> The ATO does not seek to recover the costs of investigation and is of the view that a regulator's costs of investigation form a normal part of the administration of the tax system and should not be able to be recovered in the circumstances described.[54]

33.45 The ATO noted the difficulty in introducing a 'user-pays' principle into criminal investigations and the difficulty in quantifying the costs that might be recovered. The ATO also noted that the current situation, which provided incentives for co-operation, was preferable to attempting to recover the costs of an investigation.[55] Another submission supported Proposal 13–1, 'particularly the requirement that there must be express legislative provision for cost-recovery'.[56] In consultation, one other person expressed support for Proposal 13–1.[57]

33.46 The ACCC stated that the recovery of the costs of an investigation raised two issues. 'The first concerns whether a regulator should be entitled to recover the costs of an investigation. The second is whether, having recovered costs, it is entitled to retain them'.[58] The ACCC argued that a regulator should be entitled to recover the costs of an investigation as

> there are occasions when the dimensions of an investigation or litigation and the well-funded capacity of parties under investigation significantly strains the financial capacity of a regulatory agency to conduct the investigation or litigation. In such circum-

53 Australian Competition & Consumer Commission, *Submission CAP 24*, 15 October 2002; Australian Taxation Office, *Submission CAP 16*, 17 September 2002; K Yeung, *Submission CAP 20*, 9 October 2002.
54 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.158.
55 Ibid, para 2.162.
56 K Yeung, *Submission CAP 20*, 9 October 2002.
57 A Hudson, *Consultation*, Melbourne, 4 September 2002.
58 Australian Competition & Consumer Commission, *Submission CAP 24*, 15 October 2002, 21.

> stances the cost to the agency of conducting the matter is seriously disproportionate to that agency's resources. Where this happens, it may seriously jeopardise the agency's capacity to implement its other regulatory activities as much needed funds are diverted.[59]

33.47 For this reason, the ACCC opposed Proposal 13–1, commenting that:

> The ACCC supports the view that it should be entitled to seek the recovery of costs of investigation. The ALRC's earlier Report 68 *Compliance with the Trade Practices Act* recommended that an entity under investigation should contribute toward the then Trade Practices Commission's costs of investigation in the event of a contravention being established.[60]

33.48 The ACCC also stated, however, that if any costs recovered were required to be paid into consolidated revenue, the regulator 'is no better off than it was before, and its capacity to conduct its national enforcement role could still be crippled by a single major investigation'.[61] The ACCC proposed that, if a regulator were permitted to recover the costs of an investigation, it should also be permitted to retain the costs to 'apply them in fulfilment of their national enforcement role'.[62] The ACCC acknowledged the need for transparency and accountability and proposed that it 'be for the courts to decide the relative proportion of the costs that would be recoverable'.[63]

33.49 Retention of any costs recovered by the regulator raises the vexed issue of a perception of impropriety in any payment made by a member of the regulated community to the regulator in the context of an investigation into an alleged breach of the law. One submission noted this potential stating a concern 'that conferring the power of cost recovery on regulators may generate perverse incentives'.[64] The same submission raised the issue as to whether

> consideration might also be given to whether those found innocent of allegations, or against whom investigations have been made but ultimately not formally pursued, ought to be entitled to seek some kind of cost recovery from the regulator in light of the inconvenience, expense and stress that such processes might have on them.[65]

33.50 This issue raises interesting policy questions about who should bear the costs of regulation in general. In order to properly explore this option it would be necessary to seek views from a wide range of both regulators and members of the regulated community and, in the context of the current Inquiry, this is not possible. The ALRC notes that cost recovery against regulators is possible in the context of court proceedings but acknowledges that this is subject to the limitations discussed earlier in this chapter as to the nature of the costs that may be recovered in court proceedings.

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59 Ibid, 21.
60 Ibid, 22.
61 Ibid, 21.
62 Ibid, 22.
63 Ibid, 22.
64 K Yeung, *Submission CAP 20*, 9 October 2002.
65 Ibid.

33.51 The ATO and Dr Karen Yeung also supported Proposal 13–2. The ATO noted that:

> The ATO supports the view that if costs were to be paid by the offender, this should be taken into account in determining the overall sanction from [sic] the offence.
>
> The tax law sets out a number of aggravating and mitigating factors which are relevant to the level of penalty for tax shortfalls. One factor is the level of co-operation received from the taxpayer. Co-operation from the taxpayer can lead to a less costly investigation by the ATO but the mere consideration is the willingness of the taxpayer to assist in the determination of their correct taxation liability.
>
> Courts generally take into account the offender's co-operation in any sentencing. As mentioned above, co-operation with the regulator often reduces the costs of investigation. [66]

33.52 The ALRC agrees that the level of cooperation by the person being investigated should be relevant to the award of any investigation costs by the court. An award of costs is made at the discretion of the court and the ALRC believes that, where it is relevant, the conduct of the matter, including the level of cooperation by the defendant, would be a factor taken into account by the court in assessing costs and that, therefore, there is no need to amend the law to specifically direct a court to take the level of co-operation into account.

Conclusion

33.53 The ALRC has reservations about providing a general right for a regulator to recover the costs of its investigations, particularly in the absence of any independent scrutiny of those claims. As the ATO noted, investigation costs are part of the general costs of administering a regulatory scheme. The ALRC also notes the ATO's comments that introducing a concept of 'user-pays' into a criminal scheme poses many difficulties. The ALRC sees problems in allowing payments to be made by a person under investigation directly to the entity that has undertaken the investigation, as this raises the possibility of improper acceptance by the regulator of money or, at the least, a perception of impropriety. The ALRC notes, in this context, the recent events concerning the Victorian Casino and Gaming Authority as support for the need for transparency and accountability.

33.54 The ALRC considers that, as a general principle, the conduct of a regulator should be transparent and that the regulator should be accountable for the way in which it exercises its powers. When the exercise of those powers involves requesting the payment of money by a member of the regulated community, the ALRC considers that there is a particular need for transparency and accountability. For these reasons, the ALRC is reluctant to recommend that a regulator have the general right to recover the costs of an investigation and retain those funds, unless specific consideration has been given by the legislature to whether such a right is appropriate for the particular penalty

66 Australian Taxation Office, *Submission CAP 16*, 17 September 2002, para 2.164–2.166.

scheme and the particular regulator and, unless in addition, there is the safeguard of external accountability.

Recommendations

Recommendation 33–1. The Regulatory Contraventions Statute should provide that a regulator has no general right to recover the costs of an investigation from the person under investigation unless that right is expressly provided for in the relevant legislation and, where necessary, rules of court. The legislation or rules of court should specify clearly what items are encompassed within a permissible claim for a regulator's costs of investigation. Any such recovery should be:

(a) subject to review, assessment or taxation by a court of the regulator's claim for its costs of investigation; and

(b) limited to cases in which a contravention has been found by a court, a person has been convicted of a criminal offence or an admission of a breach has been sealed by the court (even if the contravention or conviction has not been formally recorded).

Recommendation 33–2. Any costs orders, whether relating to legal, investigative or other costs, should be taken into account when assessing the level of penalty to be imposed.

List of Submissions

Name	*Submission number*
Australian Competition and Consumer Commission	CAP 01
National Farmers' Federation Ltd	CAP 02
South Brisbane Immigration & Community Legal Service Inc	CAP 03
Mrs Dawn Endresz	CAP 04
Environment Australia	CAP 05
Mr Ivan G Brown SM	CAP 06
Professor Warren Pengilley, University of Newcastle	CAP 07
Association for Compliance Professionals of Australia	CAP 08
JJ Lawson Customs and Freight Brokers	CAP 09
Mr Michael Murray	CAP 10
Mr Ian Leader-Elliott, University of Adelaide	CAP 11
Professor Michael Adams, University of Technology, Sydney	CAP 12
Insolvency and Trustee Service Australia	CAP 13
Attorney-General's Department, Criminal Justice Division	CAP 14
Australian Securities & Investments Commission	CAP 15
Australian Taxation Office	CAP 16
Customs Brokers & Forwarders Council of Australia Inc	CAP 17
The Hon Justice Garry Downes AM, Administrative Appeals Tribunal	CAP 18
Mr Andrew Hudson, Herbert Geer & Rundle	CAP 19
Dr Karen Yeung, University of Oxford	CAP 20
Mr Michael Murray	CAP 21
The Victorian Bar Association	CAP 22
Australian Broadcasting Authority	CAP 23
Australian Competition and Consumer Commission	CAP 24
Australian Customs Service	CAP 25
Environment Australia	CAP 26
Law Council of Australia	CAP 27

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United States

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