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Terms of Reference

CIVIL AND ADMINISTRATIVE PENALTIES

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:

(iii) 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

(iv) 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

[signed]
Daryl Williams
Attorney-General

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

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)
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)
Justice John von Doussa (part-time Commissioner)
Hank Spier (part-time Commissioner from September 2000)
Justice Mark Weinberg (part-time Commissioner)

Officers
Legal Officers
Michael Barnett (September to November 2001)
Kate Connors (from September 2000)
Jonathan Dobinson (from March 2001)
Helen Dakin
Paula O'Regan (May to December 2001)
Jackie Saisithidej (to June 2001)
Ben Saul (from January to August 2001)
Lynne Thompson (from July 2001)
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Suseela Durvasula
Melissa Goode
Sonia Goumenis
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Daniel Joffe
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Andreas Kirschbaum
Joshua Kulawiec
Veronica Lavulo
Victoria Lee
Michelle McCabe
Beth Midgely
Mohan Nadig
Simran Sandhu
Emily Sunman
Wendy Yap

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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
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, Deputy Chairman, Australian Securities & Investments Commission
Mr Gary Watts, Partner, Fisher Jeffries

Abbreviations

AAT	Administrative Appeals Tribunal
ABA	Australian Broadcasting Authority
ACA	Australian Communications Authority
ACCC	Australian Competition and Consumer Commission
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
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
APRA	Australian Prudential Regulation Authority
AQIS	Australian Quarantine Inspection Service
ARC	Administrative Review Council
ARO	Authorised Review Officer [in Centrelink]
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]
CES	Commonwealth Employment Service [replaced by Job Network]
Civil Aviation Act	*Civil Aviation Act 1988* (Cth)
CLERP	Corporate Law Economic Reform Program
CLERP Act	*Corporate Law Economic Reform Program Act 1999* (Cth)

Constitution	*Commonwealth of Australia Constitution Act 1900* (Imp)
Corporations Act	*Corporations Act 2001* (Cth)
Crimes Act	*Crimes Act 1914* (Cth)
Criminal Code	*Criminal Code Act 1995* (Cth)
CRU	Customer Relations Unit [within Centrelink]
Customs Act	*Customs Act 1901* (Cth)
DEWR	Department of Employment and Workplace Relations
DID	Diversified Institutions Division [of APRA]
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs
DOHA	Department of Health and Ageing
DPP	Commonwealth Director of Public Prosecutions
ECA	*Export Control Act 1982* (Cth)
Electoral Act	*Commonwealth Electoral Act 1918* (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
Evidence Act	*Evidence Act 1995* (Cth)
FACS	Department of Family and Community Services
FM Act	*Fisheries Management Act 1991* (Cth)
FOI Act	*Freedom of Information Act 1982* (Cth)
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)
JCPAA	Joint Committee of Public Accounts and Audit

Migration Act	*Migration Act 1958* (Cth)
NAT	National Adjudicatory Tribunal [of the ASX]
Navigation Act	*Navigation Act 1912* (Cth)
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
OGTR	Office of the Gene Technology Regulator
PRS	Problem Resolution Service [of the ATO]
PSA	*Prices Surveillance Act 1983* (Cth)
Quarantine Act	*Quarantine Act 1908* (Cth)
RIS	Regulatory Impact Statement
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)
TPC	Trade Practices Commission [now the ACCC]
UK	United Kingdom
US	United States of America

Summary of Proposals and Questions

4. The Regulators and the Regulated

Question 4-1. The ALRC is seeking to evaluate whether and how statements of objectives — whether informal or statutory — affect regulatory practice. Are statements of objectives helpful? Can objectives be framed in realistic and pragmatic terms so that they transcend general principles.

6. Regulators and the DPP

Proposal 6-1. 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; 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.

Proposal 6-2. 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.

Question 6-1. What status should attach to 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?

7. Fairness

Proposal 7-1. There should be 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.

Question 7-1. Is it appropriate for any statement excluding or limiting the application of procedural fairness to be in delegated, rather than in primary, legislation?

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.

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 those 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.

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 statements.

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?

Proposal 7-5. Regulators should develop and publish guidelines on how these principles of procedural fairness are to be extended to third parties who may be affected by their decisions, and on which third parties the principles of procedural fairness are to be extended to.

Question 7-3. Is it 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?

Question 7-4. Should regulators develop and publish service charters (such as the Taxpayers' Charter) to ensure that they act ethically and respect the rights of regulated entities?

Proposal 7-6. Regulators should develop and publish guidelines on the basis on which they will negotiate and agree penalty-related settlements, subject to any relevant statutory criteria, standards or limitations.

Proposal 7-7. 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.

Question 7-5. Should admissions given in enforceable undertakings be admissible in any proceedings brought by third parties?

Question 7-6. Should regulators develop and publish guidelines on the use of publicity prior to, during and following the exercise of penalty powers (including court or tribunal proceedings)?

8. Multiple Proceedings and Multiple Penalties

Proposal 8-1. When the same physical elements can attract both a civil penalty and criminal liability:

(a) the legislation must draw a clear distinction between civil penalty provisions and criminal liability provisions;

(b) the physical and mental elements of both the contravention attracting a civil penalty and the criminal offence should be clearly stated in the legislation.

Question 8-1. Are there other effective ways of distinguishing between criminal liability and civil penalties?

Question 8-2. Has the *Criminal Code Act 1995* assisted in distinguishing criminal from civil penalty provisions?

Proposal 8-2. Legislation that provides for parallel criminal liability and civil penalties for 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 an 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 an 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 offence, the civil penalty proceedings may be resumed.

Proposal 8-3. Legislation that provides for parallel criminal liability and civil penalties 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:

(a) if the individual gave the evidence or produced the documents in civil penalty proceedings;

(b) and the conduct alleged to constitute the offence is the same or substantially the same as the conduct alleged to constitute the contravention.

Proposal 8-4. 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.

Question 8-3. Are there any areas of federal regulation where the same or substantially the same conduct attracts more than one civil penalty under different statutory instruments? If so, should legislation contain protection against any double punishment consequences that flow from this duplication?

Question 8-4. Should the law permit courts, either generally or in specified cases, to make an alternative finding that the person is not guilty of an offence but guilty of a civil penalty contravention (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?

Question 8-5. Is there adequate protection against the use of evidence given in administrative proceedings in subsequent criminal or civil penalty proceedings?

Proposal 8-5. Regulators should develop and publish guidelines in relation to parallel criminal and civil penalty proceedings that address issues of choice of proceedings, double punishment and evidence when legislation provides for criminal liability and civil penalties for the same or substantially the same conduct.

9. Privilege

Proposal 9-1. Statute law should expressly state the default position that:

(a) the privilege against self-incrimination in relation to a criminal offence;

(b) the privilege against self-exposure to a non-criminal penalty; and

(c) legal professional privilege

exist 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, rules of court or court order.

Proposal 9-2. Statute law should expressly state that no privilege against self-incrimination in relation to a criminal offence or privilege against self-exposure to a non-criminal penalty operates in favour of corporations, and that a corporation may not claim any such privilege in relation to evidence that may incriminate a person or expose a person to a penalty.

Proposal 9-3. Subject to clear, express statutory 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, 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.

10. Accountability

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.

Proposal 10-3. Subject to Proposals 10-1 and 10-2, 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.

Proposal 10-4. Subject to Proposals 10-1 and 10-2, 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.

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?

Question 10-2. Are there any circumstances where internal review should be a mandatory precursor to access to external review?

Question 10-3. Should legislation 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?

Proposal 10-5. 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.

11. Recovery of Monetary Penalties

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?

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?

12. Infringement notices

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:

(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.

Question 12-1. Is it appropriate for infringement notice schemes to seek to deal with 'continuing offences'? If so, how should they be structured?

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?

13. Costs of Investigation

Proposal 13-1. There should be no general right for a regulator to recover the costs of investigation from the person investigated unless:

(a) This right is expressly granted 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 an offence or 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 any penalty to be imposed.

14. Insolvency

Proposal 14-1. The distinction in insolvency law between the status of criminal and civil penalties should be removed so that both criminal and civil monetary 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

Question 14-1. Should criminal and civil monetary penalties be given priority in corporate insolvency proceedings?

Question 14-2. Does the status of administrative penalties need to be clarified in relation to personal and corporate insolvency proceedings? If so, what status should they be given?

15. Discretion, Leniency and Immunity

Proposal 15-1. Subject to Proposals 10-1 and 10-2, regulators should develop and publish detailed guidelines describing how penalty-related discretions will be exercised.

Question 15-1. Are there any particular areas of discretion where guidelines on the exercise by regulators of their discretion should not be published as matter of policy or principle?

Question 15-2. What form should guidelines on the exercise by regulators of their discretion take? What status should attach to any such guidelines?

Question 15-3. Should regulators be bound, either legally or administratively, to follow published guidelines on the exercise of their discretions?

16. Corporate Responsibility

Question 16-1. Do the current legal tests for determining liability for conduct adequately address the issues of:

(a) identifying the extent of direction and control exerted by management over individuals involved in offences or contraventions?

(b) identifying the limits of the actual or apparent authority of individuals involved in offences or contraventions?

Question 16-2. Given the complexity of modern corporate structures, is formal delegation of authority the appropriate test for corporate liability or is functional authority more important?

Question 16-3. Would a 'corporate culture' approach to liability for conduct be appropriate as it would allow recognition that issues of authority involve questions of intention, representation and belief?

Question 16-4. Do provisions which deem the conduct of agents of corporations acting within their actual or apparent authority to be conduct of the corporations allow liability to be appropriately assigned?

Proposal 16-1. Subject to clear, 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.

Proposal 16-2. Subject to clear, express statutory statements to the contrary, where a civil penalty provision requires proof that a corporation had a particular state of mind, the provisions relating to liability for the fault elements of an offence specified in the *Criminal Code* should apply to determining liability for conduct that attracts civil penalties.

Proposal 16-3. The liability of individuals should remain concurrent with corporate liability. The basis of such liability — direct, indirect or deemed — should be clearly expressed in the legislation creating the offence or contravention.

17. The Criminal/Non-Criminal Distinction

Proposal 17-1. State or territory legislation that permits imprisonment in default of any non-criminal penalty should be amended to exclude imprisonment in relation to penalties for federal non-criminal regulatory contraventions.

Proposal 17-2. Where parallel or sequential criminal and civil penalty proceedings are possible, there should be no role for fault as an element of the non-criminal contravention.

Proposal 17-3. General defences should be available for non-criminal regulatory contraventions that consist of a physical element only. In particular, a defence of 'reasonable mistake' should be available unless specifically excluded by clear, express statutory statement.

Question 17-1. If there is a need for defences to be clarified in relation to non-criminal regulatory contraventions, is a regulatory contraventions code the best way to achieve this or would guidelines for legislators be sufficient?

Proposal 17-4. Legislation providing for penalties for non-criminal regulatory contraventions should clearly and expressly state the nature of the procedures that are to apply.

Question 17-2. What is the best way to achieve appropriate procedural protections for respondents facing civil or administrative penalties? Should legislation be specific about 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?

Question 17-3. Do we need to develop a quasi-criminal procedure or a hybrid civil/criminal procedure for those non-criminal contraventions that are identified as having serious and punitive consequences? Should there be any distinction between corporations and individual defendants when developing these procedures? How would 'serious and punitive consequences' be measured?

Question 17-4. Alternatively, if the civil/criminal distinction is to be maintained, should legislation establishing civil penalties expressly state that Parliament intends the civil standard of proof and civil court procedures to apply?

Proposal 17-5. 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.

Proposal 17-6. Subject to Proposal 17-2, unless there are compelling reasons otherwise, fault should not be an ingredient of a non-criminal regulatory contravention. If fault is to be an element in particular cases, it should be negligence.

Proposal 17-7. Parliament should amend the *Customs Act* along the lines recommended in ALRC 60. In particular, the *Customs Act* should be amended so that:

(a) indictable offences are prosecuted in the same way as any other indictable offences;

(b) Customs prosecution procedures are criminal and not civil.

Proposal 17-8. Alternatively, if Proposal 17-7 were not adopted, the *Customs Act* should be amended to:

(a) include a clear legislative statement about whether Customs proceedings are civil or criminal; and

(b) bring about consistency so that minor breaches and the more serious contraventions are treated similarly, allowing for the different procedures between courts of summary jurisdiction and higher courts.

18. Setting Penalties

Proposal 18-1. Where contraventions result in an offender obtaining large financial benefits, legislation should allow the court to link the form or quantum of the penalty to the financial gain as one of the alternative approaches to setting the penalty.

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?

Proposal 18-2. Legislation which provides for monetary penalties should provide guidelines or criteria for determining the amount of the penalty, such as those set out in s 76 of the *Trade Practices Act 1974* (Cth), s 481(3) of the *Environment and Biodiversity Conservation Act 1999* (Cth) and the factors outlined by French J in *Trade Practices Commission v CSR Ltd* (1991).

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 provisions. Where anomalies are revealed that are not explained by their context, legislation should be amended to achieve greater consistency.

Question 18-2. 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?

Question 18-3. Is there any inconsistency or unfairness in the levels of regulatory penalties imposed? If so, does this relate to:

(a) the relative penalties applied to corporations and individuals?

(b) the level of penalties in one area of legislation relative to another?

(c) the level of penalties for one type of conduct relative to another?

(d) the levels of civil penalties generally (or particular civil penalties) relative to administrative or criminal penalties for comparable conduct?

(e) any other issues?

Question 18-4. Does any inconsistency or unfairness arise from the imposition of federal civil penalties in state and territory courts in different jurisdictions?

Question 18-5. Should a regulatory contraventions code be used to set out a general list of aggravating and mitigating factors? Or should legislation set out the aggravating and mitigating factors applicable to the penalties it imposes, either generally or in relation to specific penalties or sections of the legislation?

Question 18-6. Should the courts deliver guideline sentencing judgments in relation to federal civil penalties? If so, in what areas of law and on what basis should any such judgments be issued?

Question 18-7. Should minimum penalties be set in any circumstances? If so, should principles be established for circumstances in which minimum penalties are appropriate?

Question 18-8. Where a choice of proceedings is possible, should the maximum penalty for the criminal offence 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 non-criminal regulatory contravention where the conduct is the same or substantially the same?

Proposal 18-4. 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.

Question 18-9. Should sentencing guidelines be developed for corporate offenders to ensure that a range of tailored sanctions is generally available? These sanctions might include, but not be limited to:

(a) probation orders;

(b) community service orders; and

(c) adverse publicity orders.

1. Scope and Direction of Inquiry

Contents

Introduction

1.1 The potential scope of this inquiry is enormous. The Terms of Reference refer to the Australian Law Reform Commission (ALRC), without qualification, 'the laws of the Commonwealth relating to the imposition of administrative and civil penalties'. This is a vast array of legislation and regulation, and requires the ALRC to investigate the operation of the regulatory mechanisms throughout the federal administrative systems. This entails consideration of the terms of the relevant primary and delegated legislation, court and tribunal procedures, the procedures and attitudes of the regulators (of which there are many), the responses of the regulated communities, and analysis of the theoretical background of regulation by a state and its relationship with its regulated community.

1.2 It is self-evident, and the Terms of Reference make it clear, that no review of civil and administrative penalties can be achieved without a close consideration of the way in which the criminal justice system operates and of the boundaries and relationship between the criminal justice system on the one hand and the civil and administrative regulatory systems on the other.

1.3 The Terms of Reference place particular emphasis on maintaining and enhancing the effectiveness and efficiency of the criminal justice system as well as the civil and administrative regulatory systems. The ALRC is directed to consider fair, effective and practical systems of decision making and enforcement, the relative advantages and disadvantages of various forms of penalty, the need for clear and consistent principles, the need for balance, Australia's commitments under international and domestic law to human rights and civil liberties, and in particular the remarks of the New South Wales Court of Criminal Appeal and the High Court of Australia in *Comptroller of Customs v D'Aquino Bros Pty Ltd*.[2] These remarks highlight the difficulties that have emerged in identifying clearly the boundaries

2 (1996) 135 ALR 649 (NSW CCA); [1996] 17 Leg Rep C8A (High Court).

between criminal and civil penalty actions and, in particular, the problems created when they are consciously blurred in the creation of hybrid actions.

1.4 The ALRC is directed to consider in its eventual report a number of very broad areas. For example, it must consider where civil and administrative penalties are appropriate and the limitations, if any, on their application to particular sorts of offences. Attention must be paid to particular aspects of liability in the criminal system that also apply to civil and administrative penalties such as fault elements and corporate responsibility. Protections and procedural rights available in the criminal justice system are also important. These range from procedural matters in court, which vary significantly between criminal and non-criminal proceedings, to the conduct of regulators prior to the commencement of proceedings, such as their rights to obtain information from the regulated community and their rights, and the limits on those rights, to use that information in one or more sets of proceedings against regulated entities.

1.5 In particular, the ALRC is directed to report on principles for setting the level of penalties, both in relation to the maximum penalties for a particular offence and those to be applied and determined by the relevant decision-making forum in any particular case.

1.6 Finally, the enforcement of penalties, however imposed, is to be considered, and the appropriateness of, and limitations on, the application of administrative procedures are to be taken into account.

1.7 As a matter of course in all its References, the ALRC consults publicly and as widely as possible with relevant academic, legal, government and public interest bodies. The Terms of Reference direct the ALRC to consult in particular with 12 such bodies, all of whom have been contacted and consulted in the preparation of this Discussion Paper. They represent, however, only some of the full range of interested bodies, which, on one level, would include every individual and every body corporate in Australia.

1.8 As is its usual practice, the ALRC has formed an Advisory Committee to assist it in its formulation of the issues and questions raised in this Discussion Paper, and in due course the recommendations to be found in the final Report to the Attorney-General. The members of that Committee are listed on pages 10 and 11. The ALRC thanks them sincerely for their past and continuing support and interest.

1.9 The boundaries and core concerns of this inquiry have been very difficult to pin down accurately and firmly. To investigate in detail all the aspects of the federal regulatory systems would prove impossible. It is necessary, therefore, for the ALRC to maintain a broad overview of the systems, bearing in mind the theoretical and practical objectives of regulatory systems in general and particular sys-

tems in isolation, in order to formulate the general statements of principle that the Terms of Reference require. On the other hand, it is impossible to understand whether general statements of principle have any practical value or impact without understanding with some particularity the way in which the regulatory systems are drafted, and how the regulators operate and apply those systems, bearing in mind the use of discretion and other aspects of human variability at all levels, and the way in which the regulated communities respond.

1.10 In its preliminary work, the ALRC has created a database of approximately 2,400 federal regulatory penalties. It is far from exhaustive but, the ALRC trusts, it is sufficiently detailed and comprehensive to provide a picture of the overall regulatory landscape in Australia. The ALRC has grouped legislation into some 24 categories including administrative law, aged care, aviation, banking, border control, discrimination and human rights, environmental law, licensing regimes, marketplace regulation, revenue, social security, communications and trade practices. It has endeavoured to categorise each penalty provision as criminal, administrative or civil although that exercise has demonstrated that this categorisation is difficult to make confidently in many cases. This dilemma is, of course, one of the issues that gave rise to the courts' comments in *D'Aquino* referred to above.[3]

1.11 There are over 1,345 federal statutes, many of which set up or relate to a regulatory system. Ultimately, 72 principal pieces of legislation were selected for analysis. It is clear, therefore, that some aspects of the regulatory system were overlooked. However, the ALRC is confident that it has covered all major categories of regulation and that the scope of this analysis (within these limitations) is nonetheless sufficiently comprehensive to allow, where possible, statements of generality applying to the whole of the federal regulatory systems. The ALRC does, however, seek comment from regulators or regulated communities that do not appear to have been discussed in detail, especially where aspects of those systems do not appear to fit within the general statements made by the ALRC or have distinctive features worthy of particular consideration. The conclusions drawn from that database are to be found in various places in this Discussion Paper.

Structure of Discussion Paper

1.12 This Discussion Paper has been divided into five broad parts although, as will be apparent, the division between those parts and some of the chapters within them is blurred at times. It is impossible in some cases to separate questions of theoretical or general import from particular examples or the real context in which they operate. It follows that some parts of the following discussions may straddle one or more of the somewhat arbitrary distinctions in this Paper.

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3 See para 1.3.

1.13 **Part A** (chapters 2 to 4) deals with the general nature of penalties and their role in government regulation. **Chapter 2** asks, firstly, what are penalties, at least for the purposes of this inquiry. It examines the differences between criminal and non-criminal offences, the characteristics of the procedures by which these different offences are tried, and the role of a mental element in these offences, noting in particular the impact of the *Criminal Code Act 1995* (Cth). It also seeks to deal with some of the terminological problems in these discussions. It concludes that the terms 'civil offence' and 'administrative offence' are probably misnomers as they are in reality regulatory offences dealt with by administrative or civil processes. It is the enforcement process that determines the nature of, or label to be attached to, the offence, which may be somewhat arbitrary or influenced by political considerations.

1.14 To understand some of these concepts, it is necessary to know the range and types of penalties that are or could be found in a comprehensive regulatory system. These are discussed in **chapter 3**. Chapter 3 also looks at the purposes of regulation. The state punishes people who break its rules for different purposes and with varying techniques and degrees of severity. In some cases, the purpose may be purely retribution but is more commonly punishment combined with other purposes. Deterrence is also a frequent, if not universal, purpose of penalties. Less severe punishment may simply seek to price non-compliant behaviour in a more routine fashion that will encourage the regulated entities to comply simply because it is more commercially effective (or cheaper) for them to do so, however the cost may be expressed. Penalties may also have educative purposes. They may have a role in protecting the public generally or particular special interest groups. Most commonly, however, regulation will combine some or all of these purposes, and in any given system all of them will apply at different times or in relation to different offences. Finally, the chapter examines the hybrid nature of Customs and excise prosecutions.

1.15 **Chapter 4** looks at the relationship between the state and the regulated entities. This, of course, relates closely to the purposes of regulation. The chapter examines the different approaches that may apply if the contacts between regulator and regulated are one-off, isolated or rare, or operate on a recurrent or continuous basis. The public role of the regulators is examined in their public statements of objectives or policy and, in due course, this Discussion Paper considers the way in which these statements may provide specific rights to the regulated entities, or at least give them a reasonable expectation of how the regulator will operate and how they will be treated. This chapter also considers the extent to which the regulator might be influenced by the regulated community and the extent to which that community ought to be represented within the regulator itself. This highlights the risk of the capture of a regulator by a strong industry and the limitations of self- or co-regulation. Chapter 4 ends with an examination of the difficulties associated with seeking to measure the effectiveness of regulation.

1.16 **Part B** (chapters 5 and 6) of this Discussion Paper looks at the regulators active in Australia in the federal sphere. **Chapter 5** reviews the contemporary regulatory landscape in the federal regulatory systems in Australia. It considers the relevant Acts and regulations by looking at eleven areas of regulation, the principal regulators, the way in which the regulations provide a range of penalties or regulatory mechanisms and some idiosyncratic features of particular systems that may have broader application or, alternatively, are confined to regulators with particular objectives or particular regulated communities.

1.17 **Chapter 6** considers the relationship between the regulators and the Commonwealth Director of Public Prosecutions, and their differing roles in, and approaches to, actions for the imposition of criminal and civil penalties.

1.18 **Part C** (chapters 7 to 15) looks at the procedural aspects of regulation and penalties. The categorisation of penalties as criminal, civil or administrative has an enormous impact on the way in which the alleged offender is treated, the processes used by the state to prosecute him or her for the offence and seek penalties as punishment, for reparation or as deterrence. Consequently, this categorisation has a major role in determining the protections available to the alleged offender.

1.19 **Chapter 7** considers the threshold issue of fairness. It is beyond argument that regulation must be fair, but what that means in practice and how that can or need be institutionalised for the protection of the regulated communities warrants examination.

1.20 The increasing range of penalty options available to regulators coupled with their increasing powers to demand information from regulated entities raises real risks that offenders could be unfairly and improperly exposed to multiple actions against them for the same offending conduct, in addition to any private civil actions that might be commenced. **Chapter 8** considers the issues raised by this spectre of multiple jeopardy, reviewing the common law and statutory protections against multiple proceedings, and the complications surrounding the possible use of information obtained by regulators through compulsory process (either in or out of court) in subsequent penalty actions.

1.21 One principal aspect of the protection of a person accused of a criminal offence are the two major privileges available at common law: the privilege against self-incrimination and legal professional privilege. **Chapter 9** examines the current state of the law of privilege, the extent to which the protections it affords have been variously eroded and shored up by modern statute, and the role of privilege in relation to exposure of a person to civil penalty proceedings.

1.22 **Chapter 10** looks at a fundamental aspect of procedural fairness: the right to a review of, or appeal from, a decision to impose a penalty, either within the

regulator itself or by an external body. The chapter's title indicates that the accountability of the penalty decision maker (in particular, in relation to true administrative penalties and quasi-penalties) is the focus of attention. It looks at the role of courts and tribunals, the role of internal review within the regulator, and review by external non-curial bodies such as the Commonwealth Ombudsman, Parliament, the media and so on.

1.23 **Chapter 11** looks at the way in which monetary penalties are recovered from the offender. The Terms of Reference direct the ALRC's attention to particular aspects of this topic, which are considered in the following chapters. Chapter 11 considers whether there are any more general issues that warrant consideration and possible reform.

1.24 The use of infringement notice schemes, a topic expressly covered by the Terms of Reference, is considered in **chapter 12**. In particular, the discussion here and in related parts of the Discussion Paper examines the distinction between infringement notice processes and true administrative penalties, and the constitutional restraints on the use of such notices (especially as recovery mechanisms) in the federal sphere.

1.25 **Chapter 13** considers the rights of regulators to seek to recover some or all of the costs of their investigative and enforcement activities, and the options for possible reform in this area.

1.26 A particularly topical aspect of the recovery of penalties is the use (or misuse) of insolvency to improperly avoid the payment of penalties imposed by courts or regulators. This is discussed in **chapter 14**. As this Discussion Paper was being finalised for printing, legislation had been re-introduced into the federal Parliament to amend bankruptcy legislation to make such abuse of insolvency schemes harder.[4] The different treatment of criminal and civil penalties in insolvency schemes is also considered in some detail.

1.27 Discretion of one form or another permeates decision-making processes at all levels. This applies no less to decisions in relation to the imposition, enforcement and recovery of penalties. The exercise of discretion is considered in the particular context of leniency and immunity schemes in **chapter 15**, the last of part C, as is the remission of administrative penalties.

1.28 **Part D** (**chapter 16**) deals with corporate responsibility. This is a difficult and complicated area that has produced conflicting results in relation to criminal liability. The lack of a clear philosophy of corporate criminal liability creates problems for legislators in creating effective schemes to punish and deter offensive

4 The Hon D Williams AM QC MP, 'Bankruptcy Crackdown', *News Release 30/02*, 21 March 2002.

corporate behaviour, and for courts in attempting to impose fair, appropriate and effective penalties.

1.29 **Part E** (chapters 17 and 18) looks at some possible options for reform not considered earlier in the Discussion Paper. It starts by considering in **chapter 17** whether the distinction between criminal and non-criminal penalties should be maintained or whether it has lost its utility. The ALRC asks whether it might be more useful to preserve and enhance that distinction, which is not rigorously observed at present across the whole of the federal regulatory system, rather than postulate a general spectrum of offences that would range from the traditionally criminal offences at one end to the trivial at the other, with a complementary spectrum of penalties available upon conviction. If the distinction is to be retained, should the ALRC be looking to devise general regulatory provisions covering contraventions parallel or similar to the *Criminal Code*?

1.30 **Chapter 18** considers possible statements of principle that might be applicable in relation to the assessment of penalties, both in terms of drafting maximum penalties in primary or delegated legislation, and the assessment of penalties in particular cases.

Principal areas of possible reform

1.31 Through the detail presented in this Discussion Paper, it is possible to discern an approach with three facets that might inform the ALRC in its final report, though this is naturally subject to the outcome of the further public consultations that the ALRC will pursue following the release of this Paper.

1.32 The first general area of possible reform concerns the need for greater standardisation and publication of the overall parameters within which regulators operate. There is clearly some disparity in the way that different agencies work, and some of this is easily explained by the differences in their objectives, their tasks and the nature of the communities and activities that they regulate. However, their methods and overall approaches to their tasks should be transparent and statements of them should be readily accessible to the public. To the extent that logic and practicality permit, they should be essentially the same but will inevitably vary in detail. This variation will be of much less concern to particular regulated communities and their legal advisers, and to the public at large, if it is clear where the differences arise, and why. Accordingly, the ALRC is looking towards a series of statements or guidelines to be published by regulatory agencies setting out their approaches to various aspects of their work, notably those where the exercise of discretion is most important.

1.33 Secondly, the ALRC takes the view that the law should be clear on various aspects of the imposition and recovery of civil and administrative penalties

where at present it is silent, incomplete or confused. The ALRC again acknowledges that it is inappropriate to expect one system of regulation to suit all regulatory situations. However, if the law provides for default provisions on a number of basic issues — privilege, the right to appeal and review, the right to proper notice of various forms, the recovery of investigative costs, certain principles of corporate responsibility, to name a few — while at the same time permitting specific legislation to depart from the default position by clear express statement, the law should become clearer, easier to locate and more consistent.

1.34 The final aspect of the ALRC's provisional approach is to consider how best to structure the new provisions to achieve the greatest standardisation and avoid dispersing them throughout the large body of federal regulatory primary and delegated legislation. At present, the ALRC leans towards the creation of a regulatory contraventions code that would in some ways at least reflect the *Criminal Code*. This would be the preferable location for any default provisions that might ultimately be the subject of recommendations in the ALRC's final Report. Some aspects of this standardisation might be better found in publicly available guidelines to legislators setting out, for example, a checklist of issues to be considered whenever legislation concerning civil and administrative penalties is being drafted or reviewed. Such guidelines could complement a legislative statement covering regulatory offences generally where there is a need for more flexible and less prescriptive statements but it is nonetheless important to ensure that the law is clear and deals with all relevant issues.

Part A

The Role of Penalties in Government Regulation

2. Definitions and Terminology

Contents

2.1 A key 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 offences to which they respond. This chapter seeks to clarify, for the purposes of this Discussion Paper, what is meant by a 'penalty'; the distinctions between different classes of offence; 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 in chapter 3 and the procedural differences in chapters 7 to 15.

2.2 It is important to distinguish between the terminology used to describe the prohibited act itself, the proceedings which are a consequence, 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 that lead to the penalty. The first section examines **offending conduct** and examines the differences between a criminal offence and another type of act that is also unlawful but does not attract the odium of criminality. Although there are identifiable features of some criminal offences, such as an intention to act or an element of deception, ultimately the sheer breadth 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 contraventions and discusses the notion of the 'regulatory offence'. Traditionally, civil law has been based on notions of private redress for wrongs. Modern regulation, however, contains many offences that are prosecuted by the state, but do not lead to a criminal sanction. As the term 'civil offence' is a misnomer, the ALRC will refer to them as 'non-criminal regulatory contraventions'.

2.4 The second section discusses the nature of a '**penalty**'. 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 positive rewards. An important question for the ALRC in conducting this inquiry has been how tightly should the term penalty be defined? The ALRC chooses to broadly define the term in order to consider a wide range of regulatory behaviour as part of this inquiry.

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. In the case of administrative penalties, the ALRC has identified three types: penalties dealt with administratively by infringement notice schemes (not administrative penalties in themselves but rather an administrative device to dispose of a matter); sanctions which can be defined as 'quasi-penalties', which include withholding benefits such as licences and social security payments; and 'true' administrative penalties, which are financial administrative penalties whose application and amount is predetermined by legislation.

2.6 The fourth section notes 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, civil and administrative penalty procedures are variable and uncertain.

2.7 Finally, as part of considering the operation of the different categories, the role of **fault** elements in the criminal system and their applicability to criminal offences and non-criminal regulatory contraventions of the law is discussed.

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.[5] 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 of traditional criminal law. Therefore, criminal regulatory offences include a number of traditional crimes such as fraud or obtaining benefits by deception, but also offences 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.[6] The concept of criminality involves the notion of individual culpability and having a criminal intention for one's actions. Issues related to intention and fault are discussed at para 2.97–2.137.

2.10 One way in which criminal and non-criminal contraventions could be distinguished is based on the inherent nature of the actions themselves. A key characteristic of a crime, as opposed to another form of prohibited behaviour, rests on the act being of a sufficient repugnance to invoke 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 proceeding may not be based on the inherent immorality of the act itself, but rather on assumptions about the deterrence value of the penalty, the relative procedural aspects of pursuing a criminal or non-criminal route, or the policy ramifications of a 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.[7] In a non-federal sphere, parking offences are criminal.

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

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

6 Deterrence and punishment are discussed in greater detail in chapter 3.

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

> 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.[8]

2.13 This debate is not new, HM 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.[9]

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 thus:

> 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?[10]

What is a non-criminal contravention?

2.15 Traditionally, redress against unlawful behaviour has been split into two types: criminal sanctions or punishment, and private civil remedies.[11] The underly-

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8 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.

9 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.

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

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

ing 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 thought of as a private form of redress, focusing more on compensating victims for damage caused to them personally, and not concerned with public sanctions.[12]

2.16 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.[13] Civil remedies, on the other hand, apply to conduct that has directly harmed an individual's interest.

2.17 Modern regulation contains many offences that are not punishable in a criminal process but are nonetheless dealt with by action taken by a government agency in a court seeking a sanction. 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 Australian legislation, these offences often relate to corporate or regulatory conduct. The main legislation where civil penalty provisions are found are the *Corporations Act 2001* (Cth)*, Trade Practices Act 1974* (Cth)*, Customs Act 1901* (Cth)*, Environmental Protection and Biodiversity Conservation Act 1999* (Cth) and the *Workplace Relations Act 1996* (Cth).

2.18 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.[14]

2.19 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

12 Ibid, 1799.
13 Ibid, 1806.
14 Law Reform Commission of Canada, *Sanctions, Compliance Policy and Administrative Law*, (1981) Law Reform Commission of Canada, Ottawa, 18.

> of honesty in commerce and the need to preserve our environment and husband its resources.[15]

2.20 Generally speaking, regulatory offences lack the violence or violation that characterises traditional crimes, with the exception of fraud. The decision to call some regulatory offences 'criminal' is often one of policy rather than one of principle, or may be based on the presence of an intention to commit the act or other mental element.

2.21 Under the *Corporations Act,* non-criminal offences (called 'civil penalty provisions' in 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.[16] Under the *Trade Practices Act,* civil pecuniary penalties are available in respect of restrictive trade practices, anti-competitive conduct in the telecommunications industry and in connection with the telecommunications access regime.

2.22 The ALRC has avoided the term 'civil offence'. An offence should 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 trial by civil court processes, but that is a different concept.

2.23 To avoid confusion between the private civil law as it is traditionally conceived and these types of non-criminal contraventions, the term 'non-criminal regulatory contraventions' will be used by the ALRC to describe contraventions of statutory provisions that are dealt with using civil or administrative procedures, in contrast to the term 'criminal regulatory offences', which will be used to describe those contraventions that attract criminal sanctions and are dealt with using criminal procedure.

2.24 In the final analysis, the ALRC is not required by this inquiry to determine whether any particular offences should be treated as criminal or non-criminal, but is concerned with three fundamental issues:

- Should the distinction between criminal offences and non-criminal contraventions be maintained?

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

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

- If so, what are the hallmarks of offences or contraventions that fall or should be placed into each category?

- What are the procedural consequences of categorising an offence as criminal or non-criminal?[17]

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'.[18]

2.26 Traditionally a 'penalty' has been defined as a punishment meted out under the criminal law.[19] 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.[20]

2.27 Caselaw also suggests the term 'penalty' may also be used to denote a civil debt or imposition, as compared with a 'fine', which denotes a criminal monetary penalty.[21]

2.28 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.[22] In the legal context, punishment has been defined as:

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17 These questions are considered in chapter 17.

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

19 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.

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

21 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'.

22 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.

> 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.[23]

2.29 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 contravention of legal requirements; and
- protection of third parties or society at large.

2.30 Claims for compensation in cases for civil damages are not penalties and not considered in this Reference. However, regulatory law now permits orders in penalty actions for reparation for damage caused to third parties.[24] 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 Reference is concerned with a subgroup of the penalties imposed in accordance with the second and third points above.

2.31 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 crimes such as fraud, and civil claims for damage, are frequently associated with conduct that also attracts a regulatory penalty.

2.32 There are a number of examples of broad and inclusive definitions of 'penalty'. As an illustration of the breadth of the term in contemporary usage, Freiberg listed the range of actions which can be characterised as penalties or sanctions.

> 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.[25]

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23 D Walker, *The Oxford Companion to Law* (1980) Clarendon Press, Oxford, 1017.
24 For example, see *Trade Practices Act 1974*, s 82.
25 A Freiberg, 'Reconceptualizing Sanctions' (1987) 25(2) *Criminology* 223, 225.

2.33 The Law Reform Commission of Canada took a pragmatic approach:

> More informally stated, a sanction is 'what they do to you to make you do what they want you to do'.[26]

2.34 This view of a sanction, which can include positive and negative persuasion, appears to be broader than what is meant by 'penalty'. Although in some respects 'sanction' and 'penalty' may be (and are) used interchangeably, 'penalty' carries with it connotations of 'negative sanctions', as discussed below. Freiberg has developed a useful framework for the study of sanctions or penalties.[27] This framework has three aspects:

- sanction mode — positive or negative;
- sanction form — physical, economic, social, informational, political, privacy and legal; and
- 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.[28]

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.[29]

2.37 An example of a positive sanction would be a reward or an incentive for certain behaviour.[30] This type of positive sanction encourages compliance by rewarding those who comply rather than punishing those who do not. A related defi

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

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

28 Ibid, 229.

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

30 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* that allow workplaces to brand themselves as an 'EOWA Employer of Choice for Women': <www.eowa.gov.au/empl_choice_women/index.htm>, 25 March 2002.

nitional 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 There is some controversy surrounding these definitions. For example, as outlined in chapter 3, 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. The ALRC takes 'penalty' as interpreted 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.

Categories of penalties

Criminal penalties

2.39 The main criminal penalties used in Australian legislation are fines, probation orders and imprisonment. Additional criminal penalties include community service orders and forfeiture of property, and may also result in 'follow-on' penalties such as cancellation of licences (see chapter 3).[31] 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.[32]

2.40 In a regulatory context, criminal sanctions may serve as a last-resort punishment after repeated violations. For example, in environmental or licensing regimes criminal prosecutions serve as the final rather than the primary sanctioning mode.[33] 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.

2.41 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 behaviour.[34] This approach is discussed further below at para 2.58.

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31 A Freiberg, '"Civilizing" Crime: Reactions to Illegality in the Modern State', *Thesis*, 1985, 118.

32 Ibid.

33 D Farrier, 'In Search of Real Criminal Law' in T Bonyhady (ed), *Environmental Protection and Legal Change* (1992) Federation Press, Sydney, 79.

34 For example, see I Ayres and J Braithwaite, *Responsive Regulation; Transcending the Deregulation Debate* (1992) Oxford University Press, New York.

2.42 However, criminal penalties are not only used 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.[35]

2.43 Alternatively, criminal penalties, 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.[36] This can be seen in Australia where a majority of charges dealt with by the Commonwealth Director of Public Prosecutions (DPP) involve social security recipients.[37]

Civil penalties

2.44 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 offenders … the process by which these penalties are imposed is decidedly non-criminal.[38]

2.45 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 offence itself. As will be seen, many offences allow the prosecuting authority the choice of pursuing either (or occasionally both) criminal and civil processes.

2.46 Civil penalty provisions have been described as a hybrid between the criminal and the civil law.[39] They are clearly founded on the notion of preventing or punishing public harm. The offence itself may be similar to a criminal offence (for example, breaches of a director's duties and publishing misleading material) in that it involves an element of fraud or deceptive conduct, and the purpose of imposing a sanction may be to punish the offender, but the procedure by which the offender is sanctioned is based on civil court processes.

2.47 Dr Kenneth Mann has called these penalties 'punitive civil sanctions'.[40] These penalties differ from traditional private civil remedies in that they do not

35 The use of fines is further discussed in chapter 3.
36 A Freiberg, '"Civilizing" Crime: Reactions to Illegality in the Modern State', *Thesis*, 1985, 119.
37 Commonwealth Director of Public Prosecutions, *Annual Report 2000–2001*, Commonwealth Director of Public Prosecutions, 18–19.
38 M Gillooly and N Wallace-Bruce, 'Civil Penalties in Australian Legislation' (1994) 13(2) *University of Tasmania Law Review* 269, 269–270.
39 See, for example, K Mann, 'Punitive Civil Sanctions; The Middleground Between Criminal and Civil Law' (1992) 101(5) *Yale Law Journal* 1795, 1799.
40 Ibid, 1798.

necessarily bear any relationship to the actual damage caused (that is, they are non-compensatory).[41]

2.48 Civil penalties may be more severe than criminal penalties in many cases. For example, there are substantial civil pecuniary penalties available under the *Trade Practices Act*[42] and the *Corporations Act.*[43]

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

2.50 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.

Origins of civil penalties in Australian legislation

2.51 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 3.

2.52 Civil monetary penalties have been available under Part IV of the *Trade Practices Act* 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

41 Ibid, 1815.

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

43 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.

> sense. … We think it is important not to import into the trade practices area the notion of criminality as such.[44]

2.53 The absence of criminality was 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 breaches.[45] The deterrent aspect was further enhanced when the penalties in Part IV were significantly increased to a maximum of $10 million in 1993.

2.54 In its report *Compliance with the Trade Practices Act 1974*, the ALRC questioned the distinction between the use of civil penalties in Part IV and criminal penalties in Part V (the consumer protection provisions).[46] 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.[47] It did not recommend that criminal liability be extended to Part IV.[48]

2.55 The civil penalty provisions in Part 9.4B of the *Corporations Law* (now the *Corporations Act)* came into operation on 1 February 1993. They were subsequently amended by the *Corporate Law Economic Reform Program Act 1999* (Cth), which removed the criminal penalties from Part 9.4B and declared them civil penalty provisions only.

2.56 The adoption of civil penalty provisions was based on the recommendations of the Senate Standing Committee on Legal and Constitutional Affairs (the Cooney Committee) report *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors.*[49] 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.[50] The reforms proposed by the Cooney Committee included that:

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44 Commonwealth of Australia, *Parliamentary Debates*, Senate, 15 August 1974, 984–5.

45 *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.

46 Criminal penalties are now in part VC of the *Trade Practices Act*.

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

48 Ibid, para 9.27.

49 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.

50 Ibid, 188.

- a range of sanctions be available to the regulator to best address the individual circumstances of the case;[51]

- criminal liability should only apply where conduct is genuinely criminal in nature;[52] 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.[53]

2.57 The Committee was, however, keen to stress the need to retain criminal penalties to enforce behaviour that was genuinely criminal in nature.[54]

2.58 The aim of introducing civil penalties into the *Corporations* Law was to provide a sanction for contraventions which fell short of a criminal offence, thus allowing the regulator a greater range of options moving up the regulatory pyramid.[55] 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.[56] 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. 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 the 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

51 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.

52 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.

53 Ibid, 190–191.

54 Ibid, 190.

55 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.

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

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.

> 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 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.[58]

2.59 Civil monetary penalties play a key role in the pyramid as they are sufficiently serious to act as a deterrent (if imposed at a high enough level) but do not have the stigma of a criminal prosecution. As under the *Trade Practices Act*, civil sanctions are attractive where the moralising aspects of criminal sanctions 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]

2.60 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 by use of the lower standard of proof and procedural protections available in a civil action as opposed to 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]

Types of civil penalty processes

2.61 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 when the necessary fault element to prove a criminal offence (usually intention or knowledge) is not present,

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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.

such as under the *Environmental Protection and Biodiversity Conservation Act*[63] and Part 9.4B of the *Corporations Act*;

- Separate civil penalty schemes which sit alone as the penalty for certain contraventions such as Part IV of the *Trade Practices Act*;

- Those which have a quasi-criminal status but use civil procedures, such as Customs prosecutions, and involve features of criminal and civil prosecutions.

Administrative penalties

2.62 'Administrative penalties' in Australian 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.

2.63 The Law Reform Commission of Canada initially defined administrative sanctions as 'a means of implementing compliance with agency policy'.[64] 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.[65]

2.64 The working definition of an 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.[66]

2.65 The ALRC has identified three broad categories 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 varied range of offences dealt with by infringement notices. Infringement notices are not administrative penalties in themselves: they are an administrative device to dispose of a matter that may be a criminal or non-criminal offence. When such an offence is committed, the relevant agency is required to document the breach and may enforce by either prosecuting or taking civil penalty proceedings, or by issuing an infringement notice offering the offending party the

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

65 Ibid, 13.

66 Ibid, 31.

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.

2.66 The second category is the application by regulators of 'quasi-penalties' by which they may vary, qualify or revoke the distribution of benefits. The principal areas of operation of such penalties 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 (and this is taken up further in chapter 3). If the agency has any discretion about the nature of the penalty to be imposed, such as in considering the terms of a qualification on a licence, the 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.

2.67 The ALRC agrees that these types of action cannot be categorised as true 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 detrimental to exclude such 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 understood without considering them.

2.68 The third category of penalties — true administrative penalties — are financial administrative penalties generally found under taxation and Customs legislation. In these cases the legislation determines when a breach has occurred. The application and the amount or method of calculation of monetary administrative penalties are predetermined by the relevant legislation. The regulator has no power before the penalty is imposed to determine the level of penalty or whether there are extenuating circumstances that might warrant a variation in its application. The agency does, however, have a limited discretion whether to impose the penalty for the breach or not 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 15.

2.69 Each of the specific types of administrative penalties and quasi-penalties is discussed further in chapter 3.

Procedural consequences

2.70 One of the most important features of the distinction between criminal offences and non-criminal regulatory contraventions, for both the regulator and regulated communities, is the difference in 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.[67]

2.71 A majority of the unique identifiers of crimes are procedural,[68] 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.[69]

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

- places a high burden of proof (beyond reasonable doubt) on the prosecution;
- requires the presence of mental elements such as intent (discussed at para 2.100);
- applies procedural protections to investigation and prosecution, such as the right to remain silent. The accused is not required to specify its defence, discover documents or answer interrogatories before trial;
- imposes greater ethical obligations of candour, fairness and disclosure on the prosecution;
- confers a privilege against self-incrimination, a right to silence and protection against double jeopardy upon the accused;
- extends the range and severity of sentencing powers, including imprisonment;
- requires a judge to impose the penalties.[70]

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67 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.

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

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

2.73 In most cases, convicted persons will have a criminal record, which must be disclosed for some purposes and may be publicly obtainable. Exceptions include some minor and first offences. The existence of 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 (for example, the right to vote if imprisoned).

2.74 The European Court of Human Rights has used the following set of criteria in determining whether or not proceedings should be labelled as criminal or civil. 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, then they are likely to be regarded as 'criminal'.[71] The emphasis is on the true nature of the proceedings rather than their form.

2.75 However, this distinction cannot be said to apply consistently in Australia. Australian legislation contains many examples of civil proceedings brought by a public authority. As well, some criminal penalties in the regulatory sphere specifically do not require a mental element and involve strict or absolute liability. Furthermore, recent examples of civil judgments, such as the multi-million dollar penalties awarded under the civil penalty provisions of the *Trade Practices Act*, may be far more onerous than criminal fines awarded for other types of corporate misconduct,[72] though this is not always understood by the community.

Characteristics of civil procedure

2.76 Much of the debate regarding the appropriateness of civil penalties centres on their procedural aspects. Some procedural aspects of bringing a civil penalty are the same as for a criminal penalty: for example, an agent of the state commences a 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.

2.77 The most important distinction is that civil penalty proceedings are characterised by a variable standard of proof at or above the balance of probabilities ac-

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70 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.

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

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

companied by a loss of other procedural protections of an accused, such as the privilege against self-incrimination.

2.78 The available civil penalties are usually pecuniary. In some areas, there is also an option for the offender to give undertakings, repair damage 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.

2.79 Specific examples of procedural differences in civil proceedings include:

- *pleadings*: formal written statements of claim that alternate between 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 may be lost in proceedings for civil penalties.

2.80 This greater procedural flexibility and the lower burden of proof attract many legislators towards civil penalties. The standard of proof placed on the prosecuting regulator is derived from the civil standard — the balance of probabilities — but can rise depending on the seriousness of the offence.

> [R]reasonable 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.[73]

2.81 The degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the fact to be proved.[74] This approach has been enshrined in legislation in s 140 of the *Evidence Act 1995* (Cth), which states:

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73 *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362 (Dixon J).
74 *Rejfek v McElroy* (1965) 112 CLR 517, 521.

> 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.

2.82 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.[75]

2.83 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.[76] The *Customs Act* contains a unique set of procedures discussed in chapter 3.

2.84 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*[77] 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.[78]

2.85 However, these judicial comments, based on established principles of procedural fairness, have been piecemeal and vary among the courts in which proceed-

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

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

77 *Refrigerated Express Lines (Australasia) Pty Ltd v Australian Meat and Livestock Corporation & Anor* (1979) 42 FLR 204.

78 Ibid, 207.

ings are held.[79] These procedural issues are considered in chapters 7 and 9 and in considering options for reform in Part E.

Characteristics of administrative procedure

2.86 As discussed above, the principal feature of true administrative penalties is that they are imposed mechanically by the regulator in circumstances, and to recover amounts pre-determined by statute.

2.87 Because breaches of law handled administratively 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.

2.88 There are a few common elements to procedures concerning 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; provisions allowing the regulator to exempt a person from a particular requirement; or requiring the regulator to interpret legal or factual points in determining whether the penalty applies.

2.89 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) or judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth); and High Court review pursuant to s 75 of the Constitution (see chapter 10).

Confusion and overlap

2.90 The traditional dichotomy between criminal and non-criminal procedures and penalties no longer 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

79 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 2.94).

noted, 'the distinction between the two was probably never as clear in the law as it seemed in the public mind'.[80]

> 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.[81]

2.91 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.[82]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.[83]

2.92 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'.[84] 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.[85]

2.93 An example of the confusion and overlap between criminal and civil procedures is found in the area of Customs and excise legislation.[86] Even where the civil and criminal penalties are clearly distinguished and articulated in legislation, there is concern 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

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80 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.

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

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

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

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

85 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).

86 See discussion in chapter 3.

> to civil penalty provisions, even though the statutory test is the balance of probabilities.[87]

2.94 The rules of civil procedure in proceedings may be modified (either by legislation or the courts) with the aim of protecting the accused where a civil penalty is sought.[88] An example of this is the current proceedings by ASIC against the directors of Water Wheel Holdings Ltd.[89] 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.

2.95 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.[90]

2.96 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.[91] The case continues.

Fault

2.97 The Terms of Reference require the ALRC to consider whether principles relating to criminal liability (including fault elements, corporate criminal responsibility,[92] vicarious responsibility, and strict responsibility) should apply to liability for non-criminal regulatory offences. Under some legislation, the presence or lack of fault or other mental element distinguishes a criminal from a non-criminal con

87 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.

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

89 Australian Securities & Investments Commission, *Consultation*, Sydney, 1 May 2001 (case unreported).

90 'ASIC sues Elliott over Water Wheel conduct' The Australian Financial Review, 27 November 2000.

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

92 Corporate responsibility is discussed in chapter 16.

travention. As noted above, 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 also includes many provisions, both criminal and non-criminal, which do not require proof of a fault element, but also many that do.

2.98 Since 15 December 2001, the position in relation to the fault elements articulated in federal criminal offence provisions has 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. For the first time, Commonwealth legislation creating an offence must be read alongside the *Criminal Code* to fully understand a person's legal rights and obligations.[93] 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.

2.99 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 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 such as intention, particularly in relation to contraventions of provisions such as record keeping requirements. There are a smaller number of absolute liability criminal offences.[94]

The conventional criminal law position on fault

2.100 The requirement of a mental element is considered a hallmark of our criminal justice system.[95] 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.[96]

2.101 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'.

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93 J Longo, 'CLERP 6 and Markets Regulation; The Market Misconduct Provisions' (Paper presented at Financial Markets and The Internet, Sydney, 31 May 2001), 2.

94 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).

95 P Fairall, 'He Kaw Teh in the High Court; Drug-Trafficker's Charter?' (1986) 10 *Criminal Law Journal* 139, 140.

96 D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Laws and Process of New South Wales* (2001) The Federation Press, Sydney, 344.

2.102 The physical elements of an offence can include an act, omission or state of affairs.[97] A 'state of affairs' can include, for example, possession of stolen goods.

2.103 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 a number of different things in relation to different crimes.[98] Different fault elements are required for different types of offences, generally based on intention, knowledge,[99] recklessness, or awareness of a particular circumstance or an act's consequence or result.[100]

2.104 *Intent* is the most commonly understood mental element. A person's intention may to be undertake an act (such as intention to have sexual intercourse) or an intention to bring about a consequence (intention to cause death).[101] 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.[102]

> 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.[103]

2.105 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'.[104] 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.[105]

2.106 *Negligence*, in line with civil 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

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97 R Bromwich, *Overview of the Commonwealth Criminal Code*, (2001) The College of Law, 5.
98 P Fairall, 'He Kaw Teh in the High Court; Drug-Trafficker's Charter?' (1986) 10 *Criminal Law Journal* 139, 139.
99 'Intention' includes 'knowledge', G Williams, *Textbook on Criminal Law* (1978) Stevens & Sons, London, 50.
100 P Fairall, 'He Kaw Teh in the High Court; Drug-Trafficker's Charter?' (1986) 10 *Criminal Law Journal* 139, 139.
101 D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Laws and Process of New South Wales* (2001) The Federation Press, Sydney, 376.
102 G Williams, *Textbook on Criminal Law* (1978) Stevens & Sons, London, 52.
103 Ibid, 67.
104 Ibid, 68.
105 Ibid, 68.

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.[106]

Commonwealth *Criminal Code*

2.107 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'.[107] 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.[108]

2.108 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.* There is also a range of offences of common application (such as fraud against the Commonwealth) that have been brought in from a number of Commonwealth Acts.[109]

2.109 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.[110] Corporate criminal responsibility is discussed in chapter 16.

2.110 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,* civil and criminal liability may arise from the same act. For example, where 'recklessness' is proven, Part 13 of the Act provides for a penalty of imprisonment

106 D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Laws and Process of New South Wales* (2001) The Federation Press, Sydney, 375.
107 Part 2.1.
108 Ibid.
109 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*.
110 Sections 12.2 and 12.1.

not exceeding two years or a fine not exceeding 1,000 penalty units[111] (or both).[112] Where recklessness is not established, then the offence is classed as a 'civil penalty provision' and the penalty is reduced to a fine not exceeding 500 penalty units.[113] The *Criminal Code* is identified in the Act as determining whether a person has criminal responsibility.

Fault under the Criminal Code

2.111 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 2.124–2.137). Much of the Code is based on principles similar to the common law described above. However, there are some significant differences.

2.112 Section 4.1(1) of the Code provides that an offence may consist of one or more of the following physical elements:

- conduct;[114]
- a circumstance in which conduct occurs; or
- a result of conduct.

2.113 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 permissible fault elements does not prevent a law that creates a particular offence from specifying other fault elements for a physical element of that offence.

2.114 Under the *Criminal Code*, a person is defined as intending to act if he or she means to engage in the act.[115] They intend to bring about a result (or consequence) if they mean to bring it about or are aware that it will occur in the ordinary course of events.[116] 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

111 '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.
112 *Environmental Protection and Biodiversity Conservation Act 1999*, s 196.
113 Ibid, s 196A.
114 'Conduct' means an act, omission to perform an act, or a state of affairs, s 4.1(2).
115 Section 5.2(1).
116 Section 5.2(3).

of their murders but must have been aware that deaths were almost certainly going to occur to be found to have intended those deaths.[117]

2.115 The Code defines a person as being reckless if they are 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.[118]

2.116 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.

2.117 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.[119]

2.118 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*.[120] 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.[121] 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.

Default fault elements under the Criminal Code

2.119 Under the Code, offences 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.

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117 D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Laws and Process of New South Wales* (2001) The Federation Press, Sydney, 376.

118 Section 5.4(1).

119 R Bromwich, *Overview of the Commonwealth Criminal Code*, (2001) The College of Law, 7. See s 5.3, 5.4 of the *Criminal Code*.

120 J Longo, 'CLERP 6 and Markets Regulation; The Market Misconduct Provisions' (Paper presented at Financial Markets and The Internet, Sydney, 31 May 2001), 6.

121 For example, the application of the *Criminal Code* by insertion of Part VC into the *Trade Practices Act* by the *Treasury Legislation Amendment (Application of Criminal Code) Act (No 1) 2001* (Cth).

2.120 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)).

2.121 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, where no such defence is available (see para 2.126).

2.122 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].[122]

2.123 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.[123] Part 2.5, therefore, does not apply to portions of the *Corporations Act* or the *Trade Practices Act* where a definition of criminal responsibility exists. The integrity of the *Criminal Code* scheme, or any similar scheme for non-criminal contraventions that may be proposed by the ALRC, 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

2.124 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 of offences in regulatory legislation.[124] In the legislation looked at by the ALRC, there are many regulatory offences, both criminal and non-criminal, which impose strict or absolute liability.

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122 Explanatory Memorandum to the Criminal Code Bill 1994 (Cth), 7.
123 Ibid, 45.
124 D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Laws and Process of New South Wales* (2001) The Federation Press, Sydney, 357.

2.125 In Australia (and also 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.[125] 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.[126]

Strict liability

2.126 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*.[127] 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.[128] The 'reasonable excuse' defence originated in the High Court's decision in *Proudman v Dayman,*[129] 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.[130]

2.127 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 strict liability.[131] The decision in *He Kaw Teh v R*[132] 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. Where the legislation does not make the requirement of a fault element clear, the High Court has held that there is

125 P Clifford and S Ivey, 'Problems with Defending Crimes Against the Environment' (Paper presented at Environmental Crime, Canberra, 1–3 September 1995), 3.
126 Ibid, 3.
127 D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Laws and Process of New South Wales* (2001) The Federation Press, Sydney, 357.
128 *Criminal Code*, s 6.2.
129 *Proudman v Dayman* (1941) 67 CLR 536.
130 Ibid, 540 (Dixon J).
131 P Fairall, 'He Kaw Teh in the High Court; Drug-Trafficker's Charter?' (1986) 10 *Criminal Law Journal* 139, 140.
132 *He Kaw Teh v R* (1985) 157 CLR 523.

no presumption that one is not required. Further, the initial presumption should be that a mental element is required.[133] 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.[134]

2.128 Street CJ, commenting on *He Kaw Teh* in *Wampfler v R,*[135] 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). [136]

Difficulties with strict liability offences: Customs Act amendments

2.129 There is some controversy regarding proposed amendments to the penalty provisions of the *Customs Act* 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 will commence on 1 July 2002. Others are the subject of ongoing planning and consultation.

2.130 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.*

2.131 The Customs Brokers and Forwarders Council of Australia argue that strict liability in a commercial setting like this is inappropriate as it will impose liability

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133 Ibid.
134 Ibid, 582.
135 *Wampfler v R* (1987) 11 NSWLR 541.
136 Ibid, 546.

without a test for reasonableness and does not allow for inadvertent, careless or third party mistakes.[137]

2.132 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][138]

2.133 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 had not yet reported at the time of writing.

Absolute liability

2.134 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 only to carry small penalties.[139] 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 attracted generally being revocation of the licence. A policy justification for this approach could 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, revocation of a licence (depending on what the licence is for) is not necessarily a small penalty.

2.135 In *Proudman v Dayman*, Dixon J discussed an increasing tendency of government towards the use of absolute liability provisions in legislation, especially in

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137 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.

138 Explanatory Memorandum, Customs Legislation Amendment and Repeal (International Trade Modernisation Bill) 2000, 10.

139 D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Laws and Process of New South Wales* (2001) The Federation Press, Sydney, 459.

relation to low level offences dealing with 'social and industrial regulation'.[140] In line with the reasoning in *He Kaw Teh*[141], courts have been increasingly reluctant to support this trend. In *Hawthorn (Department of Health) v Morcam Pty Ltd*[142] 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.[143]

2.136 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 to be included in legislation that establishes offences of these types.

2.137 Chapter 17 considers the role of fault in the context of distinguishing between criminal and civil contraventions.

140 Ibid, 452. See *Proudman v Dayman* (1941) 67 CLR 536, 540–41.
141 *He Kaw Teh v The Queen* (1985) 157 CLR 523.
142 *Hawthorn (Department of Health) v Morcam Pty Ltd* (1992) 29 NSWLR 120 (NSW Criminal Court of Appeal).
143 Ibid, 133.

3. Types of Penalty

Contents

3.1 Taking up the themes introduced in chapter 2, this chapter looks firstly at some of the broader issues surrounding regulatory penalties. Penalties are the most important of the tools available to regulators to promote or discourage conduct. This section outlines the basis for the imposition of penalties and the reasoning behind the selection of certain penalty types to achieve different outcomes.

3.2 Following this discussion, the chapter outlines the most common types of penalties in federal legislation. Criminal, civil and administrative penalties for regulatory contraventions include monetary penalties, imprisonment, injunctions, compensation orders for damage caused, negotiated penalties and penalties imposed by infringement notices. Other types of administrative action (described in this paper as 'quasi-penalties') include bans or disqualification from practice, enforceable undertakings, the withholding of benefits and the placing of conditions on or rescission of a licence.

3.3 In the final section, the special procedures governing Customs and excise prosecutions are considered.

Purpose of penalties

Forms and purposes of penalties

3.4 Penalties are enacted to enable regulators to promote desired behaviour and punish undesirable 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. Normally several purposes, which may not be consistent, can be discerned in any penalty.[144] Deterrence of wrongdoing, either in general or by specific offenders, is ultimately an aim of all penalty regimes.

3.5 Specific penalties have more narrowly defined aims, which affect the form they take and the means of setting individual penalties. These aims can be categorised as:

- retribution (the 'just deserts' for having committed the contravention);
- social condemnation (expressed through the stigma of a criminal record or severe penalty such as imprisonment);

144 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.

- specific deterrence (deterrence of the person punished 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 may be present in any particular penalty; in fact, this is nearly always the case. The protective aim usually applies to administrative penalties. 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.

3.7 Dr Kenneth Mann has described a punitive sanction as one that does 'not merely mirror the damage caused'.[145] He noted that:

> Money penalties are often determined independently of the damage caused, which makes them potentially more disproportionate to actual damage than multiple damages. Furthermore, they are sometimes assessed through administrative rather than judicial proceedings. Forfeitures, which impose a monetary payment equivalent to the value of the property forfeited, are also unrelated to the amount of damage caused. They too impose a non-compensatory payment on the property owner.[146]

3.8 This definition of a punitive sanction is relevant to both penalties imposed either in retribution for a contravention or in order to protect third parties.

Punishment

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

3.10 Retributive penalties are imposed as a result of a court's finding that the person has contravened the law. The most common retributive penalties are imposed for crimes. However, civil and criminal regulatory penalties also come into this category.

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145 K Mann, 'Punitive Civil Sanctions; The Middleground Between Criminal and Civil Law' (1992) 101(5) *Yale Law Journal* 1795, 1814.

146 Ibid, 1815.

3.11 The major formal distinction between civil and criminal regulatory penalties is that only criminal penalties can take the form of imprisonment.[147] Where the regulatory penalty is a monetary one, there is no distinction between the purposes of criminal and 'civil' regulatory penalties. Both are imposed in retribution for a contravention of legislation; both are calculated by reference to the level of 'wickedness' of the conduct and the aim of deterring further such conduct. However, 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.

3.12 The imposition of a monetary penalty (which may be criminal or non-criminal) does not necessarily convey social condemnation, but imprisonment does. Given the difficulty of imposing criminal sanctions on corporations, it has been suggested that civil penalties (or at least those imposed on corporations) should be made more severe by attaching a form of social sanction or shaming, for example through the use of publicity orders. This has been strongly emphasised by Professor John Coffee, who regards it as a vital component of punitive action and a compelling reason for maintaining a firm distinction between criminal and non-criminal penalties.[148] Other commentators, notably Professor Arie Freiberg, have concluded 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.[149]

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.[150]

3.14 Mann has argued that civil actions, whether invoked by the state or by private parties, are frequently punitive in nature — that is, they are imposed by reference to principles of retribution.[151] He has argued that 'the purpose of punitive civil sanctions is to punish, even though their procedural setting is civil'.[152] Mann recognised the resulting problem that procedural protections become dependent on almost arbitrary categories rather than on the severity of the penalty, calling for

147 See discussion in chapter 17.
148 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.
149 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).
150 Double jeopardy and double punishment are discussed in chapter 8.
151 K Mann, 'Punitive Civil Sanctions; The Middleground Between Criminal and Civil Law' (1992) 101(5) *Yale Law Journal* 1795.
152 Ibid, 1798.

'the resurrection and extension of a middle ground that connects procedural rights with the severity of the sanctions'.[153] 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.[154]

Constitutional issues associated with punishment

3.15 The imposition of punishment by a person who is not a judge is restricted by Chapter III of the Constitution.[155] This is especially the case where the punishment includes imprisonment, since there are very few circumstances in which such a penalty does not have a retributive character. These circumstances were described by the High Court in *Lim's* case.[156] They include detention of people awaiting trial on a criminal charge, and of people suffering from mental illness or infectious disease. The detention of the plaintiffs in *Lim's* case without a determination by a court pending determination of their cases or deportation was allowable under the Constitution only because they were non-citizens.[157]

3.16 In *Kable's* case,[158] 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 whom he had threatened. 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.[159] The High Court held that the law was unacceptable because it contravened the principle of separation of powers.[160]

3.17 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 a 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 as was discussed in chapter 2.

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153 Ibid, 1872.

154 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).

155 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.

156 Ibid.

157 Ibid, 28–29 (Brennan, Deane and Dawson JJ).

158 *Kable v Director of Public Prosecutions* (1996) 189 CLR 51

159 Ibid.

160 Although the NSW Constitution does not impose a formal separation of powers, the Court held that the NSW Parliament and judicial system are bound by an implied requirement of the Commonwealth Constitution that state courts will observe the principle.

Protection of the public

3.18 The majority of circumstances in which non-retributive penalties are imposed do not involve general restrictions of liberty, but prevent a person from doing specific activities through removal or restriction of a licence, or banning them from engaging in certain activities in the future. The justification for the action is normally a form of protection of the public. Where the regulator aims to protect public safety (for example, the Civil Aviation Safety Authority) or protect the market from fraudulent or incompetent operators (for example, the Australian Securities & Investments Commission), it may need to act quickly to prevent or mitigate damage.

3.19 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 harmful activities in the future. Licensing is the most common means of accomplishing this end. Sanctions such as withdrawing a licence, or imposing conditions on it, in response to a breach of the rules, may be regarded as punitive by the person whose activity is curtailed, but are formally regarded as measures to protect the public and for that reason as having no punitive purpose.[161]

3.20 Licensing is a method of regulation used for areas of activity whose limits are clearly defined, and where the regulator requires a continuing relationship with the entities regulated because of the complexity of the regime, the vulnerability of third parties, or the serious consequences of failing to maintain high standards. Some form of licensing is present in many of the Acts surveyed by the ALRC, and is central to the legislation concerning aged care, aviation, financial services and communications.

Withdrawal of benefits

3.21 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.[162]

3.22 Can the withdrawal of a benefit be considered a penalty? In some circumstances, the imposition of a form of disadvantage on a person is not considered a punishment by the person imposing the disadvantage. For example, banning orders and many licensing sanctions are characterised as measures to protect the public

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

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

rather than as punishment.[163] 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,[164] clearly distinct from non-eligibility for benefits as a result of gaining increased income.

3.23 Freiberg notes the debates concerning where patterns of reward (ie, licences or benefits) are viewed as a right by the receiver, regardless of whether that was the intention of the grantor. Licensing regimes and the granting of other benefits are commonly used by regulators as a compliance technique to ensure an ongoing 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.[165]

3.24 The importance of the distinction for this inquiry is that the predominance of a purpose other than punishment may justify 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.

Approaches to imposing penalties

3.25 The purpose ascribed to a penalty in particular circumstances will influence the kind of penalty imposed, and its level. For example, misconduct by a company director may give rise to criminal sanctions (punishment), 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 suspension of the director's licence as an advisor or 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 (see chapter 8).

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

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

165 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.

Just deserts

3.26 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.[166] The efficacy of a hierarchy of sanctions is discussed further in chapter 18.

Pricing

3.27 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.[167]

3.28 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.[168]

The enforcement pyramid

3.29 Professors Ian Ayres and John Braithwaite have developed the model of an 'enforcement pyramid' by which regulators use coercive sanctions only when less interventionist measures have failed to produce compliance.[169] The less interventionist measures cover a wide range of options and cannot necessarily be cate-

166 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.

167 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.

168 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 chapter 18 regarding assessments of penalties in particular cases.

169 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.

gorised as penalties.[170] The pyramid model was part of Ayres and Braithwaite's construction of 'responsive regulation',[171] 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.[172]

3.30 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,[173] 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 of regulations 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.[174]

Additional regulatory tools

3.31 Although not necessarily regarded as a penalty, educative measures are a significant tool for regulators. The ATO often uses education by field officers as a first step in projects to improve compliance in an industry identified as problematic. ATO officers distribute information, and sometimes visit businesses, to explain the law and make people aware of their responsibilities. This is followed by a concentration of audit activity on that industry and further action, if necessary, to ensure that the education message has been effective.[175]

3.32 Educational programs are frequently used as part of a penalty by the ACCC and ASIC, especially where penalties are negotiated. In addition to a monetary penalty or other sanction, the person may agree (or be required) to undertake

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170 These methods may include persuasion, inducements and education programs.

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

172 Ibid, 4.

173 J Scholz 'Deterrence, Cooperation and the Ecology of Regulatory Enforcement' (1984) 18 *Law and Society Review* 179–224; 'Voluntary Compliance and Regulatory Theory' 6 *Law and Policy* 385–404, discussed in Ibid, 21.

174 Ibid, 25.

175 Australian National Audit Office, *Administration of Tax Penalties*, Report 31 (2000), Australian Government Printing Service, Canberra.

specified professional courses, or to introduce or improve compliance programs and training in the organisation.[176] Such measures are clearly directed to minimising future contraventions rather than punishing past contraventions, although punitive and educational sanctions may be imposed together.

Criminal penalties

3.33 Criminal penalties in the regulatory sphere are imprisonment, fines and community service orders. Community service orders may also be used as a civil penalty, and are discussed below at para 3.57–3.60.

Imprisonment

3.34 Of the penalty provisions looked at by the ALRC, 793 (out of some 2,400) had imprisonment as a sentencing option. Of those, 279 allowed imprisonment only, the remainder allowing a choice between imprisonment and a fine. Under s 4B(2) of the *Crimes Act 1914* (Cth), courts may impose a pecuniary penalty for any offence punishable by a term of imprisonment unless a contrary intention is expressed in the legislation.

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

3.36 In its report ALRC 44, *Sentencing*, the ALRC found that imprisonment remained an important part of the system of punishment for offences against federal laws.[177] 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.[178]

3.37 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,

176 The ACCC guidelines on the use of enforceable undertakings state that most undertakings will generally contain a commitment to introducing compliance programs and associated training of staff, 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, 7.

177 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), AGPS, Canberra, para 40.

178 Ibid, para 52.

> 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.[179]

3.38 In 1998, the Senate Scrutiny of Bills Committee considered the issue of criminal penalties in the context of the appropriateness of imprisonment as a punishment for certain offences under the Productivity Commission Bill 1997 largely related to the failure to provide information at a hearing, providing misleading information and disrupting or hindering the work of the Productivity Commission.[180] The Senate Committee found that imprisonment was frequently used as a penalty for offences relating to the provision of information in revenue matters, or in the case of organisations with the legislative power to investigate breaches or make determinations.[181] The Committee further observed that there were significant variations in the penalties imposed for similar conduct between Acts, with some drawing a distinction between the seriousness of different manifestations of similar offences, such as failing to provide information and knowingly providing false information.[182]

3.39 The Committee agreed with the ALRC's approach that imprisonment should only be retained 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 focussed 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.[183]

Fines

3.40 There is considerable overlap and confusion in the terminology used to describe monetary penalties. For the purposes of this Discussion Paper, the ALRC will use 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.

3.41 Fines are overwhelmingly the most common criminal sanction used in federal legislation. Of the 2,400 penalty provisions mapped by the ALRC, 923 involved a fine alone as the penalty and 640 involved a fine with, or as an alternative

179 Ibid, para 59.
180 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.
181 Ibid, para 2.17.
182 Ibid, para 2.18.
183 Ibid, para 4.9.

to, some other kind of sanction such as imprisonment, compensation orders to pay a third party or forfeiture of a licence.

3.42 Fines are considered by legislators to be both an appropriate deterrent and a flexible sentencing option, allowing million dollar penalties for white collar crime but much smaller penalties for minor infractions.[184]

3.43 Many of the problems associated with the use of fines are the same as for a non-criminal monetary penalty. These are discussed below at greater length at para 3.47–3.50.

Civil penalties

Pecuniary penalties

3.44 Civil pecuniary penalties are more closely aligned with criminal fines than with private law civil damages.[185] Civil damages aim to compensate individuals for harm caused. Civil pecuniary penalties, on the other hand, serve a punitive purpose[186] and are payable whether or not any harm was actually caused by the unlawful action.[187] 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 on an illegal act.[188]

3.45 Civil pecuniary penalties are most extensively found in more recent legislation such as the *Corporations Act 2001* (Cth), the *Trade Practices Act 1974* (Cth) and the *Environmental and Biodiversity Conservation Act 1999* (Cth), although they have also been present in the *Customs Act 1901* (Cth) since its enactment in 1901.

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

Limitations on the use of monetary penalties

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

184 Australian Law Reform Commission, *Sentencing: Report*, 44 (1988), Australian Government Printing Service, Canberra, para 108.
185 K Yeung, *The Public Enforcement of Australian Competition Law*, (2001), Australian Competition and Consumer Commission, Canberra, 67.
186 As discussed earlier at para 3.9–3.14.
187 K Yeung, *The Public Enforcement of Australian Competition Law*, (2001), Australian Competition and Consumer Commission, Canberra, 67.
188 Ibid, 67.

- 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.[189]

3.48 Perhaps unsurprisingly, the ALRC has found substantial differences in the levels of fines and pecuniary penalties for similar contraventions. However, given the nature of different legislation and the types of activities it regulates, it is hard to draw conclusions based on the different level of monetary penalty for, for example, a record keeping contravention under the *Corporations Act* or the *Civil Aviation Act 1988* (Cth).[190]

3.49 While monetary penalties can be flexible around the nature of the offence, they can be criticised for their 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 to smaller players. For example, the ALRC has been told that some members of the small business sector like provisions that have large monetary penalties because they know that if they get caught they will get 'a slap on the wrist' as they cannot afford a $10 million penalty.[191] However, it is also important to note in relation to these comments that courts rarely impose maximum penalties. Indeed, it is part of the sentencing process for the court to take into account the ability of the party to pay (see chapter 18).

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

190 See the section in chapter 18 dealing with parity of penalties.

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

3.50 A number of alternative penalties to fines were suggested by the ALRC in ALRC 68, including community service orders (discussed below at para 3.57–3.60) and publicity orders (para 3.74). 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 *Trade Practices Act* in the areas of restrictive trade practices, unconscionable conduct, industry codes, consumer protection and price exploitation.

Injunctions

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

3.52 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.[192]

3.53 The ACCC has identified that it is the public interest nature of a regulator's work that leads courts towards a willingness to grant injunctions.[193] For example, in considering the 'balance of convenience test' in *TPC v Rank Commercial Ltd,* Beaumont J stated:

> It is to be borne in mind that the shares on FAL are reasonably widely held, so that undesirable complications arising in a bid now proceeding could impact adversely upon a significant section of the public. Their interests, in my view, should be accorded substantial weight in judging where the balance of convenience presently lies.[194]

3.54 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

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

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

194 *TPC v Rank Commercial Ltd & Others* (1994) ATPR ¶41–324, 42,287. This statement was endorsed by the Full Court of the Federal Court of Australia in *TPC v Rank Commercial Ltd & Others* (1994) 53 FCR 303, 321–322.

> 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 (contracts, arrangements or understandings affecting competition adversely (s. 45), the misuse of market power (s. 46), the practice of exclusive dealing (s. 47), resale price maintenance (s. 48), price discrimination (s. 49), anti-competitive mergers (s. 50) and unfair practices with respect to consumers (Part V)). 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. That is the effect of sub-s (4) and (5) (sub-s. (4) in relation to the prevention of conduct and sub-s. (5) in relation to a mandatory injunction). Their presence is not an indication of a new statutory house, rather an old house with some modern extensions.[195]

Compensation to third parties

3.55 The option to make compensation orders for third parties is available where the offence includes some element of profit-making through unlawful means at another's expense or causes loss or damage to another. 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*. Fifty such provisions were identified by the ALRC in its database exercise.

3.56 As an example, s 87 of the *Trade Practices Act* grants the court wide powers to make compensation orders to a person who has suffered, or who is likely to suffer, loss or damage 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

3.57 Community service orders have been promoted as an alternative penalty option, not only for individuals but also for corporate offenders.[196] 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 af-

195 *ICI Australia Operations Pty Ltd v TPC* (1992) ATPR ¶41–185, 40,524, 40,525.
196 See discussion in chapter 18.

ter substance spills, or give money and time to environmental organisations. Orders of this kind have been popular in the United States for some time.[197]

3.58 Community service orders are now a sentencing option under Parts IV and VC of the *Trade Practices Act.*[198] This was largely in response to the recommendations of the ALRC in its report *Compliance with the Trade Practices Act*.[199]

3.59 The ALRC discussed the issue of community service orders for corporate offenders in Discussion Paper 30 *Sentencing: Penalties.*[200] 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.[201]

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

- the inability to guarantee institutional change though the sanction;
- the danger of courts preferring certain types of projects and not necessarily relating the project to the offence in question; and

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

198 *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.

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

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

201 Ibid, para 302.

- the risk of corporate cheating on projects without adequate supervision.[202]

Administrative penalties

Monetary penalties and charges

3.61 Monetary penalties are currently imposed administratively in a number of ways. Typically, they are imposed as a charge or interest.

3.62 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. 203 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 that 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.

3.63 The amounts 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 on an amount is worked out at the rate of 8% per annum of the amount.[204]

Infringement notices

3.64 Infringement notice schemes are not true administrative penalties. They are administrative methods for dealing with certain offences.[205] They represent an

202 Ibid, para 303.
203 See the *Taxation Administration Act 1953*, s 8AAC.
204 Ibid, s 8AAK.
205 See chapter 12.

apparent and 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. 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 executing the law which determines the breach and the amount which the notice invites the alleged offender to pay.

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

3.66 Seventeen pieces of Commonwealth legislation have provision for infringement notices.[206] 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 *Environment Protection and Biodiversity Conservation Act* and the *Corporations Act.*

3.67 Most infringement notice schemes walk the line between deterrence and fairness. If the set penalty is too low, it places 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. Infringement notice schemes are discussed in depth in chapter 12.

Negotiated penalties

3.68 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.

3.69 Australian courts have shown a willingness to accept negotiated penalty submissions in civil proceedings for pecuniary penalties though not without some

206 *Air Navigation (Fuel Spillage) Regulations 1999, Air Navigation Regulations 1947, Airports (Building Control) Regulations 1996, Airports (Control of On-Airport Activities) Regulations 1997, Civil Aviation Regulations 1988, Customs Act 1901* (as amended by the *Customs and International Trade Modernisation Act 2001*), *Defence Force Discipline Act 1982, Fisheries Management Regulations 1992* and the *Interstate Road Transport Regulations 1986.*

reservation.[207] Generally, the procedure is that the regulator and the party agree on a penalty based on prior case law 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).[208] 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 depart from an agreed figure merely because it might otherwise have been disposed to select some other figure, or except in a clear case.[209]

3.70 There is some controversy over the fairness, transparency and accountability of negotiated penalties. This is discussed further at para 7.150–7.166.

Publicity

3.71 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 which accompanies a trial.[210]

3.72 Publicity as a penalty in Australia can be a formally legislated sanction and also operates at a more informal level.

Publicity as a penalty in its own right

3.73 Publicity has been used as a punishment in criminal proceedings and as a civil penalty.[211] 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, to advertise publicly that it has breached a certain provision and offer

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

208 Ibid.

209 *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 *ACCC v NW Frozen Foods* (1996) ATPR ¶41–515. See discussion in chapter 7 on fairness.

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

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

apologies and where regulatory authorities publish the names of offenders under particular legislation.

3.74 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).[212] An order requires an offender to disclose or publish such information related to the offence committed as the court directs. Courts may order that an offender 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'.[213]

3.75 Another formal use of publicity is a regulator's ability to name non-compliant entities in reports tabled in Parliament.[214]

Informal publicity and publicity arising from another penalty

3.76 Informal publicity can operate simply through the negative perceptions of a company which 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.[215]

3.77 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.[216] ASIC also publicises undertakings on its own website.

3.78 The media have often been cited as a way to bolster the responsiveness of organisations to, and increase compliance with, legislation.[217] Section 28 of the *Trade Practices Act* confers on the ACCC powers to make information on its work and matters which affect the interests of consumers available to interested persons and the general public. The ACCC has frequently responded to criticism that the

212 This penalty was introduced in September 2001 by the *Financial Services Reform (Consequential Provisions) Act 2001* (Cth).
213 'At Last, Truth in Advertising', *Sydney Morning Herald*, 9 July 2001, 31.
214 *Equal Opportunity for Women in the Workplace Act 1999* (Cth), s 19.
215 B Fisse and J Braithwaite, *The Impact of Publicity on Corporate Offenders*, (1983) State University of New York Press, Albany, 283–284.
216 A Fels, 'A Service and a Deterrent', *BRW*, 15–21 November 2001, 30.
217 For example, see B Fisse and J Braithwaite, *The Impact of Publicity on Corporate Offenders*, (1983) State University of New York Press, Albany, chapter 20.

release of press releases on prominent enforcement actions and investigations is trial by media.

> Media releases help to educate business and consumers about the law, act as deterrents and alert the community to scams, unsafe products and contamination. A release that accurately presents the facts reduces the chance of journalists getting it wrong.[218]

3.79 *Smiles v Federal Commissioner of Taxation*[219] concerned the prosecution of a member of parliament for taxation offences. The taxpayer sought an injunction from the Federal Court to prevent the continuance of the prosecution on the basis that it had been brought to achieve the improper purpose of obtaining publicity. The taxpayer maintained that, had he not been a high profile person, he would not have been prosecuted and therefore the prosecution constituted an abuse of power. Internal ATO guidelines and taxation ruling IT 2246 indicated that the publicity of a trial and, therefore, its potential effect as a deterrent to others was a factor that could be taken into account in making a decision to prosecute rather than impose alternative administrative penalties. However, it was clear that this was not to be the sole reason. Potential publicity was not a factor considered by the DPP in making the decision to prosecute.

3.80 The application was dismissed on the basis 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. As was said in *Blackstone's Commentaries of the Laws of England* (1769) Bk IV, Ch 1, P 12: 'The public gains equal security, whether the offender himself be amended by wholesome correction; or whether he be disabled from doing any farther harm: and if the penalty fails of both these effects, as it may do, still the terror of his example remains as a warning to other citizens'.[220]

3.81 In some cases it has been argued that the publicity generated by press releases should result in lower penalties.[221] The courts have generally rejected this argument unless it can be demonstrated that the adverse publicity was the result of unfair or incorrect reporting.[222] The use of publicity by regulators in further discussed in chapter 7.

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218 A Fels, 'A Service and a Deterrent', *BRW*, 15–21 November 2001, 30.
219 *Smiles v Federal Commissioner of Taxation* (1992) 35 FCR 405.
220 Ibid, 454 (Davies J).
221 See, for example, *Eva v Southern Motors Box Hill Pty Ltd* (1974–1977) ATPR ¶40–026, 17,359–360; *Thompson v JT Fossey Pty Ltd* (1978) ATPR ¶40–076, 17,782.
222 *Trade Practices Commission v Cue Design Pty Ltd & Ors* (1996) ATPR ¶41–475, 41,834–835.

Quasi-penalties

3.82 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. As such they are not true administrative penalties (see discussion in chapter 2).

Restricting rights and banning orders

3.83 Banning orders are a common enforcement tool used under the *Corporations Act*. For example, in 2000–01 ASIC banned 30 people from giving investment advice. Of these, 17 people were banned for life.[223]

3.84 Some commentators have questioned whether banning orders should be properly characterised as a penalty. In *ASC v Kippe*,[224] 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. The categorisation of banning orders was the subject of further judicial comment in *ASIC v Papotto.*[225] 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.[226]

Withholding licences

3.85 The most powerful administrative penalties in licensing regimes are cancellation, suspension or variation of a licence.[227] There is no legal right to the renewal or non-revocation of a licence. However, the value of licences is now

223 Australian Securities & Investments Commission, *Annual Report 2000–2001*, Australian Securities & Investments Commission, 24–25.
224 *Australian Securities Commission v Kippe* (1996) 67 FCR 499.
225 *Australian Securities and Investments Commission v Salvatore Papotto* (2000) 35 ACSR 107.
226 Ibid, 122.
227 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.

recognised to be such that there is a reasonable expectation of their renewal, or a right to hearing before revocation.[228] Licensing is further discussed in chapter 4.

3.86 Peter Grabosky and Professor John Braithwaite have noted that regulators relatively rarely take action to remove or suspend licences.[229] The reason for this is acknowledged to be the severe consequences that can result from such action, however, there is less reason why suspensions for short periods of time are not considered more often (see discussion withholding licences in the context of double punishment at para 8.98–8.104).[230]

3.87 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, giving the licence holder an opportunity to improve its performance and avert a more serious sanction.

3.88 Similar issues arise with licences as with banning orders.

> 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?[231]

3.89 The ALRC has been told that cancelling a licence to practice is regarded by some regulators as a protection for the public, not a punishment.[232]

Withholding financial benefits

3.90 Examples of withholding a benefit which 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 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.

3.91 An *administrative breach penalty* is imposed when a person fails to satisfy administrative requirements, for example, failing to attend a Centrelink office

228 *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.
229 P Grabosky and J Braithwaite, *Of Manners Gentle; Enforcement Strategies of Australian Business Regulatory Agencies* (1986) Oxford University Press, Melbourne, 187.
230 Ibid, 187.
231 A Freiberg, 'Reward, Law and Power: Toward a Jurisprudence of the Carrot' (1986) 19 *Australian & New Zealand Journal of Criminology* 91, 92.
232 Advisory Committee meeting, 17 November 2000.

as required, failing to reply to correspondence, or failing to notify of changes in their circumstances.[233]

3.92 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.[234]

3.93 Common types of administrative penalties imposed include reduction or cancellation of benefits and fines. Departmental officers have the power to require an applicant to attend the department,[235] undergo a medical examination,[236] and provide information[237] such as their tax file number or that of their partner.[238]

3.94 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, the then Minister for Family and Community Services, Senator Jocelyn Newman, used the term 'penalties' in referring to breaches of social security requirements.[239]

Enforceable undertakings

3.95 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.[240] An enforceable undertaking is a

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

234 Ibid.

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

236 Ibid, s 64.

237 Ibid, s 92–95.

238 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.

239 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.

240 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

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.[241]

3.96 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).[242] ASIC reported that it secured 46 enforceable undertakings in 2000–01.[243]

3.97 ASIC's Practice Note 69 states that enforceable undertakings will not be used as a substitute for a likely criminal prosecution, as an alternative to civil penalty proceedings, in relation to compliance with an ASIC instrument, or where the matter is referred to the Companies Auditors and Liquidators Disciplinary Board or the Corporations and Securities Panel.[244] 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.[245]

3.98 Undertakings under s 87B of the *Trade Practices Act* were introduced as an enforcement tool in 1993. Approximately 400 enforceable undertakings had been accepted by the ACCC to June 2000.[246] In 2000–01, the ACCC accepted 66 enforceable undertakings or variations to existing undertakings under s 87B.[247] 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.[248]

3.99 It appears generally accepted 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.[249] However, some writers have voiced

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in reviewing the agreement before approval is given: J Savin, 'Tunney Act 96; Two Decades of Judicial Misapplication' (1997) 46 *Emory Law Journal* 363.

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

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

243 Australian Securities & Investments Commission, *Annual Report 2000–2001*, Australian Securities & Investments Commission, 27.

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

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

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

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

248 K Yeung, *The Public Enforcement of Australian Competition Law*, (2001), Australian Competition and Consumer Commission, Canberra, 19–20.

249 M Toller, 'Scandalously Competent' (Paper presented at National Press Club Speech, 21 February 2001).

concerns about the accountability of enforceable undertakings. These concerns are discussed further at para 7.170–7.182.

Customs and excise prosecutions

3.100 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.[250]

3.101 Customs and excise prosecutions take a unique form in Australian legislation, primarily due to their historical origins in English law. 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*.[251] Customs prosecutions are an interesting example of the very different nature of criminal and civil penalty procedures and need for clear principles to delineate their use.

3.102 Customs prosecutions are regulated by Part XIV of the *Customs Act*.[252] Different terminology is used to distinguish these offences from ordinary criminal offences that are also contained in the *Customs Act*. Section 244 of the *Customs Act* provides that 'proceedings by Customs for the recovery of penalties' shall be referred to as 'Customs prosecutions'.[253] Customs and excise prosecutions for non-indictable offences that are not punishable by imprisonment are also regulated by special procedures in Part XIV.[254] 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'.

3.103 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

250 Australian Law Reform Commission, *Customs and Excise*, ALRC 60 (1992), Australian Law Reform Commission, Sydney.

251 *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.

252 *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.

253 See also *Excise Act,* s133. As the provisions of the *Excise Act* and *Customs Act* are similar, references to Customs prosecutions will include excise prosecutions.

254 *Excise Act*, Part XI.

prosecutions with, counter-intuitively, greater protections than may be available to defendants exposed to higher penalties in superior courts.

3.104 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'.

The consequences of the distinction

3.105 Alex Shaik has considered the practice and procedure issues relevant to the question whether Customs or excise prosecutions are criminal or civil in nature, including:[255]

- 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 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[256] that the court must examine the evidence with great care and caution before it is satisfied that an offence has been established.[257]

- Time limits: Under s 249 the Australian Customs Service must commence a prosecution within five years of the offence. Shaik argues this is considerably more lenient than time limits for a criminal prosecution.

255 A Shaik, 'Procedures in 'Customs Prosecutions' and 'Excise Prosecutions'' (2000) 7 *Australian Journal of Administrative Law* 131, 132–134.
256 *Briginshaw v Briginshaw* (1938) 60 CLR 336.
257 *Button v Evans* [1984] 2 NSWLR 335, 353.

- 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).[258]

Uncertainty in Customs and excise caselaw

3.106 There has been on-going confusion in caselaw 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 case law has indicated that the test should not rest on the use of the words 'fine' or 'penalty' but rather the intention of the legislature.[259]

3.107 In the lower courts, Customs prosecutions have been treated as applying the same rules as ordinary criminal prosecutions without controversy. However, the question of whether criminal or civil rules of procedure apply for 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.[260] Section 247 strongly suggests the civil nature of a Customs prosecution. Historically, actions for unpaid revenue were a civil process: the King's Action for Debt.[261] In overall design and purpose, however, Customs prosecutions more closely resemble ordinary criminal prosecutions. In *Jack Brabham Holdings Pty Ltd v Minister for Industry, Technology and Commerce,* Kirby J allowed the idea of considering such proceedings as 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.[262]

3.108 A recurrent issue in these authorities is the difference between the substance and form of the proceedings. For example, should only 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 one way

258 See *Li Chia Hsing v Rankin* (1978) 141 CLR 182.

259 Australian Law Reform Commission, *Customs and Excise: Customs Prosecutions, Jurisdiction and Administrative Penalties*, DP 42 (1990), Australian Law Reform Commission, Sydney.

260 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.

261 Australian Law Reform Commission, *Customs and Excise: Customs Prosecutions, Jurisdiction and Administrative Penalties*, DP 42 (1990), Australian Law Reform Commission, Sydney, para 31.

262 *Jack Brabham Holdings Pty Ltd v Minister for Industry, Technology and Commerce* (1989) 85 ALR 640, 652.

or another? The method by which a matter is found to be criminal or civil has traditionally been more closely concerned with procedure than the substance of an offence.[263] However, in Australia, there has been some consideration of the purpose of the penalty as indicative of its true nature. For example, the Supreme Court of Western Australia commented in *Bridal Fashions Pty Ltd v Comptroller-General of Customs* concerning a Customs prosecution 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.[264]

D'Aquino cases

3.109 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*.[265]

3.110 *D'Aquino* considered whether proceedings for Customs or excise prosecutions under the *Customs Act* and the *Excise Act 1901* (Cth) are civil or criminal in nature. The cases 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.

3.111 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]

3.112 Section 33(1) states:

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263 K Mann, 'Punitive Civil Sanctions; The Middleground Between Criminal and Civil Law' (1992) 101(5) *Yale Law Journal* 1795, 1804.

264 *Bridal Fashions Pty Ltd v Comptroller-General of Customs* (1996) 140 ALR 681, 684.

265 *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.

> 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].

3.113 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'.[266]

3.114 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'.[267]

3.115 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.[268]

3.116 Under the *Customs Act*, a breach of a relevant provision is a called an 'offence' and said to be 'punishable on conviction by a penalty'.[269] 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'.[270]

> [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'. [271]

3.117 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 consid-

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266 C Bali, 'The Nature of Customs Prosecutions; Civil or Criminal Standards of Proof?' (1996) 34(11) *Law Society Journal* 55, 56.

267 *Comptroller-General of Customs v D'Aquino Bros Pty Ltd* (1996) 135 ALR 649, 655.

268 Ibid, 654.

269 *Customs Act 1901*, s 5.

270 *Comptroller-General of Customs v D'Aquino Bros Pty Ltd* (1996) 135 ALR 649, 661.

271 Ibid, 661, citing Kirby J in *Jack Brabham Holdings Pty Ltd v Minister for Industry, Technology and Commerce* (1989) 85 ALR 640, 653.

ering previous authorities, the Court ultimately determined that in the superior courts the civil standard of proof applied.

3.118 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 prosecutions and suggested that their inherently uncertain meaning required clarification by legislative amendment.[272]

Caselaw after D'Aquino

3.119 In *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd*,[273] 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;[274]
- 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.[275]

272 *Comptroller-General of Customs v D'Aquino Bros Pty Ltd* [1996] 17 Leg Rep C8A.
273 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2000) 157 FLR 395.
274 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'.
275 Ibid, 421–422.

3.120 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;
- 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.[276]

3.121 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.[277]

3.122 This decision was overturned on appeal by the Court of Appeal of the Supreme Court of Queensland.[278] 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.[279]

276 Ibid, 422.
277 Ibid, 423. See discussion of ALRC 60 below at para 3.128–3.134.
278 *CEO of Customs v Labrador Liquor Wholesale Pty Ltd (2001) 162 FLR 230.*
279 Ibid, 246 (McMurdo P).

3.123 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.[280]

3.124 McMurdo P went on to note that the reasoning in past cases has been largely inconclusive on this issue:

> 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.[281]

Recent amendments to the *Customs Act*

3.125 The *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001* (Cth) amended the *Customs Act* in preparation for the coming into effect of the Commonwealth *Criminal Code Act 1995* (Cth).[282] The purpose of the amendments was 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.

3.126 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.[283]

3.127 This will not, however, impact on the criminal and civil distinction or the standard of proof required to prove these offences under the *Customs Act*.[284] The

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280 Ibid, 243.

281 Ibid, 245. It is understood that the Australian Customs Service is seeking leave to appeal to the High Court in this matter. Other recent cases continue to reflect the uncertainty in this area. For example, in *CEO of Customs v Amron* [2001] VSC 373 (9 October 2001), 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.

282 See discussion at 2.107–2.123.

283 See A Hudson, 'Debate on Standard of Proof in Customs Prosecutions Continues', <www.hgr.com.au/practice/fe2.html>, 4 June 2001.

284 Explanatory Memorandum to the Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2001, para 595.

Explanatory Memorandum to the Bill noted the illogical nature of present arrangements whereby lower courts deal with matters criminal and superior courts civilly. However, it considers 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.[285] This position may add another layer of complexity to this area.

Options for reform

3.128 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.[286]

3.129 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.[287]

- 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.[288]

3.130 Major arguments for the abolition of Customs prosecutions were that:

- Abolition would promote certainty and remove a procedure which is both very old and confusing. The civil character afforded to Customs prosecutions is essentially historical and not functional.

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285 Ibid, para 595.
286 Australian Law Reform Commission, *Customs and Excise: Customs Prosecutions, Jurisdiction and Administrative Penalties*, DP 42 (1990), Australian Law Reform Commission, Sydney, para 32.
287 Ibid, para 33.
288 Ibid, para 33.

- The objectives of the legislation are broadly the same as those of the criminal law. In *Jack Brabham Holdings Pty Ltd v Minister for Industry, Technology and Commerce*, Kirby J said:

> The provisions set out appear in Part XIII of the Act titled 'Penal Provisions'. The section heading is 'Customs Offences'. The section is expressed in the language of criminal offences. The verbs are those familiar to penal provisions in criminal and quasi-criminal legislation. Thus the section talks of 'contravenes', 'guilty', 'an offence', 'punishable' and 'upon conviction'. These are all words apt for activities stigmatised as criminal. So is the reference to 'a penalty'. The amount fixed appears akin to a fine, although it is not described as such. On the face of these provisions, therefore, the proceedings would appear to be criminal in nature.[289]

- 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'.[290]

- The special needs of Customs prosecutions (which are often akin to complex fraud prosecutions) are unsuited to civil procedures.[291] Furthermore, the application of civil procedures to such prosecutions may be substantively unfair to defendants.[292]

3.131 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

289 *Jack Brabham Holdings Pty Ltd v Minister for Industry, Technology and Commerce* (1989) 85 ALR 640, 646.

290 *Evans v Button* (1988) 13 NSWLR 57, 74.

291 Australian Law Reform Commission, *Customs and Excise Volume II*, ALRC 60 (1992), ALRC, Sydney, para 14.13.

292 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.[293]

3.132 However, in its final report the ALRC came to the opposite conclusion:

> The Commission does not consider, in a major overhaul of the Customs and excise legislation, that the legislation should perpetuate the incongruity of criminal proceedings being governed by civil procedures. The tie to civil procedures could become permanent if, following a review of this kind, it were to be maintained. That is not desirable. Civil procedures formulated by the courts are directed to true civil proceedings. Changes to the procedures or the proceedings are most unlikely to take account of the special needs of Customs and excise prosecutions. The link should, in the Commission's view, be broken now. Otherwise the same old questions that have been around for over 150 years will continue and re-emerge.[294]

3.133 The continued debate on these issues since the release of the Customs report in 1992 vindicates the ALRC's original recommendation. A recent decision of the Supreme Court of Western Australia *CEO of Customs v Tonmill Pty Ltd & Ors*,[295] 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*[296] 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.[297]

3.134 That courts continue to debate the appropriate standard of proof and procedures for Customs and excise cases and reach differing conclusions indicates that the need for reform in this area is as strong as ever. Likewise, there is little to indicate that the ALRC's original reasoning on the nature of Customs prosecutions has changed. Specific proposals for reform on this issue are discussed in chapter 17.

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293 Australian Law Reform Commission, *Customs and Excise Volume II*, ALRC 60 (1992), ALRC, Sydney, para 14.12.

294 Ibid, para 14.19.

295 *CEO of Customs v Tonmill Pty Ltd & Ors* [2001] WASC 77.

296 *L Vogel & Son Pty Ltd v Anderson* (1968) 120 CLR 157, 164. (This case related to a prosecution for smuggling).

297 *CEO of Customs v Tonmill Pty Ltd & Ors* [2001] WASC 77, para 26.

4. The Regulators and the Regulated

Contents

4.1 Regulation is said to be the product of interactions between regulators, the regulated parties, and the wider community.[298] This chapter looks at how the exercise of regulators' functions influences, and is influenced by, the relationships between them and the regulated.

4.2 This chapter also considers the context in which decisions are made to regulate particular areas of activity and the regulatory tools selected to put the regulation into effect. A regulator's approach to enforcement varies with the type of industry or environment in which it operates and with the nature of the legislation it administers. Some circumstances call for a swift, one-off response to an immediate and serious contravention, such as with Customs seizures, quarantine contraventions or environmental pollution. Many regulators have a continuing policing function. Other regulated environments call for on-going regulation where there is likely to be greater focus on securing compliance through education, co-

298 J Black, 'Managing Discretion' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001), 3.

operation, negotiation and conciliation. Other variations exist where contact between the regulator and the regulated community is periodic, such as where reporting requirements under taxation and corporations regulatory schemes mandate contact at particular intervals.

4.3 Some industry environments lend themselves to self-regulatory arrangements where there is no or minimal explicit government intervention, or co-regulation with some government involvement. This chapter examines how government regulation interacts with other forms of regulation such as industry self-regulation, compliance programs, professional groups, standards-setting organisations and industry associations. The emerging compliance culture in Australian business is also discussed.

4.4 Finally, this chapter considers the regulators' and others' attempts to gauge the effectiveness of regulation. These evaluations often depend on the purposes which the legislators seek to achieve in developing the regulatory scheme. For example, if the purpose of certain penalty provisions is to punish contravenors, measures of success will seek to identify the proportion of offenders who are caught and punished. If the purpose is deterrence, measures will look at the prevalence of the offending conduct and the rates of recidivism. In practice, it is often the effectiveness and efficiency of the regulator that is under scrutiny rather than the effects of penalties themselves.

Why regulate?

4.5 The wide reach of regulation in modern society is well recognised and is often illustrated for students by enumerating the forms of regulation governing items and activities everyone performs in the course of everyday activities such as getting dressed, having breakfast and travelling to work. 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'.[299] Robert 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 …[300]

299 R Baldwin, C Scott and C Hood (eds), *A Reader on Regulation* (1998) Oxford University Press, Oxford, 5.

300 Ibid, 5.

Market failure

4.6 Contemporary regulation 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 Robert Baldwin and Martin Cave as covering these matters:

- monopolies;
- windfall profits;
- externalities (where costs are borne by persons who do not benefit from the activity — for example, where environmental damage is caused);
- information inadequacies resulting in consumers being unable to make a reasoned choice;
- a need for continuity and availability of service (for example, communication needs in remote areas);
- anti-competitive behaviour;
- public goods that benefit all but may not be paid for by all (such as defence, security and health services);
- unequal bargaining power;
- scarcity of resources;
- social policy (such as 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 (for example, by protecting the environment).[301]

301 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.

4.7 Federal regulators can be identified covering most of these forms of market failure. Monopolies such as broadcasting and the use of telecommunications space are regulated by the Australian Communications Authority (ACA), which 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 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 (for example, insurance companies) or who are particularly vulnerable (for example, residents of nursing homes). The Australian Fisheries Management Authority and associated state bodies regulate fishing in order to preserve the 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.

4.8 If the fundamental aim of regulation is understood to be reversing one or more of these sources of market failure in a particular area of activity, in many cases the tools used by the regulator should not be aimed primarily at imposing retribution on contravenors since the purpose of the rules is not to prohibit actions but to maximise benefit or convenience to society. Where there are inequalities in information or power, or damage to third parties or future generations, there will be cases in which legal wrongs such as dishonesty, fraud, tortious acts, and damage to items of national or international heritage occur and punishment is justified. It is at this point that criminal regulatory penalties, and even crimes, enter the picture. (See chapter 3).

Regulation unrelated to market failure

4.9 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 require their own approach to regulation and imposition of penalties.

Factors influencing enforcement approach adopted

4.10 Regulators' actions in enforcing compliance vary according to differing regulatory contexts.[302] Factors which account for different enforcement styles in-

302 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

clude: the legal framework of the regulation and the sanctions it provides to the regulator; the interaction between the regulator and the regulated (for example, whether there is a continuing relationship between the regulator and the regulated); the nature of the regulated (for example, whether ill- or well-informed and intentioned); the regulator's statements of objectives; the nature and seriousness of the contravention; and general principles of procedural fairness.[303] Procedural fairness is discussed further in chapter 7 of this paper.

Legal framework

4.11 The legal framework of regulation has been described as 'the enforcement officer's basic toolkit'.[304] The type of rules provided for by legislation and the precision of their wording, the range of sanctions available, and the appeal or review mechanisms in place are all aspects of the legal framework that can affect enforcement strategies.[305]

4.12 The precision with which the 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. Most regulatory statutes give regulators broad discretions. This may be because legislators leave the statement of detailed objectives in specialist areas to those with relevant expertise. Legislators may deliberately avoid setting down precise objectives because they want regulators to have the freedom to cope with problems as they arise in the future.[306] Different enforcement strategies call for different kinds of rules. If prosecutions are the main mode of enforcement, precise rules are called for.[307] If the promotion of good practice is the objective, less precise but more flexible rules may be more effective.[308] The influence of rules on the exercise of regulatory discretion is discussed further in chapters 7 and 15.

Black, 'Managing Discretion' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001), 6.

303 K Yeung, 'Negotiated Compliance Strategies: The Quest for Effectiveness and the Importance of Constitutional Principles' (Paper presented at Ibid, 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.

304 J Black, 'Managing Discretion' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001), 23.

305 Ibid, 23.

306 R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) Oxford University Press, Oxford, 78.

307 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.

308 R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) Oxford University Press, Oxford, 101.

Interaction between regulator and regulated

Nature of regulated party

4.13 The character and habits of the regulated party are said to 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 comply with regulation, and the attitude of its managers and employees towards compliance.[309]

4.14 Regulated parties have been variously categorised by commentators, and some popular classifications include:[310]

- amoral calculators, who will only comply with the law if it is economically rational for them to do so and whose decision whether or not to comply is based on the sanctions they might incur and the probability of detection;
- political citizens, who are inclined to comply with the law;
- the organisationally incompetent, who are also inclined to comply but fail to do so because of lack of knowledge and lack of internal controls; and
- irrational non-compliers, who deliberately do not comply and reject the regulator's authority.

4.15 These characterisations provide a broad profile of various types of regulated parties. However regulated entities might move between the different types at different times, depending on the individuals within the entity. 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.[311]

4.16 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, greater sanctions should apply. Commentators agree that it is important to use the appropriate strategy or combination of strategies for a given circum-

309 J Black, 'Managing Discretion' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001), 10.

310 See for example Ibid, 9; R Baldwin and C McCrudden, *Rules and Government* (1995) Clarendon Press, Oxford, 151; J Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (1985) State University of New York Press, Albany, NY.

311 J Black, 'Managing Discretion' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001), 13.

stance — the issue is not whether to punish or persuade, but when to punish and when to persuade.[312]

Nature of contravention

4.17 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 malicious.[313]

4.18 Prosecutions are most likely to be pursued where a contravention gives rise to an immediate risk to health, safety or environment, a direct harm has already resulted, or infringements are flagrant, repeated or extreme in their culpability.[314] 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.[315] 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.[316]

Relational distance between regulator and regulated

4.19 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.[317] 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.[318] Research suggests that the greater the relational distance, the greater the use of formal sanctions. Where there is a clear case of a contravention of law and little or no contact between the offender and the enforcer, sanctions 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.

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312 Ibid, 17, citing J Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (1985) State University of New York Press, Albany, NY.

313 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.

314 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.

315 J Black, 'Managing Discretion' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001), 13.

316 Ibid, 13.

317 Ibid, 11.

318 Ibid, 11.

Capture

4.20 Where co-operative relationships exist between the regulator and the regulated, there is a risk that the two might become too close and the regulator be 'captured'.

4.21 Capture has been variously described by commentators. 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.[319] 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.[320]

4.22 People with industry-specific expertise may be essential in regulating certain areas, for example aviation, health, or technology, but industry-specific regulators may be more susceptible to capture. A regulator may become compromised when it develops sympathy for the plight of regulated industries, neglects its original mission, and is unlikely to pursue enforcement actions when warranted.[321]

4.23 Makkai and Braithwaite describe the revolving door phenomenon.[322] Regulators may become captives of industry because former industry employees take influential positions in the government agencies whose job it is to regulate that industry. Conversely, officers employed by a regulator might have aspirations of going out of the revolving door to an industry job. Makkai and Braithwaite did a study of Australian nursing homes to determine whether the revolving door leads to capture.[323] They found that inspectors who have prior senior management experience in the industry tend to be less tough in their attitudes to regulatory enforcement. They also found that over time tougher inspectors are more likely to leave the regulatory agency than softer inspectors. They concluded that the capture effects arising from the revolving door are sufficiently weak as to be outweighed by the advantages of having experienced industry people working for regulators.[324]

4.24 An example of one area where the regulator has been seen as having succumbed to capture is aviation. In 1996 the Commission of Inquiry into the Rela-

319 R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) Oxford University Press, Oxford, 36.

320 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.

321 M Sparrow, *The Regulatory Craft* (2000) Brookings Institution Press, Washington DC, 35.

322 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) Vol Oxford University Press, Oxford, 173, 174.

323 Ibid, 173.

324 Ibid, 185.

tions between the Civil Aviation Authority (CAA) and Seaview Air released its report. Commissioner Staunton cited a culture within the then CAA of 'institutional timidity' towards taking strong action, including prosecution, against operators who were knowingly and often wilfully breaching aviation law. The report said:

> [In] its efforts to please and appease industry, the management of CAA … seemed to regard standards set by the regulations and orders as negotiable. In the face of a determined operator, such standards were sacrificed in order to neutralise a complaint.[325]

4.25 Despite these adverse findings, two years later the Review of the Regulation by the Civil Aviation Safety Authority of Aquatic Air found 'an apparent unwillingness on behalf of CASA management to enforce regulatory sanctions against Aquatic Air, despite frequent and repeated breaches of various regulatory requirements'.[326] In 2000 a Senate Committee Report echoed the concerns raised in earlier investigations.[327] It said that the escape by the airline being investigated from any form of sanction or possible prosecution for their actions clearly sent a wrong message to the aviation industry. The Committee recommended that CASA take steps to recommit itself to strong action through prosecution or suspension of those operators who deliberately breach maintenance, airworthiness and reporting and recording requirements, thereby compromising safety.

Licensing

> An alternative to approval of a product, project, or process prior to production and marketing is prior approval of the person or organisation who will be responsible for the economic activity. This is licensing.[328]

4.26 Licensing is a regulation technique used where it is considered necessary to ensure close supervision of an entity's activities, or regular inspection of its equipment or practices, or control over the people or entities allowed to undertake the activity. This approach covers an enormous range of areas of activity. Close to half of the administrative penalties in Commonwealth legislation concern licensing regimes, relating to a number of areas of legislation including aviation, communications, Customs, navigation and superannuation. The most common targets of penalties are licensees (such as financial advisers, broadcasters or nursing home operators) or other regulated entities, such as corporations and company directors under corporations law, broadcasting, air navigation, fisheries, aged care and other licensing regimes.

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325 *Commission of Inquiry into the Relations between the CAA and Seaview Air: Report of the Commissioner, Volume 1* (1996), Canberra, 20–22.

326 Referred to in Senate Rural and Regional Affairs and Transport Legislation Committee, *Administration of the Civil Aviation Safety Authority; Matters Related to ARCAS Airways*, (2000), Parliament of the Commonwealth of Australia, Canberra, 38. CASA is the successor body to the CAA.

327 Ibid, xii–xiii.

328 P Grabosky and J Braithwaite, *Of Manners Gentle; Enforcement Strategies of Australian Business Regulatory Agencies* (1986) Oxford University Press, Melbourne, 186.

4.27 The essential feature of licensing regimes is the creation of a specific relationship between the regulator and the licence holder so that the licence holder's conduct is restrained not only by rules of general application but by the conditions of the licence, and the relationship created by the licence. Rights, duties and causes of action arise out of the relationship itself.

4.28 The principal purpose of setting up a licensing regime is to ensure that minimum standards are maintained within the area of activity in order to protect public safety, the environment, consumers, or the effective functioning of systems such as the financial markets. This contrasts with the policing role of regulators in enforcing laws of general application — although policing obviously plays a part in ensuring that licence holders meet their legal requirements.

Relationships created by licensing regimes

4.29 A number of roles are played under licensing regimes, often by different players with interconnecting relationships. The issuer of the licence is often a different entity from the entity charged with policing the licence holder's conduct (such as nursing home inspectors). The entity setting the applicable standards may be different again. See chapter 5 for examples of licensing regimes.

4.30 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.[329] 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.[330]

4.31 There is enormous variation in the range of licensing sanctions available to regulators. In addition to suspension of a licence or intervention by the regulator, less severe sanctions could include a system of demerit points, giving the licence holder an opportunity to improve its performance and avert a more serious sanction. A standard system of escalation drawn from the pyramid model could be adapted to the needs of different regulators to ensure that they have an adequate range of tools to draw on.

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329 For example, I Ayres and J Braithwaite, *Responsive Regulation; Transcending the Deregulation Debate* (1992) Oxford University Press, New York. See chapter 3 of this Discussion Paper.

330 An example of this is the Australian Broadcasting Authority. 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.

Statements of objectives

4.32 Paragraphs 4.11–4.12 describe how legislation and rules can provide the legal framework for a regulator's enforcement approach. 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 agencies, and their stated aims and objectives, help to signal their approach, indicating the areas of responsibility they consider most important and the methods they intend to rely on most.

4.33 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 in websites, including speeches and media releases. Some examples of regulators' articulated statements of objectives follow:

- **ACCC**. 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'[331] — the ACCC elsewhere describes its primary responsibility as 'securing compliance with the TPA by means of persuasion, education and litigation'. This description appears in a document described as 'a statement of directions and priorities'.[332] The document later states that the ACCC intends to use a range of 'tools' in addition to litigation to secure the resolution of matters, including administrative settlement, adjudication, promotion of self-regulation, compliance programs, information and liaison or a combination of these tools in response to a particular market problem.[333]

- **ASIC.** The *Australian Securities and Investments Commission Act 2001* (Cth) (*ASIC Act*) sets out ASIC's objectives,[334] once again in rather general terms. ASIC's Annual Report states that its objective is 'to promote the confident and informed participation of investors and consumers in the financial system',[335] but gives little indication as to how ASIC interacts with the entities it regulates. The aims set out in the *ASIC Act* direct the organisation to-

331 *Trade Practices Act 1974* (Cth), s 2.

332 Australian Competition & Consumer Commission, *Making Markets Work — Directions and Priorities*, (1999), ACCC Publishing Unit, Canberra, 4.

333 Ibid, 6.

334 *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.

335 Australian Securities & Investments Commission, *Annual Report 2000–2001*, Australian Securities & Investments Commission, 98.

wards education, licensing and strategic enforcement action. In putting these aims into practice, it may be assumed that ASIC's enforcement action would emphasise prevention of future wrongdoing through education, enforceable undertakings and licensing action. On this approach, punitive action would be directed at deterrence as well as punishment, and publicity for punishments is therefore important. In pursuing its aim of protecting the public, it may be assumed that ASIC would need to take pre-emptive action in some cases, before actual wrongdoing by a company or its officers can be proved. It may also be assumed that the aims of penalties pursued by ASIC emphasise reparation as much as punishment or deterrence. 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.[336]

- **ATO.** 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 1936* (Cth), which describes itself as 'An Act about income tax and related matters'. On its website, the ATO describes its function as follows:

> The Australian Taxation Office is a statutory authority responsible for the administration of Australia's taxation system. We are the Commonwealth Government's main revenue collector and collect around 96 per cent of the Commonwealth's revenue, around $140.6 billion a year.
>
> Our role is not only to collect taxes from individuals and businesses, but to also ensure taxpayers have the information they need to comply with our tax laws and to inform them of their rights under the *Taxpayers' Charter*.[337]

Penalties are one of a number of tools used by the ATO to obtain taxpayer compliance. The ATO has a Code of Settlement Practice, which provides guidelines on the settlement of taxation disputes, transparently and accountably, and describes the legal basis for settlements under the Commissioner's general administrative powers.[338] 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 articu-

336 J Segal, 'ASIC Issues: An Update on the Last 12 Months' (Paper presented at Insurance Council of Australia, 10 August 2000).

337 < www.ato.gov.au/content.asp?doc=/content/Corporate/who_we_are.htm>, 24 July 2001.

338 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.

lated ATO rulings, issues relating to tax avoidance schemes, and where it is in the public interest to have judicial clarification of an issue.[339]

- **DOHA (aged care)**. The objects of the *Aged Care Act 1997* (Cth) are set out in s 2. They include providing for funding; protecting the health and well-being of recipients of aged care services; targeting the services towards areas of greatest need; providing respite care; addressing discrimination against old people; and providing support services to assist old people to stay where they want to live.[340] The enactment of such a specific set of objectives may facilitate measurement of the success of the regulator, and also provides a context for identifying the purpose of the penalties provided for in the Act. It may also provide a basis or justification for regulators in determining their approach to their task. This can be seen in DOHA's interpretation of its responsibilities set out in its Annual Report. In the report for 2000–2001, the Department emphasises its role of planning for the whole system of aged care in the statement that its vision is for a world class health and aged care system for all Australians.[341]

- **Centrelink (social security).** The *Social Security Act 1991* (Cth) contains no objects section. It can be assumed from the short title that the main object of the Act is to provide for an efficient system for the assessment and distribution of social security payments. This leaves room for considerable doubt as to the purpose of the Act and its penalties, and the possible approaches to applying them. Centrelink, which among other things administers the social security legislation, describes its mission as:

  Building a stronger community by:

  - Providing opportunities for individuals during transitional periods in their lives;
  - Delivering innovative, cost-effective and personalised services for individuals, their families and community groups via a one-stop-shop;
  - Being committed to quality;
  - Making the best use of available dollars;
  - Listening to and enacting the community's ideas for better service; and
  - Building a quality relationship with customers.[342]

339 Ibid, chapter 4.
340 *Aged Care Act 1997,* s 2.
341 Department of Health and Aged Care, *Annual Report 2000–2001,* Commonwealth of Australia, Canberra, 11.
342 Centrelink, *Annual Report 2000-2001,* Commonwealth of Australia, Canberra, 20.

4.34 It has been suggested that regulatory agencies should have similar guidelines to the Commonwealth DPP's Prosecution Policy to assist them when carrying out their discretions in imposing civil and administrative penalties. The Prosecution Policy sets out the criteria governing the decision to launch a criminal prosecution.[343] A policy similar to this for civil and administrative penalties would lead to greater consistency of approach by regulators and enhance regulator accountability. It is apparent that 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 bureaucratic discretion so as to reduce discrepancies between government regulators, reduce uncertainty and lower compliance costs.[344]

Question 4–1. The ALRC is seeking to evaluate whether and how statements of objectives — whether informal or statutory — affect regulatory practice. Are statements of objectives helpful? Can objectives be framed in realistic and pragmatic terms so that they transcend general principles?

Regulators' culture and practices

4.35 As enforcement actions taken by regulators are 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.[345] These principles include requiring a regulator to act in a manner which is legal, consistent, rational, proportionate, transparent, accountable and procedurally fair. These principles are discussed in detail in chapter 7.

343 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*, Commonwealth Director of Public Prosecutions, <www.cdpp.gov.au/cdpp/>, 16 November 2001. This policy is discussed further in chapter 6.

344 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.

345 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.

Compliance culture

4.36 Increasingly, companies in Australia are coming to realise the importance of adopting formalised processes to ensure compliance with their corporate responsibilities. The importance and need for companies to adopt a 'culture of compliance' as a strategic management tool has been discussed by numerous commentators.[346] Courts, statutes and regulators are encouraging and mandating a culture of compliance.

4.37 A successful regulatory regime has mechanisms that encourage dialogue between regulators and the regulated community. Regulators need to understand why and how breaches occur and the practices and restraints that can be used to encourage compliance.[347]

> A sophisticated compliance analysis of regulation implies a sophisticated understanding of the target population. What will make compliance difficult for them? What will motivate them to want to comply? What technical changes will compliance mean for their business or manufacturing processes? What financial impacts will compliance have? This level of understanding of the target population is unlikely to be achieved without significant consultation with, listening to, and research of members of target populations.[348]

4.38 The pyramid approach encourages dialogue and persuasion at its base, with the deterrence of the substantial penalty at the top.[349] However, a true compliance culture will not develop unless regulators do more than simply master the compliance/deterrence balance.[350] Dr Christine Parker argues that regulators need to ensure that the compliance audience is able to understand and respond to their demands. This involves assisting in the development of a compliance professionals industry.[351] The ACCC in particular has adopted this approach, with many former ACCC officers now employed as compliance professionals.

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346 See, for example, C Parker, 'The Emergence of the Australian Compliance Industry: Trends and Accomplishments' (1999) 27(3) *Australian Business Law Review* 178; 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); 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); R Grantham, 'Attributing Responsibility to Corporate Entities; A Doctrinal Approach' (2001) 19 *Companies and Securities Law Journal* 168. See also the discussion of corporate responsibility in chapter 16 of this Discussion Paper.

347 Organisation for Economic Cooperation & Development, 'The State of Regulatory Compliance; Supporting Materials' (Paper presented at Meeting of the Regulatory Management and Reform Group, Public Management Committee, Paris, 28–29 June 1999), 51.

348 Ibid, 51.

349 Discussed further in chapter 3.

350 C Parker, 'Compliance Professionalism and Regulatory Community: The Australian Trade Practices Regime' (1999) 26(2) *Journal of Law and Society* 215, 223.

351 Ibid, 224.

4.39 Courts consider a company's compliance activities in the assessment of liability. This extends beyond the mere existence of a compliance program to a consideration of what the company does to implement it. In *Trade Practices Commission v CSR* French J regarded as a relevant factor in assessing a penalty under the TPA:

> 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.[352]

4.40 A corporate culture of compliance is regarded by the courts as a mitigating factor when imposing penalties. In *Trade Practices Commission v TNT Australia Pty Ltd* the Federal Court said:

> It is a most important factor in mitigation of the amount of a penalty that, in a particular case, there be acceptable evidence of a corporate culture of compliance and of concern to ensure that the contravention which has occurred will not be repeated.[353]

4.41 Justice Goldberg suggests that the corollary to the proposition that a compliance culture is regarded as a mitigating factor is that the absence of an adequate compliance program is an aggravating factor that ought to be taken into account in determining an appropriate penalty.[354]

4.42 Legislation also makes the existence of compliance systems important. The *Criminal Code Act 1995* (Cth) (*Criminal Code*) sets down a new regime for evaluating the criminal liability of companies. Courts will be able to consider a broader range of conduct by a broader range of employees of the body corporate in assessing liability and damages. The *Criminal Code* recognises and defines 'corporate culture' and places a greater onus on companies to create and maintain a culture of compliance.[355] The impact of the *Criminal Code* on corporate responsibility is discussed further in chapter 16.

Other forms of regulation

4.43 The main regulators discussed in this Discussion Paper are Commonwealth statutory authorities which administer explicit government regulation. However, government policy increasingly encourages industry to assume responsibility for the development of effective schemes of regulation which involve the minimum level of government intervention which is felt to be appropriate. Industry

352 *Trade Practices Commission v CSR Ltd* (1991) 13 ATPR ¶41–076, 52,153 (French J).
353 *Trade Practices Commission v TNT Australia Pty Ltd* (1995) 17 ATPR ¶41–375, 40,168 (Burchett J).
354 Justice A Goldberg, 'At the Cutting Edge of Compliance' (2001) 31(February) *ACCC Journal* 5. See also chapter 18.
355 See, for example J Black, 'Managing Discretion' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001), 9; R Baldwin and C McCrudden, *Rules and Government* (1995) Clarendon Press, Oxford, 151.

self-regulation is seen to be more flexible and less costly for both business and consumers than direct government involvement.[356] In the tax area, for example, self-regulation (in the form of self-assessment and GST administration) may be cheaper for the regulator but impose a heavy burden on the regulated community.

4.44 The chosen form of regulation must be appropriate for the particular industry environment. These arrangements within the self-regulatory spectrum often provide for the establishment of industry-specific bodies with varying regulatory functions and powers. These bodies may deal with matters such as developing and monitoring industry standards and codes of practice, providing information to consumers, dealing with industry problems and customer complaints, and setting standards of accreditation for members. Examples are the various industry ombudsman offices, professional and trade associations, and industry councils and associations. While some of these bodies are referred to in this chapter, there is a large number of such schemes[357] and the ALRC has not attempted to provide an exhaustive list.

4.45 The *Grey Letter Law* report describes regulation as a spectrum.[358] At one end is self-regulation, where there is little or no direct government involvement. At the other end there is explicit government regulation, and in between lies a range of quasi-regulatory regimes and mechanisms.

4.46 There have been numerous definitions of terms such as 'self-regulation' 'co-regulation' and 'quasi-regulation'.[359] However these terms are not precise and the boundaries between various forms of regulation are often blurred. Except where these terms are discussed specifically, the term 'self-regulation' is used generally in this chapter to mean the various gradations of regulation other than explicit government regulation. There is often some overlap between the various forms of regulation. The level of government involvement will vary with the level of regulation which is deemed appropriate for a particular market, which may change over time according to political or policy considerations. Government may need to intervene where there has been market failure, or to attain social goals such as worker safety, environmental conservation and consumer protection.[360] The Report by the Taskforce on Industry Self-Regulation states that the degree of government intervention should be the minimum necessary to achieve the identified

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356 Taskforce on Industry Self-Regulation, *Industry Self-Regulation in Consumer Markets: Report Prepared by the Taskforce on Industry Self-Regulation*, (2000), Department of the Treasury, Canberra, 41.

357 For example, the federal government's self-regulation website has a directory of 45 national self-regulatory schemes: <www.selfregulation.gov.au>, 20 June 2001. There is also a directory of 'Consumer Dispute Resolution Schemes & Complaint Handling Organisations' which provides details and background information on a wide range of dispute resolution schemes and complaint handling organisations, as well as state and territory consumer affairs and fair trading agencies and industry associations: <www.consumersonline.gov.au>, 26 November 2001.

358 Commonwealth Interdepartmental Committee on Quasi-Regulation, *Grey Letter Law*, (1997), Productivity Commission, Canberra, 2.

359 For a list of previous definitions, see Appendix B of ibid, 89.

360 Office of Regulation Review, *Guide to Regulation — Second Edition: December 1998*, Productivity Commission, <www.pc.gov.au/orr/reguide2/>, 16 October 2001, para E1.

objectives of the regulatory scheme and the manner of intervention should be that which imposes the lowest cost of compliance consistent with achieving those objectives.[361]

Self-regulation

4.47 Self-regulation is characterised by substantial industry involvement in formulating rules and codes of conduct, with industry responsible for the enforcement and funding of the self-regulation. There may be some limited government involvement in the initial formulation stages, such as providing advisory information. Self-regulation is nonetheless underpinned by an overarching legal framework governing fair trading, contract, negligence, and privacy.[362]

4.48 The Office of Regulation Review states that self-regulation should be considered where:

- there is no strong public interest concern, in particular, no major public health or safety concern;
- the problem is a low risk event and the consequences of self-regulation failing to resolve a specific problem are small; and
- the market is able to correct any problems and there is an incentive for the industry to comply with self-regulatory arrangements.[363]

4.49 There is no single best practice model for self-regulation; a successful model needs to be crafted to respond to particular market characteristics and needs. Self-regulation rests on the concept of an industry body that can effectively oversee the operation of its members. Thus it may be unsuitable for smaller industries or those without already established codes of conduct or professional rules. However, where an industry is governed by powerful groups, this leaves open the question of whether those rules will necessarily be of benefit to the wider community. Self-regulation without sufficient government oversight can lead to advantages being given to certain groups, price fixing and the exclusion of competition.[364]

4.50 There may be a degree of community cynicism regarding industry regulating itself, and there is concern amongst some commentators that self-regulation

361 Taskforce on Industry Self-Regulation, *Industry Self-Regulation in Consumer Markets: Report Prepared by the Taskforce on Industry Self-Regulation*, (2000), Department of the Treasury, Canberra, 20.
362 Ibid, 19.
363 Ibid, chapter 5.
364 Office of Regulation Review, *Guide to Regulation — Second Edition: December 1998*, Productivity Commission, <www.pc.gov.au/orr/reguide2/>, 16 October 2001, para E8.

often results in industry not being subject to a sufficiently strict enforceable regime.[365]

Quasi-regulation

4.51 Quasi-regulation refers to the range of rules, instruments and standards whereby government influences business to comply with a regulatory scheme but which do not form part of explicit government regulation. Quasi-regulation is appropriate where there is a public interest in some government involvement in regulatory arrangements on issues unlikely to be addressed adequately or at all by self-regulation.[366]

4.52 Quasi-regulation includes government-endorsed industry codes of practice or standards, government agency guidance notes, industry/government agreements and national accreditation schemes.[367] Government involvement with quasi-regulation can include endorsement of codes and arrangements, monitoring functions, and the provision of funding or other help to industry.

4.53 As with self-regulation, the advantages of quasi-regulation are said to be greater flexibility and responsiveness, lower cost to government and greater collaboration with industry.[368]

4.54 An example of quasi-regulation is the Electronic Funds Transfer (EFT) Code of Conduct, which applies to financial transactions effected through the use of a card and a personal identification number. Industry, consumer and government representatives contributed to the development of the code. The code is periodically reviewed to ensure it remains relevant, and compliance is monitored by ASIC.[369]

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365 See N Waters, 'Can Self-Regulation Ever Satisfy Consumer Advocates? Reflections from a Privacy Perspective' (Paper presented at SOCAP Australia 10th Anniversary Conference, Canberra, 26–27 October 2000), 5.

366 A list of situations where quasi-regulation is likely to be suitable and successful is set out in Office of Regulation Review, *Guide to Regulation — Second Edition: December 1998*, Productivity Commission, <www.pc.gov.au/orr/reguide2/>, 16 October 2001, para D5. Other examples where quasi-regulation is likely to be successful include where there is no clear need to develop or mandate a code for an entire industry, where there are cost advantages in having less formal and more flexible mechanisms for issues like complaints handling, and where there are advantages in industry having ownership of the scheme and developing a collaborative relationship with governments.

367 Ibid, para E9; Commonwealth Interdepartmental Committee on Quasi-Regulation, *Grey Letter Law*, (1997), Productivity Commission, Canberra, 7.

368 Office of Regulation Review, *Guide to Regulation — Second Edition: December 1998*, Productivity Commission, <www.pc.gov.au/orr/reguide2/>, 16 October 2001, para E9.

369 Ibid, para E10. ASIC is also responsible for monitoring industry compliance with the Banking Code of Conduct, the Building Society Code of Conduct and the Credit Union Code of Conduct.

Co-regulation

4.55 Co-regulation usually refers to a situation where industry develops and administers its own regulatory arrangements, but government provides legislative backing to enable the arrangements to be enforced. Under co-regulation, government involvement generally falls short of prescribing the code in detail in legislation. Legislation may delegate power to industry to regulate and enforce codes; enforce undertakings to comply with a code; set standards which can be, in certain cases, overridden by industry; prescribe industry codes as voluntary or mandatory; and require industry to have a code but, in its absence, impose a code.[370]

4.56 An example of legislation which establishes a co-regulatory scheme is the provisions of the *Privacy Act 1998* (Cth), which protect personal information held by private sector organisations.[371] It provides benchmarks for the handling of personal information. It also allows for the development of privacy codes tailored to specific industry needs that can be approved by the Privacy Commissioner. Where there is an approved privacy code, providing protection at least equivalent to that under the Act, it operates in place of the legislative standards. If an organisation does not have an approved privacy code, the legislation applies. Where a code does not provide a complaint resolution process, Part V of the Act applies. When the Privacy Commissioner or adjudicator determines that a person's privacy has been interfered with, they can impose a number of penalties, including a declaration that the organisation should not repeat or continue the offending conduct, a request that the organisation redress the loss or damage incurred, and a request that the organisation pay compensation for any loss or damage incurred.[372]

Advantages and disadvantages of self-regulation, quasi-regulation and co-regulation

4.57 The benefits of regulatory schemes other than direct government regulation are said to include lower government administration costs, because such regulations are developed and often administered by business; lower compliance costs for business; rules which are tailored to specific needs and are thus better targeted; enhanced flexibility, responsiveness and speed of implementation and modification of rules; the utilisation of the expertise of the regulated; and that the consent of the regulated is more likely to be secured.

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370 Minister for Customs and Consumer Affairs, *Codes of Conduct: Policy Framework*, (1998), Department of Industry, Science and Tourism, Canberra, 22; Office of Regulation Review, *Guide to Regulation — Second Edition: December 1998*, Productivity Commission, <www.pc.gov.au/orr/reguide2/>, 16 October 2001, para E11.

371 As amended by the *Privacy Amendment (Private Sector) Act 2000*, s 2, with effect from 21 December 2001.

372 *Privacy Act 1988* (Cth), s 52. See also 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.

4.58 Limitations include the creation of restrictions on competition; non-compliance by some businesses; ineffective sanctions for non-compliance; difficulties for industries which may not have the resources and capacity to develop or administer schemes; lack of effective enforceability; and lack of credibility and public confidence.[373]

The extent of government involvement

4.59 Although the main types of regulation and self-regulation have been described above, these are not mutually exclusive and there is much blurring and overlap between the regulatory forms on the regulatory spectrum. The different regulatory types can be viewed as 'gradations on a continuous regulatory spectrum, ranging from self-regulation, through quasi-regulation, to explicit government regulation.'[374] Accordingly, the extent of government involvement varies from little or no involvement to a more interventionist approach.

4.60 Often the role of an ombudsman overlaps with regulatory schemes. For example, the Telecommunications Industry Ombudsman (TIO) oversees parts of the telecommunications industry alongside the Australian Communications Industry Forum (ACIF), the Australian Communications Authority (ACA) and the ACCC.

4.61 ASIC has noted that self-regulation is a pervasive feature of market regulation and is closely integrated with the regulator's responsibility. ASIC relies on self-regulatory schemes to cover many day-to-day complaints and industry issues that it would otherwise not have the capacity to deal with.[375]

Codes of practice

4.62 The array of options available to address specific regulatory objectives includes information campaigns designed to educate both industry and consumers, service charters which set out the service standards which customers can expect, complaints handling procedures, quality assurance systems, and codes of practice (also called codes of conduct). [376]

4.63 A code of practice sets out guidelines concerning business activities. Codes of practice vary in what they contain and can range from setting out general

373 Office of Regulation Review, *Guide to Regulation — Second Edition: December 1998*, Productivity Commission, <www.pc.gov.au/orr/reguide2/>, 16 October 2001, para E12.

374 Commonwealth Interdepartmental Committee on Quasi-Regulation, *Grey Letter Law*, (1997), Productivity Commission, Canberra, 10.

375 J Segal, 'Institutional Self-Regulation: What Should be the Role of the Regulator?' (Paper presented at the National Institute for Governance Twilight Seminar, Canberra, 8 November 2001), 3.

376 These are set out in detail in Taskforce on Industry Self-Regulation, *Industry Self-Regulation in Consumer Markets: Report Prepared by the Taskforce on Industry Self-Regulation*, (2000), Department of the Treasury, Canberra, 26.

statements of principle about how a business or industry will operate, to detailed listings of business practices that require compliance with specific standards (such as the handling and disposal of hazardous chemicals).[377] The extent to which government is involved in supporting, establishing or enforcing a code depends upon where the particular industry arrangement sits on the regulatory spectrum. However, governments in Australia are increasingly using codes in legislation to prescribe standards, technical requirements and other specifications that business must use. Codes are usually developed by industry, or industry in collaboration with government, and are said to reflect 'best practice'. Codes may or may not provide methods for dispute resolution. A number of codes provide for dispute resolution schemes, such as the Australian Banking Industry Ombudsman, the TIO, and the General Insurance Enquiries and Complaints Scheme. Codes also differ in their levels of sanctions for non-compliance.[378]

4.64 The effectiveness of codes depends upon the strength and willingness of industry to support them. For example, the General Insurance Code of Practice includes a procedure whereby members who materially breach the Code can have sanctions imposed on them, including being named in the annual report.[379] Most professional associations have codes which provide for the removal of the right to practise in the case of serious transgressions.

4.65 Part IVB of the TPA allows the ACCC to register voluntary industry codes (for any industry) so that a contravention automatically becomes a contravention of the TPA. Part IVB gives the ACCC power to mandate an industry code if a voluntary one is not put in place under the Act.[380] Mandatory codes are binding on all industry participants whereas voluntary codes are only binding on those members of an industry or profession who have formally subscribed to them. The principal benefit to a consumer of a prescribed code is that commitments under the code are enforceable by the ACCC or by private action under the TPA, with a wide range of remedies available, including damages.[381] Under the TPA a code, whether prescribed or not, may be considered by a court in determining whether or not a corporation has acted unconscionably.[382]

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377 AusIndustry, *Introduction to the Codes of Practice Database*, AusIndustry, 25 June 2001.

378 Taskforce on Industry Self-Regulation, *Industry Self-Regulation in Consumer Markets: Report Prepared by the Taskforce on Industry Self-Regulation*, (2000), Department of the Treasury, Canberra, 29–30.

379 Minister for Customs and Consumer Affairs, *Codes of Conduct: Policy Framework*, (1998), Department of Industry, Science and Tourism, Canberra, 18.

380 C Parker, 'The Emergence of the Australian Compliance Industry: Trends and Accomplishments' (1999) 27(3) *Australian Business Law Review* 178, 182.

381 Department for Financial Services and Regulation, *Prescribed Codes of Conduct: Policy Guidelines on Making Industry Codes of Conduct Enforceable under the Trade Practices Act 1974*, (1999), Commonwealth of Australia, Canberra, 4.

382 *Trade Practices Act 1974* (Cth), s 51AC; Department for Financial Services and Regulation, *Prescribed Codes of Conduct: Policy Guidelines on Making Industry Codes of Conduct Enforceable under the Trade Practices Act 1974*, (1999), Commonwealth of Australia, Canberra, 4.

4.66 In the general insurance industry, companies are required by law to join an industry code that has been approved by ASIC. ASIC has power to approve codes in the financial services sector and monitors compliance with the codes of banks, building societies, credit unions, and the code covering Electronic Funds Transfer (EFT) transactions.[383]

4.67 The government decides which codes of conduct will be prescribed, following representations from industry participants, consumers and government authorities about problems in a particular industry. When a code is prescribed under the TPA, this will have the effect of making the code law.[384] A potential problem is that codes are not necessarily drafted to be consistent with existing legislation. Some other problems which have been identified are that there is no real evaluation of how the codes impact on existing legislation, and that codes may be drafted and proclaimed with virtually no consideration of the existing law. A further criticism is that codes of conduct are too easily mandated. A regulation calling for a code may be tabled in Parliament but the code itself does not necessarily appear before Parliament.[385]

Assessing effective regulation

4.68 Closely related to identifying the purpose of regulation is the question of how to identify whether it has been successful in achieving its purposes. A perennial problem is that the elements that can be measured are not necessarily those that reveal the most about the functioning of a system. Accordingly, this section focuses on the elements that are held to contribute to effective and principled regulation, rather than on identifying indicators and objective standards by which to calculate efficiency.

4.69 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.

383 Australian Securities & Investments Commission, *About the Industry Codes of Practice*, Australian Securities & Investments Commission, <www.fido.asic.gov.au>, 19 November 2001.

384 Department for Financial Services and Regulation, *Prescribed Codes of Conduct: Policy Guidelines on Making Industry Codes of Conduct Enforceable under the Trade Practices Act 1974*, (1999), Commonwealth of Australia, Canberra, 19.

385 W Pengilley, 'We Need to Know about Voluntary Mandatory Codes' (1998) 36(2) *Law Society Journal* 66.

Criteria for regulation regimes

4.70 The Director of the US Securities and Exchange Commission, Michael Mann, has stated that there are two aspects of any effective regulatory regime:[386]

- the legal structure or the rules must be easily understandable; and
- the implementation of the rules must be done in a predictable and consistent manner.

4.71 He summed it up by stating that 'clear principles that are predictably implemented are the building blocks of good regulation.'[387] Questions remain concerning how the effectiveness and efficiency of a regulator can be measured:

> Effectiveness and efficiency are relative terms, subject to interpretation by the will of the public. Indeed, we must recognise that regulation, even good regulation, is not an end in itself. Its effectiveness cannot be gauged independently of the success of the system it is set to regulate. [388]

4.72 Baldwin and Cave identified five criteria by which 'good' regulation may be judged:[389]

- Is the action or regime supported by legislative authority?[390]
- Is there an appropriate scheme of accountability?[391]
- Are the procedures fair, accessible and open?[392]
- Is the regulator acting with sufficient expertise?
- Is the action or regime efficient?[393]

4.73 Baldwin and Cave argued that the weighting given to each of these criteria is influenced by personal political philosophies. Some of the factors are linked;

386 M Mann, 'What Constitutes a Successful Securities Regulatory Regime?' (1993) 3(2) *Australian Journal of Corporate Law* 178.
387 Ibid, 182.
388 Ibid, 179.
389 R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) Oxford University Press, Oxford, 77.
390 See chapter 7.
391 This issue is discussed in chapter 10.
392 See chapter 7.
393 Assessments of efficiency are made by the Australian National Audit Office and others.

for example, a lack of fairness and accountability may affect compliance and therefore the regulators' ability to fulfil their mandate.[394]

4.74 Most of the criteria are discussed in detail elsewhere in the Discussion Paper. They provide a principled basis for a system of regulation, but not for assessing the effectiveness of the actions of the regulator or of the penalties imposed.

4.75 In recent years, both Australia[395] and the United Kingdom[396] have undertaken formal reviews and implemented government-wide policies aimed at improving the quality of regulation making and enforcement.

Australia

4.76 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.[397]

4.77 This ad-hoc scrutiny of the impact of regulation on small business contrasts with the very formal legislative requirements adopted in the United States. The latter require the fairness of regulation for small business to be a priority for agencies with enforcement responsibilities.

4.78 The role of the Office of Regulation Review was clarified in 1997 in response to the recommendations of the Small Business Deregulation Task Force.[398] 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 processes for regulation, including the need for, and content of, regulatory impact statements.[399]

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394 R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) Oxford University Press, Oxford.

395 Small Business Deregulation Task Force, *Time for Business*, (1996), Department of Employment, Workplace Relations and Small Business.

396 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.

397 Office of Regulation Review, *Charter for the Office of Regulation Review*, Office of Regulation Review, <www.pc.gov.au/orr/>, 11 December 2001.

398 Small Business Deregulation Task Force, *Time for Business* (1996), Department of Employment, Workplace Relations and Small Business.

399 Office of Regulation Review, *Guide to Regulation — Second Edition: December 1998*, Productivity Commission, <www.pc.gov.au/orr/reguide2/>, 16 October 2001.

4.79 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).[400]

4.80 Compliance with the requirement to prepare Regulatory Impact Statements (RIS) 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 RIS.[401] Although overall, RIS were prepared for 80% of new regulations, only '60% of regulation assessed as the most economically significant was properly subjected to the RIS process'.[402] The least compliant areas were communications and health, raising concerns over the level of public and industry consultation prior to the introduction of significant new regulation, for example, for digital television and online gambling.

4.81 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'.[403] The aim of regulatory plans is to:

- provide information about past and planned regulation changes in order to facilitate business and community involvement in development of regulation;
- help regulators to improve the way in which they develop and administer regulation;
- encourage strategic planing of regulatory activity;
- assist agencies to achieve best practice in policy formulation, including early identification of the need for an RIS; and
- improve contact between agencies and the Office of Regulation Review.

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400 Ibid, B1.
401 Productivity Commission, *Regulation and its Review 2000–01* (2001), Productivity Commission.
402 Alan Mitchell, 'Holes Abound in Regulation Net', *Australian Financial Review*, 12 December 2001.
403 Productivity Commission, *Regulation and its Review 2000–01*, (2001), Productivity Commission, 45.

4.82 The publication of annual regulatory plans is monitored by the Office of Regulation Review, which reports regularly to government on progress in this area.[404]

United Kingdom

4.83 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
- 'improving the assessment, drawing up and enforcement of regulation, taking particular account of the needs of small businesses'.[405]

4.84 The Better Regulation Task Force has established the following *Principles of Good Regulation* against which it will assess existing and proposed regulation:[406]

- 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;

404 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.

405 Cabinet Office (UK), *Role of the Regulatory Impact Unit*, <www.cabinet-office.gov.uk/regulation/>, 21 December 2001.

406 Better Regulation Task Force (UK), *Principles of Good Regulation*, <www.cabinet-office.gov.uk/regulation/TaskForce/>, 21 December 2001.

- 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'.[407]

4.85 In 1999, the Task Force reported on good enforcement practices for regulation:

> Good enforcement practice is a key element of better regulation. But our experience is that far too often it tends to be treated as the poor relation of policy making. We chose to undertake a review of enforcement arrangements because we wanted to address the concerns about consistent and efficient enforcement that have been raised repeatedly in the context of other Task Force reviews. [408]

4.86 The report's recommendations included the development by departments and enforcement agencies of clearly stated guidance and risk frameworks as a way of ensuring that the *Principles of Good Regulation* are met.[409] The recommendations aimed to 'promote consistency and best practice in enforcement and to ensure arrangements which are clear and user-friendly to businesses, consumers and citizens'.[410]

4.87 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. Orders can be made that:

- remove or reduce burdens;
- apply new burdens;
- reapply existing burdens; or
- remove inconsistencies and anomalies.

4.88 The Act also allows Ministers to develop codes of good enforcement practice.

4.89 In 1998, representatives of central and local government signed an Enforcement Concordat setting out principles of good enforcement policy and proce-

407 Ibid, 8–9.
408 Better Regulation Task Force (UK), *Enforcement*, (1999), Her Majesty's Stationery Office, London, 2.
409 Ibid, 4.
410 Ibid, 2.

dures.[411] As at December 2001, 50 central government regulators and 396 local government and other regulators had adopted the Concordat.

4.90 The Concordat sets out the policy principles of good enforcement:

- Standards — clearly setting out performance levels that regulators are to achieve;
- Openness — requiring wide dissemination of plain language guidance about applicable rules and how the regulator will enforce those rules;
- Helpfulness — requiring regulators to advise and assist business to achieve compliance with the aim of preventing, rather than punishing, non-compliance;
- Complaints about service — establishing a mechanism for the effective and timely response to complaints about regulators;
- Proportionality — ensuring that action taken is proportionate to the risk, including consideration of individual circumstances and attitudes of the regulated; and
- Consistency — giving a commitment to 'fair, equitable and consistent' activity by the regulator.[412]

4.91 The Concordat also establishes procedural 'best practice' of giving written reasons for decisions; consultation before enforcement action is taken (unless immediate action is necessary); and written advice on appeal mechanisms to be given at the time action is taken.

4.92 Dr Julia Black notes that

> the voluntary code [Concordat] has been widely adopted, and is backed by the threat that one will be imposed if the agency has not adopted the code voluntarily, and a further 'stick' used to ensure compliance is that failure to comply with a code will be taken into account should legal proceedings ever be taken by the authority (though whether this has an impact is likely to depend on how critical the authority sees legal action to be to its enforcement policy both in general and in particular where the code has been breached).[413]

411 Cabinet Office (UK), *Enforcement Concordat*, <www.cabinet-office.gov.uk/regulation/PublicSector/Enforcement/Concordate.pdf>, 21 December 2001.
412 Ibid.
413 J Black, 'Managing Discretion' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001), 33.

Criteria for success of regulators

4.93 Modern regulation occurs against a backdrop of 'outcomes-focussed' 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-specific outcomes, is limited to the micro level and local behavioral changes that result directly from individual enforcement actions.[414]

4.94 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, fines and other imposed outcomes;
- co-operative and consensual regulatory techniques — education campaigns, the numbers and scope of undertakings, and co-regulatory partnerships.

4.95 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

4.96 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

414 M Sparrow, *The Regulatory Craft* (2000) Brookings Institution Press, Washington DC, 283.

> 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.[415]

4.97 Education and deterrence do not easily translate into statistics and, therefore, measurement of enforcement success in these respects is difficult.

4.98 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.

4.99 Professor Malcolm Sparrow used the example of the border-policing role of Customs authorities to illustrate how too much emphasis on enforcement rates will distort 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 were caught.[416]

Risk control

4.100 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.[417]

4.101 Sparrow identified problem solving as a core element of regulatory reform,[418] 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.[419]

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415 Australian Competition & Consumer Commission, *Corporate Plan and Priorities 2001-02* (2001), ACCC Publishing Unit, Canberra, 8.

416 M Sparrow, *The Regulatory Craft* (2000) Brookings Institution Press, Washington DC, 151.

417 Ibid, 20.

418 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.

419 Ibid.

4.102 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.[420] 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?[421]

4.103 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: for example, environmental results, health effects, or declines in injury rates;
- Behavioural outcomes: compliance rates or other outcomes (for example, adoption of best practice, other risk reduction activities, 'beyond compliance' activities, or voluntary actions);
- Agency activities/outcomes: for example, 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.[422]

4.104 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.[423]

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420 This approach is consistent with the 'enforcement pyramid' model developed by Ayres and Braithwaite, mentioned earlier at para 4.31 and 4.38, and discussed in chapter 3.

421 M Sparrow, *The Regulatory Craft* (2000) Brookings Institution Press, Washington DC, 39.

422 Ibid, 119.

423 S Tregillis, 'Effective Regulation' (Paper presented at 25th IOSCO Annual Conference, Sydney, 18 May 2000).

4.105 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.[424]

4.106 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.[425] 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;
- 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.[426]

4.107 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 elimi-

424 Australian Securities & Investments Commission, *Submission to the Senate Select Committee on Superannuation and Financial Services*, 18–19.

425 T Boucher 'Risk Management on a Market Segmented Basis' in P Grabosky and J Braithwaite, *Business Regulation and Australia's Future* (1993) Australian Institute of Criminology, Canberra, 231.

426 This approach is discussed in M Sparrow, *The Regulatory Craft* (2000) Brookings Institution Press, Washington DC, 221.

nate the risk including law reform, education initiatives, system changes, attitude and behavioural changes, and enforcement action.[427]

4.108 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.[428]

4.109 It could be argued that considerations of equity require that a risk-management approach, which explicitly recognises that only a minority of wrongdoers will be identified, should minimise the social stigma attached to contraventions and acknowledge the aim of keeping the machinery running smoothly rather than punishing wrongdoers.[429]

4.110 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.[430]

427 Ibid.
428 Centre for Tax System Integrity 'Risk Leveraging Experiments' Project 3 <http://ctsi.anu.edu.au/project3.html>, 1 June 2001.
429 See chapter 7.
430 S Tregillis, 'Effective Regulation' (Paper presented at 25th IOSCO Annual Conference, Sydney, 18 May 2000).

Part B

Penalties and Regulation in Practice

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.[431] The roles and functions of national 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. Relationships between regulators are discussed in chapters 6 and 8.

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, there is a vast array of other regulatory arrangements that involve lesser degrees of government intervention.

5.4 Some regulators function largely autonomously, managing the full regulatory process from compliance activities through investigation of suspected contraventions to proceedings for penalties for contravention. Other regulators are less self-contained, making use of private contractors (see discussion in chapter 10) to perform some regulatory functions or the DPP to prosecute offences (see chapter

431 R Baldwin and K Hawkins, 'Discretionary Justice: Davis Reconsidered' (1984) *Public Law* 570, 590.

6). Many federal regulators also have responsibilities to administer, or co-operate 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.[432] Important considerations may also be the public interest, political and policy concerns, the influence of 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.[433] 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.[434]

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 regulation illustrates this diversity.

Marketplace

5.7 The Australian marketplace underwent considerable change in the 1990s as the result of recommendations of the Financial System Inquiry (Wallis Inquiry)[435] and the Corporate Law Economic Reform Program (CLERP). The Wallis Inquiry recommended a new regulatory structure based along functional lines rather than institutional lines.[436] 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

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432 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.

433 R Tomasic and B Pentony, 'The Prosecution of Insider Trading; Obstacles to Enforcement' (1989) 22 *Australian & New Zealand Journal of Criminology* 65, 73.

434 A Ashworth, *The Criminal Process — An Evaluative Study* (2nd ed, 1998) Oxford University Press, 145.

435 Treasury, *Financial System Inquiry Final Report: March 1997* (1997), Commonwealth of Australia, Canberra.

436 J Carmichael, *The Australian Model of Integrated Regulation*, <www.apra.gov.au/speeches/iosco.htm>, 4 September 2001, 8.

such as the Australian Stock Exchange (ASX) and AUSTRAC have discrete and complementary functions within the broad areas of marketplace regulation.

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.[437] 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;[438] 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.[439]

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'.[440] It also administers the *Prices Surveillance Act 1983* (Cth) (PSA) and other legislation.[441] 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. The TPA covers anti-competitive and unfair market practices, mergers or acquisitions of companies, and product safety and liability. 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 broadcasting services, trade marks, and access to essential services such as airport services and natural gas pipeline systems.[442]

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 for contraventions 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

437 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.

438 Australian Competition & Consumer Commission, *ACCC Annual Report 2000–2001*, (2001), ACCC Publishing Unit, Canberra, 157.

439 Ibid, 11.

440 Australian Competition & Consumer Commission, *Making Markets Work — Directions and Priorities*, (1999), ACCC Publishing Unit, Canberra, 4.

441 The ACCC has responsibilities under the *Airports Act 1996, Australian Postal Corporation Act 1989, Broadcasting Services Act 1922, Gas Pipelines Access (Commonwealth) Act 1998, Moomba–Sydney Pipeline System Sale Act 1994, Telecommunications Act 1997* and the *Trade Marks Act 1995*.

442 Australian Competition & Consumer Commission, *ACCC Annual Report 2000–2001*, (2001), ACCC Publishing Unit, Canberra, 12.

ACCC has published a range of guidelines and other material which summarises the law and the ACCC's practices in particular areas.[443]

5.11 The ACCC acknowledges that its work is unpredictable, reactive and event-driven, responding to the changing needs of the market, with resource constraints demanding cost-effective remedies and speedy resolution of matters — where possible without resort to litigation.[444] The ACCC uses a range of 'tools' in addition to litigation to secure the resolution of matters, including administrative settlement, adjudication, promotion of self-regulation, compliance programs, information and liaison. A combination of these tools is frequently used in response to a particular market problem.[445]

5.12 The ACCC investigates complaints and oversees market behaviour for possible contraventions and actively enforces the legislation it administers. 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.[446] Where it does have discretion, it is necessarily selective in the matters it chooses to pursue given the large number of complaints it receives.[447] 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.[448] The ACCC is most concerned with anti-competitive agreements involving price-fixing and primary boycotts, mergers which would lessen competition in a substantial market, and misuse of market power.[449]

5.13 The majority of the ACCC's investigations arise from complaints made by consumers, businesses and associations.[450] The ACCC obtains information through voluntary production and through the use of coercive powers. It has powers to require information, documents and evidence.[451] While the ACCC prefers to

443 For example, Australian Competition & Consumer Commission, *Collection and Use of Information*, (2000), ACCC Publishing Unit, Canberra, 2.

444 Australian Competition & Consumer Commission, *Making Markets Work — Directions and Priorities*, (1999), ACCC Publishing Unit, Canberra, 4, 7.

445 Ibid, 6.

446 Ibid, 32.

447 During 2000–01, the ACCC received a total of 95,801 inquiries and complaints, 63,634 of which were GST-related. During that period the ACCC pursued 2,882 non GST-related matters: Australian Competition & Consumer Commission, *ACCC Annual Report 2000–2001*, (2001), ACCC Publishing Unit, Canberra, 180.

448 Australian Competition & Consumer Commission, *ACCC Working in New South Wales, 1999–2000 Report*, (2000), ACCC Publishing Unit, Canberra, 2.

449 S Bhojani, 'Principles of Fairness and Accountability' (Paper presented at Penalties; Policy, Principles & Practice in Government Regulation, 8 June 2001), 4.

450 Australian Competition & Consumer Commission, *ACCC Working in New South Wales, 1999–2000 Report*, (2000), ACCC Publishing Unit, Canberra, 1.

451 *Trade Practices Act*, s 155.

receive information voluntarily, it may use its coercive powers in certain situations, such as when there is voluntary disclosure with conditions attached which could constrain the ACCC.[452]

5.14 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.[453]

5.15 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 contravention 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)

5.16 ASIC is an independent Commonwealth government body that regulates the financial system including the securities and futures industries.[454] It has prime responsibility for consumer protection in the financial system. It regulates the advising, selling and disclosure in relation to all financial products and services except credit to consumers, and aims to protect markets and consumers from manipulation, deception and unfair practices. 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.[455]

5.17 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 to the public; and enforcing and giving effect to the laws that confer functions and powers on it. [456]

5.18 ASIC administers the *Corporations Act 2001* (Cth). The *Corporations Act* and related legislation came into effect on 15 July 2001. The *Corporations Act*

452 Australian Competition & Consumer Commission *Collection and Use of Information*, (2000), ACCC Publishing Unit, Canberra, 6.

453 S Bhojani, 'Principles of Fairness and Accountability' (Paper presented at Penalties; Policy, Principles & Practice in Government Regulation, 8 June 2001), 6. TPA, s 28 supports the ACCC's practice of issuing press releases in respect of its enforcement activities.

454 P Lipton and A Herzberg, *Understanding Company Law* (10th ed, 2001) Law Book Co, Sydney, 16.

455 Australian Securities & Investments Commission, *Annual Report 2000–2001*, Australian Securities & Investments Commission, 7.

456 *ASIC Act*, s 1(2).

replaced the old *Corporations Law* scheme, in which the High Court had identified a number of constitutional problems. The new legislation essentially re-enacted the old state-based scheme as one federal act. To maintain consistency, it retained the previous section numbers from the old legislation.

5.19 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 remedies.

5.20 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, Australian Stock Exchange Ltd and Sydney Futures Exchange, managed investments, companies, company auditors and liquidators.[457]

5.21 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, inspect and seize 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.[458] Additionally, ASIC may obtain information from other agencies such as the Australian Stock Exchange (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.[459]

5.22 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.[460] ASIC's priority is to protect the interests of consumers and investors as quickly and as effectively as possible. 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

457 Australian Securities & Investments Commission, *Annual Report 2000–2001*, Australian Securities & Investments Commission, 2.

458 For 2000-2001 ASIC received a total of 6,946 public complaints, 1.7% of which were investigated, and 3,866 complaints through statutory reports from external administrators and auditors, 1.2% of which were investigated: Ibid, 48.

459 See Butterworths, *Australian Corporations Law* (Looseleaf) Butterworths vol 3, para 15.1.0025 for details of the legislative bases for exchanges of information.

460 J Segal, 'ASIC Issues: An Update on the Last 12 Months' (Paper presented at Insurance Council of Australia, 10 August 2000), 6.

achieved more quickly.[461] However, ASIC says that it will take 'strong and decisive action to enforce the law' when necessary.[462]

5.23 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).[463] 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.[464]

5.24 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.[465] 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.[466] 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.[467]

5.25 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 6.

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461 Ibid, 6.

462 Ibid, 6.

463 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.

464 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.

465 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.

466 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.

467 M Gething, *Consultation*, Sydney, 12 June 2001.

Securities exchanges

5.26 The *Corporations Act* imposes statutory requirements on securities exchanges to maintain market integrity by performing direct daily supervision.[468] ASIC has specific functions and powers under the *Corporations Act*[469] to oversee the role of market supervision.[470] ASIC has memorandums of understanding with the exchanges that set out their respective supervisory roles and cover matters such as exchange of information between ASIC and the exchange, and procedures and requirements governing the referral of matters by an exchange to ASIC.[471]

5.27 'Securities exchange' is defined as a stock exchange, or a body corporate approved under s 769 of the *Corporations Act*. 'Stock exchange' includes the ASX and its state subsidiaries, existing regional stock exchanges and any other body approved under s 769. Stock exchanges must adopt business rules and listing rules which provide for certain matters as to membership of the exchange, listing of securities, conduct of members and generally as to 'the protection of the interest of the public'.[472]

5.28 The ASX is Australia's most significant securities exchange. 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'.[473]

5.29 The ASX's supervision activities include the surveillance of trading activity to detect any unusual trading behaviour, indications of insider trading or market manipulation.

5.30 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

468 *Corporations Act*, Part 7.

469 These include powers to review compliance reports submitted by exchanges (s 769C), suspend trading over securities (s 775), consider changes to market operators' rules (s 774), and apply to a court to order compliance with the business or listing rules of an exchange (s 777).

470 Treasury, *Submission to Senate Economics References Committee Inquiry into the Framework for the Market Supervision of Australia's Stock Exchanges*, (2001), Treasury, Canberra, 3.

471 Ibid, 4.

472 *Corporations Act*, s 769.

473 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].

comprising industry specialists, established by the Business Rules.[474] 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.[475] Decisions of the NAT can be appealed to an Appeal Tribunal.[476]

5.31 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.[477] As mentioned earlier, the ASX and ASIC have entered into four 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)

5.32 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.[478] 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.[479] 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.[480]

5.33 APRA's stated mission is to 'establish and enforce prudential standards and practices designed to ensure that, under all reasonable circumstances, financial promises made by institutions we supervise are met within a stable, efficient and competitive financial system'.[481] The *APRA Act* requires APRA to 'balance the objectives of financial safety and efficiency, competition, contestability and competitive neutrality'.[482] APRA has stated that its two main functions are to promote the soundness of financial institutions by requiring them to observe minimum stan-

474 Rule 14.2.
475 Australian Stock Exchange, *Supervision of Brokers*, Australian Stock Exchange, <www.asx.com.au>, 27 September 2001.
476 Rule 14.2.2(1)(a).
477 *Corporations Act*, s 776, 862, 1139, 1221.
478 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 2000*, Reserve Bank of Australia, Sydney, 7.
479 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.
480 Australian Prudential Regulation Authority, *What We Do — APRA's Objectives and Funding*, Australian Prudential Regulation Authority, <www.apra.gov.au/aboutApra/>, 25 September 2001.
481 Ibid.
482 *Australian Prudential Regulation Authority Act 1998* (Cth), s 8.

dards 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.[483]

5.34 In addition to its functions and powers set out in the *APRA Act*, APRA is responsible for administering legislation and regulations in respect of authorised deposit-taking institutions (which include banks, building societies and credit unions),[484] insurance[485] and superannuation.[486] APRA is responsible for the supervision of 12,248 institutions, 11,537 of which are superannuation entities.[487]

5.35 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.[488]

5.36 With the integration of 11 Commonwealth and state agencies into APRA in 1998 and 1999,[489] 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.[490] 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.[491] This has involved reform of prudential supervision of general insurance,

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483 G Thompson, *The Prudential Regulator of the Future*, Australian Prudential Regulation Authority, <www.apra.gov.au/Speeches/00_02.htm>, 14 August 2001.

484 *Banking Act 1959* (Cth), *Financial Sector (Shareholdings) Act 1998* (Cth) and *Financial Sector (Transfers of Business) Act 1999* (Cth).

485 *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.

486 *Financial Sector Legislation Amendment Act (No.1) 2000* (Cth), *Superannuation Industry (Supervisions) Act 1993* (Cth) and regulations, and *Retirement Savings Accounts Act 1997* (Cth) and regulations.

487 Australian Prudential Regulation Authority, *Annual Report 2000–2001*, (2001), Commonwealth of Australia, Sydney, 11.

488 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.

489 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).

490 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.

491 Australian Prudential Regulation Authority, *Annual Report 2000–2001*, (2001), Commonwealth of Australia, Sydney, 17.

harmonisation of prudential standards and guidelines covering authorised deposit-taking institutions, strengthened supervision of small and medium sized superannuation funds, conclusion of work on a new regulatory framework for financial conglomerates,[492] and work assisting on a revised international accord in capital adequacy for banks.[493]

5.37 APRA describes its supervisory practice as 'more rigorous and demanding than was previously applied to most industry groups'.[494] 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.[495]

5.38 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, [496] 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.[497]

5.39 Deposit-taking institutions are all 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.[498]

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492 Such as banking and traded market activities, life and general insurance, stockbroking, funds management and superannuation.

493 Australian Prudential Regulation Authority, *Annual Report 2000–2001*, (2001), Commonwealth of Australia, Sydney, 17.

494 G Thompson, 'Perils of the Prudential Regulator' (Paper presented at Investment and Financial Services Association Annual Conference, 2 August 2001).

495 Australian Prudential Regulation Authority, *Annual Report 2000–2001*, (2001), Commonwealth of Australia, Sydney, 7.

496 A desk review involves analysis of the institution's latest annual return and any other information available to APRA. Unsatisfactory results of desk visits give rise to on-site visits: Ibid, 8.

497 Ibid, 11.

498 Council of Financial Regulators, *Annual Report 2000*, Reserve Bank of Australia, Sydney, 7.

5.40 Where the financial weakness of a life insurance company, general insurer, friendly society or superannuation fund could have a detrimental effect on the interest of members and policyholders, APRA may intervene in the management of the troubled entity.[499]

5.41 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.[500] APRA is funded by levies paid by regulated financial institutions based on a percentage of assets held by the entity.[501]

Australian Transaction Reports and Analysis Centre (AUSTRAC)

5.42 AUSTRAC is a single-activity regulator. Its main role is as an intelligence-gathering agency.[502] 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'. Cash dealers must also report all international funds transfer instructions.

5.43 All the penalties under the FTRA are criminal. These include imprisonment from one to five years, and fines.

Revenue

The Australian Taxation Office (ATO)

5.44 The ATO is the Commonwealth's principal revenue collection agency. It administers the enforcement of more than 130 statutory penalties[503] in more than

499 Ibid, 8.
500 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.
501 Ibid, 10.
502 Australian Transaction Reports and Analysis Centre, *Annual Report 2000–2001*, (2001), Commonwealth of Australia, Canberra, 2.
503 Australian National Audit Office, *Administration of Tax Penalties*, Report 31 (2000), Australian Government Printing Service, Canberra, 25.

20 federal statutes (excluding GST-related legislation). The main taxation legislation administered by the ATO includes the *Taxation Administration Act 1953* (Cth), *Income Tax Assessment Act 1936* (Cth) and the *Excise Act 1901* (Cth).[504]

5.45 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.

5.46 In major tax legislation about 45% of penalties are administrative.[505] Common types of administrative penalties are fines or interest charges. Some fines 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 tax Acts 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.[506] Where the original penalty is an administrative penalty, the cumulative penalty is often the General Interest Charge (GIC).[507]

5.47 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 of taxpayers through education and the provision of efficient service delivery.[508] Where voluntary compliance is not obtained, there is an escalation of sanctions, which include penalties.[509] The ATO acknowledged that 'one size fits all' solutions were no longer appropriate and that different

504 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*.

505 These figures are based on the *Taxation Administration Act 1953*, *Income Tax Assessment Act 1936* and the *Excise Act 1901*.

506 *Taxation Administration Act 1953*, s 8H.

507 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.

508 Australian Taxation Office, *Improving Tax Compliance in the Cash Economy*, (1998), Australian Taxation Office, Canberra, 20.

509 Australian National Audit Office, *Administration of Tax Penalties*, Report 31 (2000), Australian Government Printing Service, Canberra, 23.

approaches were required to support those trying to do the right thing whilst targeting its toughest approaches to the hardened evaders.[510]

5.48 The ATO has a Code of Settlement Practice, which provides guidelines on the settlement of taxation disputes, transparently and accountably, and describes the legal basis for settlements under the Commissioner's general administrative powers.[511] 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.[512] 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.[513] The Code is discussed further at para 7.169.

5.49 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). In 2001 major enforcement issues flagged by the ATO included aggressive tax planning (including test cases and a focus on tax planners and promoters) and persistent tax debtors.[514]

5.50 The ATO has developed a detailed Prosecution Policy that states the principles guiding the ATO's enforcement response,[515] although other documents are also relevant.[516] The policy is not legally binding.[517] 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.[518] Although the ATO Prosecution Policy primarily relates to decisions about criminal proceedings, it ac-

510 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.

511 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.

512 Ibid, 5.1.

513 Ibid, ch 4.

514 Commissioner of Taxation, *Annual Report 2000–2001*, (2001), Australian Taxation Office, 3. See also Michael Laurence, 'A Big Year for the Taxman', *BRW*, 15 December 2000, 56.

515 Australian Taxation Office, *ATO Prosecution Policy*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/index.htm>, 9 March 2001.

516 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.

517 Australian Taxation Office, *ATO Prosecution Policy*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/index.htm>, 9 March 2001, para 1.1.9.

518 Ibid, para 2.3.5.

knowledges the need to consider a range of alternative responses to non-compliance, 'from help and education, to audits and/or prosecution'.[519]

5.51 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.[520] 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.[521] The use of discretion by the ATO is considered further at chapter 15.

5.52 Over the years there have been a number of criticisms of ATO penalty and prosecution policies, in particular that they are inflexible, aggressive or, in other instances, that inappropriately lenient responses are made by ATO staff.[522] The ATO concedes that differential access to professional tax advice and representation is perceived as a major cause of inequity in the tax system.[523] ATO practice makes some concession to this inequity. In 2000, the ATO gave evidence to the Senate Economics References Committee that it imposed 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.[524] 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.[525] According to the Australian National Audit Office (ANAO) estimates, in 1998–99 the value of penalties applied by the ATO was $1.122 billion (compared with a total tax revenue collected by the ATO of $135.3 billion). The ATO remitted $139 million worth of penalties, or about 12% of the total penalties applied.[526]

5.53 The ATO's annual report provides little detailed information about the imposition of criminal, civil and administrative penalties by the ATO, a stance criticised by the ANAO in 2000.[527] The ANAO found that the ATO annual report only gives information about the total amount of penalties remitted during the year,

519 Ibid, para 2.3.3.

520 *Taxation Administration Act 1953*, s 8AAG, 8AAM, 8AAS, 48, 298–20; *Income Tax Assessment Act 1936*, s 160ASB.

521 Australian National Audit Office, *Administration of Tax Penalties*, Report 31 (2000), Australian Government Printing Service, Canberra, 20.

522 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 26–37.

523 Senate Economics References Committee, *Inquiry into the Operation of the Australian Taxation Office*, (2000), Commonwealth of Australia, Canberra, 20.

524 Ibid, 24.

525 Ibid, 24.

526 Australian National Audit Office, *Administration of Tax Penalties*, Report 31 (2000), Australian Government Printing Service, Canberra, 9.

527 Ibid, 36.

but does not report the gross value of penalties applied or the net value of penalties after remission.[528] The ANAO audit of the ATO also found that the ATO does not collect adequate system-wide data relating to penalties, and that the data it does collect is not analysed to improve the administration of penalties.[529] These deficiencies in information about penalties make it difficult to gain a clear picture of how penalties impact on taxpayers. For example, a break down of the number and value of penalties applied for particular offences is not available, so it is not possible to compare the enforcement or relative importance of different penalty types. Neither is it possible to gauge differences in how the various ATO BSLs impose penalties in different market sectors.

Border control

5.54 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 assistance 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)

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5.55 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.[530]

5.56 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

528 Ibid.

529 Ibid, 11.

530 For example, under the Border Security Legislation Amendment Bill 2002, the ACS would be granted significant information gathering powers with the aim of enhancing its ability to risk-assess passengers and employees at Australia's ports of entry.

across the Australian border.[531] The ACS provides air- and sea-based surveillance and response services to a number of government agencies.[532]

5.57 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; Customs officers; and any person contravening export and import laws.

5.58 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.[533]

5.59 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.[534]

Department of Immigration and Multicultural and Indigenous Affairs (DIMIA)

5.60 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 implements 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, as well as a number of character-related powers, which include criminal deportation and visa cancellation on character grounds.

5.61 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

531 Australian Customs Service, *Annual Report 2000–2001*, (2001), Commonwealth of Australia, Canberra, 15.
532 Ibid, 60.
533 Australian Customs Service, *A Guide to Customs; Complying with Customs*, Australian Customs Service, <www.customs.gov.au/bizlink/comply/index.htm>, 24 May 2001.
534 Customs prosecutions are discussed further in chapter 3.

of licences. In 2000–01, there were 121 summary prosecutions and 378 indictable prosecutions under the *Migration Act*.[535]

Australian Quarantine Inspection Service (AQIS)

5.62 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.

5.63 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.[536] Quarantine officers have wide powers to search, seize and treat goods suspected of being a quarantine risk.

5.64 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 government 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.

5.65 AQIS investigators have powers delegated to them pursuant to the Customs legislation and other Commonwealth legislation, including the *Crimes Act 1914* (Cth).[537] 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 Administrative Appeals Tribunal or the Federal Court.

Australian Fisheries Management Authority (AFMA)

5.66 AFMA is a statutory body that administers the day-to-day management of fisheries.[538] AFMA is responsible for enforcing the *Fisheries Management Act*

535 Commonwealth Director of Public Prosecutions, *Annual Report 2000–2001*, Commonwealth Director of Public Prosecutions, table 8, 19.

536 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.

537 Department of Agriculture Fisheries and Forestry — Australia, *Compliance and Investigations*, Department of Agriculture, Fisheries and Forestry — Australia, <www.affa.gov.au/>, 11 September 2001.

538 Australian Fisheries Management Authority, *Annual Report 2000–2001*, (2001), Australian Fisheries Management Authority, Canberra, 5. Broader fisheries policy, international negotiations and strategic policy issues are administered by another group within the Department of Agriculture, Fisheries and Forestry.

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 co-ordination, policy direction, technical advice and funding.[539] The *Fisheries Management Act* provides for administrative (35%) and criminal penalties (65%). 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.

5.67 AFMA also has responsibilities in relation to protection of the marine environment by maintaining sustainable fishery levels.

Environment

5.68 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 quarantine inspection services for the arrival of international passengers, cargo, mail, animals and plants or their products (discussed above at para 5.62–5.65) 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

5.69 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.[540] The *EPBC Act* is a major reform of Commonwealth environment legislation and regulates actions

539 Australian Fisheries Management Authority, *About AFMA*, Australian Fisheries Management Authority, <www.afma.gov.au>, 22 June 2001.

540 The *EPBC Act* 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).

that will, or are likely to, have a significant impact on any matter of national environmental significance.[541]

5.70 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, orders to remedy environmental damage, personal liability of executive officers, and publicising of contraventions.[542]

5.71 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.[543] 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.

5.72 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 criminal penalties and criminal offences (including up to two years imprisonment) for a contravention of the *EPBC Act* committed by the body corporate. The *EPBC Act* also permits the Minister to make public any contraventions of the Act.[544]

Australian Maritime Safety Authority (AMSA)

5.73 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

541 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).

542 Australian Fisheries Management Authority, *About AFMA*, Australian Fisheries Management Authority, <www.afma.gov.au>, 22 June 2001.

543 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: C McGrath, 'The Flying Fox Case' (2001) 18(6) *Environmental and Planning Law Journal* 540.

544 Environment Australia, *Compliance and Enforcement*, Environment Australia, <www.ea.gov.au/epbc/compliance/index.html>, 22 May 2001.

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,[545] intervention to save life or protect the environment in the event of a pollution incident,[546] imposing civil liability or pursuing compensation for pollution,[547] the imposition of a levy on certain oil tankers entering Australian ports to fund national marine pollution response strategies,[548] and the dumping or incineration at sea of waste or hazardous substances.[549]

5.74 AMSA also has regulatory functions in relation to transport (see para 5.102).

Social security

Centrelink

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5.75 Centrelink is the primary agency for delivering social services and income support within the Department of Family and Community Services (FACS). Centrelink, established in 1997 pursuant to the *Commonwealth Services Delivery Agency Act 1997* (Cth), is intended to provide a co-ordinated 'one stop shop' for the delivery of social security services to 6.3 million recipients in respect of over 9 million individual entitlements.[550] 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.

5.76 Centrelink delivers services, program and payments for 10 federal government departments,[551] the Tasmanian State Government, and state and territory housing authorities. Services provided by Centrelink include welfare entitlements concerning employment, youth and students, retirement, families and children, those with a disability and their carers, rural housing, multicultural services, and

545 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).

546 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.

547 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.

548 *Protection of the Sea (Shipping Levy) Act 1981* (Cth).

549 *Environment Protection (Sea Dumping) Act 1981* (Cth).

550 Centrelink, *Annual Report 2000–01*, (2001), Commonwealth of Australia, Canberra, 15.

551 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, Training and Youth Affairs; Department of Agriculture, Fisheries and Forestry Australia; Department of Foreign Affairs and Trade; Department of Communication, Information Technology & the Arts; and the Department of Immigration and Multicultural and Indigenous Affairs.

indigenous services.[552] 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.[553]

5.77 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.

5.78 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, sets out the offences[554] and some administrative penalties.

5.79 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.

5.80 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.

5.81 Almost all penalties in the SSA 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.

552 Centrelink, *Annual Report 2000–01*, (2001), Commonwealth of Australia, Canberra, 16–18.
553 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.
554 SSAA, Part 6.

5.82 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.

5.83 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.

5.84 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.

5.85 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 236–7).

5.86 From 1 July 2002, under the Government's welfare policy *Australians Working Together — Helping People to Move Forward*,[555] 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.

5.87 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.[556] The use of private contractors by Centrelink is considered further in chapter 10.

5.88 The SSAA also contains a number of criminal offences including providing a false or misleading statement or document (SSAA, s 214), failing to provide

555 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.
556 SSAA, s 63 and SSA, s 601.

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).

5.89 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).

5.90 Where offences have been committed and cases fall within referral guidelines, they are investigated by Centrelink officers (or referred to the Australian Federal Police for investigation) and referred to the DPP for prosecution. The relationship between Centrelink and the DPP is discussed in chapter 6.

Transport

5.91 Federal regulation covers certain aspects of the air, rail and road transport industries.

5.92 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 inci-

dents, and Airservices Australia manages air traffic control, airport rescue and fire fighting services.[557]

5.93 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, co-ordinates transport and road safety policy issues across Australia.[558] The Commonwealth has entered into various arrangements with the States regarding rail passenger and freight services.[559] The National Road Transport Commission co-ordinates the development and implementation of a body of national road transport legislation that provides a model for state and territory legislation.[560] 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)

5.94 CASA is an independent statutory authority established under the *Civil Aviation Act 1988* (Cth). It is one of a number of Commonwealth authorities and agencies that form part of the Australian aviation community within the portfolio of the Department of Transport and Regional Services.[561]

5.95 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.[562]

5.96 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 Regu-*

557 Civil Aviation Safety Authority, *Overview of CASA*, Civil Aviation Safety Authority, <www.casa.gov.au/corporat/overview.htm>, 18 September 2001.

558 Australian Transport Council, *About the ATC*, Department of Transport and Regional Services, <www.dotrs.gov.au/atc/atcabout.htm>, 22 June 2001.

559 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 Victorian 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.

560 National Road Transport Commission, *National Legislation*, National Road Transport Commission, <www.nrtc.gov.au/place/index.asp?lo=legis>, 22 June 2001.

561 Civil Aviation Safety Authority, *Annual Report 2000–2001*, (2001), Commonwealth of Australia, Canberra, 8.

562 Ibid, 6.

lations 1998 (Cth), together with the *Civil Aviation Orders* made under the Regulations and the *Civil Aviation Act*, are 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.[563]

5.97 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, CASA investigators, and any person who interferes with crew or aircraft.

5.98 CASA has a range of enforcement tools available which are set out in detail in its enforcement manual.[564] CASA states that the objectives of its enforcement activities are to promote compliance with safety rules, to educate the aviation community, to identify those in the industry who require additional training or supervision, and to take enforcement action against deliberate contraventions of legislation.[565] 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. CASA has recently introduced a system of infringement notices which may be issued where informal enforcement action would be normally appropriate but where, for example, the act or omission was deliberate, the person attempted to conceal the non-compliance, the offender showed a reckless disregard for the rules, or the offender is a repeat offender.[566] There are three levels of administrative fines payable under infringement notices ranging from one to five penalty units.[567]

5.99 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.[568]

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563 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 Civil Aviation Regulations 1998*, Civil Aviation Safety Authority, <www.casa.gov.au/avreg/newrules/misc/casrguide.htm>, 19 September 2001.

564 Civil Aviation Safety Authority, *Enforcement Manual*, Civil Aviation Safety Authority, <www.casa.gov.au/manuals/htm/enf/enf.htm>, 18 September 2001.

565 Ibid, para 1.1.

566 Ibid, para 2.2.2.

567 Ibid, para 2.4.

568 Civil Aviation Safety Authority, *What is 'Appropriate Regulatory Action'?*, Civil Aviation Safety Authority, <www.casa.gov.au/hotopics/action/index.htm>, 18 September 2001.

5.100 A scheme of enforceable voluntary undertakings for some situations where prosecution or licence action would be unwarranted, but fines, counselling or warnings would be inadequate, has been proposed.[569] Where voluntary undertakings are not complied with, CASA would be able to apply to the Federal Court to secure compliance.

5.101 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.

Australian Maritime Safety Authority (AMSA)

5.102 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.

5.103 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.

5.104 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.

5.105 As discussed at para 5.73, 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.

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Health and aged care

5.106 The Department of Health and Ageing has wide-ranging responsibilities, and administers 23 statutes.[570] 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.

569 The *Aviation Legislation Amendment Bill (No.1) 2002* (Cth) will insert s 31A into the *Civil Aviation Act 1988* (Cth), which will provide for enforceable voluntary undertakings. The provision is modelled on s 87B of the *Trade Practices Act*.

570 Department of Health and Aged Care, *Annual Report 2000–2001*, (2001), Commonwealth of Australia, Canberra, 501.

Aged Care Standards and Accreditation Agency

5.107 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.[571] All residential care service providers must be accredited by the Aged Care Standards and Accreditation Agency (ACSAA) in order to receive government funding. The Department provides support for service providers to assist them to reach the necessary residential care standards and, where necessary, may take regulatory action including notices of non-compliance, penalties or revocation of licences.[572]

5.108 ACSAA is the accreditation body prescribed in the *Aged Care Act 1997* (Cth).[573] 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 Department 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.

5.109 The Department of Health and Ageing imposes sanctions on approved providers of Commonwealth-funded residential aged care facilities in cases of serious non-compliance.[574] Information about sanctions is published by the Department on its website.[575] 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;[576]
- restricting approval to aged care services that are being conducted by the approved provider at the notice time;[577]
- restricting approval to care recipients to whom the approved provider is providing care at the notice time;[578]
- revoking or suspending the allocation of some or all of the places allocated to the approved provider;[579]

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571 Ibid, 393.
572 Ibid, 405–406.
573 ACSAA is an independent company limited by guarantee, established under the Australian Securities and Investments Commission.
574 Department of Health and Ageing, *Sanctions Update*, Department of Health and Aged Care, <www.health.gov.au/acc/rescare/sanction.htm>, 11 September 2001.
575 See <http://www.health.gov.au/acc/rescare/sanction.htm>, 1 February 2002.
576 *Aged Care Act 1997* (Cth), s 66-1(a).
577 Ibid, s 66-1(b).
578 Ibid, s 66-1(c)(i).

- varying the conditions to which the allocation is subject;[580]
- prohibiting the further allocation of places to the approved provider;[581]
- 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;[582]
- revoking or suspending the certification of a residential care service in respect of which the approved provider has not complied with its responsibilities;[583]
- prohibiting the charging of accommodation bonds or the accrual of accommodation charges;[584]
- 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;[585] or
- such other sanctions as are specified in the Sanctions Principles.[586]

5.110 The *Aged Care Act* grants monitoring powers[587] to authorised officers.[588] Some of these powers can only be exercised with the consent of an occupier,[589] 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.[590]

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579 Ibid, s 66-1(d).
580 Ibid, s 66-1(e).
581 Ibid, s 66-1(f).
582 Ibid, s 66-1(g) and (h).
583 Ibid, s 66-1(i).
584 Ibid, s 66-1(j).
585 Ibid, s 66-1(k).
586 Ibid, s 66-1(l). The Sanctions Principles are made by the Minister under s 96-1 and have effect as a disallowable instrument.
587 Described in ibid, s 90-4.
588 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'.
589 Ibid, s 91.
590 Ibid, s 92.

Australia New Zealand Food Authority (ANZFA)

5.111 All food sold in Australia must comply with food regulations. ANZFA is a statutory authority established under the *Australia New Zealand Food Authority Act 1991* (Cth) to provide a consistent regulatory framework.[591]

5.112 ANZFA develops, varies and reviews uniform national food standards codes for Australia and New Zealand. ANZFA 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)

5.113 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.

5.114 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.[592] Failure to comply with a requirement set by the Secretary carries penalties of up to 60 penalty units.[593] Criminal penalties of up to 400 penalty units apply for product tampering.[594]

5.115 The surveillance unit of the TGA is responsible for the enforcement of therapeutic goods legislation. In 2000–2001, 516 referrals were made to the Unit, of which 512 matters were actioned.[595] Action ranged from advice and counselling, formal warnings and regulatory visits for minor contraventions up to and including

591 *Australia New Zealand Food Authority Act 1991* (Cth), s 2A.
592 *Therapeutic Goods Act 1989* (Cth), s 41
593 Ibid, s 30, 30A, 30B.
594 Ibid, Part 4C.
595 Department of Health and Aged Care, *Annual Report 2000–2001*, (2001), Commonwealth of Australia, Canberra, 375.

criminal prosecutions for more serious offences.[596] For the same period the DPP reported nine summary prosecutions under the *Therapeutic Goods Act*.[597]

Gene technology

5.116 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.[598] 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.[599]

5.117 The regulatory system is managed by the Office of the Gene Technology Regulator, a federal statutory office holder who derives power from both Commonwealth and State and Territory legislation.[600] 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:[601]

- 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 Therapeutic Goods Administration.

- 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.

5.118 The National Industrial Chemicals Notification and Assessment Scheme regulates GM industrial chemicals.

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596 Ibid.
597 Commonwealth Director of Public Prosecutions, *Annual Report 2000–2001*, Commonwealth Director of Public Prosecutions, 19.
598 Office of the Gene Technology Regulator, *Handbook on the Regulation of Gene Technology in Australia* (2001) Office of the Gene Technology Regulator, Canberra, 16.
599 This framework also operates in conjunction with relevant existing Commonwealth and state schemes.
600 *Gene Technology Act 2000* (Cth), s 17.
601 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.

Office of Gene Technology Regulator

5.119 The Office of the Gene Technology Regulator (OGTR) was established by the *GT Act* (see para 5.117).[602] The functions of the OGTR are to administer the *GT Act* and related legislation and assess any risks posed by GMOs, 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.[603] The *GT Act* also establishes three advisory groups to assist the OGTR.[604]

5.120 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.

5.121 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.[605] 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.[606]

Australia New Zealand Food Authority (ANZFA)

5.122 As discussed at para 5.112, ANZFA develops standards for foods, including GM foods, which are regulated under state and territory food legislation. ANZFA assesses the safety for human consumption of each food produced through gene technology.[607] Under this standard, GM foods cannot be sold in Australia and

602 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.

603 *Gene Technology Act 2000* (Cth), s 27.

604 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.

605 Ibid, 159.

606 Ibid, 161–165.

607 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 ANZFA: Biotechnology Australia,

New Zealand unless they have passed stringent pre-market safety assessments conducted by ANZFA.[608]

Therapeutic Goods Administration (TGA)

5.123 The responsibilities of the TGA described above at para 5.113 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.[609]

National Registration Authority for Agricultural and Veterinary Chemicals (NRA)

5.124 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.[610] Where a GMO or product of genetic manipulation technology has herbicidal or pesticidal uses, it may need to be registered with the NRA.[611]

Privacy

5.125 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. 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.

Questions & Answers, Biotechnology Australia, <www.biotechnology.gov.au/community_issues/qa/qa.asp>, 11 September 2001.

608 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.

609 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.

610 Biotechnology Australia, *Questions & Answers*, Biotechnology Australia, <www.biotechnology.gov.au/community_issues/qa/qa.asp>, 11 September 2001.

611 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.

Office of the Federal Privacy Commissioner (OFPC)

5.126 The OFPC is an independent organisation that reports to the federal Attorney-General.[612] Its purpose is to promote an Australian culture that respects privacy.[613] This is done by supporting individuals with privacy concerns, and working with organisations and agencies to improve their practices in the handling of personal information.[614]

5.127 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)[615] and the *National Health Act 1953* (Cth).[616]

5.128 The *Privacy Act* is the main privacy legislation. When it was enacted, it mainly covered public sector agencies. Its scope was extended to cover private sector organisations with effect from 21 December 2001.[617] 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.

5.129 Under the *Data-matching Program (Assistance and Tax) Act* the OFPC regulates the comparing of personal information held by the Australian Taxation Office 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 Privacy Commissioner 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

612 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.

613 Ibid, 16.

614 Ibid, 16.

615 Under the Spent Convictions Scheme: *Crimes Act 1914* (Cth), s 85ZM.

616 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.

617 *Privacy Amendment (Private Sector) Act 2000* (Cth).

assesses applications from organisations seeking to be excluded from the operation of this law.[618]

5.130 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.[619]

5.131 Most complaints received by the OFPC regarding alleged contraventions of the *Privacy Act* are resolved through negotiation and conciliation. In most cases, where the Privacy Commissioner has formed the view that the respondent has contravened the *Privacy Act*, 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 Privacy Commissioner 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.[620]

5.132 While the Privacy Commissioner has formal complaint determination powers under the *Privacy Act*, these also are rarely used.[621] If the Privacy Commissioner 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.[622]

5.133 In relation to the private sector, the Privacy Commissioner has powers to investigate complaints and to seek injunctions to prevent contraventions of the *Privacy Act*. If an organisation does not comply with a Privacy Commissioner's determination, the Privacy Commissioner 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.[623]

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618 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.

619 '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.

620 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.

621 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.

622 *Privacy Act*, s 52.

623 *Privacy Act*, s 55A.

Discrimination and human rights

5.134 Australia has anti-discrimination legislation at the federal level as well as in all States and Territories.[624] The primary pieces of federal anti-discrimination legislation are administered by the Human Rights and Equal Opportunity Commission. The principal constitutional basis for federal anti-discrimination legislation is Australia's international human rights obligations.[625]

The Human Rights and Equal Opportunity Commission (HREOC)

5.135 HREOC is a national 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.

5.136 The *HREOC Act* gives HREOC responsibility for seven international instruments ratified by Australia.[626] 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).[627]

5.137 HREOC undertakes and co-ordinates research and educational programs to promote human rights and eliminate discrimination in relation to all the Acts. HREOC investigates alleged infringements. Where appropriate, it will endeavour to settle matters by conciliation.[628] If settlement attempts are not successful, or if HREOC considers that it is not appropriate to attempt to settle a particular matter,

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624 *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); H*uman 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).

625 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.

626 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*.

627 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.

628 *HREOC Act*, s 11(f)(i).

it will formally report on the case to the federal Attorney-General and recommend the action required for a resolution.[629] The President of HREOC may terminate a complaint where he or she believes it is not appropriate to proceed.[630] If a complaint is terminated, the complainant may still have it heard in the Federal Court or the Federal Magistrates Court.[631]

5.138 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 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.[632] Subsequent legislation[633] 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.[634] 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,[635] it may provide the Court with a report on a complaint that has been terminated,[636] and it may assist the Court as *amicus curiae*.[637]

5.139 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.[638]

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629 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

630 *HREOC Act*, s 46PH(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.

631 *HREOC Act*, s 46PO.

632 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

633 *Human Rights Legislation Amendment Act 1995* (Cth).

634 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.

635 Section 46PT.

636 Section 46PS.

637 Section 46PV.

638 Section 26.

Equal Opportunity for Women in the Workplace Agency (EOWA)

5.140 EOWA is a statutory authority established to administer the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) (*EOWA Act*). EOWA comes within the Employment and Workplace Relations government portfolio, and is responsible for administering the *EOWA Act*, and educating and assisting organisations to achieve equal opportunity for women.[639] 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;[640]
- to promote, amongst employers, the elimination of discrimination against, and the provision of equal opportunity for, women in relation to employment matters;[641] and
- to foster workplace consultation between employers and employees on issues concerning equal opportunity for women in relation to employment.[642]

5.141 The functions of EOWA are described in the *EOWA Act*, and include:

- 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.[643]

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639 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.
640 *Equal Opportunity for Women in the Workplace Act 1999* (Cth), s 2A(a).
641 Ibid, s 2A(b).
642 Ibid, s 2A(c).
643 Ibid, s 10.

5.142 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.[644] EOWA requires employers to submit a report on their workplace program.

5.143 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.[645] Secondly, an employer may be affected by the Contract Compliance policy,[646] 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.[647]

Communications

5.144 In the Australian telecommunications regulatory environment, three main types of industry operators are subject to regulation: carriers, carriage service providers, and content service providers.[648]

5.145 A carrier is a holder of a carrier licence granted by the Australian Communications Authority (ACA) under the *Telecommunications Act*. The owner of a network unit which is used to supply carriage services to the public must hold a carrier licence. A 'carriage service provider' is a person who supplies carriage services using network units. 'Internet service providers' are carriage service provid-

644 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.

645 *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.

646 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.

647 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.

648 Australian Communications Authority, *Overview — The Australian Telecommunications Regulatory Environment*, Australian Communications Authority, <www.aca.gov.au/authority/overview.htm>, 30 October 2001.

ers. A 'content service provider' is a person who supplies broadcasting and on-line services. Content service providers are subject to content regulation by the ABA.[649]

Australian Communications Authority (ACA)

5.146 The ACA, established under the *Australian Communications Authority Act 1997* (Cth), is responsible for regulation of the telecommunications and radiocommunications industry.[650] It also regulates the universal service regime, which requires that there is access to basic telecommunications services across the country.[651]

5.147 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.[652] 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. [653]

5.148 The ACA encourages and facilitates the development of industry self-regulation by requesting that codes of practice be developed, and determining and enforcing mandatory standards where required.[654] The codes developed by industry are registered with the ACA.[655]

5.149 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[656] or a failure to pay the universal service levy.[657] Furthermore, the ACA may issue directions for a person to take action within a specified period, or refrain from taking that action.[658]

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649 Ibid.

650 Australian Communications Authority, *The Australian Communications Authority*, Australian Communications Authority, <www.aca.gov.au/authority/aca.htm>, 20 June 2001.

651 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.

652 Australian Communications Authority, *The Australian Communications Authority*, Australian Communications Authority, <www.aca.gov.au/authority/aca.htm>, 20 June 2001.

653 Australian Communications Authority, *Annual Report 2000–2001*, Commonwealth of Australia, Sydney, 2.

654 Australian Communications Authority, *The Australian Communications Authority*, Australian Communications Authority, <www.aca.gov.au/authority/aca.htm>, 20 June 2001.

655 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.

656 *Telecommunications Act 1997* (Cth), s 72(1).

657 Ibid, s 72(2).

658 Ibid, s 212.

Likewise, the ACA has the power to give directions to carriers and service providers.[659] Under the *Radiocommunications Act 1992* (Cth), the ACA may cancel an operator's certificate of proficiency.[660]

Australian Broadcasting Authority (ABA)

5.150 The ABA, established by the *Broadcasting Services Act 1992* (Cth),[661] 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.[662] The ABA has power to allocate, renew, suspend and cancel licences and to take other enforcement action under the *Radiocommunications Act*; to conduct investigations or hearings relating to the allocating of licences; to collect fees payable; to monitor compliance with codes of practice and standards; and to investigate complaints concerning broadcasting services.[663]

5.151 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.[664] The ABA has responsibility for monitoring the broadcasting, datacasting and Internet industries in a manner consistent with the regulatory policy, so as to produce regulatory arrangements that are stable and predictable, and deal effectively with contraventions of the *Broadcasting Services Act*.[665]

5.152 The ABA regulates a licensing scheme in which it can allocate, renew, suspend or cancel licences, and take other enforcement action.[666] 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).[667] Where the contravention relates to a commercial radio broadcasting licence, there is a penalty

659 Ibid, s 581.
660 *Radiocommunications Act 1992* (Cth), s 124.
661 Section 154(1). It began operations on 5 October 1992 replacing the Australian Broadcasting Tribunal.
662 Australian Broadcasting Authority, *Annual Report 2000–2001*, (2001), Commonwealth of Australia, Sydney, 19.
663 Ibid, 12.
664 *Broadcasting Services Act 1992* (Cth), s 4.
665 Ibid, s 5(1).
666 Ibid, s 158 (c).
667 Ibid, s 66(1)(e).

of 2,000 penalty units.[668] Importantly, a person who contravenes these provisions is guilty of a separate offence in respect of each day during which the contravention continues.[669] There are similar penalties available for providing broadcasting services without authority.[670] 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 2,000 penalty units.[671]

5.153 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.[672] Furthermore, the ABA is entrusted with developing program standards relating to broadcasting in Australia, and monitoring compliance with these standards.[673]

5.154 The ABA also has responsibility for regulating the content of Internet services.[674] 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)

5.155 Apart from its numerous other functions (see para 5.8–5.15), 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 *Trade Practices Act*. Part XIB enables the ACCC to address anti-competitive conduct by carriers and carriage service providers, and issue tariff filing directions and record-keeping rules.[675] 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.[676]

5.156 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 ser-

668 Ibid, s 66(1)(f).
669 Ibid, s 66(2).
670 Ibid, s 137 and 138.
671 Ibid, s 139.
672 Ibid, s 158(h) and (i).
673 Ibid, s 158(j) and (k).
674 Australian Broadcasting Authority, *Annual Report 2000–2001*, (2001), Commonwealth of Australia, Sydney, 13.
675 Australian Competition & Consumer Commission, *The ACCC Telecommunications Group*, Australian Competition & Consumer Commission, <www.accc.gov.au/telco/telecom_.htm>, 7 August 2001.
676 Ibid.

vices and carriage services utilised by the Defence forces, operator services and directory assistance services.[677]

677 Ibid.

6. Regulators and the DPP

Contents

Role of the DPP

6.1 The Commonwealth Director of Public Prosecutions (DPP) is responsible for prosecutions under federal criminal law. Regulatory agencies typically lack independent authority to pursue criminal prosecutions although the Australian Taxation Office (ATO) has powers to prosecute certain summary offences (see discussion at para 6.19–6.22).

6.2 Generally speaking, regulators refer suspected criminal breaches to the DPP, which then decides whether to pursue criminal charges. Therefore, often the decision to pursue a criminal, civil or administrative penalty is influenced by the role of the DPP.

DPP Prosecution Policy

6.3 Decisions by the DPP to initiate criminal proceedings are made in accordance with its Prosecution Policy, which expressly states that the prosecution of

suspected criminal offences should not be automatic.[678] Rather, the decision whether to prosecute is regarded as the most important step in the process.[679] 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.

6.4 The Prosecution Policy provides a detailed list of questions to be considered when evaluating the quality of the evidence.[680] It also lists 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.[681] Many of the factors may be relevant to the public interest considerations of federal regulators, and 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;

678 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.
679 Ibid, para 2.2.
680 Ibid, para 2.7.
681 Ibid, para 2.10.

- 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 co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so.

6.5 The availability of an alternative enforcement mechanism is a particularly important public interest consideration.[682] The Prosecution Policy 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
- the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.[683]

6.6 The DPP has a discretionary power to confer immunity from prosecution on informants 'if he or she considers it appropriate to do so'.[684] 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). Informal guidelines structure the exercise of this discretion. (See further discussion of this immunity in chapter 15.)

6.7 The Prosecution Policy is of particular interest to the ALRC as a possible model for policies and guidelines structuring the use of civil and administrative penalties.

Choice of response

6.8 The Prosecution Policy states that the key consideration in deciding to initiate criminal proceedings is to ensure that the charge adequately reflects the

682 Ibid, para 2.12.
683 Ibid, para 2.13.
684 *Director of Public Prosecutions Act 1983* (Cth), s 9(6).

nature and extent of the criminal conduct on the evidence, and will provide the court with an appropriate basis for sentencing.[685] Ordinarily, the charge will be the most serious available, subject to issues such as available defences and the strength of the evidence.[686] 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).[687]

6.9 Where the legislation allows a choice between criminal and non-criminal enforcement, regulators usually seek criminal penalties as a 'last resort' for the most serious offences. Criminal prosecutions are generally regarded as the ultimate deterrent due to the persuasive threat of imprisonment (where available), the stigma of a criminal conviction, and the publicity attracted by public trials.

6.10 Strategically, officers of the DPP have noted that, where there is a choice among civil, criminal or administrative penalties, it can be difficult to identify the point at which the criminal 'card' goes on the table.[688] The investigative path would be very different if a decision were made too early to pursue a civil rather than criminal remedy. Although civil penalties are a pragmatic way of resolving contraventions and may be easier to pursue than a criminal prosecution, it is dangerous to use civil penalties just to avoid having to prove the criminal onus. At the same time, 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.[689]

6.11 The availability and use of both civil and criminal penalties for the same conduct has been described as a 'real problem' for the DPP.[690] 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 regulatory offence to a criminal offence.[691] This approach has been used in recent legislation such as the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).[692]

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685 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.
686 Ibid, para 2.19.
687 Ibid, para 2.20–2.21.
688 Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 20 February 2001.
689 Ibid.
690 Ibid.
691 Ibid.
692 For example, see *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 18–18A.

Criminal process

6.12 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, although for strict liability offences only harm and not intention must be proved and, as a result, the sanction is often lower.[693] The high criminal standard of proof (beyond reasonable doubt) and the importance of evidentiary issues also make it difficult to take successful criminal action.

6.13 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. Although the Australian Consumer & Competition Commission (ACCC) is not set up to prosecute criminal offences, few ACCC matters go to the DPP. This is because the *Trade Practices Act 1974* (Cth) has few criminal penalties available and is designed around civil penalty provisions. Instead, the ACCC favours the use of 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.[694]

6.14 There is a perception that defendants put a great deal of effort into defending themselves against criminal proceedings but are more willing to accept (or negotiate) civil penalties.[695]

6.15 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.[696] Criminal penalties are less vulnerable to this problem because of the principle in criminal law that the punishment must be proportionate to the crime.[697] The officers regarded the scope for negotiated outcomes in relation to criminal regulatory penalties as limited.[698]

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693 Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 20 February 2001.
694 Australian Competition & Consumer Commission, *The Australian Competition and Consumer Commission — Role and Functions*, (1999), Australian Competition & Consumer Commission, 17.
695 Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 5 June 2000.
696 Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 20 February 2001.
697 Ibid.
698 Ibid.

Matters referred to the DPP

6.16 The initial decision to investigate possible contraventions, and therefore to commence proceedings, often comes from an investigative or administrative agency. The DPP does not necessarily have any involvement in the decision about who is targeted.[699] The following tables indicate the sources of referrals to the DPP.

Table 1: Offences dealt with by the DPP by referring agency[700]

By Referring Agency	Summary Offences Defendants Dealt With		Indictable Offences Defendants Dealt With	
	1999–2000	**2000–2001**	**1999–2000**	**2000–2001**
ACCC	4	4	-	-
ACS	15	23	19	12
AEC	421	155	-	-
AFP	533	582	461	565
AQIS	21	5	-	2
ASIC	45	35	35	40
ATO	188	236	14	15
Centrelink	3,077	2,948	35	29
CASA	27	32	3	-
DIMIA	43	45	13	13
Other	664	-	65	-
Total	**5,038**	**4,700**	**645**	**734**

699 Ibid.

700 Commonwealth Director of Public Prosecutions, *Annual Report 1999–2000*, Commonwealth of Australia, Canberra, table 10, 19; Commonwealth Director of Public Prosecutions, *Annual Report 2000–2001*, Commonwealth Director of Public Prosecutions, table 10, 21.

Table 2: Offences dealt with by the DPP by legislation[701]

By Legislation	Summary Charges Dealt With		Indictable Charges Dealt With	
	1999–2000	**2000–2001**	**1999–2000**	**2000–2001**
ASIC Act	8	7	-	2
Civil Aviation Act	71	102	2	-
Corporations Law	61	30	30	27
Crimes Act	703	577	303	273
Customs Act	97	92	264	249
Electoral Act	421	-	-	-
Migration Act	138	121	118	378
Quarantine Act	6	4	4	-
Social Security Act	3,525	3,953	-	-
Taxation legislation	267	291	2	2
Trade Practices Act	5	6	-	-
Other	1,227	-	626	-
Total	**6,429**	**6,531**	**929**	**1,092**

6.17 The statistics above reveal that social security prosecutions comprise the bulk of the DPP's caseload.

- In 2000–01, around 63% of all summary cases referred to, and actually dealt with by, the DPP were from Centrelink. This figure excludes any welfare fraud cases referred by the Australian Federal Police (AFP).

- In the same year, about 60% of all summary charges dealt with by the DPP came under the *Social Security Act 1991* (Cth). This figure excludes any welfare fraud cases dealt with under the *Crimes Act*.[702]

- Centrelink exceeded its 2000–01 target of 3,800 referrals to the DPP by 1.7%, with 3,868 total referrals.[703] The DPP prosecuted 2,977 cases (or 77% of referrals),[704] resulting in 2,788 convictions involving fraud worth $26.4 million.[705] This represented a prosecution success rate of over 99%.[706]

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701 Commonwealth Director of Public Prosecutions, *Annual Report 1999–2000*, Commonwealth of Australia, Canberra, table 8, 16–17: Commonwealth Director of Public Prosecutions, *Annual Report 2000–2001*, Commonwealth Director of Public Prosecutions, table 8, 18–19.

702 Now covered by the *Criminal Code*.

703 Centrelink, *Annual Report 2000–01*, (2001), Commonwealth of Australia, Canberra, 41.

704 Ibid, 41.

705 Ibid, 81.

706 Ibid, 81.

6.18 By contrast, in 2000–01 the DPP dealt with only four summary criminal matters under the *Trade Practices Act*.[707] The DPP dealt with 35 summary and 40 indictable offences referred by ASIC in 2000–01.[708] Further, the DPP dealt with 236 summary and 15 indictable matters referred by the ATO in 2000–01,[709] or 291 summary and two indictable offences under taxation legislation.[710]

Relationships with regulators

ATO and the DPP

6.19 The DPP has specialist tax prosecution units in Sydney, Melbourne, Brisbane, Adelaide, Perth and Canberra.[711] 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.[712]

ATO Prosecution Policy[713]

6.20 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. These categories include:

- all prosecutions for offences against the *Crimes Act* 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;
- all cases which involve novel or difficult questions of law or previously untested sections; and

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707 Commonwealth Director of Public Prosecutions, *Annual Report 2000–2001*, Commonwealth Director of Public Prosecutions, table 10, 21.
708 Ibid, table 10, 21.
709 Ibid, table 10, 21.
710 Ibid, table 8, 19. This figure does not include any cases referred by the ATO to the AFP for investigation that may have been subsequently referred to the DPP for prosecution. This figure also does not reflect the total number of referrals made by the ATO to the DPP, but only referrals that resulted in charges being laid. Neither the ATO nor the DPP has made the total number of ATO referrals publicly available.
711 Ibid, 12.
712 Australian Taxation Office, *ATO Prosecution Policy*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/index.htm>, 9 March 2001, para 4.4.1.
713 Ibid.

- any cases which involve prominent or high profile figures or which, for any reason, are likely to attract public attention.

6.21 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'.[714] The ATO Prosecution Policy delineates the enforcement functions of, and relationship between, the ATO prosecution investigation units, the ATO in-house prosecutors, the DPP and the AFP. The role of the ATO, particularly the prosecution investigation units, is to:

- identify potential cases for prosecution;
- investigate those potential cases, assess and collect evidence and prepare a brief;
- refer matters to the DPP 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).[715]

6.22 Where matters have been referred to the DPP, the ATO's Prosecution Policy states that the ATO should consult with the DPP during investigations of more serious offences[716] and must refer suspected cases of serious fraud to the AFP for investigation.[717] The role of the AFP is to investigate serious fraud and support government agencies in their own investigations.[718] The ATO's Prosecution Policy lists a number of indicators which 'should alert ATO officers to the possibility' of serious fraud.[719] If the AFP rejects the case because of resource constraints or other

714 Ibid, para 3.2.1
715 Ibid, para 4.2.4.
716 Ibid, para 4.2.2.
717 Ibid, para 4.5.1.
718 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.
719 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

reasons, the ATO may investigate on its own and prepare a brief of evidence for referral to the DPP.[720]

ASIC and the DPP

6.23 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.[721] DPP officers have commented that ASIC and the DPP make decisions together at an early stage.[722] 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.[723] ASIC noted that in most cases charges are laid within three months of the DPP accepting a brief, while in 25% of cases briefs are accepted at the same time as charges are laid.[724] The DPP stated that most of its work for ASIC involves complex indictable offences, which result in a 75–80% conviction rate.

> The ASIC and DPP have settled guidelines for the investigation and prosecution of 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 help to direct the investigation to areas that are most likely to result in prosecution.[725]

ACCC and the DPP

6.24 There is an internal agreement between the ACCC and the DPP covering the referral of matters to the DPP for prosecution. As noted above, the ACCC does not undertake its own criminal prosecutions.[726] In 2000–01, four summary criminal matters were referred by the ACCC to the DPP.[727] In contrast, the ACCC was in-

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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.

720 Ibid, para 4.5.1.

721 Australian Securities & Investments Commission, *Annual Report 1999–2000*, Commonwealth of Australia, Canberra, 34.

722 Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 20 February 2001.

723 G Delaney, *Correspondence*, 5 April 2002.

724 Australian Securities & Investments Commission, *Annual Report 1999–2000*, Commonwealth of Australia, Canberra, 34.

725 Commonwealth Director of Public Prosecutions, *Annual Report 1999–2000*, Commonwealth of Australia, Canberra, 9.

726 Australian Competition & Consumer Commission and Australian Government Solicitor, *Consultation*, Brisbane, 13 June 2000.

727 Commonwealth Director of Public Prosecutions, *Annual Report 2000-2001*, Commonwealth of Australia, Canberra, table 10, 21.

volved in over 85 court actions during 2000–01[728] and accepted 66 enforceable undertakings or variations to existing undertakings.[729]

Centrelink and the DPP

6.25 The DPP has specialist Centrelink prosecution units in Sydney and Melbourne.[730] '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'.[731] See the number of Centrelink referrals at para 6.16, table 1 and prosecutions under social security law above at para 6.16, table 2.

Issues raised by referring agencies and the DPP

Consistency

6.26 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.[732] For example, penalties imposed on people prosecuted 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.[733]

Priorities

6.27 In consultations with the ALRC, officers of the ACCC commented that the criminal process can be slow and conservative in dealing with marketplace problems.[734] Loss of control of cases once they have been referred to the DPP was also a concern although they did indicate that the situation had improved.[735] Similar comments have been made in relation to ASIC and its relationship with the DPP.

728 Australian Competition & Consumer Commission, *ACCC Annual Report 2000–2001*, (2001), ACCC Publishing Unit, Canberra, 1.
729 ACCC, *Electronic Public Registers: Section 87B Undertakings Register*, <www.accc.gov.au>, 21 January 2002.
730 Commonwealth Director of Public Prosecutions, *Annual Report 2000–2001*, Commonwealth Director of Public Prosecutions, 12.
731 Ibid, 13.
732 Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 20 February 2001.
733 Ibid.
734 Australian Competition & Consumer Commission and Australian Government Solicitor, *Consultation*, Brisbane, 13 June 2000.
735 Ibid.

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.[736]

6.28 It has been reported that ASIC has been frustrated by the number of cases rejected for trial by the DPP.[737] One academic has stated that the relationship between ASIC and the DPP is often difficult[738] and another has noted that the relationship often involves 'incongruent priorities'[739] and differences of attitude and perspective.[740]

6.29 One reason for an incongruence of priorities may be confusion on the part of the various 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.[741]

6.30 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, requires 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 in many cases these objectives lead to directly contradictory views on how to deal with a case.

Speed

6.31 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.[742] 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.[743] The officers noted that proceedings for civil penalties are not always faster.[744]

736 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.
737 I McIlwraith, 'Watchdog Bares Teeth at Insurers', *The Age* (Melbourne), 26 February 2001, 1.
738 I Ramsay, *Consultation*, Melbourne, 7 April 2000.
739 G Gilligan, *Consultation*, Melbourne, 26 February 2001.
740 I Ramsay and H Bird, *Consultation*, Melbourne, 26 February 2001.
741 Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 5 June 2000.
742 Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 20 February 2001.
743 Ibid.
744 Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 5 June 2000.

Criminal prosecutions by regulators

6.32 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.

6.33 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.[745]

6.34 Unlike the ATO, 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 Customs already undertake both investigation and litigation of civil penalty proceedings.

6.35 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.[746] Finally, consistency of principle and priorities is most easily achieved by the existence of a prosecutor with an overview of the full range of criminal regulatory penalties.[747]

Options for reform

6.36 It has been suggested that regulatory agencies should have similar guidelines to those of the DPP to assist them when exercising their discretion in relation to the investigation and enforcement of non-criminal regulatory offences. This could help to ensure consistency of approach in the pursuit of penalties and that regulators remain accountable for their decisions. There are a number of options for reform.

- Uniform guidelines structuring the use of penalties for non-criminal contraventions, and their relationship with criminal referrals to the DPP, could be drafted for adoption by all regulators with penalty powers. Such guidelines could be developed in close consultation with regulators, and reflect similar considerations analogous to those in the DPP's Prosecution Policy.

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745 *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: Victorian Bar Association, *Consultation*, Melbourne, 29 May 2001.

746 Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 20 February 2001.

747 Attorney-General's Department, *Consultation*, Canberra, 19 February 2001.

- Specific or customised guidelines structuring the use of penalties for non-criminal contraventions, and their relationship with criminal referrals to the DPP, could be drafted and adopted by individual regulators with penalty powers. Such guidelines could be customised from template guidelines containing core standards in consultation with individual agencies.

- Uniform or specific guidelines could have the status of policy documents, or they could be made legally enforceable so that administrative decisions made pursuant to the guidelines would be reviewable. Alternatively, only certain procedural parts of penalty guidelines could be made enforceable, such as the notification and natural justice requirements under, for example, the existing ATO Prosecution Policy.[748] For further discussion of guidelines and their enforceability see para 7.52 and chapter 10 (Accountability).

6.37 Guidelines would be even more important if prosecutions were to be outsourced to lawyers other than the DPP, such as the Australian Government Solicitor or private law firms.

Proposals and question

Proposal 6–1. 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; 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.

Proposal 6–2. 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.

Question 6-1. What status should attach to 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?

748 Australian Taxation Office, *ATO Prosecution Policy*, Australian Taxation Office, <http://law.ato.gov.au atolaw/index.htm>, 9 March 2001, para 4.3.3–4.3.6.

Part C

Procedures and Protections

7. Fairness

Contents

Introduction

7.1 It is beyond argument that the principles of fairness are an important consideration in penalty arrangements.[749] To claim that a regulator's procedures are appropriate and fair is to claim a number of things.

> 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.[750]

7.2 The purpose of this chapter is to set out a number of fairness principles that legislators should consider when drafting civil or administrative penalty schemes. Some proposals are directed at regulators and the methods they can use to ensure that their penalty processes are fair. Not all of these principles will be relevant to every penalty scheme and regulator; nor relevant to the same extent. The principles outlined in this chapter are meant as a general guide to facilitating regulation and penalty schemes that are fair.

7.3 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.[751] This chapter focuses on administrative penalties, where the court's role is either minimised or absent. Many of the stated principles are relevant to only administrative penalties; however, civil penalties are also considered, and some of the principles and proposals are relevant to them.

7.4 The ALRC draws a distinction between different types of administrative penalties. 'Administrative penalties' encompass both true administrative penalties and quasi-penalties. Some administrative penalties arise automatically by operation

749 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: J Von Doussa, 'Natural Justice in Federal Administrative Law' (1998) 17 *Australian Institute of Administrative Law Forum* 1, 1.

750 R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) Oxford University Press, Oxford, 314.

751 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'.

of legislation such as penalties for late payment of a fee (true administrative penalties). Other administrative penalties require the exercise of discretion, such as licensing decisions or social security breach penalties in relation to the granting of or withholding of benefits (quasi-penalties). For further discussion of the ALRC categorisation of administrative penalties for the purposes of this inquiry see chapter 3.

7.5 The first section of this chapter looks at fairness in the context of regulation and outlines the value and cost of ensuring fairness in regulatory arrangements.

7.6 The second section of the chapter examines the legal doctrine of procedural fairness — the bias rule, the hearing rule and the concept of legitimate expectations. Administrative law principles in relation to administrative decision making are relevant to decisions to impose administrative penalties. Consideration is given to:

- when procedural fairness applies or should apply; and
- what interests and rights are protected.

7.7 The third section outlines how the legal doctrine of procedural fairness can be applied in legislation, policy statements and guidelines, delegated legislation and training of staff. Here the focus is on the bias rule, the hearing rule, notification requirements and third party issues.

7.8 The fourth section of the chapter broadens the scope of inquiry. It looks at 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. A number of proposals are made which seek to translate these general principles into procedural rights.

7.9 The next section looks at negotiations with the regulated, in particular, settlement, enforceable undertakings and infringement notice schemes.

7.10 The following section examines the use of publicity by regulators and whether, as a matter of fairness, this should be permitted. A further issue considered here is whether the nature and extent of any publicity should be a factor to be considered when setting the quantum of penalty.

7.11 The final section relates to ease of understanding of the regulatory process. Consideration is given to access to legislation and information provided by the regulator, and access to the regulator.

Fairness as good regulation

7.12 The principles of procedural fairness are founded upon fundamental ideas of fairness and the related concept of good administration.[752] Here fairness, as articulated in procedural rights, performs an 'instrumental role'[753] by contributing to the accuracy of the decision. There are also 'non-instrumental' justifications for the provision of fairness. Procedural fairness can be seen as protecting human dignity by ensuring that the 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. Furthermore, 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.

7.13 Procedural justice scholars emphasise the effects of the 'perceived fairness' of regulatory processes.[754] 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?*[755]

7.14 A failure to factor fairness into regulatory arrangements, or a failure of regulation to appear fair, can lead to threatened and actual non-compliance.[756] 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.[757]

752 J Von Doussa, 'Natural Justice in Federal Administrative Law' (1998) 17 *Australian Institute of Administrative Law Forum* 1, 2.

753 Ibid, 2.

754 T Makkai and J Braithwaite, 'Procedural Justice and Regulatory Compliance' (1996) 20(1) *Law and Human Behavior* 83.

755 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, Chapter 2.

756 For example, GST compliance. See J Gilmour, 'Taxing Times Need a Lender of Last Resort', *The Sydney Morning Herald*, 26 May 2001, 50.

757 K Yeung, *The Public Enforcement of Australian Competition Law*, (2001), Australian Competition and Consumer Commission, Canberra, 46–47.

7.15 The requirements of fairness are in many respects an expensive, time-consuming,[758] and often inefficient, aspect of a balanced regulatory system. Allowing 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.[759] 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.[760] 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.[761] It has been noted that procedural safeguards are also open to abuse, leading to a less efficient regulatory regime.[762]

7.16 Resource limitations mean that compromise in this respect is inevitable. Less than optimum decisions will be made and procedural shortcuts will be taken. However, adherence to proper standards of fairness will increase the chances that these can be prevented or corrected. Furthermore, it will ensure that public confidence in and respect for the regulatory system is maintained.

7.17 All these issues are relevant to the design and enforcement of penalty schemes in Commonwealth legislation. Legislators and regulators must consider these competing issues if a penalty scheme's objectives are to be realised.

Procedural fairness: legal doctrine

Introduction

7.18 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.

7.19 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 embodied in particular in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*). This Act

758 D Pearce, 'Is There Too Much Natural Justice?' (1992) 12 *Australian Institute of Administrative Law Newsletter* 1, 6.
759 Ibid, 17–18.
760 Ibid.
761 J Von Doussa, 'Natural Justice in Federal Administrative Law' (1998) 17 *Australian Institute of Administrative Law Forum* 1, 2.
762 T Sykes, 'Battling With the Law', *The Australian Financial Review* (Sydney), 13 August 2001, 53.

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.[763]

7.20 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 directly and individually to affect a person's rights, interests, status or legitimate expectations.[764] The legal doctrine 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). This section of the paper will also consider the concept of 'legitimate expectations'.

7.21 All these elements of procedural fairness are relevant to administrative penalties, particularly quasi-penalties, because these administrative decisions usually adversely affect a person's rights, interests or legitimate expectations.

When does procedural fairness apply?

7.22 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.[765] 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. [766]

7.23 The question of whether rights, interests, status or legitimate expectations are affected is then relevant to the practical content of the duty in the particular case.[767] A range of factors will be relevant to that end, 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 deci-

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763 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'.

764 *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 for Immigration, Local Government and Ethnic Affairs* (1990) 169 CLR 648, 652–53 and 680; *Annetts v McCann* (1990) 170 CLR 596, 598 and 607.

765 *Annetts v McCann* (1990) 170 CLR 596, 598.

766 *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550, 584.

767 *Minister for Immigration and Multicultural Affairs, Re; Ex parte Miah* [2001] HCA 22, para 31; *Haoucher v Minister for Immigration, Local Government and Ethnic Affairs* (1990) 169 CLR 648, 653.

sion.[768] 'Flexibility' is, in effect, the fundamental principle which guides the approach of the courts in determining the content of procedural fairness.[769]

7.24 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.[770] Where legislation provides regulators with the discretion to make subjective assessments in determining whether to impose a quasi-penalty, procedural fairness may need to be extensively applied.[771] In contrast, where a regulator is given little discretion to impose a quasi-penalty, or the penalty is a true administrative penalty (imposed by operation of legislation), the content of procedural fairness may be either minimised or non-existent.[772] Other considerations may include the severity of the penalty.

What interests and rights are protected?

7.25 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.[773] They can include:

- legal rights and interests;
- non-legal interests such as status, business and commercial or personal reputation; and
- legitimate expectations of conferral of a benefit (including an expectation which has been created by a decision maker).

7.26 Most decisions to impose a quasi-penalty will attract procedural fairness requirements as they are clearly decisions that adversely affect a person's rights, interest or legitimate expectations. These decisions could include:

768 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).

769 B Dyer, 'Determining the Content of Procedural Fairness' (1993) 19 *Monash University Law Review* 165, 165–166.

770 *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.

771 An example is the power of ASIC to cancel a licence under s 1292 of the *Corporations Act 2001*. The power to impose this penalty is contingent on variable considerations such as whether the person is 'fit and proper'.

772 For example, *Corporations Act 2001*, s 206B which provides for automatic disqualification from managing a corporation if a person is convicted on indictment of an offence.

773 *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 for an administrative or activity test breach which adversely effects a person's right to receive a benefit that they are 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;[774]

- the decision to disqualify a person from managing a corporation or from acting as a liquidator or auditor as this decision can again clearly affect livelihood, career and reputation.

7.27 Legislators and regulators must be aware of what interests are affected by the imposition of a penalty and how procedural fairness should apply to the imposition of these penalties.

The bias rule

7.28 As Professor Mark Aronson and Bruce Dyer note:

> One of the central tenets of our legal system is that the law be applied and executed without fear, favour or prejudice.[775]

7.29 Penalty schemes enforced by a biased decision maker could result in general perceptions 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.[776]

7.30 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'.[777] 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.

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774 Revocation of licences: *Banks v Transport Regulation Board (Vic)* (1968) 119 CLR 222; *Ackroyd v Whitehouse (Director of National Parks & Wildlife Service)* (1985) 2 NSWLR 239. Suspension of licences: *R v Liquor Commission (NT); 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.

775 M Aronson and B Dyer, *Judicial Review of Administrative Action* (1996) LBC Information Services, Sydney, 587.

776 *Johnson v Johnson* (2000) 201 CLR 488, 492.

777 *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248, 263.

7.31 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 the judge or decision maker will be disqualified.[778] Non-pecuniary bias will result in disqualification where there is 'reasonable suspicion' of a bias.[779] This test does not require proof of actual bias.[780] Rather, 'it is concerned solely with the outward appearance of bias to a reasonable observer'[781] and reinforces the importance of judges and decision makers being seen to be unbiased. The reasonable suspicion test has been described as a flexible test that can be applied 'either strictly or liberally'.[782]

7.32 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.

7.33 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.[783] 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

7.34 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.[784] 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 legisla-

778 S Hotop, *Principles of Australian Administrative Law* (6th ed, 1985) The Law Book Company Ltd, Sydney, 204.

779 E Sykes and others, *General Principles of Administrative Law* (4th ed, 1997) Butterworths, Sydney, 223. Cases to support this proposition include *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 12 CLR 545.

780 In Australia, a test of 'actual bias' has been applied to non-statutory bodies. The test requires proof of actual bias in a specific case, and is difficult to satisfy: S Hotop, *Principles of Australian Administrative Law* (6th ed, 1985) The Law Book Company Ltd, Sydney, 207.

781 Ibid, 205.

782 Ibid, 205.

783 R Douglas and M Jones, *Administrative Law: Commentary and Materials* (2nd ed, 1996) Federation Press, Sydney, 537.

784 *Twist v Council of the Municipality of Randwick* (1976) 136 CLR 106, 110.

> ture has left it to the courts to prescribe and enforce the appropriate procedure to ensure natural justice.[785]

7.35 In the legislation surveyed by the ALRC, the right to be heard prior to the imposition of a penalty is provided for by either a formal hearing or by making of submissions. These rights are generally reserved for severe quasi-penalties, most commonly the removal of licences. Other rights, such as the right to prior notice of an administrative penalty, are less consistently applied. 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.[786] 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.[787] However, procedural fairness does not require an opportunity to comment on every adverse piece of information irrespective of its credibility, relevance or significance.[788]

Legitimate expectation

7.36 The concept of legitimate expectation has facilitated the extension of procedural fairness to interests falling short of legal rights. It has enabled a court 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.[789]

7.37 As discussed by Aronson and Dyer, the concept of legitimate expectation has prompted considerable judicial and academic discussion.[790] 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.[791]

7.38 The concept is particularly relevant to on-going regulation, where the regulator and regulated regularly negotiate compliance and penalties. A past course

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785 Ibid.
786 *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550, 629.
787 Ibid, 587.
788 *Lek v Minister for Immigration, Local Government & Ethnic Affairs* (1993) 43 FCR 100, 129–130.
789 *Haoucher v Minister for Immigration, Local Government and Ethnic Affairs* (1990) 169 CLR 648, 680.
790 M Aronson and B Dyer, *Judicial Review of Administrative Action* (1996) LBC Information Services, Sydney, 413–414.
791 Ibid, 413–415.

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 depart from it without the affected individual being given an opportunity to argue for its continuance.[792]

7.39 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.[793] 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.[794]

7.40 A regulator's published, considered statement of policy (for example, a policy on a quasi-penalty process) 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.[795] However, not all policy statements and guidelines will give rise to legitimate expectations that impose procedural obligations. Only policy statements which are clear, unambiguous and relatively particularised will do so.[796]

7.41 A regulator is entitled to change and abandon its policies unfettered by any previous representation or undertaking.[797] 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[798] unless, arguably, a reasonable expectation to that effect has been generated.[799] 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.[800]

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792 *Breen v Amalgamated Engineering Union* [1971] 2 QB 175.

793 *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.

794 *Merman Pty Ltd v Comptroller-General of Customs* (1988) 16 ALD 88, 96 (Lee J).

795 A policy will be operative where the relevant public authority purports to act in compliance with its provisions: J Von Doussa, 'Natural Justice in Federal Administrative Law' (1998) 17 *Australian Institute of Administrative Law Forum* 1, 7.

796 Ibid, 15. See also *One.Tel Limited v Commissioner of Taxation* (2000) 101 FCR 548, 567–568.

797 *Attorney-General (NSW) v Quin* (1990) 93 ALR 1.

798 *Save the Showground for Sydney Inc v Minister for Urban Affairs & Planning* (1997) 95 LGERA 33, 40–41.

799 Ibid, 53.

800 *Attorney-General (NSW) v Quin* (1990) 93 ALR 1, 24 and 60.

Providing for procedural fairness

7.42 Procedural fairness can be provided in a number of ways. Some of these methods are considered in this section, particularly in relation to quasi-penalties where regulatory discretion is exercised in the imposition of a penalty.

7.43 Legislators can expressly provide for procedural fairness in penalty processes by including certain procedural steps in legislation and delegated legislation. Legislators can also exclude procedural fairness.[801] Regulators can provide for procedural fairness through policy statements, guidelines and staff training.

Legislation

7.44 The statutory structuring of process and regulatory 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.[802]

7.45 Legislation may require compliance with specified procedural mechanisms such as internal agency review. Statutes can require affected parties, including third parties, to be given notice of pending decisions or an opportunity to be heard prior to imposing a penalty. External controls such as administrative review, judicial scrutiny or ministerial oversight[803] can check the quasi-penalty decisions of agency officers after discretion has been exercised.[804] Legislation could also provide for the provision of written reasons for the imposition of a penalty.

7.46 However, providing for procedural fairness in legislation might result in unduly complex legislation, which raises some issues of itself. Regulated communities are unlikely to refer to complex legislation for information on the process in relation to the imposition of a penalty. If legislation includes excessive detail, it can become incomprehensible, will have little meaning to the regulated community and can cause problems for a regulator's staff. Further, if the processes are enshrined in legislation, any necessary changes, will be impeded by the slow pace of legislative change.

Excluding procedural fairness

7.47 The presumption that procedural fairness must be observed may be displaced by clear legislative provisions to the contrary.[805] However, such is the

801 See Proposal 7-1 below.
802 M Seidenfeld, 'Bending the Rules: Flexible Regulation and Constraints on Agency Discretion' (1999) 51(2) *Administrative Law Review* 429, 433.
803 R Baldwin and K Hawkins, 'Discretionary Justice: Davis Reconsidered' (1984) *Public Law* 570, 595.
804 See discussion in chapter 10.
805 *Commonwealth v Crowe* (1992) 39 FCR 435, 443–444.

strength of the common law presumption that the intention to do so must appear from express words.[806]

7.48 Ultimately, however, the question is not whether the legislative scheme shows an intention to exclude procedural fairness, but whether the process viewed in its entirety satisfies the requirements of procedural fairness.[807] The grant of a comprehensive right of appeal or similar remedy has at times been taken as an indication that procedural fairness is excluded in the making of the primary decision, but this is not conclusive.[808] An alternative approach is to interpret the grant of a full and effective right of appeal not as excluding the obligation to observe procedural fairness, but as limiting the available remedies for breach of procedural fairness.[809]

Delegated legislation

7.49 Statements on procedural fairness in penalty processes can take the form of delegated legislation. For example, the *Infringement Notice Guidelines* made under the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* (Cth) are to be a disallowable instrument.[810]

7.50 The operation of a 'disallowable instrument' is outlined in s 46A of the *Acts Interpretation Act 1901* (Cth). That section states that a 'disallowable instrument' is subject to the same rules as regulations. Importantly, it is subject to parliamentary scrutiny. Section 46A also provides that if the enabling provision is a regulation, the disallowable instrument shall be deemed to be an enactment for the purposes of the *Administrative Appeals Tribunal Act 1975* (Cth). This is important because the AAT does not have general power to review administrative decisions. Its powers to review come from specific legislative provision. Further, unless expressly excluded, a failure to comply with a disallowable instrument can be the subject of judicial review.[811]

7.51 The ALRC is interested in hearing views on the efficacy of creating procedural guidelines for the regulator and regulated as disallowable instruments. See Question 7-1 below.

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806 See, for example, *Twist v Council of the Municipality of Randwick* (1976) 136 CLR 106, 110; *Annetts v McCann* (1990) 170 CLR 596, 598.

807 *South Australia v O'Shea* (1987) 163 CLR 378, 389.

808 See *Minister for Immigration and Multicultural Affairs; Ex parte Miah* [2001] HCA 22 and *Twist v Council of the Municipality of Randwick* (1976) 136 CLR 106, 116–117.

809 *Marine Hull & Liability Insurance Co Ltd v Hurford* (1985) 10 FCR 234, 242–248.

810 *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001*, s 243XA. See chapter 3 for a more detailed discussion of these amendments and chapter 12 for a discussion of the infringement notice scheme.

811 See D Pearce, *Delegated Legislation* (1977) Butterworths, Sydney, chapter 29.

Policy statements and guidelines

7.52 A less formal method of affording procedural fairness is the provision of guidelines and policy statements by regulators to assist a regulator's staff to exercise their discretion and to inform both the regulator and the regulated community of the procedure to be followed when imposing a penalty. Guidelines are generally more accessible than delegated legislation to both the regulated and regulator staff. Further, they allow greater flexibility for the regulator as they can be easily amended as required.

7.53 Like legislation, these informal documents can provide for certain procedural steps to be taken before the imposition of an administrative penalty, rights of third parties, and how targeting, enforcement and choice of penalty discretions are to be exercised. They can also be used to outline how the procedural fairness provisions in legislation should be translated into practice by a regulator's staff.

7.54 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.[812] Where rules structure discretion, there may remain discretion to choose between rules, or depart from the rules by creating new ones,[813] that can undermine the policy and public confidence.[814] Further, administrative agencies can 'use structuring to circumvent the interests of individuals'.[815] Guidelines may be applied inflexibly not taking account of the circumstances of an individual case. 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.[816] 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 legislation. Decisions made pursuant to them could therefore be struck down as ultra vires or invalid.[817]

How are guidelines made?

7.55 In some cases a regulator will produce guidelines and statements drawing on its own knowledge and experience in a particular regulatory field. Other policy documents and guidelines are created through a process of consultation.

812 R Baldwin and K Hawkins, 'Discretionary Justice: Davis Reconsidered' (1984) *Public Law* 570, 575.
813 Ibid, 577.
814 M Seidenfeld, 'Bending the Rules: Flexible Regulation and Constraints on Agency Discretion' (1999) 51(2) *Administrative Law Review* 429, 433.
815 R Baldwin and K Hawkins, 'Discretionary Justice: Davis Reconsidered' (1984) *Public Law* 570, 576.
816 R Baldwin, 'Accounting for Discretion' (1990) 10(3) *Oxford Journal of Legal Studies* 422, 428.
817 See for example, *Green v Daniels* (1977) 13 ALR 1 and *Amalgamated Television Services Pty Ltd v Australian Broadcasting Tribunal* (1989) 91 ALR 363.

7.56 If a regulator is considering using policies that deal with the imposition of administrative penalties it is essential to seek the views of the regulated community. 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. If, as procedural scholars suggest, the regulated community's perceptions of fairness are important for compliance (see para 7.13 above), there is considerable value in regulators consulting with regulated communities when devising policy statements and guidelines about the imposition of penalties.

The enforceability of policy statements and guidelines

7.57 One issue in relation to informal guidelines is their lack of enforceability by the regulated community. A failure to follow guidelines is unlikely to give rise to judicial review under the *ADJR Act* as they are not 'enactments' for the purposes of the Act. Further, merits review by the AAT would also be unavailable without specific provision.

7.58 It is arguable that if legislation requires the making of guidelines, the decisions made under the guidelines could be considered to be made under an enactment.[818] Some statements utilised by regulators may be binding on the regulator. However, in most cases, the regulator is not bound by its guidelines. For example, the ATO considers itself not bound by its Prosecution Policy.[819]

7.59 However, as noted above at para 7.40, certain publicly available guidelines and policy statements may give rise to legitimate expectations that procedural fairness will be complied with.

Training of regulator staff

7.60 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;

818 Legislation can require the making of guidelines. For example, under s 38 of the *Competition Act 1998* (UK) the Director-General of the Office of Fair Trading is required to publish guidance on the amount of penalties that will be sought for anti-competitive cartel activities.

819 Australian Taxation Office, *ATO Prosecution Policy*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/index.htm>, 9 March 2001, para 1.1.9.

- 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.[820]

7.61 However, 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.[821]

7.62 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 — from senior directors down to field level officers and back again, and between regulators, enforcers, the regulated, and other stakeholders.[822]

7.63 A practical application of this concept of 'shared understandings' is suggested 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.[823]

7.64 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.

7.65 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 recent audit of the ATO's penalties, the Australian National Audit Office suggested that consistency and equity in the application of pen-

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820 Australian Taxpayers' Association, *Consultation*, Melbourne, 27 February 2001.
821 J Black, 'Managing Discretion' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001), 26.
822 Ibid, 27.
823 J Von Doussa, 'Natural Justice in Federal Administrative Law' (1998) 17 *Australian Institute of Administrative Law Forum* 1, 18.

alties could be improved if penalties administration was aligned with the principles of the *Taxpayers' Charter* by developing 'on-line, rule-based, decision support tools'[824] and providing tax officers with access to taxpayer histories and guidance on interpreting histories in determining culpability and an appropriate penalty.[825]

The bias rule

7.66 As noted above at para 7.32, where there is a previous association between the decision maker and one of the parties, a perception of bias could arise.

7.67 This issue was raised in one consultation in relation to the system of withdrawal of infringement notices under the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act*.[826] Under the new s 243ZA of the *Customs Act*, a person on whom an infringement notice has been served may make written representations to the CEO seeking withdrawal of the notice. However, the legislation does not provide that the delegate of the CEO who considers withdrawal should be different from the delegate who issued the notice. The draft *Infringement Notice Guidelines*[827] also do not provide that the delegate considering the withdrawal must be different from the person who makes the initial decision.

7.68 The ALRC has considered models of internal review that may avoid these issues of bias at para 10.107.

The hearing rule

Right to a hearing

7.69 Very few administrative 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, that remove the right to a livelihood in a particular industry. True administrative penalty schemes are prevented by the constitutional limitations on the exercise of judicial power from including a hearing of almost any kind before the imposition of a penalty.

7.70 Many of the provisions that provide for a hearing prior to imposition of a penalty occur under the *Corporations Act* for example, in relation to the management of a corporation or the holding of a dealer's or investment advisor's li-

824 Australian National Audit Office, *Administration of Tax Penalties*, Report 31 (2000), Australian Government Printing Service, Canberra, para 3.5.

825 Ibid, para 3.6.

826 A Hudson, *Consultation*, Sydney, 26 February 2002.

827 Australian Customs Service, *Infringement Notice Guidelines: Draft 11 February 2002*, Australian Customs Service, <www.customs.gov.au/cmr/cmr_leg/industry_guidelines0202.pdf>, 18 February 2002.

cence.[828] ASIC publishes a *Hearings Practice Manual* guiding the hearing process in accordance with statutory requirements.[829]

Notification of hearing

7.71 It is an elementary requirement of procedural fairness that persons who are entitled to be heard are given prior notice of the hearing.[830] The notice should be adequate by giving the recipient sufficient time and information 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.[831]

7.72 It may be difficult to ascertain who should receive notice where the potential participants in a hearing are numerous or indeterminate. This may be the case where corporations are involved and the persons affected may include the corporation's officers, employees, shareholders and other third parties. However, the difficulty arises less as a matter of procedural fairness than as one of statutory interpretation, given that the implication of procedural fairness depends on whether a person's interests are directly affected in his or her individual capacity.

Rights at hearing

7.73 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 and the right to refuse to answer questions. These rights are available, for example, at hearings under s 837 of the *Corporations Act*.

7.74 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*.[832]

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828 See, for example, *Corporations Act 2001*, s 826 and 837.

829 See <www.asic.gov.au>. In ASIC hearings each matter will be determined on its merits. A person may call witnesses. Written reasons are given or can be requested, as long as within 28 days. Penalties such as banning orders must be published in the Gazette. See *Corporations Act 2001*, s 834(2) and 1198(2).

830 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 problems, that the person will usually be given access to copies of material which ASIC will use when making its decision.

831 *Hart v Bookmakers Revision Committee* (1987) 9 NSWLR 713.

832 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

Notification and right to make submissions

7.75 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 a quasi-penalty decision.

7.76 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.

7.77 Section 206F of the *Corporations Act* 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.

7.78 Section 106T of the *Health Insurance Act 1973* (Cth) provides that notice of a draft determination, that a person under review has engaged in an inappropriate practice in connection with rendering or initiating referred services, must be given within one month after the final report and that the person under review has 14 days in which to make submissions.

Right to notice only

Right to prior notice

7.79 Some quasi-penalty provisions provide for notice after a decision has been made but before it takes effect. These provisions do not include provision for a hearing although provision is made for submissions. An example is the *Telecommunications Act 1997* (Cth), which utilises a system of written directions and formal warnings relating to contraventions of service provider rules and industry

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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.

codes. Section 72 provides for notice of at least seven days before the ACA will cancel a carrier licence.

7.80 Importantly, these provisions have the following effect:

- The regulated party is notified that the regulator is considering imposing a quasi-penalty for certain conduct;

- A reasonable time period is provided before the quasi-penalty is to take effect. This would suggest that the regulated party is given an opportunity to address the matter.

Right to notice but not prior notice

7.81 There is an important distinction to be drawn between the right to notice of a penalty decision, and the right to notice of the decision *prior* to its taking effect. The *Social Security Act 1991* (Cth) does not provide for 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.[833]

7.82 The rate reduction or non-payment period generally starts on the day on which the notice is given to the person.[834] Interestingly, only notices sent to Austudy recipients are required to also contain 'reasons why the activity test breach rate reduction period applies to the person'.[835]

7.83 The *Guide to Social Security Law* also sets out rules for applying these quasi-penalties (also known as 'breach penalties').[836] 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.

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833 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.

834 Subject to some exceptions. See *Ibid*, s 644AC and 557C

835 See Ibid, s 582B and 583B.

836 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.

7.84 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.[837] They told the ALRC that 'breach penalties' seem to be automatically imposed, no notice is given and that there is no final chance for a recipient to give an explanation or reasonable excuse.[838]

7.85 In one consultation it was observed that Centrelink uses a system of processing mail which contributes to delay in correspondence reaching claimants in time. Correspondence is sent out a few days after the date on the letter.[839] The ALRC has also been told that in the past Centrelink has failed to notify people of their right to seek a stay pursuant to s 131 and review under s 129 of the *Social Security (Administration) Act 1999* (Cth).[840]

7.86 It was also 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.[841] Additionally, it has been documented that breaches often occur through no fault of the benefit recipient, and rather because of some problem in the Job Network scheme.[842]

7.87 The Commonwealth Ombudsman in his 2000–2001 *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.[843]

837 Welfare Rights Centre, *Consultation*, Brisbane, 15 December 2000.
838 Hanover Welfare Services, *Consultation*, Melbourne, 19 December 2000.
839 S Koller, *Consultation*, Sydney, 7 January 2000.
840 Welfare Rights Centre, *Consultation*, Brisbane, 15 December 2000.
841 Ibid.
842 Australian Council of Social Service and National Welfare Rights Network, *Doling out Punishment; The Rise and Rise of Social Security Penalties*, (2000), ACOSS, Sydney.
843 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. The Ombudsman stated that his office will continue to monitor developments to ensure that Centrelink's original decision makers are properly considering each breach recommendation before imposing penalties: Office of the Commonwealth Ombudsman, *Annual Report 2000–2001*, (2001), Commonwealth of Australia, Canberra, 52.

7.88 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.[844] For this to occur without any notification does not accord with the rules of procedural fairness. Prior notice of 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. See Proposal 7-2 below.

Form of notice

7.89 As noted above, legislative and guideline requirements as to what form a notice should take vary across regulatory schemes. Having considered a number of hearing and notification requirements, the ALRC would propose that when a party is required to notify a person of the imposition of a quasi-penalty, that notice should conform to some general requirements.[845]

- The notice should be clearly identified as notice to impose a quasi-penalty. The form of the notice should be prescribed in legislation[846] or in guidelines. This notice should be used consistently whenever a quasi-penalty is being imposed to alert the party to its importance. Notice to impose a penalty should not take the form of a letter which deals with other matters.

- It is preferable that, if the recipient of the notice is from a non-English speaking background, that at least the header of the notice, identifying the notice as a penalty notice, is in the appropriate language.

- The notice should detail:

    - The intention to impose a quasi-penalty;

    - The effect of the penalty;

    - The date on which the penalty will take effect;

844 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 to take effect on 1 July 2002 will re-classify some breaches as administrative rather than acticvity test breaches, 'thereby attracting [a] lesser penalty' and allow payments to be temporarily suspended rather than a breach imposed in some circumstances: Senator the Hon Amanda Vanstone, 'Breaching Rules Change to protect the Vulnerable', *Media Release: 4 March 2002*, <www.facs.gov.au>, 4 March 2002.

845 See Proposal 7-3 below.

846 See, for example, *Corporations Act 2001*, s 206F.

- If provided for in legislation, the right to present submissions before the penalty is imposed. This should be accompanied by an explanation of the form those submissions should take;

- If provided for in legislation, the fact that the regulator is to consider these submissions prior to making a decision on penalty;

- If provided for in legislation, the time period within which to provide submissions and the effect if no submission is made within that period;

- If provided for in legislation, the right to receive written reasons of the penalty decision;

- If provided for in legislation, the right to review of the penalty decision, and how to seek both internal and external review;

- The right of access to a review officer; and

- Contact details for further information.

No right to a hearing or notice

7.90 Some administrative penalty schemes make no allowance for a hearing or notice for a number of reasons:

- True administrative penalties can arise automatically as an act of legislation.

- Notice may be impracticable where interest charges are imposed for late payment, as such charges may accrue from day to day, and the final amount may depend both on the original amount owing and the number of days it is late.[847]

- Notice may be impracticable for other reasons; for example, forewarning would lessen the effectiveness of an investigation.[848]

- 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 pro-

847 For example, the General Interest Charge for failure to pay a penalty by the due date under s 8AAT of the *Taxation Administration Act 1953*.

848 See, for example, *Norwest Holst Ltd v Secretary of State for Trade and Ors* [1978] 1 Ch 201, 224. See also Northrop J in *Sixth Ravini Pty Ltd v Deputy Commissioner of Taxation* (1985) 85 ATC 4307. However, see section on excluding procedural fairness at para 7.47.

vider'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.[849]

- Rights are dealt with by means of unlegislated or informal procedures. For example, ACCC 'fast track' strategies typically begin with a letter of demand, which serves as an informal notice requirement to the affected party before a penalty is imposed or sought.[850]

Third party issues

7.91 The administrative application of a penalty 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.[851] Administrative banning or disqualification of a manager could adversely affect the corporation — its employees, board or shareholders. In broadcasting and aviation regulation, third parties may include the general public.

7.92 Identifying third parties who may be directly, materially and adversely affected is important, but sometimes difficult.[852] When a regulator is establishing who should be given the opportunity to make submissions on a decision, it often has limited information; confidentiality restrictions on whom it may contact in order to discover who may be directly, materially and adversely affected; competing views from applicants and other parties; commercial pressures to decide the application quickly; and the possibility of many persons to consider (which may mean that consulting all of them would be impractical).[853] Often, the most important considerations a regulator must balance in order to afford all relevant persons procedural fairness are:

- confidentiality versus disclosure; and
- a quick decision versus consultation and its inevitable delays.[854]

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849 The focus of these criticisms was that the provision resulted in hardship for third parties: Victorian Bar Association, *Consultation*, Melbourne, 29 May 2001.

850 Australian Competition & Consumer Commission, *Making Markets Work — Directions and Priorities*, (1999), ACCC Publishing Unit, Canberra, 6.

851 Victorian Bar Association, *Consultation*, Melbourne, 29 May 2001.

852 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.

853 Ibid.

854 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.

7.93 The obligation to afford procedural fairness arises where a regulator proposes to make a decision that may adversely affect a person's rights, interests or legitimate expectation. As noted above, a person's interests can be extremely broad.[855] 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.[856] Many decisions will not fall in this category.

7.94 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[857] 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 or kin, about the imposition and consequences of a quasi-penalty. However, although these provisions consider third parties before imposing a quasi-penalty, they do not afford procedural fairness.

7.95 Affording procedural fairness to third parties will require a number of considerations on the part of the regulator. For example, ASIC's *Policy Statement 92: Procedural Fairness to Third Parties*[858] notes that ASIC must consider the following in deciding its procedural fairness obligations:

- 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?

7.96 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. ASIC notes that affording procedural fairness includes:

- deciding which third parties ASIC should notify;[859] and

855 *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550, 582.
856 *Salemi v MacKellar (No 2)* (1977) 137 CLR 388, 452.
857 Called a 'sanction' in the legislation.
858 This policy statement primarily relates to granting relief. However, it provides a good outline of the issues involved in affording procedural fairness to third parties.
859 In doing so, ASIC does not necessarily have to consult with every person who may be affected by a decision and be entitled to receive notification of the decision once it has been made (see Australian Securi-

- ensuring that those third parties are provided with sufficient information to make informed and reasoned submissions to ASIC. ASIC will notify an applicant if it decides that it must give third parties the opportunity to make submissions. Before a third party can make submissions it needs to know what action ASIC has in mind and why.[860]

7.97 Other issues raised by third party considerations are discussed in the section on appeal and review in terms of standing at para 10.73 and in the section on enforceable undertakings at para 7.170.

Elements of fairness

7.98 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.[861] 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.

7.99 These six concepts are useful in the ALRC's current inquiry. They provide a means of categorising the concerns raised in consultations with the ALRC. The principles also reflect much academic writing on various areas of regulated activity. In many cases the principles can be reduced to procedural rights that already have acceptance or force in law, and which could contribute to the formation of procedural guidelines for drafters and regulators in relation to the imposition of civil and administrative penalties.

Consistency

7.100 Consistency leads to predictability and stability. The regulated community knows where it stands and what compliance requires.[862] 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

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ties & Investments Commission, *Practice Note 57: Notification of Rights of Review*, Australian Securities & Investments Commission, <www.cpd.com.au/asic/pn/>, 20 December 2001).

860 See Proposal 7-5 below.

861 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.

862 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).

can also extend to consistency between different regulatory regimes. See section on consistency under Regulators and the DPP at para 6.26. 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. [863]

7.101 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.[864]

Regulatory discretion

7.102 The issue of 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. However, regulators with powers to impose civil and quasi-penalties regularly exercise a variety of penalty-related discretions in relation to the interpretation of legal rules, targeting and choice of penalty. The ALRC's consultations to date have revealed that in some cases these discretions are exercised inconsistently. The discretion to consider leniency and immunity is considered in chapter 15.

7.103 Currently, a number of Commonwealth regulators address consistency issues by utilising guidelines to describe and direct the operation of certain penalty-related discretions.

Interpretation of legal rules

7.104 Interpretative discretion determines the operational meaning of statutory or policy directives, and the assumptions and values purportedly underlying such directives.[865] 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.[866] 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

863 Australian National Audit Office, *Administration of Tax Penalties*, Report 31 (2000), Australian Government Printing Service, Canberra, 31.
864 Australian Taxpayers' Association, *Consultation*, Melbourne, 27 February 2001.
865 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.
866 A Hudson, *Consultation*, Sydney, 26 February 2002.

consistently applied because of a lack of understanding among Centrelink staff as to what stage of the review process a breach should be imposed.[867] In some cases, a lack of understanding of the law can lead to a regulatory tool being under-utilised. In a report on the effectiveness of civil penalty provisions in the *Corporations Law*, it was noted that enforcement officers were hesitant to use the penalties as they did not fully understand how they worked.[868]

7.105 Some regulators such as the ACCC provide specific publications on the operation of certain provisions of the legislation they administer.[869] ASIC currently makes available statements on how it interprets the law: for example, *Policy Statement 92: Procedural Fairness to Third Parties*.[870] The ATO uses public rulings to promote consistent interpretations of tax legislation.

Targeting decisions

7.106 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.[871] 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 that was consulted suggsted that the regulator was inconsistent in its targeting policy leading to a perception of vindictiveness on the part of the regulator.[872] 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.[873] See discussion on risk management approach in the section on Effective Regulation at para 4.100.

7.107 Agencies may decide to publish their targeting and enforcement priorities in advance. Publicly available priorities give notice to the regulated community

867 Auditor-General, *Management of Fraud and Incorrect Payment in Centrelink* Audit Report No 26 (2001-2002) Australian National Audit Office, 77.

868 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.

869 For example, 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.

870 Policy statements are issued as formal declarations of ASIC policies. They indicate how ASIC will administer the *Corporations Act 2001* and other legislation for which ASIC is responsible. Practice notes are issued for the guidance of practitioners on reporting and compliance matters.

871 P Finkle and D Cameron, 'Equal Protection in Enforcement; Towards More Structured Discretion' (1989) 12(1) *Dalhousie Law Journal* 34, 35.

872 Customs Brokers Council of Australia, *Consultation*, Brisbane, 16 February 2001.

873 Australian Competition & Consumer Commission, *Making Markets Work — Directions and Priorities*, (1999), ACCC Publishing Unit, Canberra, 8.

about what sort of enforcement action to expect in a given year, although they are always subject to the over-riding scope of statutory powers. Public availability promotes deterrence and guides the public in complying with predictable standards. These priorities are also one method of structuring discretion.

7.108 For example, in *Making Markets Work – Directions and Priorities into 2000*, the ACCC elaborated on its discretionary targeting choices for 2000 in key areas of enforcement.[874] Another method of maintaining integrity in relation to targeting is by providing a general policy statement about when a party will not be targeted.[875] Agencies may publish enforcement priorities, benchmarks and performance indicators in their annual reports. For example, the ATO has made statements about targeting high wealth individuals and specific professions.[876]

7.109 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 concealing their behaviour. Target statements may not be able to foretell changes in regulated activity. For example the ATO may not have been able to anticipate that barristers avoiding tax would receive considerable media attention. Further, at times the factors that can contribute to a choice to target are so complex and variable that it would be impossible to reduce the facts to an accessible policy.

Choice of response or penalty

7.110 An agency's discretion to choose an appropriate response to a contravention largely depends on the variety of responses conferred on it by statute. Regulatory style also has implications for the types of regulatory tools that are used. Penalties should be applied consistently and it is important that individual penalties are understood within the larger regulatory framework. 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.[877] If certain responses are reserved for specific sectors of the regulated community, perceptions of unfairness can arise. In the area of taxation, it was observed in one consultation that the 'big fish' rarely pay penalties, but people lower down have difficulty engaging in complex tax structuring so they cheat in-

874 Ibid, 4.

875 'In 94% of cases, we took no further action because of the age of the matter, lack of sufficient evidence or scarce resources': Australian Securities & Investments Commission, *Annual Report 1999–2000*, Commonwealth of Australia, Canberra, 33.

876 Australian Taxation Office, *Commissioner of Taxation Annual Report 2000–01*, (2001), Australian Taxation Office.

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

stead.[878] Because this is considered evasion rather than avoidance, there is a perception that a high percentage of these smaller people are caught.[879]

7.111 In some 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* provides that in deciding whether it is appropriate to impose quasi-penalties on an approved provider for non-compliance with one or more of its responsibilities under Part 4.1, 4.2 or 4.3 of the Act, the Secretary must consider the following:

- whether the non-compliance is of a minor or serious nature;
- whether the non-compliance has occurred before and, if so, how often;
- whether the non-compliance threatens the health, welfare or interests of care recipients;
- whether the approved provider has failed to comply with any undertaking to remedy the non-compliance; and
- any other matters specified in the Sanctions Principles.[880]

7.112 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 also outlines a number of factors which 'must clearly not' influence a decision whether or not to prosecute. [881]

7.113 It has been suggested that regulatory agencies should have similar guidelines to those of the DPP to assist them in structuring their discretions in imposing civil and administrative penalties. This would encourage consistency in the targeting and choice of penalty. It would also assist in keeping regulators accountable for their decisions to impose civil and quasi-penalties. Such guidelines would also have to take account of the Prosecution Policy of the Commonwealth to ensure that they were consistent with considerations relevant to the imposition of criminal penalties. For a detailed discussion of the policy see Regulators and the DPP at para 6.3. The ATO has also developed a detailed Prosecution Policy that states the

878 R Krever, *Consultation*, Melbourne, 26 February 2001. It should be noted that this comment was made prior to the publicity surrounding tax avoidance by a number of barristers.

879 Ibid.

880 Under s 624 the imposition of sanctions on approved providers is also dealt with in the Sanctions Principles.

881 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*, Commonwealth Director of Public Prosecutions, <www.cdpp.gov.au/cdpp/>, 16 November 2001, para 2.7.

'principles' guiding the ATO's enforcement response,[882] although other documents are also relevant.[883]

7.114 Some regulators may 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.

Individualised justice

7.115 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.[884] 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.[885]

7.116 Tax administration provides a good example. In tax administration, the public arguably 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. For example, business taxpayers and individual taxpayers are subject to different statutory rules and thus varying amounts of enforcement discretion.

7.117 On the other hand, individuals or entities within the similar groups or categories can expect a significantly greater degree of equal or consistent treatment, reflecting their similar situations.[886]

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882 Australian Taxation Office, *ATO Prosecution Policy*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/index.htm>, 9 March 2001.

883 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.

884 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.

885 Australian Corporate Lawyers Association, *Consultation*, Melbourne, 26 February 2001.

886 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 (or objectively) equal treatment may therefore differ from substantively (or subjectively) equal treatment that takes individual circumstances into account in its evaluation of fairness.

Providing for individualised justice

7.118 Individualised and proportionate justice 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.[887]

7.119 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, 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.

7.120 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 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.[888]

7.121 Unlike activity test breaches, the penalty does not increase with subsequent breaches within a two year period, but another 13 week reduction period will be imposed if a subsequent administrative breach occurs. 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.[889]

7.122 Centrelink officers have a limited discretion to decide whether or not to apply a breach penalty (although it is not necessary to show an intention on behalf of the recipient to breach his or her requirements).[890] Social security legislation re-

887 K Yeung, *The Public Enforcement of Australian Competition Law*, (2001), Australian Competition and Consumer Commission, Canberra, 46.

888 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.

889 Ibid, topic 3.2.11.10.

890 Welfare Rights Centre, *Consultation*, Brisbane, 15 December 2000. Breach recommendations made to Centrelink by private third parties (such as Job Network providers) are 'almost completely discretionary':

quires that penalties cannot be imposed on a person who has a 'reasonable excuse' for not complying.[891] 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 complying.[892] The ALRC's research indicates that this procedure is not always followed.

7.123 Once the decision to apply a penalty is made, Centrelink officers do not have a power to remit penalties. However, the Secretary has the power to exempt claimants from, for example, requirements under an activity test, in accordance with guidelines set by the Minister.[893] The only option or right to comment given to recipients in breach of an administrative requirement is the choice between a longer rate reduction period and a shorter non-payment period.[894]

7.124 One criticism of this quasi-penalty regime is that it is 'excessive and harsh'.[895] Social security penalties are typically harsher than average fines for serious criminal offences[896] or comparable taxation offences.[897] 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

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J Moses and I Sharples, 'Breaching — History, Trends and Issues' (Paper presented at 7th National Congress on Unemployment, Sydney, 30 November–1 December 2000), 13. Around 21% of penalties imposed in 1998–99 and 24% in 1999–2000 originated in breach recommendations from the Job Network, although penalties were imposed for less than 50% of all breaches recommended by the Job Network: J Moses and I Sharples, 'Breaching — History, Trends and Issues' (Paper presented at 7th National Congress on Unemployment, Sydney, 30 November–1 December 2000), 11.

891 *Social Security Act 1991* (Cth), s 577C.

892 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.

893 See, for example, *Social Security Act 1991* (Cth), s 542H.

894 Around 96% of jobseekers choose rate reduction over non-payment 'despite the fact that in dollars a 16% reduction in basic payment for 13 weeks is more than a fortnight's basic payment': J Moses and I Sharples, 'Breaching — History, Trends and Issues' (Paper presented at 7th National Congress on Unemployment, Sydney, 30 November–1 December 2000), 4.

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

896 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 $1,300 applies for failure to attend an interview, and penalties range from $632 to $1,304 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.

897 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.

will be breached a second time for non-declaration of income, even though non-declaration was necessary to have enough money to support themselves.[898]

7.125 The Australian Council of Social Service claims that many of these breach penalties are being imposed improperly or indiscriminately, as evidenced by the fact that an extraordinary additional 172,000 breach penalties were applied by Centrelink but later revoked. This is around 35% of all breach penalties recommended.[899] Anecdotal information from public servants suggests that breaches are sometimes used as a device to get a person who has been out of contact with Centrelink back in touch. Once the person attends the office, the breach is then revoked.[900]

Correctability

7.126 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. 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. For a more detailed discussion of appeal and review see chapter 10.

Appeal and review

7.127 The ability to correct a penalty decision becomes increasingly important when there is little discretion to tailor penalties and so harsh penalties are imposed.[901]

7.128 If a right of appeal is exercised and the appellant is given a full and fair rehearing, it could be concluded, having regard to the entire circumstances, that any breach of procedural fairness at first instance has been 'cured'. In appropriate cases, this approach can achieve a balance between the public interest in the efficiency of the administrative process and the individual's interest in securing a fair hearing.[902]

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898 Welfare Rights Centre, *Consultation*, Sydney, 6 December 2000.

899 Australian Council of Social Service and National Welfare Rights Network, *Doling out Punishment; The Rise and Rise of Social Security Penalties*, (2000), ACOSS, Sydney, 1.

900 Ibid, 7.

901 Australian Taxpayers' Association, *Consultation*, Melbourne, 27 February 2001.

902 *Twist v Council of the Municipality of Randwick* (1976) 136 CLR 106, 116. See also *Preston v Carmody* (1993) 44 FCR 1, 16. In *Marabouti v Secretary, Department of Employment, Education, Training and Youth Affairs* (1998) 53 ALD 585, the applicant contended that the failure to give him any warning of the intention to make an order under s 660I to cancel his Newstart Allowance, or to allow him to comment upon or explain his conduct, demonstrated bias on the part of the decision maker or amounted to a denial

7.129 Notification of appeal rights is essential. Some regulators facilitate the correction of regulatory decisions by advising the regulated of their review rights.[903] In consultations it was identified that some regulators do not always notify those subject to quasi-penalties of their review rights.[904]

7.130 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.[905] See decision accuracy or quality below at para 7.145.

Revocation of penalty

7.131 Correctability could include a right to have a penalty revoked where, for example, the regulator has made a factual error when determining that the administrative penalty should be imposed, or that special circumstances make the imposition of the quasi-penalty inappropriate. 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, where the legislation is complex or when the regulatory response has to be imposed quickly due to the nature of the regulated activity. See Question 7-3 below.

7.132 The infringement notice scheme to be introduced into the *Customs Act 1901* by the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001*, s 243ZA(2) will allow a decision maker to withdraw an infringement notice (whether or not representations seeking withdrawal have been made) by causing written notice of the withdrawal to be served on the person during the period within which the penalty specified in the infringement notice is required to be paid. Section 243ZA sets out the matters to which the decision maker may have regard to in deciding whether to withdraw an infringement notice. These matters include, but are not limited to, the following:

- whether the person has previously been convicted of an offence for a contravention of this Act;

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of natural justice. In finding that no provision of social security legislation provided that any warning had to be given, Lindgren J stated that the *de novo* nature of review by the ARO, SSAT and AAT cured the breach of natural justice.

903 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.

904 Welfare Rights Centre, *Consultation*, Sydney, 6 December 2000.

905 *Administrative Appeals Tribunal Act* 1975, s 28 and *Administrative Decisions (Judicial Review) Act* 1977, s 13.

- the circumstances in which the offence specified in the notice is alleged to have been committed;

- whether the person has previously been served with an infringement notice in respect of which the person paid the penalty specified in the notice;

- any written representations made by the person.

7.133 Under s 126 of the *Social Security (Administration) Act 1999*, the Secretary can review a decision made by an officer under social security law at any time, and irrespective of whether a review has been requested. The Secretary can also 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 breaches: for example, on the provision of further information to the regulator by the benefit recipient. The exercise of this power is contingent on the regulator affording a right to be heard in order to gather information that may lead to withdrawal of the penalty.

7.134 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.[906]

7.135 A number of regulators are given the discretion to remit penalties under certain circumstances. For a discussion on remission see chapter 15.

Control

7.136 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[907] (where the decision to remove or qualify a licence often has an immediate and drastic effect on the viability of the regulated enterprise) and social security (where the decision has an immediate effect on the income and welfare of the recipient).

7.137 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

906 A Hudson, *Consultation*, Sydney, 26 February 2002.

907 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'.

heard may be satisfied 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 above at para 7.34.

Ethicality

7.138 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.[908] 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.

7.139 Of course, regulators, as public servants, are under an obligation to operate ethically.[909] Further, regulators must comply with the Commonwealth's Model Litigant Policy, that 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). However, most regulators express their obligation to operate ethically in service charters.[910] 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'.[911] See Question 7-4 below.

7.140 The ATO's *Taxpayers' Charter* is a more comprehensive document.[912] 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 taxpayer's charter was worthwhile. However, it was noted that the Charter was not enforceable and that it should have been incorporated into legislation.[913] In another consultation it was stated that the Charter does not say much, iterates past practices, and does not mean much to tax avoiders.[914]

908 T Makkai and J Braithwaite, 'Procedural Justice and Regulatory Compliance' (1996) 20(1) *Law and Human Behavior* 83, 85.

909 See *Public Service Act 1999* (Cth) and the Australian Public Service Values and Code of Conduct at <www.psmpc.gov.au/media/index.html>.

910 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>.

911 On the ACCC's website at <www.accc.gov.au/about/fs-about.htm>.

912 On the ATO's website at <www.ato.gov.au>.

913 Australian Taxpayers' Association, *Consultation*, Melbourne, 27 February 2001.

914 R Krever, *Consultation*, Melbourne, 26 February 2001.

Impartiality

7.141 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 para 7.28 above).

7.142 The hearing rule requires the subject of the administrative penalty to be given an opportunity to present evidence to the regulator. A regulator which makes a decision based on its own evidence and that provided by the subject of the administrative penalty is more likely to be impartial and less subject to challenge.

7.143 Another way to avoid a perception of partiality would be to have a system of review. In its *Better Decisions* report the Administrative Review Council (ARC) acknowledged that internal review, by definition, cannot be completely impartial.[915] The ARC recommended that one means of lessening the likelihood of partiality was that internal review of an administrative decision should be undertaken by internal review officers who are independent of the primary decision makers.[916] This would also reduce perceptions of bias. For a more detailed discussion of these issues see section on Internal Review at para 10.79.

7.144 Of course, 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.

Decision accuracy or quality

7.145 It could well be seen that high quality decision making is not really an aspect of fairness but the objective of all regulation. There is probably no substitute for quality. 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.[917] Other writers have distinguished between this concept — the 'quality of outcomes' — with the quality of the processes used to achieve them.[918]

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915 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report no 39 (1995), Commonwealth of Australia, Canberra, para 6.60.

916 Ibid, recommendation 75.

917 T Makkai and J Braithwaite, 'Procedural Justice and Regulatory Compliance' (1996) 20(1) *Law and Human Behavior* 83, 84.

918 R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) Oxford University Press, Oxford, 314.

7.146 In many respects this aspect of fairness equates with the common law obligation to act in accordance with the law[919] and within jurisdiction.[920] ASIC has on-line guides to legislation,[921] policy statements and practice notes. These guides to the legislation help both the regulator's staff and the regulated community understand what the law requires. Although many of these publications are relevant to the application of civil and administrative penalties, at present there are no guidelines as to how the law relating to civil penalties and administrative penalties should be applied and the procedures that should be followed in imposing those penalties.

7.147 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 regulator's officers.[922] 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 above at para 7.60.

Statements of reasons

7.148 Regulators can improve the quality of their quasi-penalty decisions by providing statements of reasons. As noted above, in some cases this is provided for in legislation such as the *Administrative Appeals Tribunal Act* and the *ADJR Act*. Perhaps this could be a general principle to apply to quasi-penalty schemes. Several factors lead to this conclusion.[923]

- The practice of providing statements of reasons has the potential to improve the quality of primary decision making.[924] 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.[925]

- Providing statements of reasons can be seen as part of a general due process requirement. In many cases, the very provision of reasons 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.[926]

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919 *Craig v South Australia* (1995) 184 CLR 163, 179.
920 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 180 ALR 1, 21.
921 As does the ACCC: see <www.accc.gov.au/pubs/Publications/Corporate/Summary_of_TPA.pdf>.
922 A Hudson, *Consultation*, Sydney, 26 February 2002. Also see section on training above at para 7.60.
923 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).
924 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.
925 *Commonwealth of Australia v Pharmacy Guild of Australia* (1989) 91 ALR 65.
926 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[927] 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 reason 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.[928]

- 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.[929] The practice also provides the wider public, and government agencies, with examples of how the law is applied in particular fact situations.[930]

7.149 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 very high standard. See Proposal 7-4 and Question 7-2 below.

Negotiations with the regulated

7.150 In some cases parties negotiate penalties and reach settlement without court action or a formal or separate court determination. Indeed, quantitatively, the primary output of courts and tribunals is settlements.[931] 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.

7.151 Courts,[932] regulators,[933] and lawyers[934] have all stated that negotiated outcomes are preferable to protracted litigation. Alternative dispute resolution advocates seek to emphasis its informality (implying that it is less alienating and intimidating to ordinary citizens), low cost, ease of access and speed of operation.

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927 *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500, 507.
928 *Dalton v Commissioner of Taxation* (1985) 7 FCR 382.
929 *Commonwealth of Australia v Pharmacy Guild of Australia* (1989) 91 ALR 65.
930 H Katzen, 'Inadequacy of Reasons as a Ground of Appeal' (1993) 1 *Australian Journal of Administrative Law* 33, 36.
931 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (2000), Australian Law Reform Commission, Sydney.
932 See *Trade Practices Commission v Allied Mills Industries Pty Ltd (No 4)* (1981) 37 ALR 256.
933 See also 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.
934 Victorian Bar Association, *Consultation*, Melbourne, 8 October 2001.

7.152 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.[935] 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.

7.153 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.[936]

7.154 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 'bullied' into agreement and are acutely aware of the relevant legal rules.[937] In other areas of regulation, the regulated community is not so well resourced and can be at an obvious disadvantage.[938]

7.155 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.[939]

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935 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).

936 R Abel, *The Politics of Informal Justice* (1982) Academic Press, Los Angeles, 271.

937 R Mnookin and L Kornhauser, 'Bargaining in the Shadow of the Law' (1979) 88 *Yale Law Journal* 950.

938 For example, social security recipient or individual tax payers.

939 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).

Settlement

7.156 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 contravener the cost and uncertainty of contested litigation. These settlements are extensively used by the ACCC.

7.157 However, a number of concerns have been raised in relation to this process. Justice Finkelstein 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.[940]

7.158 The lack of transparency of negotiated settlements may also reinforce the perception that penalties negotiated out of court are not adequately grounded in fact and legal principle.[941] It has also been suggested that in some cases negotiated penalties are relatively low.[942]

7.159 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 have nevertheless endorsed the proposed settlement in recognition that the admissions were made to enable the proceedings to be settled expeditiously.[943] Because settlement negotiations are conducted in private, little or no evidence concerning the extent of the suspected contravention or the regulator's reasons for agreeing to a particular level of penalty are made public. However, 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 …[944]

940 *Australian Competition and Consumer Commission v ABB Transmission & Distribution Ltd* (2001) ATPR ¶41–815, 42,936.

941 K Yeung, *The Public Enforcement of Australian Competition Law*, (2001), Australian Competition and Consumer Commission, Canberra, 92.

942 Justice J Merkel, Justice J Finkelstein and Justice J Goldberg, *Consultation*, Melbourne, 21 May 2001.

943 *Australian Competition and Consumer Commission v NW Frozen Foods Pty Ltd* (1996) 141 ALR 640.

944 K Yeung, *The Public Enforcement of Australian Competition Law*, (2001), Australian Competition and Consumer Commission, Canberra, 145.

7.160 On a number of occasions the courts have departed from penalties agreed to by parties.[945] For example, in *ACCC v North West Frozen Foods*[946] 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).[947]

7.161 Another concern raised by commentators is that settlement is reserved only for certain sections of the 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.[948]

7.162 A number of commentators have raised unequal bargaining power and accountability as issues. Alan Ducret suggested that:

> 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. [949]

7.163 Similarly Jeffrey Hilton 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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945 Spender J in *ACCC v Sundaze Pty Ltd* (1999) FCA 1642, para 35, while still approving the parties agreement, stated that: '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'.

946 *Australian Competition & Consumer Commission v N W Frozen Foods Pty Ltd* (1996) ATPR ¶41-515 (Heerey J).

947 On appeal, this decision was set aside with the Full 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 penalty, notwithstanding that it might have done so if considering the matter in the absence of any agreement between the parties: *NW Frozen Foods v Australian Competition & Consumer Commission* (1996) 71 FCR 285.

948 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.

949 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.[950]

7.164 It is noted, however, that 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, this raises further issues. By opening negotiations with a regulator, the contravener could effectively lose the opportunity to contest the merits of the matter at a hearing before the court.[951] 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;[952]
- 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 co-operating with the regulator, rather than litigating with that organisation, will gain from the court.

7.165 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.[953]

7.166 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

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950 J Hilton, 'Principles of Fairness and Accountability' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001), 6.

951 Ibid, 6.

952 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 case law: 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 Commissionr of Taxation* [2002] FCA 318 and *White v Overland* [2001] FCA 1835.

953 J Hilton, 'Principles of Fairness and Accountability' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001), 6.

innocent respondents are not improperly pressured into accepting a penalty settlement rather than exercising their right to trial.[954]

Settlement guidelines

7.167 Settlement guidelines are an important way of injecting elements of certainty and transparency into the process of negotiating penalties.

7.168 In its leniency policy, the ACCC has published the factors it will consider when reaching agreement on penalties.[955] The use of leniency policies in Australia and overseas is considered in detail in chapter 15.

7.169 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.[956] 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 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.[957] The Code lists circumstances where it would generally be appropriate and inappropriate to settle,[958] the level of personnel to be involved in settlement negotiations, the documentation required and other procedural requirements,[959] remission,[960] and mitigating factors such as the ability to pay.[961] The

954 K Yeung, 'Negotiated Compliance Strategies: The Quest for Effectiveness and the Importance of Constitutional Principles' (Paper presented at Ibid, 8 June 2001), 15.

955 Including whether the company or individual has cooperated with the authorities; 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 and Leniency in Enforcement*, Australian Competition & Consumer Commission, <www.accc.gov.au/compliance/leniency.htm>, 23 October 2001.

956 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.

957 Ibid.

958 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.

959 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

960 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.

Code requires that a settlement must be fully documented and countersigned.[962] The Code acknowledges the 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.[963] Accountability is encouraged through the use of a register.[964] See Proposal 7-6 below.

Enforceable undertakings

7.170 Enforceable undertakings are a relatively new and effective enforcement response for the ACCC and ASIC.[965] For a detailed discussion of enforceable undertakings see chapter 3. Enforceable undertakings are raised here as they can have significant negative impact on a corporation or individual. The punitive nature of these negotiated penalties is acknowledged by the ACCC.[966]

7.171 From the ALRC's consultations, enforceable undertakings appear to be popular with regulators; indeed many other regulators are interested in introducing them.[967] The flexibility of undertakings has enabled ASIC and 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.[968]

7.172 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.[969]

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961 Ibid, cl 4.1.1.
962 Ibid, cl 2.1.4.
963 Ibid, c 2.1.4.
964 Ibid, cl 2.1.5. This register is not publicly accessible.
965 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 (*ASIC Act*, s 93A, 93AA). Enforceable undertakings became available for ASIC in July 1998. Amendments to the *Trade Practices Act* introduced s 87B undertakings in 1993.
966 Section 87B enforceable undertakings are included as penalties in Australian Competition & Consumer Commission, *The ACCC and its Use of Penalties*, 2001.
967 M Toller, 'Scandalously Competent' (Paper presented at National Press Club Speech, 21 February 2001).
968 J Longo and J Redfern, 'Summary of Papers' (Paper presented at Enforceable Undertakings Seminar, 11 April 2000).
969 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.

7.173 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 stated that regulators give guidance and perform an educative role. It was also stated that enforceable undertakings encourage greater candour and promote compliance.[970]

7.174 Both ASIC and the ACCC emphasise that they only accept enforceable undertakings where there is evidence of a breach that would otherwise justify litigation.[971] Yeung, in her analysis of the ACCC undertakings, stated that this limitation on use is important as:

> - It ensures that the Commission [ACCC] 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, 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.
>
> - 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.[972]

7.175 While it is generally accepted that enforceable undertakings are working well, some writers have voiced concerns about these 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 …

970 Australian Corporate Lawyers Association, *Consultation*, Melbourne, 26 February 2001.

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

972 K Yeung, *The Public Enforcement of Australian Competition Law*, (2001), Australian Competition and Consumer Commission, Canberra, 114.

> 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.[973]

7.176 Yeung has identified a number of 'constitutional values' concerns in relation to enforceable undertakings.[974] Although her observations are specifically directed to s 87B undertakings under the *Trade Practices Act*, 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 *ADJR Act*, 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. The ALRC has been told that the terms of these undertakings are often

973 F Zumbo, 'Section 87B Undertakings; There's No Accounting for Such Conduct!' (1997) 5 *Trade Practices Law Journal* 121, 122.

974 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).

too wide and that obligations need to be reviewed in light of changes in the marketplace.[975]

7.177 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.[976] It was suggested in one consultation that a company should remain anonymous when it enters into an enforceable undertaking.[977]

7.178 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 is considered that enforcement outcomes *must* be published.[978] It is noted that enforceable undertakings are only accepted where the alternative would be public court proceedings seeking penalties. In exceptional circumstances, though, ASIC has suggested that certain information in the enforceable undertaking may be kept confidential.[979] 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.[980]

7.179 In its report, *Compliance with the Trade Practices Act,* the ALRC stated that there is a general recognition of the need for safeguards against the Trade Practices Commission [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 Commission 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 Commission is not satisfied that such scrutiny is necessary. Section 87B undertakings are entered voluntarily after

975 Australian Compliance Professionals Association, *Consultation*, Sydney, 14 May 2001.
976 Australian Corporate Lawyers Association, *Consultation*, Melbourne, 26 February 2001.
977 Ibid.
978 Australian Securities & Investments Commission, *Practice Note 69: Enforceable Undertakings*, Australian Securities & Investments Commission, <www.cpd.com.au/asic/pn/>, 20 December 2001, PN 69.26.
979 Ibid, PN 69.27.
980 Ibid, 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.

> negotiation and the TPC is committed to ensuring that undertakings are fair and clear and are not obtained unfairly.[981]

Enforceable undertakings guidelines

7.180 At present there is no judicial guidance on the scope and use of enforceable undertakings. However, as noted above, ASIC has a Practice Note on its use of enforceable undertakings and the ACCC has published a booklet *Section 87B and the Trade Practices Act*.[982] 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.[983]

Third party issues

7.181 The ALRC is considering whether regulators could develop and publish a third party policy for enforceable undertakings to address third party issues. Perhaps ASIC's *Policy Statement 92: Procedural Fairness to Third Parties*, which currently relates to granting relief, could be used as a starting point. For a discussion of the policy see para 7.95 above.

7.182 A further issue is the frustration of access to compensation by third parties. Currently under s 83 of the *Trade Practices Act*, a finding of any fact in a penalty proceedings is *prima facie* evidence of that fact and can be used in compensation proceedings. This provision assists third party claimants in that they are not necessarilyrequired to re-prove the contravention. It is unclear whether admissions made in undertakings can be used in the same way.

Publicity

7.183 Many regulators issue press releases when penalty proceedings are instituted, or when penalties or other regulatory response is imposed. These press re-

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981 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), Australian Law Reform Commission, Sydney, para 11.8.

982 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.

983 See Proposal 7-7 and Question 7-5 below.

leases usually garner considerable publicity. Thereafter, the proceedings will attract the publicity attendant upon the hearing of any case in open court. Once proceedings are concluded, regulators will often put out further press releases which may attract substantial adverse publicity to the contravener. It has been claimed that this type of publicity

> can do a great deal of injury to business or goodwill — perhaps injury disproportionate to the damage done to the public interest or the interests of consumers by the particular contravention …[984]

7.184 Publicity prior to adjudication has attracted the most condemnation from the regulated community and been the subject of contention in the courts. Over the years, parties in several cases have sought to have some regulators held accountable for issuing press releases before final decisions have been handed down, arguing that the conduct of the regulator in issuing press releases, and the consequential publicity generated by such press releases, should result in lower penalties. The Federal Court has generally rejected these arguments unless respondents could demonstrate that any adverse publicity was something more than fair reporting of the commencement of a prosecution by importing some unfair or incorrect element into the publicity.[985]

7.185 Professor Allan Fels has defended the ACCC's use of publicity prior to adjudication, noting the public interest benefits.[986] However, some have called for legislative change:

> In my opinion the only feasible solution is for section 76 to be amended to allow the Court in an appropriate case to take account of any past or proposed ACCC press release when considering the appropriate quantum of penalty.[987]

7.186 In consultations, the ALRC has been told that the use of publicity by the ACCC is sometimes 'outrageous'[988] and some practitioners have called for boundaries to be placed on regulators.[989] Others have stated that, although such publicity has educative and deterrent value, it effectively penalises companies before they

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984 J Hilton, 'Principles of Fairness and Accountability' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001), 6–7.

985 See, for example, *Eva v Southern Motors Box Hill Pty Ltd* (1974–1977) ATPR ¶40–026, 17,359–360; *Thompson v JT Fossey Pty Ltd* (1978) ATPR ¶40–076, 17,782; *Trade Practices Commission v Cue Design Pty Ltd & Ors* (1996) ATPR ¶41–475, 41,834–835; *Smiles v Federal Commissioner of Taxation* (1992) 35 FCR 405.

986 A Fels, 'A Service and a Deterrent', *BRW*, 15–21 November 2001, 30. Further, Sitesh Bhojani, a Commissioner of the ACCC, has noted that the ACCC is accountable for its use of publicity through risk of defamation action, applications for stay of proceedings, the Commonwealth's Model Litigant Policy, risk of contempt of court action, complaints to the Commonwealth Ombudsman, and Parliamentary scrutiny: S Bhojani, 'Principles of Fairness and Accountability' (Paper presented at Penalties: Policy, Principles and Practice in Government, Sydney, 9 June 2001).

987 J Hilton, 'Principles of Fairness and Accountability' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001), 7.

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

989 Ibid.

have been found guilty and before a penalty has been imposed.[990] See also discussion on publicity of enforceable undertakings at para 7.177.

7.187 A further issue is raised when a regulator issues a press release prior to adjudication that they are commencing an investigation or proceedings against a firm or individual, and then as a result of that investigation or proceedings a penalty is not imposed. In many cases, if the regulator is unsuccessful, they do not publish a press release that investigation has ceased, or that the court did not impose a penalty, or that there was no wrongdoing. See Question 7-6 below.

Access

7.188 Access to information is fundamental to fairness.[991] In terms of the ALRC's current inquiry, access primarily relates to:

- accessibility of legislation;
- access to information provided by the regulator about how a penalty scheme operates;
- access to the regulator.

7.189 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. 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.[992]

Accessibility of legislation

7.190 One of the recommendations to come out of the *Access to Justice: An Action Plan* report was the need for greater access to legislation.

> '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 it-

990 Australian Corporate Lawyers Association, *Consultation*, Melbourne, 26 February 2001.

991 See, for example, Access to Justice Advisory Committee, *Access to Justice: An Action Plan Report* (1994) Commonwealth of Australia.

992 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.

> self would become accessible to more 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.[993]

7.191 The action plan included greater consultation in the making of rules and clearer drafting of legislation.[994] It referred to the 1993 report of the House of Representatives Standing Committee on Legal and Constitutional Affairs on *Clearer Commonwealth Law*.[995] This report was directed primarily at clearer drafting of legislation in order to make it easier to understand. The Committee made a number of recommendations designed to:

- Ensure that legislation is drafted with a particular audience in mind (according to the subject of the law) 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 target audiences;[996]

- Improve the structure of legislation to specify which matters should be included in primary and delegated legislation respectively and how to present the legislative scheme within primary legislation;[997]

- Further improve the new and simpler drafting style and broaden the range of legislation covered by it;[998]

- Improve the presentation of legislation.[999]

7.192 Clearer drafting of legislation is particularly relevant to the current reference. Legislation should clearly set out a number of matters including:

- the prohibited conduct which attracts a penalty;

- the nature of the penalty;

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993 Access to Justice Advisory Committee, *Access to Justice: An Action Plan Report* (1994) Commonwealth of Australia, xlvi.

994 Access to Justice Advisory Committee, *Access to Justice: An Action Plan Report* (1994) Commonwealth of Australia, 466–473.

995 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Clearer Commonwealth Law*, (1993), Commonwealth of Australia.

996 Ibid, rec 17–19.

997 Ibid, rec 20–21.

998 Ibid, rec 22–30.

999 Ibid, rec 31–34.

- the process used to impose the penalty — criminal, civil or administrative;
- the procedures to be followed in imposing the penalty;
- any defences and protections available;
- the availability of appeal and review.

7.193 These issues have become particularly apparent in relation to social security legislation which regulates a broad group of people. The penalty scheme and the rules under the legislation are complex and generally inaccessible. A good example of clear and plain legal drafting is the Small Business Guide under the *Corporations Act 2001*.[1000]

7.194 Another recent example of clearer drafting is the *Environment Protection and Biodiversity Conservation Act*. For example, it uses plain English and clearly sets out the objects of the Act and principles of 'ecologically sustainable development' which underpin much of the legislation.[1001] The legislation also includes simplified outlines of chapters and divisions.[1002] Civil penalties and criminal penalties are clearly distinguished and the conduct attracting those penalties is clearly set out in the legislation. Some of these features broaden the accessibility of the legislation. This is particularly relevant in environmental regulation — the Act needs to be accessed by a broad group of people ranging, for example, from members of the general public seeking standing to review a decision made under the Act to corporations defending civil penalty proceedings.

7.195 Where a regulator provides a guide to the operation of legislation imposing penalties, this should be clearly set out having regard to the nature of the reader — both the regulator's staff and the regulated community.

Access to information

7.196 Many of the proposals and questions in this chapter relate to the drafting of guidelines and policies that set out how the regulator will impose civil or administrative penalties. These guidelines should be publicly available whether they relate to procedural fairness requirements, appeal and review mechanisms, third party issues, or choice of penalty discretion. These policies should be clearly drafted to enable accessibility by both regulator officers and the regulated community.

1000 *Corporations Act 2001*, Pt 1.5.
1001 *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 3 and 3A.
1002 For example, Ibid, s 11, 66 and 85.

7.197 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, regulator websites provide the perfect site for much of this information. The ALRC's research has revealed that much of this information is not currently available on regulator websites. 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.

Access to the regulator

7.198 In many cases, the regulated community may need to access information from the regulator. The regulator should provide resources so that the regulated community can access information directly from the regulator in relation to civil and administrative penalties. This may include the provision of interpreter services for people from a non-English speaking background, or more clearly drafted correspondence to the regulated community.

7.199 This issue is particularly relevant to the issue of control (see above at para 7.136) and the hearing rule (see above at para 7.34).

Proposals and questions

7.200 Some aspects of procedural fairness are considered in detail in later chapters of this Discussion Paper: see chapter 10 on Accountability (appeal and review) and chapter 15 on Discretions. However, the ALRC at present considers it desirable to institute some reforms to state or re-state certain basic aspects of procedural fairness. These might take the form of a default legislative statement to take effect in the absence of express contrary or modifying statements in the specific statutes establishing particular penalty regimes. In this context, the focus would be on regimes, or on those stages of decision-making processes, that do not involve court or tribunal proceedings as the ALRC assumes for the purpose of this inquiry that the rules of courts and tribunals deal with these questions thoroughly.

Proposal 7-1. There should be 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.

Question 7-1. Is it appropriate for any statement excluding or limiting the application of procedural fairness to be in delegated, rather than in primary, legislation?

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.

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 those 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.

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 statements.

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?

Proposal 7–5. Regulators should develop and publish guidelines on how these principles of procedural fairness are to be extended to third parties who may be affected by their decisions, and on which third parties the principles of procedural fairness are to be extended to.

Question 7–3. Is it 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?

Question 7–4. Should regulators develop and publish service charters (such as the Taxpayers' Charter) to ensure that they act ethically and respect the rights of regulated entities?

Proposal 7–6. Regulators should develop and publish guidelines on the basis on which they will negotiate and agree penalty-related settlements, subject to any relevant statutory criteria, standards or limitations.

Proposal 7–7. 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.

Question 7–5. Should admissions given in enforceable undertakings be admissible in any proceedings brought by third parties?

Question 7–6. Should regulators develop and publish guidelines on the use of publicity prior to, during and following the exercise of penalty powers (including court or tribunal proceedings)?

8. Multiple Proceedings and Multiple Penalties

Contents

Introduction

8.1 The Terms of Reference require the ALRC to report on the relationship between administrative and civil penalties and criminal liability in respect of the same conduct, including joint proceedings, double jeopardy, elections and bars to proceedings.

8.2 Under some federal legislation, the same conduct or contravention can attract more than one form of liability, and therefore more than one type of penalty. It is recognised that good regulation requires that the regulator have access to a range of regulatory tools. However, the power to pursue a number of enforcement

options presents a number of risks primarily relating to multiple punishment and the use of evidence in multiple proceedings.

8.3 The first section of this chapter looks at the policy issues raised by multiple penalties for the same conduct and examines the benefits and risks of legislation providing multiple penalties for the same conduct.

8.4 The second section briefly outlines what is meant by 'conduct' for the purpose of this chapter. Although common law and statutory protection diverge on whether the conduct has to be the 'same' or 'substantially similar' to attract certain protections, 'conduct' generally relates to the physical elements of an offence or contravention.

8.5 The third section outlines four types of multiple exposure to liability that appear in the federal legislation surveyed by the ALRC:

- parallel criminal liability and civil penalties for the same conduct;
- separate schemes of criminal liability and civil penalties;
- true administrative penalties that arise automatically by operation of legislation; and
- parallel criminal liability and quasi-penalties.

8.6 The fourth section examines specific schemes of parallel criminal liability and civil penalties for the same conduct such as under the *Corporations Act 2001* (Cth), the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and the *Commonwealth Authorities and Companies Act 1997* (Cth). This section notes the need for criminal and civil penalty liability to be clearly identified in legislation. Double jeopardy issues, statutory bars and the use of evidence and information in multiple proceedings are also discussed.

8.7 Following this discussion, the chapter focuses on separate schemes of criminal liability and civil penalties, in particular under Parts IV and VC of the *Trade Practices Act 1974* (Cth). Double punishment is briefly discussed.

8.8 The sixth section of the chapter considers criminal liability and administrative penalties and quasi-penalties.

8.9 The ALRC is interested in how these models of liability operate in practice, particularly how regulators deal with issues of double punishment and evidence issues raised by multiple proceedings. The final section looks at the current

arrangements between regulators and the DPP and other regulators in relation to multiple proceedings and liability. This section asks:

- What factors influence a regulator to elect a particular enforcement response?
- Do regulators consider double punishment issues and evidence issues when they elect to pursue more than one type of liability in response to the same conduct?
- Are these issues likely to arise in practice?

Policy issues

Benefits of provision for multiple penalties for the same conduct

8.10 Contemporary regulatory theory favours a pyramid of enforcement measures.[1003] Essentially, this model calls for regulators to respond to non-compliance at first by means such as persuasion but, if the non-compliance is repeated, by escalating the severity of the regulatory response. However, many Australian regulators now administer legislation that provides either:

- both criminal and civil liability for the same conduct; or
- criminal liability and civil liability for different conduct.

8.11 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 likely to receive an appropriate and proportionate penalty.

8.12 As outlined in chapter 3 (Types of Penalties), penalties differ in speed of application, process and severity. Several actions may be available in response to the same conduct. For example, a contravention of the *Corporations Act* by a corporate officer may justify immediate disqualification by ASIC as a protective measure; but a civil or criminal penalty may also be imposed by a court at a later time.

1003 See chapter 3 for discussion of the enforcement pyramid and its place in contemporary theory. Relevant discussions of the concept include I Ayres and J Braithwaite, *Responsive Regulation; Transcending the Deregulation Debate* (1992) Oxford University Press, New York; V Goldwasser, 'CLERP 6 — Implications and Ramifications for the Regulation of Australian Financial Markets' (1999) 17(4) *Company and Securities Law Journal* 206, 210.

8.13 Of course, a regulator's power to choose the most appropriate action to take depends on the variety of options available in the legislation.[1004] Professor Allan Fels, ACCC Chairman, has recently called for a greater variety of sanctions, including imprisonment, to be included in the *Trade Practices Act*, claiming that more severe penalties are needed because of an increase in 'hard core collusive behaviour'.[1005] Currently collusive behaviour attracts a civil penalty under Part IV of the Act.

> We must respond to this challenge at two levels. First, we must continue to review and revise our civil penalty regime to ensure that it remains a relevant and effective deterrent. In the vast majority of cases under Part IV, civil penalties … will remain the most appropriate deterrent …
>
> At the second level, the most serious, flagrant and profitable acts of collusion such as price fixing, market sharing and bid rigging are in a separate class of their own… If we are to effectively deter and properly punish this sort of behaviour in the future, we must follow the lead of several of our major trading partners and consider imprisonment as an additional sanction for executives who engage in these highly profitable, hard core breaches of Part IV, specifically, conduct that is caught by sections 45A and 4D.[1006]

8.14 An insufficient range of regulatory options in legislation can leave awkward gaps, reducing the regulator's ability to be effective. For example, 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.[1007]

8.15 The introduction of civil penalties into the *Corporations Law* (now the *Corporations Act*) went some way to filling this 'regulatory gap'. One senior ASIC officer has observed that both civil penalties and criminal liability are necessary because:

> (1) 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.

1004 A number of other factors direct such decisions, including the nature of the conduct, the availability of resources, risk management evaluations and timeliness. For a discussion on regulatory discretion in specific areas see chapter 15.

1005 A Fels, 'Jail Would Hurt More Than Fines', *The Canberra Times*, 5 July 2001, 11.

1006 A Fels, 'Regulating in a High Tech Marketplace' (Paper presented at Penalties: Policy, Principles and Practice and Government Regulation, Sydney, June 2001), 2.

1007 H Bird, 'The Problematic Nature of Civil Penalties in the Corporations Law' (1996) 14 *Company and Securities Law Journal* 405, 409–410.

(2) 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) the scope to effectively regulate those aspects of directors' duties.

(3) Criminal sanctions for a contravention of a civil penalty provision are not available unless the conduct is genuinely criminal in nature.

(4) Criminal sanctions, and not civil actions, should be imposed for fraudulent contraventions of civil penalty provisions.

(5) Non-criminal sanctions should be imposed for non-fraudulent contraventions of civil penalty provisions.

(6) Disqualification is not an appropriate sanction for all non-fraudulent contraventions of a civil penalty provision.

(7) Pecuniary civil penalties are an appropriate and necessary sanction for a non-fraudulent contravention of a civil penalty provision.

(8) The court has ample scope to ensure that a proportionate sanction can be given in the circumstances of every contravention.[1008]

Risks associated with multiple penalties for the same conduct

8.16 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 regulatory penalties and assist in identifying principles relevant to multiple penalties for regulatory contraventions.

8.17 Rationales for the rule against double jeopardy in Australian jurisprudence include:

- fairness and the prevention of oppression;[1009]
- that a person should not be twice punished for what is substantially the same act;[1010]
- finality;[1011] and
- prevention of vexation caused by multiple prosecutions.[1012]

1008 M Gething, 'Do We Really Need Criminal and Civil Penalties for Contraventions of Directors Duties?' (1996) 24 *Australian Business Law Review* 375, 376.
1009 *Australian Securities and Investments Commission v Hosken* (1999) 153 FLR 372.
1010 *R v Hoar* (1981) 148 CLR 32, 38.
1011 *Cachia v Isaacs* [1985] 3 NSWLR 366, 386.

8.18 Without adequate safeguards multiple penalties for the same conduct could result in a variety of punishments that may be imposed upon the regulated which would be both oppressive and unfair.[1013]

8.19 To allow a well-resourced regulator to make repeated attempts to punish an individual or corporation for an alleged offence would also be oppressive. The costs of litigation are well known, as outlined by the ACCC in its publicity:

> If we take you on and win you may be up for your costs and ours. Whilst legal costs may be tax deductible they are by no means productive![1014]

8.20 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.[1015] Multiple proceedings delay finality and create extra cost for the regulated, the regulator, the legal system and the public.

8.21 Where civil penalty liability and criminal liability exist for the same conduct there is 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.[1016]

8.22 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, it can be difficult to identify the point at which the criminal 'card' goes on the table.[1017] Clearly, the investigative path will differ if a decision is made early to pursue a civil or administrative penalty, rather than a criminal remedy.

8.23 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

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1012 *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'.

1013 *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.

1014 Australian Competition & Consumer Commission, *What Are the Costs of Non-Compliance with the Trade Practices Act*, Australian Competition & Consumer Commission, <www.accc.gov.au/compliance/costs.html>, 1 June 2001.

1015 *Cachia v Isaacs* [1985] 3 NSWLR 366, 386.

1016 Welfare Rights Centre, *Consultation*, Brisbane, 15 December 2000.

1017 Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 20 February 2001.

the regulatory structure. Joe Longo, former National Director of Enforcement of ASIC, recently 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.[1018]

8.24 Prior to many of the CLERP reforms, this issue was raised in relation to Part 9.4B of the *Corporations Law*.[1019] Helen Bird argued that the presence of both types of liability creates competing rather than progressive regimes and that this undermined the enforcement pyramid model.[1020] 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 to provide an additional deterrent; and non-civil treatment of management disqualification.[1021]

'Conduct'

8.25 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 Act 1995* (Cth) provides that an offence consists of physical elements and fault elements.[1022] Section 4.1 of the Code states that a physical element of an offence may be:

(a) conduct; or

(b) a circumstance in which conduct occurs; or

(c) a result of conduct.

8.26 'Conduct' is defined as an act, an omission to perform an act or a state of affairs.[1023]

8.27 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, for example, the *Corporations Act* and

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1018 J Longo in A Hepworth, 'ASIC's Use of Civil Penalties Rises', *The Australian Financial Review*, 21 January 2002, 5.

1019 H Bird, 'The Problematic Nature of Civil Penalties in the Corporations Law' (1996) 14 *Company and Securities Law Journal* 405.

1020 Ibid, 411.

1021 V Goldwasser, 'CLERP 6 — Implications and Ramifications for the Regulation of Australian Financial Markets' (1999) 17(4)Ibid206, 212. This approach makes no distinction in principle between civil and criminal penalties, which is itself controversial – see chapter 3 (Types of Penalty).

1022 However, the law that creates the offence may provide that there is no fault element for one or more physical elements: *Criminal Code Act 1995* (Cth), Schedule s 3.1(2).

1023 Ibid, Schedule s 4.1(2)

Environment Protection Biodiversity Conservation Act, apply if conduct constituting a contravention or offence is 'substantially the same' as conduct constituting a subsequent offence or contravention. The rule against double jeopardy 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.[1024]

8.28 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.[1025]

Models of liability

8.29 The ALRC's research to date has determined that there are primarily four models of liability under federal legislation that foreground 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 *Environment Protection and Biodiversity Conservation Act* and the *Commonwealth Authorities and Companies Act*.

- Separate schemes of civil penalties and criminal liability, for example, under the *Trade Practices Act* Parts IV and VC.

- 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, and licence suspension and cancellation.

1024 *Pearce v The Queen* (1998) 194 CLR 610, 617.
1025 Ibid, 623.

Unclear relationship between civil and criminal penalties

8.30 One threshold issue is the need for clarity of the relationship between criminal liability and civil penalties.

8.31 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.[1026] 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.[1027]

8.32 A contravention of s 232(2) required evidence of lack of honesty by a director. 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.[1028]

8.33 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.[1029]

8.34 The ALRC's research has revealed that the regime of criminal and civil penalties under the *Superannuation Industry (Supervision) Act 1993* (Cth) is very

1026 H Bird, 'The Problematic Nature of Civil Penalties in the Corporations Law' (1996) 14 *Company and Securities Law Journal* 405, 414.

1027 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.

1028 Cited in ibid, 51.

1029 Cited in ibid, 51.

similar[1030] to the pre-CLERP *Corporations Law* model. Further, s 202 of the *Superannuation Industry (Supervision) Act 1993* is identical to the old s 1317FA of the *Corporations Law*. In the light of an ASIC officer's comments as to operation of the pre-CLERP provisions,[1031] the ALRC would be interested in receiving submissions in relation to how effective the *Superannuation Industry (Supervision) Act* provisions are in practice.

Parallel criminal liability and civil penalties for the same conduct

8.35 In some federal legislation, criminal liability and civil penalties attach to the same conduct. Under this model criminal liability is distinguished from civil penalty liability: criminal penalty, 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 do not require proof of any fault elements. This model of liability is becoming common. Examples appear in the *Corporations Act*, the *Environment Protection and Biodiversity Conservation Act* and the *Commonwealth Authorities and Companies Act*.

8.36 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 a civil penalty for *contravention*.[1032] If a court is satisfied that a person has contravened the provision, it must make a 'declaration of contravention'[1033] 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. With the additional fault elements of recklessness and intentional dishonesty, the same conduct is classified as an *offence* leading to a criminal penalty under s 184(1).

8.37 Similarly s 20 of the *Environment Protection and Biodiversity Conservation 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 5,000 penalty units for an individual or 50,000 penalty

1030 In this legislation, civil is distinguished from criminal liability by the words 'civil liability' in the contravention provision.

1031 See 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.

1032 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.

1033 *Corporations Act 2001* (Cth), s 1317E(1).

units for a body corporate. Section 20A(1) of the *Environment Protection and Biodiversity Conservation Act 1999* 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*.

Double jeopardy issues

8.38 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.

Crimes Act

8.39 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 administrative penalty.[1034] 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

8.40 Historically the common law has also provided some protection against double jeopardy.[1035] This protection has particularly 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:

1034 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.

1035 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 of Human Rights and Fundamental Freedoms*, ETS No 5, (entered into force on 3 September 1953) Article 4, Protocol 7(1).

- practices adopted by prosecutors;[1036]
- by the plea of *autrefois acquit* or *autrefois convict;*[1037]
- by a plea in bar, not strictly *autrefois acquit* or *autrefois convict;*[1038]
- by the adoption of various practices in the conduct of criminal trials designed to reduce the risks of double jeopardy;[1039]
- by the exercise of a judicial discretion to prevent an abuse of process;[1040]
- by courts ensuring that, in sentencing, double punishment for what is essentially the same conduct is avoided.[1041]

8.41 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 offense, 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.[1042]

1036 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.

1037 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).

1038 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).

1039 Kirby J sets out a number of protective rules at trial in *Pearce v The Queen* (1998) 194 CLR 610, 647–648.

1040 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.

1041 '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 impose 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.

1042 *Green v United States* 355 US 184 (1985), 187–188, cited in *Pearce v The Queen* (1998) 194 CLR 610, 614.

8.42 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'.[1043]

8.43 These rationales are no less applicable to parallel civil and criminal liability for the same conduct. Under this model regulators could impose more than one punishment for the same conduct.[1044] This would also necessitate bringing two proceedings in order to punish the same conduct twice.

8.44 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 punitive, in the absence of statutory protection common law double jeopardy protection should be extended to subsequent civil penalty proceedings for the same conduct.

8.45 To date Australian courts have not extended common law double jeopardy protection to civil penalties. 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 (see para 8.105–8.110);
- the current legislative protections are adequate to protect against double punishment (see para 8.73–8.79); or
- the operations of the Director of Public Prosecutions (DPP) ensure that the issue rarely arises (see para 8.116–8.124).

8.46 There has been some debate overseas as to whether a civil penalty can be regarded as a 'punishment' for the purposes of double jeopardy.[1045] In *United States v Halper* the US Supreme Court departed significantly from its traditional analysis of double jeopardy, as relating only to criminal prosecutions, and held that a civil penalty could amount to a prohibited 'second punishment' in certain cases.[1046] However, in the US Supreme Court's decision in *Hudson v United States* the Court, applying a 'statutory construction' test, overruled *Halper* and held that double jeopardy was not a bar to criminal prosecution after the imposition of civil

1043 *R v Hoar* (1981) 148 CLR 32, 38.

1044 For a discussion of 'punishment' in the context of civil penalties see chapter 3 — Types of Penalties.

1045 A related debate has occurred in relation to the purpose of civil penalties, outside of the context of double jeopardy, in Australian courts. There are conflicting judicial statements as to whether the purpose of civil penalties under the *Trade Practices Act* are deterrence or punishment. In *Trade Practices Commission v CSR Ltd* (1991) 13 ATPR ¶41–076, French J stated that the purpose of civil penalties in Part IV of the *Trade Practices Act* is not to punish: 52,152. However, in the earlier case of *Trade Practices Commission v Stihl Chain Saws (Aust) Pty Ltd* (1978) 2 ATPR ¶40–091, Smithers said of a s 76 penalty, that the 'penalty should constitute a real punishment proportionate to the deliberation with which the defendant contravened the provisions of the Act': 17,896.

1046 *United States v Halper* 490 US 435 (1989), 448–449.

penalties where Congress intended the civil penalties to be civil in nature and there was less than the 'clearest proof' to suggest that the civil penalties were so punitive in form and effect to render them criminal despite Congress' contrary intent.[1047]

8.47 As outlined in chapter 3 (Types of Penalties), one purpose of civil penalties is retributive and therefore they may be regarded as punishment. The imposition of a retributive penalty necessitates certain procedural protections to minimise the chance of a person being unfairly subjected to punishment,[1048] including protections against double punishment. If double punishment protections are reserved for criminal penalties, the severity of civil penalties is ignored. If civil penalties are retributive, and yet the criminal law double jeopardy protection does not apply, what other methods can be adopted to protect against double punishment?

Statutory bar to civil penalty proceedings after conviction

8.48 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*,[1049] the *Environment Protection and Biodiversity Conservation Act*[1050] and the *Commonwealth Authorities and Companies Act*.[1051]

8.49 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.[1052]

8.50 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 was made before the criminal conviction. Nor is there anything to stop a civil court making a

1047 *Hudson v United States* 522 US 93 (1997), 95–99.
1048 See chapter 3 (Types of Penalties).
1049 *Corporations Act*, s 1317M.
1050 *Environment Protection and Biodiversity Conservation Act*, s 486A.
1051 *Commonwealth Authorities and Companies Act*, Schedule 2 Item 9.
1052 See Proposal 8-2 below.

compensation order in proceedings taken before or after the criminal proceedings.[1053]

8.51 However, the ALRC is unaware if this provision, and others like it under the *Environment Protection and Biodiversity Conservation Act* and the *Commonwealth Authorities and Companies Act*, have the effect of forcing a regulator and the DPP to elect a criminal or civil path too early in the process.

8.52 Prior to the most recent CLERP reforms, s 1317FB (now repealed) of the *Corporations Law* 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 bar has now been removed and is discussed below at para 8.56–8.57.

Multiple proceedings: bars to proceedings

8.53 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.

8.54 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. The statutory bar to civil proceedings after a conviction is discussed above at para 8.48–8.52.

8.55 These bars to proceedings, to a certain extent, 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.[1054]

1053 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.

1054 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.

Criminal proceedings after civil proceedings

8.56 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 provision applied irrespective of the outcome of the civil penalty proceedings. Section 1317FB was intended to prevent evidence obtained in the course of the civil proceedings being used in subsequent criminal proceedings. However, it did not bar the commencement of criminal prosecutions under other legislation, for example, the *Crimes Act*.

8.57 Section 1317B also had the potential to act as a significant disincentive for the regulator to commence civil penalty proceedings by forcing the regulator to elect a criminal or a civil path too early in the process. It also presented the risk that, if civil proceedings had commenced, it was difficult to punish criminal behaviour appropriately.

8.58 Section 203 of the *Superannuation Industry (Supervision) Act* provides for a similar bar to the former s 1317B of the *Corporations Law*. This bar is necessary under the legislation as there is no specific protection against the use of evidence in criminal proceedings after civil penalty proceedings.[1055] However, the ALRC would be interested in receiving submissions addressing whether the bar under s 203 acts as a disincentive for the regulator to commence civil penalty proceedings.

8.59 Most federal legislation, that provides for both criminal liability and civil penalties for the same, or similar, conduct, no longer includes this bar.[1056] 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
- the person has been disqualified from managing a corporation under Part 2D.6.

1055 Specific protection against the use of evidence in criminal proceedings after civil proceedings is provided for in, for example, *Corporations Act*, s 1317Q. This provision is discussed below at para 8.73-8.79.

1056 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 8.66–8.72.

8.60 Similar protections are contained in s 486C of the *Environment Protection and Biodiversity Conservation Act* and Schedule 2 of the *Commonwealth Authorities and Companies Act*.

8.61 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 be made 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.

Overlapping criminal and civil proceedings

8.62 Most federal legislation that provides for criminal liability and civil penalties for the same conduct now 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.

8.63 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. Similar protections are provided under Schedule 2 of the *Commonwealth Authorities and Companies Act* and s 486B of the *Environment Protection and Biodiversity Conservation Act*.

8.64 This provision again appears to allow a regulator the flexibility to pursue the appropriate penalty for the prohibited conduct. Importantly, it does not require the regulator to elect a particular path too early in the investigation process. It also effectively protects 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.

8.65 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. Further,

s 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.[1057]

Use of information and evidence

Investigation powers

8.66 Commonwealth regulators have ever-widening investigative powers.[1058] A thorough examination of these investigative powers is beyond the scope of this Discussion Paper. However, the prospect of multiple proceedings for the same conduct raise a number of competing policy issues in relation to the use of information collected during investigations. The issues surround whether or not information gathered during investigations should be able to be used in both civil and criminal proceedings in relation to the same conduct.

8.67 On one hand, regulators should be given wide investigatory powers and the authority to use that information 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, a regulator should be restricted as to how it can use that information. It is in the interest of finality in litigation, as well as fairness to the regulated, that the use of information gathered by a regulator should be restricted. This is especially so where the 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 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.

8.68 A large body of law has developed around the use of information gathered during an investigation. For example, a regulator should give the subject of an investigation an opportunity to oppose the giving of information to a Royal Commission where the information would be the subject of public hearings.[1059] As a result of the decision in *Johns v Australian Securities Commission* a number of regulators have guidelines as to the proper use of confidential information gathered in inves-

1057 Butterworths, *Australian Corporations Law* (Looseleaf) Butterworths, para 13.2.0085.

1058 This was evident in the recent decision of the Full Federal Court in *Australian Competition & Consumer Commission v Daniels* (2001) 108 FCR 123. In this case it was held that a notice compelling disclosure of information to the ACCC under s 155 of the *Trade Practices Act 1974* (Cth) could not be refused by claiming legal professional privilege. Special leave to appeal to the High Court has been granted, and Woolworths and Coles Myer have been joined as parties. The appeal has not yet been heard.

1059 See *Johns v Australian Securities Commission* (1993) 178 CLR 408.

tigations.[1060] It has also been held that the ACCC cannot issue a s 155 notice to a person after it has instituted proceedings against that person.[1061]

Use of evidence in more than one proceeding

8.69 The use of evidence given in one proceeding in subsequent proceedings in relation to the same conduct raises a number of issues. In particular, multiple use of evidence could prevent finality in litigation and increase the likelihood of double punishment and vexation caused by multiple prosecutions.

8.70 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 — could 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.[1062] 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 9 (Privilege).

8.71 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 raises issues in relation to the distinction 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.[1063]

8.72 Further, evidence collected through a civil process is subject to less protection than the criminal process. The civil process is much more open as it utilises pleadings to clearly define the issues between the parties, and discovery and interrogatories 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 docu

1060 It is worth noting that some regulators such as ASIC have policies in place relating to the use of material gathered during investigations for criminal, civil or administrative proceedings. See, for example ASIC 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.

1061 *Brambles Holdings Ltd v Bannerman* (1980) 44 FLR 182.

1062 Butterworths, *Cross on Evidence* (Looseleaf) Butterworths, para 5240.

1063 'The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequence flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved': *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362. Also see *Evidence Act 1995*, s 140 and 141.

ments or answer interrogatories before trial. To allow evidence given in civil penalty proceedings (proven to a lower standard of proof and collected with lesser protections) to be used without control in subsequent criminal proceedings would be unjust.

Legislative protection

8.73 Many of these issues are addressed in legislation. The ALRC's research has revealed that, 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.[1064]

8.74 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.[1065]

8.75 However, 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. Further, there is no equivalent provision to protect against evidence given in proceedings for a disqualification order, a compensation order or a declaration of contravention.

8.76 Some have stated that s 1317Q is problematic.[1066] 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 pro-

1064 See Proposal 8-3 below.
1065 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*.
1066 Butterworths, *Australian Corporations Law* (Looseleaf) Butterworths, para 3.420.

> ceedings for a pecuniary penalty order, and in this respect the accused will be disadvantaged.[1067]

8.77 In many respects, these criticisms highlight the benefits of the provision. It would seem fair that evidence obtained by discovery and proven 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 resources and wide range of investigatory powers, should take care when gathering and using evidence. The operation of this provision 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 a later successful criminal proceeding.

8.78 It seems equally 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.

8.79 No matter how the balance is to be struck, there will always be the risk that complications will arise in determining whether evidence sought to be adduced in the subsequent criminal proceeding is the very evidence given in the earlier proceedings for a civil penalty.

Parallel proceedings

8.80 Interestingly, 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. Similar provisions remain under the *Superannuation Industry (Supervision) Act*. Sections 1317GF and 1317GG were required under the *Corporations Law* because of the statutory bars to proceedings under the pre-CLERP *Corporations Law*. As these bars remain under the *Superannuation Industry (Supervision) Act*, the mechanism has been retained in that legislation.

8.81 The ALRC would be interested in receiving submissions in relation to the efficacy of this mechanism.[1068] 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

1067 Ibid, para 3.420.
1068 See Question 8-4 below.

expenditure on the part of the regulator, but also the person subject to the proceedings. Further, because the mechanism relates to criminal proceedings followed by a possible civil penalty contravention order, the issues raised in relation to evidence may not arise.

Separate schemes of criminal liability and civil penalties

8.82 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 *Trade Practices Act*, cannot generally give rise to criminal liability.[1069]

8.83 Contravention of Part IV (restrictive trade practices) can only lead to civil, and not criminal penalties. Until recently, criminal liability only attached to contravention of Part V of the *Trade Practices Act* (consumer protection). 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*.[1070]

8.84 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. Further, the election to be made by the regulator to go down a criminal or civil path in relation to certain conduct is much clearer.

Double punishment

8.85 As noted above at para 8.39–8.47, 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.

8.86 It is conceivable that multiple civil penalties could be imposed for the same conduct under different provisions of Part IV of the *Trade Practices Act*. This prohibited conduct can attract fines as large as $10 million for corporations. There

1069 *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* as outlined above at 8.

1070 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.

fore, some protection against double punishment for the same conduct is provided under s 76(3) of the Act.[1071] The onus of proving that s 76(3) applies rests with the respondent.[1072] 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.

8.87 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). See Proposal 8-4 and Question 8-3 below.

Criminal liability and administrative penalties

Administrative penalties

8.88 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:

- on indictment of an offence that:
    - concerns the making, or participation in making, of decisions that affect the whole or a substantial part of the business of the corporation; or
    - concerns an act that has the capacity to affect significantly the corporation's financial standing; or
- of an offence that
    - is a contravention of this Act and is punishable by imprisonment for a period greater than 12 months; or

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1071 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).'

1072 *Ducret v Colourshot Pty Ltd* (1981) 35 ALR 503.

- involves dishonesty and is punishable by imprisonment for at least 3 months; or

- of an offence against the law of a foreign country that is punishable by imprisonment for a period greater than 12 months.

8.89 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.

8.90 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 it is not surprising that administrative penalties have rarely been considered as punishment for the purposes of double jeopardy in Australia.[1073] When the issue has been raised by parties to litigation, it has been quickly dismissed[1074] or the 'protective and managerial purpose of the legislation' has been held to exclude the operation of the protection.[1075]

8.91 However, it could be thought that the above example constitutes double punishment. This is answered by the fact that disqualification under the *Corporations Act*, and similar actions under other legislation, have the purpose not of retribution but protecting the corporation and the public.[1076]

Quasi-penalties

Social Security

8.92 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.*

1073 See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.
1074 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.
1075 See, for example, *Evans v Strachan* (1999) 167 ALR 159.
1076 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.

8.93 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? 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 perception of a suspension of benefits in many circumstances is that it is a form of punishment,[1077] clearly distinct from non-eligibility for benefits as a result of gaining increased income.

8.94 However, double jeopardy issues do not arise here. In addition to double jeopardy only applying to criminal offences, failure to notify leading to an administrative breach, and conduct leading to an offence under s 215 or 216, constitute separate conduct. Under s 558 of the *Social Security Act* an administrative breach can be imposed for a failure to do certain actions[1078] 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.

8.95 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.

8.96 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 they have 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.[1079]

8.97 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.[1080] 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-

1077 For example, see Australian Council of Social Services, *Breaching the Safety Net: The Harsh Impact of Social Security Penalties*, ACOSS Info 305 (2001), Australian Council of Social Services.

1078 For example, attend the Department, undergo a medical examination, provide a tax file number, or provide information.

1079 Welfare Rights Centre, *Consultation*, Brisbane, 15 December 2000.

1080 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.

incriminating admissions as well as reveal their defence, which they would not ordinarily have to do in criminal proceedings. See Question 8-5 below.

Licensing

8.98 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.[1081]

8.99 The justification for the action is normally a form of protection of the public and not retributive. Where the regulator aims to protect public safety (for example, CASA) or protect the market from fraudulent or incompetent operators (for example, ASIC), it may need to act quickly to prevent or mitigate damage. Some form of licensing is present in many of the statutes surveyed by the ALRC, and is central to the legislation concerning aged care, aviation, financial services and communications.

8.100 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.[1082]

8.101 In addition, section 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.

8.102 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 punishment.

8.103 A further consideration is how often this issue would arise in practice across licensing regimes. Professors Peter Grabosky and John Braithwaite note

1081 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 $2,000 and $10,000 in health insurance and navigation respectively. Breaches of licence conditions may also result in fines.

1082 The fault elements of the offence provision are determined by reference to the default elements under Chapter 2 of the *Criminal Code*.

generally that 'it is remarkable how rarely action is taken to remove or suspend licences in most cases'.[1083] The reason for this is acknowledged to be the severe consequences that can result from such action. Grabosky and Braithwaite also comment:

> On the other hand, licence suspension for a short period is not so catastrophic a sanction, and one wonders why, with the enormous proliferation of types of licences in Australia, this sanction is also used very rarely.[1084]

8.104 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. See chapter 18 (Setting Penalties).

Operational issues

Elections

8.105 Faced with a choice between criminal liability and non-criminal penalties, for the same conduct, what factors influence regulators to choose a particular enforcement response? Do regulators consider double punishment issues when electing more than one regulatory response to the one violation? Do regulators consider evidence issues when initiating multiple proceedings?

8.106 The ALRC has been told that, when there is a choice among criminal, civil and administrative penalties, it is often difficult to determine at what point a certain path should be elected.[1085] The ALRC is interested in how regulators choose an enforcement response, and at what point in the regulatory process regulators are required to elect what type of liability they will pursue. For further discussion on choice of response see discussion in chapter 6 (Regulators and the DPP) and chapter 7 (Fairness).

8.107 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 be-

1083 P Grabosky and J Braithwaite, *Of Manners Gentle; Enforcement Strategies of Australian Business Regulatory Agencies* (1986) Oxford University Press, Melbourne, 187.
1084 Ibid, 187.
1085 Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 20 February 2001.

tween effort, time, money and results will discourage enforcement.[1086] One ASIC enforcement officer's comments reflect these concerns:

> 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 four to five years after their misconduct. Having to crank up a different kind of action, resources, more delay, so in that scenario then the jury acquits. [sic] What are you supposed to do then? Bring another application and two years can go by before the judicial system deals with it, and in the meantime there are other matters to deal with. So I don't want to fetter having the power and discretion, but those other consideration would weigh heavily I think.[1087]

8.108 Where legislation provides for parallel criminal liability and civil penalties for the same conduct, is it likely that a resource- and time-stretched regulator would commence both criminal and civil penalty proceedings?

8.109 Crucial factors impacting on the choice of proceedings include the strength of the evidence of a breach and the likelihood of enforcement success.[1088] 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 which attracts a high level of public interest may be subject to a greater degree of political and public pressure in their enforcement decisions.[1089]

8.110 The ALRC's research has also indicated that, where legislation allows a choice between criminal and non-criminal enforcement, regulators usually seek criminal penalties as a 'last resort' for the most serious offences. 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.

Regulatory overlap

8.111 Occasionally overlap will exist across different statutory instruments administered by different regulators. For example, there is some duplication in the consumer protection area administered by both ASIC and ACCC as both the *Trade Practices Act* and *Corporations Act* have provisions relating to 'misleading and de-

1086 R Tomasic and B Pentony, 'The Prosecution of Insider Trading; Obstacles to Enforcement' (1989) 22 *Australian & New Zealand Journal of Criminology* 65, 73.

1087 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, 53.

1088 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.

1089 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.

ceptive conduct'.[1090] This conflict is effectively guarded against as ASIC alone is responsible for the financial services industry.[1091]

8.112 The ALRC's research of federal legislation did not reveal any areas of regulation where there was significant duplication of regulatory effort. Further, the ALRC did not find that the same conduct attracted more than one civil penalty under more than one statutory instrument. Obviously, if this were to occur, double punishment issues would arise. Whereas s 4C of the *Crimes Act* guards against more than one criminal penalty being imposed for the same conduct across more than one statutory instrument, there is no equivalent protection afforded to civil penalties.

Guidelines

8.113 In chapters 6 (Regulators and the DPP) and 7 (Fairness) the ALRC has proposed that regulators develop and publish guidelines to structure their response to non-criminal contraventions and their relationship with criminal referrals to the DPP. When 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.

8.114 The US Environmental Protection Agency (EPA) has a *Parallel Proceedings Policy*.[1092] 'Parallel' in this context means simultaneous or successive civil, administrative and criminal proceedings, against the same or related parties, dealing with the same related course of conduct. It 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.

8.115 A survey of Australian regulators' websites and publicly available information reveals that regulators do not have publicly available policies on double punishment issues or the use of evidence in multiple proceedings for the same conduct. There are, however, a number of arrangements, strategies, and operational issues that may address many of these concerns.

1090 There is also some overlap with state fair trading laws.

1091 *Trade Practices Act*, s 51AF. See, for example, *Application of NRMA Limited and NRMA Insurance Limited* [2000] NSWSC 408, paras 125–131.

1092 See 'Revised EPA Guidance for Parallel Proceedings', US Environmental Protection Agency, <http://es.epa.gov/oeca/osre/890621-1.html>, 4 March 2002.

Prosecution Policy of the Commonwealth

8.116 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.[1093] 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).[1094] For further discussion of the Prosecution Policy see chapter 6 (Regulators and the DPP).

Administrative arrangements with the DPP and memorandums of understanding

8.117 Many regulators have administrative arrangements with the DPP including ASIC, the ATO, Customs and Centrelink. Each of these arrangements outline 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. For example, following the first assessment stage

> the ASC will inform the DPP in writing of the details of the investigation and the future anticipated direction of the investigation (ie, civil or criminal or both) … Before the ASC makes an application for a civil penalty order, the ASC will consult with the DPP.

8.118 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 co-ordinated approach to enforcement, they may also act as some protection of the regulated from double punishment.

8.119 Most regulators now have memorandums of understanding (MOUs) with other agencies, both nationally and internationally. 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.

8.120 At the national level, for example, ASIC and the ATO each have an MOU with the DPP as well as an MOU with each other. ACCC has MOUs with a number

1093 Regulatory agencies typically lack independent authority to pursue criminal prosecutions, although the ATO has powers to prosecute certain summary offences.

1094 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*, Commonwealth Director of Public Prosecutions, <www.cdpp.gov.au/cdpp/>, 16 November 2001.

of agencies including ASIC, APRA and the Reserve Bank to share information, encourage cooperative enforcement and avoid the duplication of effort in enforcement. The ACCC also has cross membership between agencies with ACCC Commissioners sitting on various agency boards.[1095] The Australian Compliance Professionals Association agrees that cooperation between regulators is important, but warns that regulators need to be sensitive to privacy issues in relation to the sharing and use of information.[1096]

8.121 Prosecuting and regulatory agencies need to communicate and work together when bringing prosecutions or imposing civil penalties. 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.[1097]

Overarching Principles for Selecting Cases for Investigation and Administrative, Civil and Criminal Sanctions

8.122 In 1996, the Heads of Commonwealth Operational Law Enforcement Agencies, which include major Australian regulators,[1098] adopted *Overarching Principles for Selecting Cases for Investigation and Administrative, Civil and Criminal Sanctions*.[1099] The Principles are inter-agency guidelines which 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. The extent to which the principles have had an impact on penalty decisions is unclear. Clause 1 and 2 of the Principles state:

> **1. Each agency will act coherently, consistently and objectively**
>
> Each HOCOLEA agency will administer and enforce relevant Commonwealth legislation and have recourse to administrative, civil and criminal sanctions in a coherent, consistent and objective manner.
>
> **2. Each agency will have a compliance strategy**
>
> Each HOCOLEA agency will have a compliance strategy which will include an enforcement strategy. The strategies will encourage compliance with the laws the agency enforces by making full use of all available and appropriate means, including:

1095 Australian Competition & Consumer Commission, *Consultation*, Canberra, 5 June 2000.
1096 Australian Compliance Professionals Association, *Consultation*, Brisbane, 14 December 2000.
1097 Attorney-General's Department, *Report of the Review of Commonwealth Enforcement Arrangements*, (1994), AGPS, Canberra, 226.
1098 These included ACCC, Australian Customs Service, the Attorney-General's Department, ASIC, the Australian Taxation Office, AUSTRAC, DIMIA, DPP, and NCA.
1099 Heads of Commonwealth Operational Law Enforcement Agencies, *Overarching Principles for Selecting Cases for Investigation and Administrative, Civil and Criminal Sanctions*, (1996) HOCOLEA.

- applying remedies including administrative sanctions;
- strategic use of available sanctions (administrative, civil and criminal) for example, prosecutions that send a message to a selected group;
- civil action;
- prosecution; and
- where appropriate, make proposals to amend Commonwealth law.

8.123 The strategy is to be in writing and distributed throughout the agency. The strategy also provides:

> The DPP will prosecute on an appropriate charge all cases of serious crime where it is in the public interest to do so, as provided by the *Prosecution Policy of the Commonwealth*. Each agency's enforcement strategy will provide that the agency will support and facilitate this policy and practice and outline how the agency will do so preferably in a memorandum of understanding with the DPP.[1100]

8.124 These strategies are currently not publicly available. It is not known if they address double jeopardy issues and other issues relating to multiple proceedings. It is also not known to what extent these strategies are available to a regulator's staff.

Proposals and questions

Proposal 8-1. When the same physical elements can attract both a civil penalty and criminal liability:

(a) the legislation must draw a clear distinction between civil penalty provisions and criminal liability provisions;

(b) the physical and mental elements of both the contravention attracting a civil penalty and the criminal offence should be clearly stated in the legislation.

Question 8-1. Are there other effective ways of distinguishing between criminal liability and civil penalties?

Question 8-2. Has the *Criminal Code Act 1995* assisted in distinguishing criminal from civil penalty provisions?

1100 Ibid, cl 8.

Proposal 8-2. Legislation that provides for parallel criminal liability and civil penalties for 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 an 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 an 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 offence, the civil penalty proceedings may be resumed.

Proposal 8-3, Legislation that provides for parallel criminal liability and civil penalties 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:

(a) if the individual gave the evidence or produced the documents in civil penalty proceedings;

(b) and the conduct alleged to constitute the offence is the same or substantially the same as the conduct alleged to constitute the contravention.

Proposal 8-4. 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.

Question 8-3. Are there any areas of federal regulation where the same or substantially the same conduct attracts more than one civil penalty under different statutory instruments? If so, should legislation contain protection against any double punishment consequences that flow from this duplication?

Question 8-4. Should the law permit courts, either generally or in specified cases, to make an alternative finding that the person is not guilty of an offence but guilty of a civil penalty contravention (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?

Question 8-5. Is there adequate protection against the use of evidence given in administrative proceedings in subsequent criminal or civil penalty proceedings?

Proposal 8-5. Regulators should develop and publish guidelines in relation to parallel criminal and civil penalty proceedings that address issues of choice of proceedings, double punishment and evidence when legislation provides for criminal liability and civil penalties for the same or substantially the same conduct.

9. Privilege

Contents

Privilege against self-incrimination

Common law privilege against self-incrimination

9.1 The common law privilege against self-incrimination entitles a person to refuse to answer any question, or produce any document, if the answer would tend to incriminate that person.[1101] 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).

1101 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 335.

9.2 Most caselaw deals with the privilege against self-incrimination in criminal matters, and to a lesser extent the privilege against self-exposure to a penalty. It is not yet settled whether each of the privileges is a distinct and separate principle of the common law, but the prevailing view is that the two most common types of the privilege form part of 'one fundamental principle'.[1102] The privilege against self-exposure to a penalty developed by analogy to the privilege against self-incrimination so that it is arguably a 'different aspect or ground' of the same privilege.[1103]

9.3 The privilege applies in court in civil and criminal cases as a rule of evidence, but it also applies outside court as a substantive doctrine applicable wherever information may be compulsorily acquired, including by administrative agencies.[1104] The privilege applies only to natural persons and not to corporations,[1105] and it protects only against self-incrimination and cannot be invoked to shield others from incrimination.[1106]

9.4 There is an established procedure for claiming the privilege at common law. The onus is on the claimant to establish that there are reasonable grounds for the claim. A person must claim the privilege before answering the question or providing the document,[1107] otherwise the privilege is waived. Privilege must be claimed in relation to specific requests rather than as a 'blanket' claim.[1108] The information must tend to incriminate, meaning the risk of prosecution is 'real and appreciable, and not of imaginary or insubstantial character'.[1109] The court is not entitled to consider other interests and deny the privilege once the claim has been made out.[1110] Negative inferences cannot be drawn from a claim to privilege.[1111]

1102 It is argued that the two privileges are now 'often subsumed under a single statement of the law': *The Laws of Australia*, LBC, 16.7 at [54]; Burchett J in *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96, 111: 'many statements of principle in the books assimilate the two privileges into one rule'.

1103 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 504, citing *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 336; 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, 365.

1104 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *Sorby v Commonwealth* (1983) 152 CLR 281; *Comptroller-General of Customs v Disciplinary Appeal Committee* (1992) 35 FCR 466.

1105 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477; *Bridal Fashions Pty Ltd v Comptroller-General of Customs* (1996) 140 ALR 681 following *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96.

1106 *Controlled Consultants v Corporate Affairs Commission* (1985) 156 CLR 385.

1107 *R v Owen* [1951] VLR 393.

1108 *Gamble v Jackson* [1983] 2 VR 334; *R v Holmes* (Unreported, Supreme Court of Tasmania, Cox CJ, 17 December 1996); *Price v McCabe; Ex parte McCabe* (1984) 55 ALR 397.

1109 *Trade Practices Commission v Arnotts* (1990) 93 ALR 638; *Controlled Consultants v Corporate Affairs Commission* (1985) 156 CLR 385; *Price v McCabe; Ex parte McCabe* (1984) 55 ALR 397.

1110 *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 547.

1111 Australian Law Reform Commission, *Evidence*, ALRC 26 (1985), Australian Law Reform Commission, Sydney, para 877.

Types of evidence privileged

9.5 While the privilege against self-incrimination originally applied to testimonial evidence, it has been extended to documentary evidence.[1112] However, a distinction is drawn between protecting people from testifying to their own guilt and producing existing documents that speak for themselves.[1113]

9.6 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.

Application to corporations

9.7 Until recently it was assumed that the privilege applied to corporations at common law,[1114] but since the decisions in *Environment Protection Authority v Caltex*[1115] and *Trade Practices Commission v Abbco Iceworks*,[1116] confirmed by s 128 and 187 of the *Evidence Act 1995* (Cth), the privilege has been unavailable 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.[1117]

9.8 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'.[1118] 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'.[1119]

9.9 One policy issue surrounding the application of the privilege to corporations involves weighing up effective corporate regulation against damage to the adversarial principle.[1120] On one hand, the nature of corporations, the complexity of

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1112 See, for example, *Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd* (1999) 163 ALR 465.

1113 *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96, 540; *Sorby v Commonwealth* (1983) 152 CLR 281.

1114 *R v Associated Northern Collieries* (1910) 11 CLR 738 and *Refrigerated Express Lines v Australian Meat and Livestock Corporation* (1979) 42 FLR 204.

1115 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

1116 *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96.

1117 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.

1118 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 500.

1119 Ibid, 500.

1120 *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96, 535.

corporate structures, and the centrality of documentary records to business activity would make effective regulation (particularly detection of unlawful behaviour) difficult if corporations were protected by the privilege.[1121]

9.10 On the other hand, the adversarial system of justice requires that a party must be found guilty on the evidence and not forced to do the work of the accuser.[1122]

Application of the privilege to company directors

9.11 Company directors may claim the privilege in their own right where the disclosure would incriminate them personally.[1123] However, it has been argued that denying the privilege to corporations may adversely affect the privilege for directors personally.[1124] For example, 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.[1125]

9.12 In *Spedley Securities v Bond Brewing*,[1126] Cole J urged the legislature to consider removing the protection against self-incrimination for public company officers. However, 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'.[1127]

9.13 Clearly, the artificiality of the distinction between company officers and the corporate legal entity is 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.

1121 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 502 (McHugh).

1122 *Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd* (1999) 163 ALR 465.

1123 *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.

1124 Puls argues that the legal divide between directors and corporations is artificial: 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.

1125 Ibid, 369. *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 493–496.

1126 *Spedley Securities Ltd (in liq) v Bond Brewing Investments Pty Ltd* (1991) 4 ACSR 249.

1127 *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96, 116.

The privilege against self-incrimination under the *Evidence Act*

9.14 Section 128 of the *Evidence Act* 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.[1128] 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).[1129] 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 either.

Application of the privilege out of court

9.15 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. Commonwealth regulatory bodies now have extensive information-gathering and investigatory powers. In recent decades, federal legislatures have increasingly conferred similar powers on non-judicial tribunals, regulators and investigators to acquire information.

9.16 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.[1130] 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.[1131]

1128 Clause 3 of Part 2 of the Dictionary in the *Evidence Act* defines a 'civil penalty'.

1129 See discussion of use and derivative use immunities below at para 9.45–9.59.

1130 *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.

1131 *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

9.17 The availability of the privilege in non-curial situations is subject only to legislative removal or modification.[1132] As Murphy J stated, the privilege 'unless otherwise excluded … attaches to every statutory power (judicial or otherwise) to require persons to supply information'.[1133] Professor Robin Woellner notes that in recent years 'the scope of the privilege … against self-incrimination … [has] been severely constrained by both statutory provisions and judicial decisions'.[1134]

9.18 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.

Legislative approaches to self-incrimination

9.19 In relation to the investigative powers of federal regulators, a common approach has been to expressly remove 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.[1135] Removal 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.

9.20 On the other hand, the removal 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.

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.

1132 *Sorby v Commonwealth* (1983) 152 CLR 281.

1133 Ibid, 311.

1134 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.

1135 B Bolton, 'Compelling Production of Documents to the ASC' (1995) *Queensland Law Society Journal* 221, 238.

The privilege against self-incrimination in federal statutes

9.21 In the legislation surveyed by the ALRC, the common law privilege may be:

- expressly restated in similar or identical terms;
- impliedly retained where legislation is silent on the privilege;
- absolutely removed, expressly or by implication; or
- partially removed or modified, expressly or by implication.

Availability of privilege by categories of legislation

9.22 In the legislation analysed by the ALRC, some trends are evident by category of legislation. Tax legislation and the *Social Security Act 1991* (Cth) are silent on the application of the privilege against self-incrimination. However, the information-gathering powers in taxation legislation remove the privilege by implication in some circumstances. In *Stergis v Boucher*,[1136] it was held that the privilege against self-incrimination was removed by s 264 of the *Income Tax Assessment Act 1936* (Cth) (which gives the Commissioner power to obtain information and evidence). In the absence of express words removing it, the privilege may still have limited application in respect of s 263 of the *Income Tax Assessment Act* (which governs the Commissioner's access to documents).

9.23 In all border control and environment legislation other than the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), the privilege against self-incrimination is excluded in specified circumstances. The *EPBC Act* is silent on the issue.

9.24 In the majority of licensing regimes, the privilege against self-incrimination is not available. The exceptions are broadcasting (where it is expressly stated to apply)[1137] and fisheries and navigation (where legislation is silent on the matter). In those licensing regimes that have excluded the privilege, it has either been completely excluded (for example, civil aviation)[1138] or excluded in specific circumstances (for example, aged care, health, insurance and telecommunications). No clear principles emerge from the variety of licensing regimes. Under the *Aged Care Act 1997* (Cth),[1139] and in relation to insurers under the *Insurance*

1136 *Stergis v Boucher* (1989) 20 ATR 591.
1137 *Broadcasting Services Act 1992* (Cth), s 202.
1138 *Civil Aviation Act 1988* (Cth), s 32AJ.
1139 *Aged Care Act 1997* (Cth), s 93-2.

Contracts Act 1984 (Cth),[1140] the privilege applies when an authorised officer requires information, whereas under the health and telecommunications legislation the privilege does not apply when information is required by the Director (health)[1141] or the ACA (telecommunications).[1142] Under the *Health Insurance Act 1973* (Cth) the privilege does not apply for witnesses before the Professional Services Review Committee[1143] but does apply for witnesses before the Medicare Participation Review Committee.[1144]

9.25 The privilege against self-incrimination is generally unavailable in marketplace legislation. Under s 68 of the *ASIC Act*, the privilege does not apply where a person is required to provide information, sign a record or produce a book in relation to ASIC investigations and information gathering. The privilege against self-incrimination is unavailable in trade practices cases under s 155 of the *Trade Practices Act 1974* (Cth).

Express restatement of the privilege

9.26 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.[1145]

9.27 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.

9.28 Secondly, different provisions refer to the privilege in terms of protecting against disclosures that 'may', 'might', 'will' or 'would' incriminate a person or

1140 *Insurance Contracts Act 1984* (Cth), s 11C and 11D.
1141 *Health Insurance Act 1973* (Cth), s 89B and 106ZPQ.
1142 *Telecommunications Act 1997* (Cth), s 524.
1143 *Health Insurance Act 1973* (Cth), s 105A.
1144 Ibid, s 124M.
1145 *Aged Care Act 1997* (Cth), s 927(3) and 932; *Broadcasting Services Act 1992* (Cth), s 202(3); *Customs Act 1901* (Cth), s 67ES(5) (note that s 67ES(5) differs to proposed s 243SC (scheduled to commence 1 July 2002), which preserves the privilege against self-incrimination generally); *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).

expose them to a penalty. 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*.[1146] O'Loughlin J stated:

> Both '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.[1147]

9.29 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,[1148] while there would be a 'far greater compulsion' to apply the privilege where disclosure 'will' or 'would' tend to incriminate.[1149]

9.30 What remains unclear is the degree to which such gradations were intentionally established by the legislature or simply reflect inconsistent drafting. At common law, there are no easily apparent gradations of privilege. Judicial decisions seem to use all four terms interchangeably[1150] and few, if any, cases not involving statutory provisions have turned on the issue of the precise definition of these terms at common law. In *F v National Crime Authority*, O'Loughlin J rejected the submission that the common law test was closer to 'will' or 'would' tend to incriminate than 'may' or 'might' tend to incriminate, noting that authorities do not generally distinguish between the terms.[1151] In conclusion, O'Loughlin J held:

> [T]he statutory use of the phrase 'might tend to incriminate' does not do any violence to the common law test. The most that could be said is that it marginally assists the witness who might be concerned about the risk of self-incrimination. But a court must still see for itself that there is a reasonable ground to fear that the answer might — not may — have the stated effect.[1152]

9.31 The third difference in the content of statutory formulations of privilege is that 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.[1153] It

1146 *F v National Crime Authority* (1998) 83 FCR 99.
1147 Ibid, 110.
1148 Ibid, 110.
1149 Ibid, 110.
1150 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380.
1151 *F v National Crime Authority* (1998) 83 FCR 99, 107.
1152 Ibid, 111.
1153 *Acts Interpretation Act 1901* (Cth), s 15AA.

may be that the 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.

9.32 Further, at least one statute, the *Life Insurance Act 1995* (Cth), whilst removing the privilege, renders information so obtained inadmissible in both 'a criminal proceeding' and 'a proceeding for the imposition of a liability'.[1154] The concept of a 'liability' extends much further than the usual privileges against self-incrimination and self-exposure to a penalty.[1155] A liability may be imposed through private litigation or pursuant to private contractual arrangements, whereas penalties broadly defined refer to impositions by government. Statutory protection against proceedings for the imposition of a liability therefore significantly extends the accepted common law application of the privilege.

9.33 Any statutory extension to privilege liabilities would be particularly significant given the decision of *Australian Securities Commission v Kippe*.[1156] In that case, the Full 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.[1157] 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

9.34 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.[1158] 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.[1159]

1154 *Life Insurance Act 1995* (Cth), s 148.
1155 'Liability' is not defined in the *Life Insurance Act*.
1156 *Australian Securities Commission v Kippe* (1996) 67 FCR 499.
1157 R Schaffer, 'When is a Penalty Not a Penalty?' (1996) 31(8) *Australian Lawyer* 7, 7.
1158 *Sorby v Commonwealth* (1983) 152 CLR 281, 289.
1159 Ibid, 309; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 343.

9.35 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.[1160]

9.36 This confusion is increased in legislation where some provisions expressly remove 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

9.37 Increasingly the privilege has been completely removed by statute[1161] in order to assist regulators and administrators with enforcement. Statutes may remove the privilege expressly or by 'necessary implication'.[1162] There must be clear words or a clear implication to exclude the privilege,[1163] and implied removal requires a clear and plain intention of the legislature.[1164]

9.38 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'.[1165] Mason CJ required a similarly high threshold in *Hamilton v Oades*: 'the privilege is not lightly removed, and the

1160 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.

1161 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.

1162 This requires a 'clear and plain intention' of Parliament: *Sorby v Commonwealth* (1983) 152 CLR 281.

1163 *Re Sneddon; Ex parte Grinham* (1961) 61 SR 862, 874–875.

1164 *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.

1165 *Sorby v Commonwealth* (1983) 152 CLR 281, 311.

phrase "necessary implication" imports a high degree of certainty as to legislative intention'.[1166]

9.39 The courts will consider a number of factors when deciding whether the privilege has been removed 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'.[1167] For example:

> The privilege will be impliedly excluded if the obligation to answer, provide information or produce documents is expressed in general terms and it appears from the character of and purpose of the provision that the obligation was not intended to be subject to any qualification. This is so when the object of imposing the obligation is to ensure the full investigation in the public interest of matters involving the possible commission of offences which lie peculiarly within the knowledge of persons who cannot reasonably be expected to make their knowledge available otherwise than under a statutory obligation. In such cases it will be so, notwithstanding that the answers given may be used in subsequent legal proceedings.[1168]

9.40 The privilege may be excluded where claiming it would defeat the statutory purpose: '[t]o read down the wide terms of the section so as to allow a danger of self-incrimination as a valid ground for refusing to answer a question would render the provision relatively valueless in the very cases which call most loudly for investigation'.[1169] 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.[1170]

9.41 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 remove the privilege may be more readily implied.[1171] 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.[1172]

9.42 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 ex-

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1166 *Hamilton v Oades* (1989) 166 CLR 486, 495.
1167 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 341.
1168 Ibid, 341.
1169 *Mortimer v Brown* (1970) 122 CLR 493, 496.
1170 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 341.
1171 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.
1172 *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.

press 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'.[1173] There are, however, contrary authorities on this point.[1174]

9.43 The courts have implied a statutory intention to remove the privilege in provisions which:

- impose an unqualified obligation to answer;[1175]
- enable an agency to determine if an offence has been committed or a legislative provision contravened;[1176]
- provide for the answering of questions, the provision of information and the production of documents;[1177]
- provide for grounds for failing to comply, such as reasonable excuse provisions;[1178]
- establish a general or limited use immunity;[1179] and
- relate to investigations leading to the imposition of penalties or forfeiture.[1180]

9.44 It would seem that the vast majority of statutory information-gathering powers would meet one or more of these criteria.

1173 *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).

1174 *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).

1175 *Sorby v Commonwealth* (1983) 152 CLR 281, 311; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 341 and 343; *National Companies and Securities Commission v Sim* [1987] 2 VR 421, 425. In *Sorby v Commonwealth* (1983) 152 CLR 281, the High Court held that the privilege was removed when testifying to a Royal Commission under the *Royal Commissions Act 1902* (Cth) — s 3 provides that a person summoned before a Royal Commission is required to answer all questions put to them; s 6 provides that self-incrimination is not a ground on which to refuse to answer a question.

1176 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 341.

1177 Ibid, 341.

1178 *Controlled Consultants v Corporate Affairs Commission* (1985) 156 CLR 385, 392 and 396; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 343.

1179 *Sorby v Commonwealth* (1983) 152 CLR 281, 300 and 311; *Price v McCabe; Ex parte McCabe* (1984) 55 ALR 397, 37.

1180 *Price v McCabe; Ex parte McCabe* (1984) 55 ALR 397, 34.

Partial removal of the privilege and subsequent immunity

9.45 Sometimes statutes remove the privilege but limit the subsequent use of information. There are three types of immunity potentially available:[1181]

(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); 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.[1182]

9.46 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'.[1183] 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.[1184]

9.47 With regard to immunity against use of the evidence in subsequent proceedings, the ALRC's analysis reveals that legislation may provide that evidence obtained compulsorily is:

- inadmissible solely in criminal proceedings, so that exposure to civil (and possibly administrative) penalty proceedings will remain;[1185]

1181 P Sofronoff, 'Derivative Use Immunity and the Investigation of Corporate Wrongdoing' (1994) 10 *Queensland University of Technology Law Journal* 122.

1182 An example of an express derivative use immunity is s 243SC(1)(d) of the *Customs Act* (introduced by the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* (Cth) and scheduled to commence on 1 July 2002), 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'.

1183 S Ansell, 'Self-Incrimination Privilege in Australia: The United States Influence' (1994) 24 *Queensland Law Society Journal* 545, 548.

1184 M Allars, 'Reputation, Power and Fairness: A Review of the Impact of Judicial Review upon Investigative Tribunals' (1996) 24 *Federal Law Review* 235, 258.

1185 *Civil Aviation Act 1988* (Cth), s 32AJ(3); *Disability Services Act 1986* (Cth), s 27(4); *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 112(5); *Health and Other Services (Compensation) Act 1995* (Cth), s 26(5), 44(4); *Health Insurance Act 1973* (Cth), s 106E(3); *Health Insurance Commission Act 1973* (Cth), s 8S(2); *Insurance Acquisitions and Takeovers Act 1991* (Cth), s 73(9); *Insurance Act 1973* (Cth), s 56(2); *Migration Act 1958* (Cth), s 24, 308(3); *Proceeds of Crime Act 1987* (Cth), s 66(13); *Superannuation Act 1990* (Cth), s 163A(5); *Trade Practices Act 1974* (Cth), s 159(2), 155(7), 155B(4).

- inadmissible in both criminal and any or all other penalty proceedings;[1186]
- inadmissible in both criminal and certain specified penalty proceedings (but not penalty proceedings generally);[1187]
- inadmissible in both criminal and broader 'liability' proceedings;[1188]
- inadmissible in 'any proceedings';[1189] or
- inadmissible in 'any proceedings for an offence against a law' of the Commonwealth, a Territory or a State, or in any 'disciplinary proceedings', subject to an immunity certification procedure.[1190]

9.48 One statute provides, in wide terms, that a person who discloses information or produces records under statutory compulsion 'is not liable to anyone else in respect of the disclosure or production'.[1191] At least two statutes establish use immunity in criminal proceedings against corporations other than criminal proceedings established under the respective Acts.[1192]

9.49 At least one use immunity provision still enables the use of incriminating evidence in certain penalty proceedings specified in the legislation. Under the *Customs Act 1901* (Cth), a person is liable to conviction or a pecuniary penalty for knowingly or recklessly obtaining or retaining diesel fuel rebate to which the person is not entitled.[1193] Information compulsorily obtained can be used in a substantive criminal proceeding notwithstanding the existence of a general statutory use immunity. This example differs from the usual exceptions to statutory use immunity, which are more procedural in character.

9.50 Different types of regulatory legislation take different approaches to immunity. There are no provisions in tax legislation guaranteeing use immunity in criminal proceedings, although the courts have implied use immunity.[1194] In aged care, broadcasting, navigation and fisheries legislation there are no provisions relating to the admissibility of evidence in different proceedings. In health, insurance and civil aviation legislation, any self-incriminating evidence obtained by virtue of the removal of the privilege is inadmissible in criminal proceedings. In telecom-

1186 *Australian Securities and Investments Commission Act 2001* (Cth), s 68(3); *Banking Act 1959* (Cth), s 14A(4); *Customs Act 1901* (Cth), s 183Q, 214B(6); *Superannuation Industry (Supervision) Act 1993* (Cth), s 287(2), 290.
1187 *Telecommunications Act 1997* (Cth), s 524(2); *Trade Practices Act 1974* (Cth), s 151BUF(2).
1188 *Life Insurance Act 1995* (Cth), s 148(2).
1189 *Migration Act 1958* (Cth), s 257(3).
1190 *Privacy Act 1988* (Cth), s 66(5) and (8).
1191 *Life Insurance Act 1995* (Cth), s 247.
1192 *Superannuation Act 1990* (Cth), s 163A(5); *Trade Practices Act 1974* (Cth), s 155(7).
1193 *Customs Act 1901* (Cth), s 164AC(15).
1194 *Kirk v Commissioner of Australian Federal Police* (1988) 19 FCR 530.

telecommunications legislation, the incriminating information is inadmissible in criminal proceedings or procedures for the recovery of a pecuniary penalty.

9.51 Under the *Corporations Law*, where the privilege did not apply, the incriminating evidence was inadmissible in other proceedings.[1195] The *Corporations Law* was amended in the early 1990s so that the protection for a person against the use of self-incriminating evidence by the regulator was reduced from derivative use immunity to direct use immunity. A report on this amendment recommended against reverting back to derivative use immunity.[1196]

Claiming use immunity

9.52 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.

9.53 Less commonly, statutes specify the procedures for claiming immunity in greater detail. Under the *Insurance Act 1973* (Cth), use immunity applies where a disclosure would tend to incriminate a person *and* the person 'informs the authorised person or the inspector before answering the question'.[1197] The person is expressly required to claim that a disclosure would tend to incriminate, in the same way that privilege itself must be claimed at common law. A similar claim procedure operates under the *Superannuation Industry (Supervision) Act 1993* (Cth). After the person claims that the disclosure might tend to incriminate, the legislation then requires that the disclosure might also 'in fact' tend to incriminate the person. There is both a subjective element (the person's claim) and an objective element (the factual tendency), although it is not specified who is administratively responsible for determining the factual tendency.

9.54 Some statutes explicitly permit a person to claim use immunity provided the claim is made before the incriminating disclosure is made.[1198] A failure to claim the privilege prior to disclosure 'means that the protection against subsequent use is irretrievably lost'.[1199] Woellner suggests that the requirement to claim the privi-

1195 *Controlled Consultants v Corporate Affairs Commission* (1985) 156 CLR 385.
1196 J Kluver, 'ASC Investigations and Enforcement: Issues and Initiatives' (1992) 15(1) *University of New South Wales Law Journal* 31.
1197 *Insurance Act 1973* (Cth), s 56.
1198 *Australian Securities and Investments Commission Act 2001* (Cth), s 68.
1199 Ibid, s 68.

lege in advance of each answer 'can result in the "Gilbertian farce" of endless claims of "privilege" before answering even the most innocuous questions',[1200] yet this is identical to the procedure required at common law.

9.55 Most statutes containing self-incrimination provisions do not expressly require privilege to be claimed before making incriminating disclosures in order to attract use immunity. On one interpretation, a person who discloses incriminating information without first claiming privilege might subsequently be able to benefit from use immunity, which arguably extends to all information obtained in compliance with the relevant statutory provision. On another interpretation, a failure to claim privilege at the outset might be deemed to be a waiver of privilege, and thus of any subsequent use immunity. The latter view appears to accord better with common law principles in this regard.

9.56 The most complex procedure for claiming use immunity exists under the *Privacy Act 1988* (Cth), which establishes an immunity certificate procedure similar to that under the *Evidence Act*. An individual is permitted to claim the privilege against self-incrimination as a reasonable excuse for not complying with a requirement to disclose information.[1201] But the privilege is not available where giving the information might tend to prove guilt of an offence against, or liability to forfeiture or a penalty under, a Commonwealth or territory law if the DPP has given the person a written undertaking stating that any incriminating evidence, or derivative evidence, disclosed by the person will not be used in evidence in 'any proceedings' for an offence against a Commonwealth or Territory law, or in any disciplinary proceedings, other than proceedings in respect of the falsity of evidence. The undertaking must also state that, 'in the opinion of the DPP, there are special reasons why, in the public interest, the information or document should be available to the Commissioner', and state the general nature of those reasons. The Privacy Commissioner may recommend to the DPP that an individual who has been, or is to be, required to give information be given an immunity undertaking (see further discussion in section on leniency and immunity in chapter 15).

9.57 The *Privacy Act* procedure is unique in that it gives the DPP a guided discretion to exclude an otherwise valid claim of privilege. By contrast, at common law, judges have no such discretion since a valid claim of privilege must be upheld, regardless of public interest considerations. Other regulatory authorities also have no such discretion. It is only under the *Evidence Act* that a similar discretion to

1200 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.

1201 *Privacy Act 1988* (Cth), s 66.

consider the 'interests of justice' is given to judges, enabling them to overrule a valid claim to the privilege and issue an immunity certificate.[1202]

9.58 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,*[1203] displacing the *Evidence Act* provisions on self-incrimination

> 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.[1204]

9.59 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*.

Rationales for the privilege

9.60 Achieving a consistent legislative approach to the privilege across federal legislation depends on a proper understanding of the rationale for the privilege. The privilege has been variously described as 'fundamental',[1205] 'deeply ingrained',[1206] and an 'elementary principle' concerned with 'protecting people against being forced to do something which would have a *tendency* to incriminate them'.[1207] In the leading case of *Caltex*, 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.[1208] 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.[1209]

1202 *Evidence Act 1995* (Cth), s 128.
1203 Ibid, s 8(3).
1204 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.
1205 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 340.
1206 *Sorby v Commonwealth* (1983) 152 CLR 281, 309.
1207 M Aronson and J Hunter, *Litigation: Evidence and Procedure* (1998), 586.
1208 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 498. See also B Marshall, 'The Penalty Privilege: Assessing its Relevance in Trade Practices Cases' (1996) 14 *Australian Bar Review* 214.
1209 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 544.

9.61 A number of modern justifications for the privilege have been put forward, including the:

- avoidance of self-accusation, perjury and contempt ('cruel trilemma');
- underlying basis of the adversarial system;
- prevention of inhumane treatment;
- balance between state and individual power;
- human personality and individual privacy ('human rights');
- unreliability of self-deprecatory statements; and
- protection of the innocent.[1210]

9.62 There is significant disagreement between the majority and minority judgments in the leading Australian authorities addressing the modern rationale for the privilege.[1211] 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'.[1212] 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'.[1213]

9.63 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 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 defen-

1210 The Law Commission (New Zealand), *The Privilege against Self-Incrimination: A Discussion Paper*, (1996), The Law Commission, Wellington.

1211 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.

1212 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 532.

1213 Ibid, 532.

> dant in an action for the recovery of a penalty to furnish against himself the evidence needed to establish his liability.[1214]

9.64 On this reasoning, the rationale for the penalty privilege is not founded on human rights but on limiting judicial powers of compulsion.

9.65 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.[1215] Mason CJ and Toohey J rejected the view that the privilege is founded on preserving the integrity of the adversarial system.[1216] The privilege is indeed a human right recognised under international law,[1217] although it is not a right enshrined in the Australian Constitution. As a result, any attempt by a federal legislature to remove the privilege in relation to criminal proceedings would violate Australia's international obligations unless it could be justified under one of the limited exceptions provided for under international law.[1218]

9.66 On the other hand, because international law only guarantees the privilege against self-incrimination in relation to criminal proceedings, the common law of Australia extends the international human right to civil or administrative penalty proceedings and forfeiture proceedings. The international human right is therefore a minimum guarantee, which the Australian courts have enlarged.[1219]

9.67 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

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1214 Ibid, 519.

1215 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.

1216 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 500 – 501. In other words justice 'would not perish if the accused were subject to a duty to respond to orderly inquiry': Cardozo J in *Palko v Connecticut* 302 US 319 (1937), 326, cited in *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96, 115. See B Marshall, 'The Penalty Privilege: Assessing its Relevance in Trade Practices Cases' (1996) 14 *Australian Bar Review* 214, 215.

1217 Article 14(3)(g) of the *International Covenant on Civil and Political Rights* provides that in the 'determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality … Not to be compelled to testify against himself or to confess guilt'.

1218 For example, limitations necessary for 'meeting the requirements of morality, public order and general welfare in a democratic society': *Universal Declaration of Human Rights*, article 29(2).

1219 A similar result has been achieved in the EU human rights law by developing a very broad definition of 'criminal proceedings': see R English, *Analysis of the Convention and the Human Rights Act 1998*, Lawtel, 15 October 2001; *Bendenoun v France* (1994) 18 EHRR 54; *Ozturk v Germany* [1984] ECHRR 409; *Engel v Netherlands* [1979-80] EHRR 647.

of the convergence of the severity of criminal punishments and non-criminal penalties.

9.68 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.[1220] 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.

Consistency and clarity

9.69 The application of the privilege against self-incrimination is 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 removes the privilege, particularly in terms of the rationale for removing the privilege;
- where legislation provides for use immunity, in terms of:
    - the scope of the use immunity;
    - the procedure for claiming the use immunity; and

1220 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.

- in the application of the common law where legislation restates or excludes the privilege.

9.70 This variance across different legislative and penalty schemes clearly demonstrates the need for consistency and a definitive statement of the nature and scope of application of the privilege.

9.71 Another issue raised by the ALRC's analysis is the need for clarity in legislative provision concerning the privilege. This is particularly apparent when legislation *impliedly* retains or removes the privilege. As suggested by the discussion above, the imposition of a penalty can have serious consequences. 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.

9.72 A further issue relates to how regulators administer penalty schemes, in particular the privilege against self-incrimination. If the application of the privilege differs across different fields of regulation, regulators should develop policies as to how the privilege operates for the benefit of their staff and the regulated community.

Legal professional privilege

Introduction

9.73 The scope and availability of legal professional privilege in relation to federal regulatory offences is unclear. Historically, at common law the privilege protected confidential communications between a lawyer and client from compulsory disclosure in the context of court and similar proceedings.

9.74 The conventional rationale was that privilege enhances the administration of justice by promoting freedom of consultation and unrestricted disclosure between clients and lawyers, and by assisting in the production of information in litigation.[1221] These interests outweighed the competing public interest in having all relevant evidence available to facilitate a fair trial.[1222]

9.75 Key modifications to the doctrine over time have included the extension of privilege to investigative and administrative proceedings,[1223] the enactment of a statutory privilege in s 118 and 119 of the *Evidence Act*, and the shift from a 'sole purpose' test[1224] at common law to a 'dominant purpose' test.[1225]

1221 *Baker v Campbell* (1983) 153 CLR 52.
1222 Ibid.
1223 Ibid.
1224 *Grant v Downs* (1976) 135 CLR 674.

9.76 In 2001, the decision of the Full Federal Court in *ACCC v Daniels*[1226] 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 *Trade Practices Act* could not be refused by claiming legal professional privilege.[1227]

9.77 Changes to the *Corporations Act* made by the *Financial Services Reform Act 2001* (Cth) will require lawyers giving certain kinds of financial advice to be licensed by ASIC.[1228] Supervision of lawyers by ASIC may require disclosures about advice which could conflict with both the lawyer's duty of confidentiality and the capacity of clients to claim privilege over certain information.

9.78 The same issue has arisen regarding the dual regulation of lawyers practising as migration agents. In late 2000, the Federal Court set aside a requirement to answer a notice issued by the Migration Agents Registration Authority (MARA) under the *Migration Act 1958* (Cth) which required a solicitor to provide MARA with information that included legal advice to clients.[1229] Section 308 of the *Migration Act* does not expressly remove legal professional privilege, although it removes the privilege against self-incrimination.

9.79 Underlying the decision in *Daniels* is a policy issue about the scope of the statutory investigative powers of federal regulators. 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. For example, one statute states that privilege applies in the same way as it does to a witness in a High Court proceeding.[1230] Two other statutes provide that certain parts of the statute do 'not affect the law relating to legal professional privilege'.[1231]

9.80 Three statutes make the privilege available unless the client (including an official manager, administrator or liquidator) waives it.[1232] To claim privilege under these statutes, the lawyer claiming privilege must provide a 'written notice' set-

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1225 *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49.

1226 *Australian Competition & Consumer Commission v Daniels* (2001) 108 FCR 123. *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.

1227 Special leave to appeal to the High Court of Australia was granted on 15 February 2002.

1228 Lawyers who 'deal' or advise' will need a licence: *Corporations Act 2001* (Cth), s 766B and 766C. Law Council of Australia, 'Financial Services Reform; Will You Be a Lawyer or a Financial Adviser?' (2001) (September 2001) *Australian Lawyer* 1, 1.

1229 *Joel v Migration Agents Registration Authority* (2000) 63 ALD 380.

1230 *Broadcasting Services Act 1992* (Cth), s 200(3).

1231 *Customs Act 1901* (Cth), s 183UB and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 440.

1232 *Superannuation (Resolution of Complaints) Act 1993* (Cth), s 60; *Superannuation Industry (Supervision) Act 1993* (Cth), s 288; and *Australian Securities and Investments Commission Act 2001* (Cth), s 69.

ting out the name and address of the client and particulars to identify any document containing the communication.

9.81 Few statutes expressly remove the privilege. One express removal of privilege, albeit in limited circumstances, 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. The provision reverses the High Court's decision in *Carter v Northmore Hale Davy & Leake*.[1233]

Implied removal of privilege

9.82 Where statutes are silent about privilege, it can be difficult to decide whether there is a legislative intention to remove it. The High Court has held that privilege is available unless a contrary statutory intention is shown by express words or necessary implication.[1234] The courts have been traditionally reluctant to remove the privilege by implication[1235] and the intention of Parliament to do so must be 'unmistakeably clear'.[1236] The courts will consider whether upholding privilege would impede the functions or powers of a statute.[1237]

9.83 In some cases, wide statutory powers to compel the disclosure of information have been held not to remove the privilege.[1238] In *Baker v Campbell,* the power to issue search warrants (and seize documents) under s 10 of the *Crimes Act* was restricted by privilege.[1239] In *Commissioner of Taxation v Citibank*, the ATO's powers to access documents under the *Income Tax Assessment Act* were restricted by privilege,[1240] and in *Commonwealth v Frost* privilege was available against the disclosure powers of a board of accident inquiry.[1241]

9.84 The first case to remove the privilege by implication was *Corporate Affairs Commission (NSW) v Yuill*.[1242] A bare majority of the High Court held that the legislature intended that privilege should not be a 'reasonable excuse' for a failure or refusal to comply with the investigative powers under the *Companies (NSW) Code*. Relevant factors were that the character and purpose of the power would have been frustrated if privilege were available, and that the Code expressly re-

1233 *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121.
1234 *Baker v Campbell* (1983) 153 CLR 52.
1235 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.
1236 *Yuill v Corporate Affairs Commission (NSW)* (1990) 20 NSWLR 386.
1237 *Australian Competition & Consumer Commission v Daniels* (2001) 108 FCR 123.
1238 *Baker v Campbell* (1983) 153 CLR 52; *Federal Commissioner of Taxation v Citibank Ltd* (1989) 20 FCR 403; *Allen Allen & Hemsley v Deputy Commissioner of Taxation* (1989) 20 FCR 576; *Re Compass Airlines Pty Ltd* (1992) 35 FCR 447, distinguishing *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 and holding that privilege had not been removed by s 597 of the *Corporations Law*.
1239 *Baker v Campbell* (1983) 153 CLR 52.
1240 *Federal Commissioner of Taxation v Citibank Ltd* (1989) 20 FCR 403.
1241 *Commonwealth v Frost* (1982) 61 FLR 378.
1242 *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319.

moved the privilege against self-incrimination, analogously justifying removal of legal professional privilege.

9.85 The decision in *Yuill* was not authority for the view that the privilege can be removed in all investigations involving a prevailing public interest. The investigation in that case depended on the special fact that a ministerial opinion was required, constituting an interest of 'great public importance'.[1243] The construction of the statute and the interpretation of legislative intent were decisive factors.

9.86 In many subsequent cases, the courts have demonstrated a reluctance 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.[1244] 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* have held or assumed that these powers are subject to legal professional privilege.[1245] By contrast, these sections have been held to remove the privilege against self-incrimination.[1246]

9.87 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.[1247] In *Daniels* the provision required disclosure 'to the extent that the person is capable of complying'. The Federal Court followed the reasoning in *Pyneboard* 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 *Trade Practices Act*.[1248] 'Capability' was interpreted as physical capability. Consequently, in *Daniels* it was 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.[1249]

1243 Ibid.
1244 *Re Compass Airlines Pty Ltd* (1992) 35 FCR 447.
1245 *Federal Commissioner of Taxation v Citibank Ltd* (1989) 20 FCR 403; *Fieldhouse v Commissioner of Taxation* (1989) 25 FCR 187.
1246 *Commissioner of Taxation v De Vonk* (1995) 61 FCR 564.
1247 *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 336.
1248 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.
1249 *Australian Competition & Consumer Commission v Daniels* (2001) 108 FCR 123, 137.

Impact of removing privilege

9.88 Impliedly removing privilege may assist regulators in improving compliance. Dawson J has 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'.[1250] Some ATO auditors are concerned that legal professional privilege, and the administrative privilege extended by the ATO to professional accounting advisers, is being used as a tactical tool to impede and frustrate the progress and outcomes of taxation audits.[1251] In 1997 Kirby J stated that

> a brake on the application of legal professional privilege is needed to prevent its operation bringing the law into 'disrepute', principally because it frustrates access to communications which would otherwise help courts to determine, with accuracy and efficiency, where the truth lies in disputed matters.[1252]

9.89 Conversely, it could be argued 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 giving of oral advice by lawyers (though the focus of disclosure may simply shift from documentary advice to lawyers' notes of oral advice). Removing privilege might also deter complex advice testing the limits of the law, result in the prosecution of lawyers (not undesirable if dishonesty is involved), and deter the development of internal corporate compliance programs.

9.90 It is important to remember that the modern rationale for the privilege is based on balancing the powers of the state against individual human rights to freedom, dignity and privacy. For Deane J in *Baker v Campbell*, the privilege ensures 'some protection of the citizen — particularly the weak, the unintelligent and the ill-informed citizen — against the leviathan of the modern state'.[1253] Kirby J cited authority in *Esso Australia Resources Ltd v Commissioner of Taxation* that the privilege is 'a bulwark against tyranny and oppression … not to be sacrificed even to promote the search of justice or truth'.[1254] Yet the protection is personal, not corporate, and the human rights rationale applicable to individuals does not apply with equal force to corporations.

9.91 Even when the privilege is not expressly or impliedly removed by statute, the courts have always retained discretion to deny a claim of privilege in favour of

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1250 *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319.

1251 Australian National Audit Office, *Administration of Tax Penalties*, Report 31 (2000), Australian Government Printing Service, Canberra, para 2.33. But note *McCormack v Deputy Commissioner of Taxation* [2001] FCA 1700 (Sackville J) in which partners of an accounting firm were required to provide a list of clients to the ATO in response to a s 264 notice issued under the *Income Tax Assessment Act*.

1252 *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.

1253 *Baker v Campbell* (1983) 153 CLR 52.

1254 *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49, 92.

a competing public policy interest such as the prevention of crime or fraud[1255] or broader cases of 'fraud on justice'.[1256] Advice given by a lawyer which assists in or amounts to unlawful conduct does not attract privilege, and so it could be argued that there is no policy reason for more readily finding that compulsory disclosure provisions impliedly remove privilege. Privilege may not apply, for example, in cases concerning the accessorial liability of solicitors under trade practices law,[1257] or solicitors assisting a breach of a regulatory scheme such as Customs controls.[1258]

9.92 The decision in *Daniels* was, however, influenced by the view that unlawful conduct '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 [regulator] to see the whole picture'.[1259] Simple cases of unlawful activity by lawyers are less common than cases where unlawful activity is dispersed across corporate processes and a variety of actors.

9.93 The complexity of modern business arguably requires the removal of privilege to facilitate monitoring compliance with the law. This is particularly so given the new compliance functions of lawyers — particularly the corporate practice of 'routing as many documents as possible' through compliance lawyers[1260] — and the likelihood that the dominant purpose test would otherwise shield many revealing documents from inspection.

Immunity following disclosure

9.94 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 (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* protects persons compelled to disclose information by making them 'not liable to anyone else in respect of the disclosure'.[1261] If it were held that the disclosure provisions impliedly removed privilege, the disclosed information could not be used in any proceedings whatsoever.

1255 *Re Compass Airlines Pty Ltd* (1992) 35 FCR 447; see also R O'Connor, 'Legal Professional Privilege: An Engine for Fraud?' (1990) 64 *Australian Law Journal* 174; *Evidence Act 1995* (Cth), s 125(1)(a).

1256 *Evidence Act 1995* (Cth), s 121–126.

1257 L Huett, 'Could You Be an Accessory?' (2001) 75(2) *Law Institute Journal* 49.

1258 S Daley, *Legal Issues for Commonwealth Investigators — Getting the Evidence (and Keeping It), Getting the Assets*, (2001) Australian Government Solicitor — Government Law Group (NSW Chapter), 17.

1259 *Australian Competition & Consumer Commission v Daniels* (2001) 108 FCR 123, 137.

1260 C Parker, 'Smoking Guns or Effective Compliance Tools: Protecting Compliance Documents via Privilege or Immunity?' (2001) 17 *Compliance News* 9, 10.

1261 *Life Insurance Act 1995* (Cth), s 247.

9.95 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.

9.96 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.[1262] 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'.[1263] There are, however, contrary authorities on this point[1264] and the conferral of use immunity is discretionary rather than an enforceable legal right.

Privilege for regulators

9.97 Privilege may apply to confidential communications between government agencies and salaried legal advisers.[1265] There must be a professional relationship involving the provision of independent advice, and the adviser must be competent and under a duty to observe professional standards. A distinction is drawn between non-privileged executive advice about the exercise of a statutory discretion and privileged legal advice about the policy of the statute itself.[1266] Privilege should arguably be available to public decision makers because of 'the growing complexity of the legal framework within which government must be carried on'.[1267]

9.98 It is questionable whether regulators may claim privilege in relation to information secured through the use of investigative powers. This may be significant where a person has provided information to the regulator that amounts to evidence of a contravention by another person or entity. The ACCC, for example, cannot rely on privilege to refuse to produce transcripts of examination conducted under s 155 of the *Trade Practices Act* because the information so provided is given under coercion rather than in confidence,[1268] and the information is obtained 'in the course of an investigation for the purpose of deciding whether to institute proceed-

1262 See Multiple Proceedings and Multiple Penalties at para 8.66–8.8.72.
1263 *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).
1264 *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).
1265 *Waterford v Commonwealth* (1987) 163 CLR 54.
1266 Ibid, 77 but see 84, 96–97, 103.
1267 Ibid, 64 but see 82, 97.
1268 *Trade Practices Commission v Ampol Petroleum (Victoria) Pty Ltd* (1994) 127 ALR 533.

ings, as well as for use in potential proceedings if that occasion arose', rather than in the context of legal proceedings.[1269] However, information obtained without the use of s 155 can be the subject of privilege if the information was obtained at or after the time at which proceedings (as opposed to an investigation) were anticipated.[1270]

9.99 Further, although s 157 of the *Trade Practices Act* does not remove the privilege claimed by the ACCC, the Federal Court has the power to order the ACCC to provide certain documents to a party against whom the ACCC has instituted proceedings, even if the documents attract privilege. This was the case in *ACCC v Rural Press*, where the Federal Court found that s 157 of the *Trade Practices Act* does not remove a claim of privilege by the ACCC.[1271] That section requires the ACCC to provide documents to a party against whom the ACCC has instituted proceedings that 'tend to establish the case' of the party, unless the documents were prepared by an officer or professional adviser of the ACCC.

9.100 The court may order the ACCC to comply or refuse to make an order if disclosure would prejudice any person, or for any other reason. Following *Arnotts v TPC*,[1272] a court may also refrain from exercising its power to refuse to make an order even for a privileged document. Thus in *Arnotts* the Full Federal Court held that:

> If, in any given case, the Court orders disclosure … despite what otherwise would be the operation of the privilege, then to that extent and in that particular situation the common law privilege of the Commission has been qualified or diminished by the order of the Court in the exercise of its statutory powers.[1273]

9.101 The regulator's privilege appears narrower than the privilege available in the ordinary lawyer-client relationship since privilege can normally be claimed over documents for the purpose of legal advice, including documents obtained by a lawyer during an investigation.

Options

9.102 The issues raised by the ALRC's analysis of legal professional privilege, mirror many of the issues raised in relation to the privilege against self-incrimination. Inconsistency is again an issue, particularly in relation to express removal and implied removal of legal professional privilege.

1269 *Australian Competition and Consumer Commission v Rural Press Ltd and Others* (1999) 96 FCR 141, 151. See also *National Employers' Mutual General Insurance Association Ltd v Waind* (1979) 141 CLR 648.

1270 *ACCC v Australian Safeway Stores Pty Ltd* (1998) 81 FCR 526.

1271 *Australian Competition and Consumer Commission v Rural Press Ltd and Others* (1999) 96 FCR 141.

1272 *Arnotts Ltd v Trade Practices Commission (No 1)* (1989) 21 FCR 297.

1273 Ibid.

9.103 One avenue of law reform may be to draft 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.

9.104 Achieving a consistent legislative approach depends on rethinking the rationales and justifications for removing or modifying the privilege, and deciding whether particular fields of regulation require special rules. Most importantly, achieving consistency depends on questioning whether effective regulation requires greater use of intrusive measures like the removal of privilege, or whether more informal, cooperative or voluntary mechanisms — like leniency or immunity policies and discretions — would achieve better compliance outcomes.

Proposals

9.105 The ALRC's provisional view is that the existence and nature of the three privileges discussed in this chapter[1274] 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.

9.106 This restatement should also 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.

9.107 The 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 can be modified by clear statutory statement.

9.108 In general terms, the ALRC inclines to the view that the basic rights found in the three privileges discussed in this chapter should be given clear statutory imprimatur, though subject to modification in other statutory provisions. In this way there can be no doubt that the privilege is available unless the regulator challenging the claim can point to a statutory provision supporting challenge. The same can be said of the rights of use immunity in relation to information given under compulsion, that is subject to a claim for privilege which would have been suc-

1274 Privilege against self-incrimination in criminal matters, privilege against self-exposure to a non-criminal penalty and legal professional privilege.

cessful 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.

Proposal 9-1 Statute law should expressly state the default position that:

(a) the privilege against self-incrimination in relation to a criminal offence;

(b) the privilege against self-exposure to a non-criminal penalty; and

(c) legal professional privilege

exist 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, rules of court or court order.

Proposal 9-2. Statute law should expressly state that no privilege against self-incrimination in relation to a criminal offence or privilege against self-exposure to a non-criminal penalty operates in favour of corporations, and that a corporation may not claim any such privilege in relation to evidence that may incriminate a person or expose a person to a penalty.

Proposal 9-3. Subject to clear, express statutory 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, 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.

10. Accountability

Contents

Introduction

10.1 Regulatory decisions concerning penalties involve the exercise of public power which affects individuals and the community. Within a democratic system, principles of accountability require public officials to whom powers have been delegated 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.[1275] For accountability to be meaningful, there must be some awareness of the decision-making process, the basis upon which regulatory decisions are taken,[1276] and of the means by which decisions can be reviewed.

10.2 This chapter considers when accountability mechanisms should be built into penalty processes. These accountability mechanisms could include:

- systems of appeal for the review of a decision relating to a penalty;
- accountability for a regulator's action in relation to a penalty;
- accountability for a regulator's general approach to regulation and penalties.

10.3 As civil and criminal penalties are court-imposed and, therefore, the process is strictly regulated and held in full public view, the focus of this chapter is on administrative penalties. However, a regulator may make a number of administrative decisions prior to commencing criminal or civil penalty proceedings and before the imposition of an administrative penalty. The ALRC draws a distinction between these penalty-related administrative decisions and administrative penalties themselves.

10.4 The ALRC also draws a distinction between different types of administrative penalties. 'Administrative penalties' encompass both true administrative penalties and quasi-penalties. Some administrative penalties arise automatically by operation of legislation, such as penalties for late payment of a fee ('true administrative penalties'). Other administrative penalties require the exercise of discretion, such as licensing decisions or social security breach penalties ('quasi-penalties'). For further discussion of the categorisation of administrative penalties for the purposes of this inquiry see Types of Penalties in chapter 3.

10.5 The first section of this chapter briefly discusses court-imposed penalties and the accountability provided by courts.

1275 D Galligan, 'Procedural Fairness' in P Birks (ed), *The Frontiers of Liability* (1994) Oxford University Press, Oxford, 4.

1276 R Baldwin, C Scott and C Hood (eds), *A Reader on Regulation* (1998) Oxford University Press, Oxford.

10.6 The second section considers the policy issues that attend when and how appeal and review mechanisms should be built into penalty processes. This section also describes appeal and review bodies and the nature of an appeal. Consideration is also given to the two forms of review of administrative decisions — judicial review and merits review. Merits review is particularly relevant to quasi-penalties.

10.7 The third section looks at administrative review by courts and tribunals. The benefits of courts and tribunals are outlined. This section also considers the choice between judicial review and merits review and whether both forms of administrative review should be available to the recipient of an administrative penalty. A number of features of court and tribunal review are described: the operation and implementation of penalties under review, time limits and standing.

10.8 The fourth section discusses internal review. Whereas the processes adopted in court and tribunal review are well established, there is more scope for legislators and regulators to design procedures for internal review. This section asks whether internal review should be a mandatory precursor to external review and considers the appropriate design of internal review schemes.

10.9 The following section outlines other sources of public accountability including parliamentary committees, the Commonwealth Ombudsman, the Privacy Commissioner, the Australian National Audit Office, the requirements of annual reporting and freedom of information legislation as well as independent review bodies and the media. The main concern of this chapter is appeal and review, however, these other sources of accountability are considered for completeness.

10.10 The final section discusses limits on accountability. Three quite specific penalty-related issues are considered: prosecutorial discretion, private contractors and infringement notice schemes. Enforceable undertakings and the use of publicity by regulators also raise accountability issues, and are considered in the chapter on Fairness (chapter 7).

Court-imposed penalties

10.11 The ALRC's research on federal legislation and data on practice show that the majority of federal penalties require a court, in either the criminal or civil justice system, to make findings of fact and set the penalty. The Constitution requires this except where true administrative penalties are involved. 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 judgement explaining the decision is provided. It is in these formal procedures that the most stringent and rigorous procedural safeguards are found.[1277]

10.12 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 Australian federal criminal law and civil penalty systems. The issues concerning court procedure focus on the choice of procedure and, importantly, the protections for the alleged offender found in each, rather than the details of the procedural rules.

Appeal and review

10.13 Appeal and review mechanisms are another means of keeping a penalty scheme accountable and fair by allowing decisions made at one level to be tested at 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.[1278]

10.14 One issue for the ALRC is when, and how, should appeal and review mechanisms be built into penalty processes. A number of commentators have reservations about the provision of appeal mechanisms in regulatory arrangements. Robert Baldwin and Martin Cave, for example, acknowledge that appeal procedures are often viewed as useful safeguards, but that the following caveats should be entered:

- Appeal mechanisms may increase delays and costs and may weaken the capacity of the first instance decision maker to make sustainable policies.
- 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, in addition to the delays and uncertainties of a two-tier process.

1277 Of course, court-imposed penalty proceedings can also be costly, time-consuming and legalistic.

1278 M Aronson and B Dyer, *Judicial Review of Administrative Action* (1996) LBC Information Services, Sydney, 476. Typically, the concept of 'natural justice' incorporates the 'hearing rule' and the 'bias rule'. For a detailed discussion of these rules see chapter on Fairness (chapter 7).

- Appeals involving legalistic arguments before generalist decision makers may prove less timely and less expert than decisions by specialists.

- 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.[1279]

10.15 Baldwin and Cave have further noted that controversy will often attend the selection of the individuals and bodies that provide accountability.[1280] Appeal and review may assist a regulator to claim public support because it uses procedures that are fair, accessible and open.[1281] However, further guiding principles are required in order to explain, for example, who should be able to participate and in what manner.[1282] Disputes may also arise concerning the appropriate mode of participation in appeal and review processes.

10.16 Dr Julia Black notes that agencies are likely to prefer administratively applied penalties because enforcement officers may believe that their interpretation of the rules will be shared by the part of the agency or separate body that is responsible for discipline and enforcement.[1283] Mechanisms of appeal and review can upset this 'cosy world of shared interpretations and commonly imposed standards'.[1284] However, as Black notes, interpretive control is essential for many regulators:

> [I]t is important to the development of regulatory interpretive communities that the regulator has some form of interpretive authority, and the development of interpretive communities is important to ensuring the effective implementation of regulation.[1285]

10.17 Black concludes that the route which best balances the competing concerns of accountability of the regulator with allowing the regulator sufficient interpretive authority is for the regulator's interpretation of the rules to be open to review on the grounds of rationality, not appeal on a point of law.[1286]

1279 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'.

1280 R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) Oxford University Press, Oxford, 79.

1281 Ibid, 79.

1282 Ibid, 79.

1283 J Black, 'Managing Discretion' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001), 24.

1284 Ibid, 24.

1285 Ibid, 24.

1286 Ibid, 24.

10.18 A further issue is that appeal and review is not universally available in penalty processes. A number of decisions that may result in a penalty are currently not subject to appeal and review including those relating to:

- enforceable undertakings (see discussion at para 7.170);
- publicity (see discussion at para 7.183);
- prosecutorial discretion (see discussion below at para 10.115);
- private contractors (see discussion below at para 10.123);
- infringement notice schemes (see discussion below at para 10.145).

Appeal and review bodies

10.19 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.

- Civil penalties are imposed using formal court proceedings and appeals are provided for in individual statutes. This avenue of appeal generally involves a court sitting in its appellate jurisdiction.
- 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 in private settlements. The regulator can also apply to the Federal Court to enforce an enforceable undertaking under the *Trade Practices Act 1974* (Cth) or *Australian Securities and Investments Commission Act 2001* (Cth) (*ASIC Act*).
- Quasi-penalties 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 in Centrelink (see para 10.93).
- 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) that can be appealed to the AAT. Courts can provide judicial review of administrative decisions. A party 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*, the Constitution and *Judiciary Act 1903*.

The nature of an appeal

10.20 The word 'appeal' has no single and invariable meaning, but is used to describe a number of different processes.[1287] In *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* the majority of the High Court reiterated that 'the nature of [an] appeal must ultimately depend on the terms of the statute conferring the right [of appeal]'.[1288] Callinan and Kirby JJ confirmed this approach, the latter stating that 'the only safe starting point is careful examination of the language and context of the statutory provisions affording the appellate right, together with a consideration of the powers enjoyed by, and the duties imposed on, the body to which the appeal lies'.[1289]

10.21 The courts have identified three broad types of appellate review:[1290]

- An appeal in the strict sense.[1291] An example of a strict appeal is an appeal to the High Court.[1292]
- Appeal by way of re-hearing.[1293] Appeals by way of re-hearing can be divided into two sub-categories:
- Appeal by way of re-hearing on the original evidence only;[1294] and
- Appeal by way of re-hearing on the original evidence and further evidence of fact or law.[1295]

1287 A Shaik, 'A Review of Appeals' (2001) 8(2) *Australian Journal of Administrative Law* 70, 74.

1288 *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 174 ALR 585, 589. See also *CDJ v VAJ* (1998) 197 CLR 172, 185–186.

1289 Ibid, 606 citing *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616.

1290 *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 174 ALR 585, 605–606. Glass JA in *Turnbull v NSW Medical Board* [1976] 2 NSWLR 281, 297–298 outlined some additional categories of appeal: appeals to supervisory jurisdiction; appeals on questions of law only; appeals after a trial before judge and jury, appeals from a judge by way of re-hearing.

1291 The appellate body may only exercise its appellate powers where there has been an error in the decision-making process, or the original decision maker has made a finding of fact that is 'clearly wrong'. The appellate body cannot hear further evidence, and subsequent changes in the law are disregarded.

1292 The nature of an appeal to the Full Court of the Federal Court is less certain: see *Re Coldham; Ex Parte Brideson (No 2)* (1990) 170 CLR 267.

1293 The appellate tribunal can receive further evidence and its powers are not restricted to making the decision that should have been made at first instance. Ordinarily, if no further evidence has been admitted and if there has been no relevant change in the law the appellate body can exercise its powers only if satisfied that there was an error on the part of the primary decision maker (as in the above case of a strict appeal).

1294 The appellate body can ordinarily only exercise its appellate powers if satisfied that there was an error on the part of the primary decision maker

1295 The appellate body can hear further evidence of fact and changes in the relevant law as authorised by the statute. However, aside from an error by the primary decision maker, the appellate body is ordinarily not

- Appeal involving a re-hearing *de novo*.[1296] Typically, merits review by the AAT is a re-hearing *de novo*.

10.22 The type of appeal conferred by a statute will obviously affect the nature of the appeal or review, and possibly the outcome of a penalty decision. For example, an appeal from the SSAT to the AAT in relation to a social security activity test breach will involve a review *de novo* and therefore consideration of both old and new evidence and the formation of an opinion on the law. However, while the AAT may have the power to 'decide' questions of law that necessarily arise, it lacks the power to decide such questions conclusively. Conversely, an appeal from an AAT decision to the Federal Court under s 44 of the *AAT Act* in relation to a social security activity test breach will only involve a question of law.

10.23 Where discretionary powers are involved, the courts have seen their powers of review by way of statutory appeal limited to exercising a supervisory, as opposed to a determinative, function over the discretionary aspects of the case.[1297] In discretionary cases, therefore, AAT review is seen as offering more comprehensive relief than review by way of statutory appeal.[1298]

10.24 Statutes which confer jurisdiction to hear and determine appeals do not always indicate clearly what kind of appeal is contemplated.[1299] In its report on *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*,[1300] the ALRC recommended that:

> Legislation conferring appellate jurisdiction on each federal court should be amended to specify clearly the nature of the appeal undertaken by the court. To the extent that the Constitution permits, legislation should indicate that the appellate court has a discretion, which it may exercise in appropriate cases, to:
>
> - draw inferences from the evidence given at trial;
> - review findings of credibility of witnesses;
> - admit further evidence; and

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able to disturb findings of fact reached by the primary decision maker which are independent of any further evidence.

1296 The matter is heard completely afresh with all relevant issues being reconsidered and a new decision is given on the evidence presented at the new hearing regardless of whether or not there was an error in the first instance.

1297 *Secretary, Department of Housing and Construction v Wildman* (1984) 3 AAR 38.

1298 A Hall, 'Judicial Power, the Duality of Functions and the Administrative Appeals Tribunal' (1994) 22(1) *Federal Law Review* 13.

1299 *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 174 ALR 585, 618.

1300 Australian Law Reform Commission, *The Judicial Power of the Commonwealth*, ALRC 92 (2001), Australian Law Reform Commission, Sydney.

- consider changes in the law up to the date at which it gives judgment, subject to relevant transitional legislation.[1301]

10.25 This recommendation is equally applicable to legislation which confers appeal and review jurisdiction in relation to civil and administrative penalties.

Civil penalty appeals

10.26 Most civil penalties are appellable to a higher court.[1302] 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.[1303]

Administrative appeal and review

10.27 When penalties are imposed administratively by a regulator, many of the benefits[1304] of a court-imposed penalty scheme are lost. Here, particularly in the case of quasi-penalties, the value of an appeal and review mechanism becomes more pronounced. Judicial review and merits review each fulfil a different function and provide different remedies in relation to administrative decisions, including the decision to impose a penalty.

Judicial review

10.28 Judicial review is concerned only with whether the decision made by the primary 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 the decision maker with any residual discretion or where outstanding facts remain to be found.[1305]

1301 Ibid, recommendation 17-1.

1302 The structure of original and appellate jurisdiction of courts is well established under various pieces of legislation including the Constitution and *Judiciary Act 1903* and courts' principal legislation and other legislation for example, the *Corporations Act 2001* and *Environmental Protection and Biodiversity Conservation Act 1999*. See also Ibid.

1303 D Ipp, 'Reforms to the Adversarial Process in Civil Litigation — Part II' (1995) 69 *Australian Law Journal* 790.

1304 See below at para 10.47.

1305 See *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 578–579, 598–600.

Administrative Decisions (Judicial Review) Act 1977

10.29 Unless specifically excluded, at present most decisions of an administrative character made under an enactment are subject to judicial review by the Federal Court and, with some exceptions, the Federal Magistrates Service (FMS), under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*).[1306] A wide variety of decisions to impose an administrative penalty have been reviewed under this legislation.[1307] Unless a decision is explicitly exempted from the *ADJR Act*, it will be subject to judicial review. Sections 5 and 6 of the *ADJR Act* set out the various grounds on which the Court can review a decision. Sections 15 and 15A of the Act give the Federal Court and FMS power to stay original decisions, which would include penalty decisions. Further, s 16 provides that, on an application for an order of review in respect of a decision, conduct engaged in for the purpose of making a decision or a failure to make a decision, the Federal Court or the FMS may make a variety of remedial orders.

Appeals from AAT decisions

10.30 Decisions of the AAT are subject to judicial review by the Federal Court[1308] 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 1903* (Cth). The limit on this avenue of appeal was stated by the majority of the High Court in *Harris v Director-General of Social Security*.

> Where the decision under review by the Tribunal turns on a question of fact, the Federal Court … should by its order leave to the Tribunal the function of finding the facts if the Tribunal has not already found them.[1309]

1306 Other than decisions by the Governor-General and certain other specified decisions: *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 5 and 6.

1307 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* (*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).

1308 Section 44AA of the *Administrative Appeals Tribunal Act 1975* (Cth) as amended by the *Federal Magistrates (Consequential Amendments) Act 1999* (Cth) provides that the Federal Court of Australia must not transfer an appeal to the FMS if the appeal relates to a decision given by the Tribunal constituted by a member who was or by members at least one of whom was a Presidential Member or relates to a decision given by the Tribunal for an application for review of a decision under the *Australian Citizenship Act 1948* (Cth), the *Immigration (Guardianship of Children) Act 1946* (Cth), the *Migration Act 1958* (Cth) or regulations made under each of those Acts.

1309 *Harris v Director-General of Social Security* (1985) 7 ALD 277, 284.

The Constitution and Judiciary Act

10.31 Two important sources of judicial review of administrative action are the Constitution and *Judiciary Act*.[1310] 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 in respect of administrative action where the Commonwealth or its agent is a party to proceedings. Section 75(iii) ensures that there is a jurisdiction to give judgment against the Commonwealth in respect of unconstitutional action.

10.32 The High Court's jurisdiction to issue other administrative law remedies is made explicit in s 75(v) of the Constitution, which provides that it has jurisdiction to grant mandamus (compelling the exercise of the jurisdiction), prohibition (preventing the exercise of the jurisdiction), an injunction against a Commonwealth officer, 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.

10.33 The original jurisdiction of the High Court under s 75(v) of the Constitution 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 jurisdiction under s 75(v).

10.34 The appellate jurisdiction given to the High Court under s 73 of the Constitution is subject to certain exceptions.[1311] One such exception arises when the federal Parliament gives a court jurisdiction to hear and determine appeals on questions of law against a certain class of administrative decisions and it provides that a decision on appeal is 'final and conclusive'.[1312]

1310 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.

1311 Exceptions and regulations are to be found in the *Judiciary Act 1903* (Cth), s 35 and 35A and various other federal Acts, for example, *Federal Court of Australia Act 1976* (Cth), s 33. See E Campbell, 'Appeals to Courts from Administrative Decisions: Restrictions on Further Review' (1997) 4 *Australian Journal of Administrative Law* 164.

1312 *Watson v Commission of Taxation (Cth)* (1953) 87 CLR 353; *Point v Commission of Taxation (Cth) (No 2)* (1970) 124 CLR 669.

Merits review tribunals

10.35 The provision for merits review enables a review of all aspects of the challenged administrative decision,[1313] including the finding of facts and the exercise of any discretions conferred upon the decision maker. Thus, a merits review body, usually an internal review officer or tribunal, will 'stand in the shoes' of the primary decision maker and will make a fresh decision based upon all the evidence[1314] available to it.[1315]

Administrative Appeals Tribunal Act

10.36 The AAT is an independent body that reviews, on the merits, a broad range of administrative decisions made by federal (and, in limited circumstances, state) Government ministers and officials, authorities and other tribunals. The AAT also reviews administrative decisions made by some non-government bodies. 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 will affirm, vary or set aside the original decision. Review by the AAT must be specifically provided for in legislation.[1316]

Small Taxation Claims Tribunal

10.37 The Small Taxation Claims Tribunal (STCT) is a tribunal set up within the Taxation Division of the AAT. The STCT provides informal and inexpensive review of small taxation disputes. The amount of tax in dispute must be under $5,000. The STCT can also review decisions of the ATO refusing a request for an extension of time within which to make a taxation objection. The STCT can make a variety of decisions about an application: affirm or substitute a new decision; remit the matter back to the ATO directing it to reconsider its original decision; or vary the original decision by changing part of it.

Social Security Appeals Tribunal

10.38 The SSAT currently has jurisdiction to review a very broad range of decisions relating to eligibility for, and the rate of, social security payments.[1317] Ap-

1313 Except for the constitutional validity of any legislation under which the decision was made: *Re Adams* (1976) 1 ALD 251.

1314 Including any new evidence not available to the primary decision maker.

1315 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report no 39 (1995), Commonwealth of Australia, Canberra, paras 2.2–2.3, 2.54–2.55. See *Administrative Appeals Tribunal Act 1975* (Cth), s 43(1).

1316 *Administrative Appeals Tribunal Act 1975* (Cth), s 25.

1317 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.

peals now lie from the SSAT to the AAT, thus creating a second tier of merits review.

What decisions are suitable for merits review?

10.39 Whereas judicial review under the *ADJR Act* will apply to an administrative decision unless excluded by legislation, merits review must be 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.[1318]

10.40 Most decisions that impose an administrative penalty would fall under this broad rubric. However, not all decisions involved in 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);[1319] and

- decisions that automatically follow from the happening of a set of circumstances (which leave no room for merits review to operate).[1320] This exception would apply to penalties that are automatically imposed under legislation such as disqualification under s 206B of the *Corporations Act* where there is no scope for the exercise of discretion ('true administrative penalties').

10.41 The ARC also listed a number of factors that may be relevant in excluding merits review. Those relevant to penalty decisions are outlined below.[1321]

(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

1318 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.

1319 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.

1320 Ibid, para 3.8.

1321 See Ibid for more categories of decisions that have not been included here.

review of these preliminary decisions may frustrate the making of substantive decisions.

- *Decisions to institute proceedings.* An example is an exercise of power under s 50 and 49 of the *ASIC Act* to institute civil proceedings or prosecutions. See the discussion on review of prosecutorial discretion at para 10.115.

- *Law enforcement decisions.* If review of such decisions, including decisions to investigate, was available, both the investigation of possible breaches and the subsequent enforcement of the law could be jeopardised.[1322] An example would be a decision by the ACCC to exercise powers to obtain information pursuant to s 155 of the *Trade Practices Act*, or not to.

(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.[1323] 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. See the discussion of the Job Network scheme at para 10.126.

- *Decisions where there is no appropriate remedy.* This exception concerns decisions where there is no appropriate remedy that may be conferred by the reviewing body. 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 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. Care needs to be taken, however, not to over-extend this exception. Practical solutions may be found, for example, in the AAT's capacity to deal with urgent cases, including its power to issue stay orders.[1324]

(c) The costs of review of the decision:

1322 Ibid, para 4.31–4.33.
1323 Ibid, para 4.47–4.48.
1324 Ibid, para 4.49–4.51.

- *Decisions which 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.[1325]

10.42 A statement of principle emerges from this discussion. Penalties that arise automatically by operation of legislation (true administrative penalties) are not suitable for merits review.

10.43 One principle to emerge from this inquiry is that merits review is suitable for a decision that is likely to substantively affect the interests of a person. Quasi-penalties, whether they be the removal, cancellation or placing conditions on a licence or the withdrawal of a benefit, will all fit within this broad criterion.

10.44 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.

10.45 Where any discretion is removed from an administrative action, for example, where penalties arise automatically by operation of legislation (true administrative penalties), merits review is not suitable. Importantly, judicial review may still be suitable, for example, to consider whether the correct legislation was applied to impose the penalty.

10.46 As administrative review is limited for these types of penalties, legislators will have to carefully consider the appropriate use of penalties that arise by operation of legislation. In many such cases, the regulators have the power to remit all or part of the penalty.[1326] In these cases, the penalties still stand; the regulator, however, agrees not to collect all or part of it. There is in this mechanism a form of internal review. The remission decision is, however, subject to judicial review and can be made subject to merits review.

Review by courts and tribunals

The benefits of courts and tribunals

10.47 The benefits of courts and tribunals have been stated many times.[1327] Legal proceedings continue to be a major focus of regulatory work[1328] as formal legal

1325 Ibid, para 4.56–4.57.
1326 See chapter 15.
1327 Of course, courts have also been subject to many criticisms. See for example, I Ramsay, 'Corporate Law in the Age of Statutes' (1992) 14 *Sydney Law Review* 474, 486–493.
1328 This is evidenced in regulators' large litigation budgets. For example, in 1999–2000 the ACCC spent over $12 million on litigation out of an overall budget of $57.453 million: Australian Competition & Consumer Commission, *Annual Report 1999–2000*, Commonwealth of Australia, Canberra, 1. In its 2000–01

proceedings provide an independent and authoritative statement of the consequences of breaches of the law, clarification of the requirements of the law, and punishment of, restitution from, and deterrence to wrongdoers.[1329] Decisions by courts and tribunals have also provided guidance to regulators when making decisions in relation to penalties.

Deterrence

10.48 In *Vogel and Son Pty Limited v Anderson*, Kitto J commented on the deterrence role of courts:

> [F]or some people little seems to matter but fear of the consequences of discovery. The *Customs Act* makes those consequences potentially drastic. It is for the courts to make them, in suitable cases, drastic in fact, for otherwise traders who are not saved by qualms of conscience from willingness to defraud their fellow citizens may weigh the profits they hope for against the penalties they have cause to fear and find the gamble worthwhile.[1330]

10.49 Regulators stress the adverse impact of court proceedings, as in this ACCC publicity:

> If you do fall foul of the law you are going to need a good lawyer, and good lawyers do not come cheap! If the ACCC takes you to Court, remember that we have a success rate of over 90% in the cases we run. The ACCC's reputation is based on its enforcement success, so we don't go off to the Federal Court on a whim.
>
> If we take you on and win you may be up for your costs and ours. Whilst legal costs may be tax deductible they are by no means productive![1331]

10.50 The ACCC further notes that 'completed litigation invariably triggers information and liaison activities to maximise its deterrent and educative effect'.[1332]

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annual report, the ACCC notes: 'A litigation reserve fund, initially of $10 million, will assist court actions. The fund will build to a reserve of $20 million and will strengthen the Commission's ability to deal with major litigation': Australian Competition & Consumer Commission, *ACCC Annual Report 2000–2001*, (2001), ACCC Publishing Unit, Canberra, 5.

1329 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, 3. See also 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.

1330 *Vogel and Son Pty Limited v Anderson* (1967) 120 CLR 157, 164.

1331 Australian Competition & Consumer Commission, *What Are the Costs of Non-Compliance with the Trade Practices Act*, Australian Competition & Consumer Commission, <www.accc.gov.au/compliance/costs.html>, 1 June 2001.

1332 Australian Competition & Consumer Commission, *Making Markets Work — Directions and Priorities*, (1999), ACCC Publishing Unit, Canberra, 6. Publicity often attaches to the imposition of large penalties as a result of the public nature of court and tribunal proceedings, and media interest in them. Indeed, regulators often publicise the imposition of large penalty awards and the individuals implicated. For ex-

Guide to decision making

10.51 In resolving disputes, courts and tribunals provide 'norms and procedures'[1333] which regulate adjudication of disputes, providing guidance to adjudicators.[1334] For example, in the case of *Nagel and Comptroller-General of Customs*[1335] the AAT granted a 50% remission of a penalty imposed under s 243 of the *Customs Act 1901* (Cth). The Customs Brokers and Forwarders Council of Australia noted in consultations with the ALRC that, after that decision, the Australian Customs Service routinely granted a 50% remission that obviated the need for bulk remission applications to the Tribunal for a number of years.[1336]

10.52 In *Trade Practices Commission v CSR Ltd*,[1337] French J noted that the purpose of s 76 of the *Trade Practices Act* is neither 'retribution nor rehabilitation' and elaborated on the criteria relevant to the determination of penalty quantum.[1338] These principles have impacted on the ACCC's targeting policy,[1339] leniency guidelines[1340] and acceptance of s 87B undertakings.[1341] Indeed, the 'French factors' have been applied to other regulatory schemes, not just the TPA.[1342]

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ample, the reporting of the award of $26 million against a vitamin cartel for price fixing and a market-sharing agreement: Australian Competition & Consumer Commission, 'Federal Court Imposes Record $26 million Penalties Against Vitamin Suppliers', *Australian Competition and Consumer Commission Press Release*, 28 February 2001. In a media release documenting a Federal Court injunction against Telstra for One.Tel representations it was noted that 'following the ACCC's announcement of the case yesterday, a considerable number of calls have been received on the ACCC hotline by other One.Tel customers claiming similar behaviour to that alleged in the case': Australian Competition & Consumer Commission, *Court Grants Injunction Against Telstra for One-Tel Representations*, Media Release, 6 July 2001.

1333 M Galanter, 'The Radiating Effects of Courts' in K Boyyum and L Matheu (eds), *Empirical Theories About Courts* (1983) Longman, New York, 121.

1334 Australian Competition & Consumer Commission, *Making Markets Work — Directions and Priorities*, (1999), ACCC Publishing Unit, Canberra, 14.

1335 (1990) 12 AAR 47; (1990) 20 ALD 703.

1336 Customs Brokers Council of Australia, *Consultation*, Brisbane, 16 February 2001. This will probably change with the commencement of the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001*.

1337 *Trade Practices Commission v CSR Ltd* (1991) 13 ATPR ¶41–076.

1338 See chapters 3 and 18.

1339 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.

1340 Australian Competition & Consumer Commission, *Cooperation and Leniency in Enforcement*, Australian Competition & Consumer Commission, <www.accc.gov.au/compliance/leniency.htm>, 23 October 2001.

1341 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.

1342 Australian Compliance Professionals Association, *Consultation*, Brisbane, 14 December 2000.

10.53 In a recent study of ASIC penalty arrangements, ASIC officers were said to be continually mindful of judicial and administrative review, and this awareness probably contributes to improved decision making.[1343]

10.54 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.[1344]

Independence

10.55 Courts and tribunals are well structured to maintain independence[1345] and resist the 'regulatory capture'[1346] that regulatory bodies must guard against. No other branch of government responds so consistently to every application within its jurisdiction or gives such adequate explanation of the reasons for its decisions.[1347] As has been noted recently, in the context of administrative decision making:

> 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.[1348]

10.56 Independence is probably the most salient feature of court and tribunal proceedings that sets them apart from other systems of accountability. It has been stated in consultations with the ALRC that when penalties are imposed by a regulator, external review should always be available.[1349] Further, as will be discussed below, internal review can never be a substitute for external independent review. For this reason the ALRC would recommend that administrative decisions that impose

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1343 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.

1344 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 at para PS 103.1 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'.

1345 The Hon D Williams AM QC MP, 'Opening Ceremony' (Paper presented at Judicial Conference of Australia Colloquium 2001, Uluru, 7 April 2001).

1346 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.

1347 G Brennan, 'Farewell to the Honourable Sir Gerard Brennan AC KBE' (1998) 5 *Australian Bar Gazette* 1, 7.

1348 R Creyke, 'Sunset for the Administrative Law Industry? Reflections on Developments under a Coalition Government' (1998) 87 *Canberra Bulletin of Public Administration* 39, 48.

1349 For example, Victorian Bar Association, *Consultation*, Melbourne, 8 October 2001.

a penalty should be subject to at least one level of external review, whether it be a judicial review by a court, merits review by a tribunal (excluding true administrative penalties) or, if appropriate, both. See Proposal 10-3 below.

Courts or tribunals? Judicial or merits review?

10.57 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[1350] and to ensure that their decisions are in accordance with relevant legislation.

10.58 What factors influence a party's choice of forum when contesting an administrative penalty? 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 recipients.

10.59 It was observed in one consultation that, even when tribunal merits review is available, there is still a tendency for people to 'rush off to the Federal Court' where a more limited form of review is available.[1351] It was noted that often the Court will consider that the matter should be dealt with by a tribunal, and use its discretion under the *ADJR Act* to send it to the tribunal.[1352]

10.60 However, it was also stated in the same consultation that the Federal Court is much better geared to giving immediate relief than the AAT, particularly if the applicant is seeking interlocutory relief. It was also observed that the AAT often requires a lot of material before it reaches a decision and that this was unfortunate because, after the interlocutory stage, the AAT should really give a more satisfactory result.[1353] One barrister noted that, for regulators, it often suits their purpose to sit back and 'knock off' challenges in the Federal Court, often on relatively procedural grounds. However, it was stated that it should be in the interests of regulators to improve their decision-making processes by having their decisions challenged on merit to ensure quality control.[1354]

10.61 Conversely, another practitioner observed that, if the cost of going to the Federal Court is higher than the penalty, a tribunal is preferable. He stated that

1350 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 no 39 (1995), Commonwealth of Australia, Canberra, 10, fn 31.

1351 Victorian Bar Association, *Consultation*, Melbourne, 8 October 2001.

1352 Ibid.

1353 Ibid.

1354 Ibid.

there is not always a trade off in quality; the main thing is that the appeal takes less time.[1355]

10.62 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.[1356] For this reason it would seem appropriate to maintain a choice of external judicial review and merits review mechanisms. See Proposal 10-4 below.

10.63 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.[1357]

10.64 The choice of forum or review may be limited by legislation. Occasionally legislation will exclude a certain avenue of appeal. For example, the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* (Cth) does not provide for AAT review (see discussion below at 10.145).

10.65 Occasionally, the statute which confers the appellate jurisdiction will contain a provision which indicates that decisions made by the court in exercise of that jurisdiction are not subject to any further appeal. There are various ways in which Parliament can restrict the scope of, for example, judicial review.[1358] The statute may, for example, state that the court's decision on appeal '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 effect of a finality clause is to preclude the operation of the more general statutory provisions which allow for appeals against the court's decisions.[1359]

Important principles of court and tribunal review

Operation and implementation of decisions under review

10.66 The negative impact of administrative penalties on individuals, companies and their dependents is well recognised.[1360] As proposed above, when adminis-

1355 Ibid.

1356 See below for further discussion of various avenues of appeal and review.

1357 '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.

1358 See M Aronson and B Dyer, *Judicial Review of Administrative Action* (1996) LBC Information Services, Sydney, 941–942.

1359 It is now well established that finality clauses of the kinds described above, so far as they apply to decisions of administrative bodies, are not effective to preclude judicial review by way of an application for certiorari for a non-jurisdictional error of law which is disclosed on the face of the record: Ibid, 948–951.

1360 For example, in 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 Services, *Breaching the Safety Net: The Harsh Impact of Social Security Penalties*, ACOSS Info 305

trative penalties are imposed by a regulator, external review should always be available. However, when external review is provided for in legislation, should the subject of an administrative penalty always have the option to stay the operation of the penalty until the review is concluded?

10.67 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 Tribunal, 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'.

10.68 The power to order a stay is generally discretionary. 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 and a corporation need to be protected.

10.69 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 *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 1953* (Cth) prohibits the grant of a stay under the *ADJR Act* if it has the effect of preventing or restraining the recovery of additional tax. See Question 10-3 below.

Time limits

10.70 The timeliness of administrative penalty decisions, and appeals from them, is also an issue. This is particularly so where a penalty directly affects livelihood such as the cancellation or suspension of, or conditions placed on, a licence, disqualification or administrative banning.

10.71 Most courts and tribunals acknowledge the need for timely delivery of decisions and so set themselves informal benchmarks. 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 immedi-

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(2001), Australian Council of Social Services. Other examples would be banning and disqualification orders and suspension and cancellation of licences. All these quasi-penalties have the potential to jeopardise livelihood.

ately 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'.

10.72 Most courts and tribunals now have provisions allowing for the 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.

Standing and third parties

10.73 Standing is fundamental to access to justice. It is a particular issue for third parties who may be affected by a regulator's decision to impose an administrative penalty. 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:

> (1) Where this Act or any other enactment (other than the *Australian Security Intelligence Organisation Act 1979*) provides that an application may be made to the Tribunal for a review of a decision, the application may be made by or on behalf of any person or persons (including the Commonwealth or an authority of the Commonwealth) whose interests are affected by the decision.

10.74 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.[1361] The AAT can be more demanding, however, when commercial interests are at stake.[1362]

10.75 Only 'persons aggrieved' can invoke the *ADJR Act*. A 'person aggrieved' includes a person whose interests are adversely affected,[1363] which suggests that this is a broader category than under the *AAT Act*. However, the ADJR cases insist that the formula's application largely depends upon the particular statutory context concerned, because it is only by looking to the Act's scope, objects and purposes that one can determine the relevancy of the applicant's interests.[1364] 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*.[1365]

1361 See *Re Control Investments Pty Ltd and Australian Broadcasting Tribunal (No 3)* (1981) 4 ALD 1, 5.

1362 See M Aronson and B Dyer, *Judicial Review of Administrative Action* (1996) LBC Information Services, Sydney, 712.

1363 See *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 3(4)(a)(i).

1364 M Aronson and B Dyer, *Judicial Review of Administrative Action* (1996) LBC Information Services, Sydney, 713.

1365 R Glindemann, 'Standing to Sue for Environment Protection: A Look at Recent Changes' (1996) 24 *Australian Business Law Review* 246, 252.

10.76 A number of provisions in federal legislation modify standing in certain review and appeal mechanisms, such as s 487 of the *Environment Protection and Biodiversity Conservation Act*, which extends (and does not limit) standing under the *ADJR Act*. An individual is taken to be a person aggrieved by the decision, failure or conduct if the individual is an Australian citizen or ordinarily resident in Australia or an external Territory, and at any time in the two years immediately before the decision, failure or conduct, the individual has engaged in a series of activities in Australia or an external Territory for the protection or conservation of, or research into, the environment. Extended standing is of particular importance in matters of public interest, such as environmental issues.[1366]

10.77 A lack of formal provision for standing can exclude potentially interested parties. As was observed in one consultation in relation to aged care legislation,[1367] 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 but had no rights of review.

Notification of appeal and review rights

10.78 Proper access to appeal and review is dependent on people being notified by the regulator of their right to appeal and review. Notification is discussed at para 7.129.

Internal review

What is internal review?

10.79 An emerging theme in Australian government policy is the increased emphasis on internal review processes, often at the expense of external review.[1368] Internal review is a process of review by a regulator of the merits of its own primary decision. It is undertaken by another officer within the same agency, usually a more senior officer. This form of review has been little studied.[1369]

10.80 Internal review can take a number of forms and an agency may have more than one system of internal review. An agency, for example, may administer a number of statutory schemes for internal review as well as having systems for review of various non-statutory decisions. Some agencies have relatively formal internal review systems, while others have less formal systems in place.

1366 For a discussion of tests of standing in public interest proceedings see Australian Law Reform Commission, *Beyond the Door-keeper: Standing to Sue for Public Remedies*, 78 (1996), Commonwealth of Australia, Canberra

1367 Victorian Bar Association, *Consultation*, Melbourne, 29 May 2001.

1368 R Creyke, 'Sunset for the Administrative Law Industry? Reflections on Developments under a Coalition Government' (1998) 87 *Canberra Bulletin of Public Administration* 39, 47.

1369 Ibid, 47.

10.81 In its report, *Better Decisions: Review of Commonwealth Merits Review Tribunals,* the ARC briefly considered internal review, recognising its advantages as being:

- a quick and easily accessible form of review which can efficiently satisfy large numbers of clients 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);[1370]
- a useful quality control mechanism, wholly 'owned' by an agency, with the best chance of feeding back and influencing primary decision making.[1371]

10.82 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. It is also attractive to many regulators as it can be less resource- and time-consuming than formal external processes.

10.83 From the outset, 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.[1372]

10.84 The *Better Decisions* report identified some disadvantages of internal review:

- it can act as a barrier, introducing lengthy delays and deterring clients from reaching a genuinely independent review body;[1373]
- it is subject to regulatory capture, resulting in few variations of original decisions;[1374]

1370 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report no 39 (1995), Commonwealth of Australia, Canberra, 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.

1371 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report no 39 (1995), Commonwealth of Australia, Canberra, para 6.49.

1372 J Uhr, 'Accountability Without Independent External Review' (1997) 84 *Canberra Bulletin of Public Administration* 57, 58.

1373 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report no 39 (1995), Commonwealth of Australia, Canberra, para 6.50.

1374 Ibid, para 6.60.

- it can lead to inconsistent treatment of clients in different geographic areas or regions.[1375]

10.85 Commentators have also observed that some people cannot, or do not, access internal review. Contributing factors include delay, expensive fees, 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, nature of internal review and lack of representation.[1376]

10.86 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.[1377]

Should internal review be mandatory?

10.87 A significant issue raised in regard to internal review is whether making it a mandatory precursor to external review is the most effective way of adding value to the administrative decision-making process.

10.88 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'.

10.89 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. Alternatively, if internal review were mandatory, provision could be made for the decision to be 'expedited' straight through to external review.

Not all decisions are suitable for merits review

10.90 Internal review is typically merits review. As noted above at para 10.40, not all administrative penalty decisions are suitable for merits review.

1375 Ibid, para 6.51.

1376 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.

1377 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report no 39 (1995), Commonwealth of Australia, Canberra. See Proposal 10-4 below.

Internal review is not suitable for all regulators

10.91 The main argument supporting mandatory internal review is efficiency; that is, the mechanism provided by the agency should be quick, cheap and used by applicants prior to accessing more formal and expensive external procedures.[1378] 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 merits review system.[1379] 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.[1380]

10.92 When the ATO imposes a penalty it sends a written notice to the taxpayer stating the type and amount of penalty. 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.[1381] Other penalty decisions that may be relevant to the imposition of an administratively imposed 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.

10.93 Centrelink received 40,920 requests for internal review in 2000–01. Nationally in 2000–01 Authorised Review Officers (AROs) finalised 82% of reviews within 28 days.[1382] What proportion of these reviews related to administrative and activity test breaches is unknown. 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, review by an ARO has been a pre-requisite to review by the Social Security Appeals Tribunal (SSAT).

10.94 Primary decisions are made in customer service centres around the country, using policy guidelines provided by 'client' departments such as the Department of Family and Community Services. Requests for internal review go to the original decision maker (ODM) for reconsideration and, if not reversed, then to the

1378 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.

1379 N Waters, 'Internal Review and Alternative Dispute Resolution: The Hidden face of Administrative Law III' (1996) 79 Ibid 91, 93.

1380 S Skehill, 'The Hidden Dimension of Administrative Law: Internal and First Tier Review' (1989) 58Ibid137, 137.

1381 Australian National Audit Office, *Administration of Tax Penalties*, Report 31 (2000), Australian Government Printing Service, Canberra, para 2.42.

1382 Centrelink, *Annual Report 2000–01*, (2001), Commonwealth of Australia, Canberra, 104.

ARO.[1383] The ARO may set aside, vary or affirm a decision. AROs will advise the client in writing of their decision. When new evidence is received by AROs, they will deal with that evidence without referring it back to the ODM.

10.95 Regulators who make relatively low numbers of quasi-penalty decisions, for example the Australian Broadcasting Authority (ABA), tend not have internal review. This could be for a number of reasons:

- Most of the administrative penalty decisions are directly appellable to an external review body, such as the AAT.[1384]

- Penalty decisions are not 'high volume'.[1385] 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.

- The decision to suspend or cancel a licence may have repercussions not only for the individual or organisation but also for their dependents and the community. The seriousness of decisions may necessitate senior decision making and fast-track external review.[1386]

- Other internal structure considerations may also be relevant.[1387]

1383 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).

1384 For example a decision by the ABA under s 143(1) of the *Broadcasting Services Act 1992* (Cth) to suspend or cancel a licence.

1385 For example, in 2000–01 the ABA reported only 142 breaches, of these 123 were breaches of the various broadcasting codes of practice, 15 of licence conditions, and 4 of the *Broadcasting Services Act*: Australian Broadcasting Authority, *Annual Report 2000-2001*, Commonwealth of Australia, Sydney.

1386 This may also explain why there is no internal review by CASA of decisions under the *Civil Aviation Act 1988*. In 2000–01 CASA reported 16 suspensions, 16 cancellation and two variations. During the reporting period the AAT received 35 applications for review of CASA decisions, and three decisions were set aside. There were eight applications to the Federal Court under the *ADJR Act* resulting in one decision being overturned: Civil Aviation Safety Authority, *Annual Report 2000-2001*, Commonwealth of Australia.

1387 For example, the ABA's policy and enforcement functions are driven by the ABA Board. Further, some ASIC penalties, such as those under s 206F of the *Corporations Act 2001*, 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 *Corporations Act 2001* (Cth), s 834(2) and 1198(2). Similarly, before making a banning order under s 828, 829, 1193 or 1194 of the *Corporations Act*, ASIC is generally 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.

Complaint handling

10.96 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.

10.97 If taxpayers feel that their rights have been infringed, that the standards in the Taxpayers' Charter have been breached, or if they have another complaint, they can contact the ATO's Problem Resolution Service (PRS).[1388] Data obtained during an ANAO audit showed that between July 1997 and June 1999, 48% of cases where the taxpayer had made a complaint through the PRS regarding penalties resulted in the penalty being remitted. The ANAO sought to compare this remission rate with the percentage of penalties remitted through normal ATO review processes but the ATO was unable to provide comparative data.[1389]

10.98 Centrelink also has extensive complaint handling mechanisms and Customer Relations Units (CRUs). Centrelink distinguishes between complaints about the merits of decisions and complaints about service delivery issues. The two categories of complaints are treated differently. Complaints to the Commonwealth Ombudsman have suggested that there is an occasional tendency to 'screen' merit complaints before referral to AROs and that this can cause customer confusion. The Commonwealth Ombudsman has suggested that there is probably a need for a more customer-friendly system that allows serious complaints to proceed relatively unhindered to ARO review.[1390]

Options

10.99 Clearly, internal review is not suitable for all regulators responsible for imposing administrative penalties. Internal review is generally more appropriate for high volume regulators. A number of different options have been canvassed in relation to mandatory internal review:

- no mandatory internal review;
- agency discretion to refer an application directly to an external review tribunal;

1388 Australian National Audit Office, *Administration of Tax Penalties*, Report 31 (2000), Australian Government Printing Service, Canberra, para 2.45–2.48.
1389 Ibid, para 2.45–2.48.
1390 Office of the Commonwealth Ombudsman, *Centrelink's Complaint Handling System*, (2000), Commonwealth of Australia.

- reviewable agency discretion to refer the application directly to an external review body; or

- mandatory internal review systems.[1391]

10.100 Some commentators propose that one solution may be to allow applicants to apply to the internal review and external review processes at the same time.[1392] However, such a system would require effective liaison between the agency and the external review body and may strain the applicant's resources. See Question 10-2 below.

Should internal review be statute-based?

10.101 Would a statute-based internal review system be more effective than a system without a statutory basis?[1393] The most obvious advantage of an internal review system with a statutory basis is that it can give the applicant a guaranteed right to a 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 conditions under which review can occur, and the categories of cases amenable to review by a delegate could be delineated).[1394] Similarly, there may be a need for legislative provisions to clarify the external review position of decisions that have been already subject to internal review.

Important principles of internal review

10.102 What factors are relevant when considering whether internal review should be included in the design of a penalty process and regulatory arrangements? As suggested above, ultimately, the peculiarities of the jurisdiction will govern the way in which an internal review system is constructed.[1395] However, three significant issues are the operation of a penalty while the review is undertaken, standing and notification of appeal rights.

1391 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.

1392 M Mitchell, 'Internal Review and Alternative Dispute Resolution: The Hidden Face of Administrative Law' (1996) 79 *Canberra Bulletin of Public Administration* 84, 84.

1393 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.

1394 S Skehill, 'The Hidden Dimension of Administrative Law: Internal and First Tier Review' (1989) 58 *Canberra Bulletin of Public Administration* 137, 139.

1395 Ibid, 138.

Operation of penalty

10.103 As noted, one advantage of having legislated internal review is that the process and certain rights can be detailed in a way that provides some certainty to the regulated community. One issue relevant to the current inquiry is the operation of the penalties while internal review takes place.[1396] 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.[1397]

10.104 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.[1398] Other penalty schemes are silent on the operation of the penalty during review. See Question 10-3 below.

Standing

10.105 The statutory basis of most of the current administrative law, including the law of standing, rests on, and is interpreted through, the common law origins of administrative review. Increasingly, however, proceedings are not governed by these common law rules of standing but rather by a particular formula of words in the statute under which, or in respect of which, proceedings are to be brought.[1399] Generally, internal review of an administratively imposed penalty can be sought by a 'person affected'. This is the case under, for example, s 129 of the *Social Security (Administration) Act*, s 16 of the *Export Inspection and Meat Charges Collection Act 1985* (Cth), s 85-5 of the *Aged Care Act 1997* (Cth) and s 558 of the *Telecommunications Act 1997* (Cth). See discussion on standing in Courts and Tribunals at para 10.73.

1396 See discussion of operation of penalty in relation to courts and tribunals above at para 10.66–10.69.

1397 It is not known whether this power is regularly exercised in practice.

1398 For example, s 126 of the *Radiocommunications Act 1992* (Cth) provides that the Australian Communications Authority may at any time, by written notice, revoke the suspension of a licence. Under the *Aged Care Act 1997* 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.

1399 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.

Notification of appeal and review rights

Proper access to appeal and review is dependent on people being notified by the regulator of their right to appeal and review.

Other principles

10.106 In November 2000 the ARC released a report *Internal Review of Agency Decision Making*.[1400] Based on its research and analysis, the ARC produced a Best Practice Guide to Internal Review. Some of the notable qualities of effective internal merits review were independence, single-layer review, accessibility, personal contact, new information and timeliness. The ALRC would reiterate the importance of these qualities, particularly when penalties are the subject of the internal review.

Independence

10.107 In order to review decisions in an impartial manner, internal review officers require a degree of independence from the makers of primary decisions. In its *Better Decisions* report the ARC acknowledged that internal review, by definition, cannot be completely independent of the relevant agency.[1401] However, it recommended that internal review be undertaken by internal review officers who are sufficiently independent of the agency primary decision makers whose decisions they review.[1402] 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 on the 'bias rule' at para 7.28.

Number of layers of review

10.108 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'[1403] and wastage of resources.

1400 Administrative Review Council, *Internal Review of Agency Decision Making: Report to the Attorney-General*, (2000), Commonwealth of Australia, Canberra.
1401 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report no 39 (1995), Commonwealth of Australia, Canberra, para 6.60.
1402 Ibid, recommendation 75.
1403 See above at para 10.63.

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.[1404]

Accessibility

10.109 Accessibility is one of the key principles of administrative law against which internal review systems can be measured. It 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'.[1405] Accessibility of internal review, then, is particularly important.

Personal contact with the applicant

10.110 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.[1406] 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.[1407] See discussion on the Hearing Rule at para 7.34.

New information

10.111 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 papers already perused by the original decision maker as it is only when the review officer has taken additional steps to obtain information and to analyse and to evaluate the information supplied that the aims of the internal review process will be met.[1408]

1404 Administrative Review Council, *Internal Review of Agency Decision Making: Report to the Attorney-General*, (2000), Commonwealth of Australia, Canberra, para 3.49.

1405 Ibid, para 3.41.

1406 R Creyke, 'Sunset for the Administrative Law Industry? Reflections on Developments under a Coalition Government' (1998) 87 *Canberra Bulletin of Public Administration* 39, 47.

1407 N Waters, 'Internal Review and Alternative Dispute Resolution: The Hidden face of Administrative Law III' (1998) 87 *Canberra Bulletin of Public Administration* 91, 92.

1408 R Creyke, 'Sunset for the Administrative Law Industry? Reflections on Developments under a Coalition Government' (1998) 87 *Canberra Bulletin of Public Administration* 39, 47.

Timeliness of internal review decisions

10.112 As noted above (at para 10.70), the timeliness of review can be particularly important when the imposition of a penalty is the subject of the review. 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 made.[1409] A number of agencies do have informal performance standards for timeliness of internal review.[1410] Other agencies have time limits prescribed by legislation.[1411]

10.113 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 to clients that can result from lengthy delays in internal review.[91] An alternative may be to give applicants the choice of either persisting with internal review despite the expiry of the time limit, or proceeding to external review. Alternatively, the applicant could be given an automatic right to choose to proceed to external review once the time limit on internal review has expired.

Limits on accountability

10.114 The ALRC's research has suggested that penalty scheme accountability mechanisms are generally operating effectively. Much of this chapter has mainly been concerned with the design of appeal and review processes when drafting penalty provisions. However, there are a number of areas of concern in relation to accountability for penalty decisions. These are:

- enforceable undertakings (see discussion at para 7.170);
- publicity (see discussion at para 7.183);
- prosecutorial discretion (see discussion below);
- private contractors (see discussion below);
- infringement notice schemes (see discussion below).

1409 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report no 39 (1995), Commonwealth of Australia, Canberra, para 6.55.

1410 Ibid, 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: Department of Family and Community Services, *Annual Report 1998-1999*, 268.

1411 Under s 286 of the *Radiocommunications Act 1992* the Australian Communications Authority (ACA) must make a review decision within 90 days after receiving the application or after receiving further information.

Prosecutorial discretion

10.115 In the context of the current inquiry, 'prosecutorial discretion'[1412] refers to the choice, exercisable by the regulator or the DPP, whether or not to impose an administrative penalty or commence penalty proceedings. The exercise of this discretion may be guided by formal or informal agency guidelines.[1413]

10.116 It is debateable whether decisions made pursuant to prosecutorial guidelines should be subject to 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.[1414]

10.117 However, the courts on a number of occasions have excluded 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.[1415]

10.118 The federal government has recently made moves to restrict statutory rights to judicial review of decisions made as part of the criminal justice process. Schedule 2 of the *Jurisdiction of Courts Legislation Amendment Act 2000* (Cth) amends the *ADJR Act* to remove or restrict rights to review the legality of administrative decisions made in the criminal justice system. The major features are the:

- removal of the right to review a decision to prosecute;

1412 At times referred to as the 'discretion to target', though this may also refer to targeting particular entities for investigation that may ultimately lead to the imposition of penalties.

1413 See, for example, discussion on the DPP's Prosecution Policy in chapter 6.

1414 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.

1415 *Maxwell v The Queen* (1996) 184 CLR 501, 534.

- 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;[1416]

- 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.[1417]

10.119 The moves to restrict review of certain criminal justice process decisions raise questions about the review of decisions made by regulators to investigate particular regulated entities or groups of regulated entities, to initiate civil or administrative penalty proceedings and decisions made not to make or continue investigations or not to commence proceedings.

10.120 Clearly, there are good policy reasons why a regulator should be accountable 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 prosecutorial discretion in Fairness chapter at para 7.106). This may necessitate the use of published prosecution guidelines.

10.121 However, the public interest is also served by regulators having a broad discretion to target. As suggested by the court in *Maxwell v The Queen*,[1418] and above in relation to merits review (at para 10.39), not all penalty-related decisions are appropriate for review. The ALRC suggests that the decision to prosecute or target 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. See Proposals 10-1 and 10-2 below.

10.122 This is not to say that the discretion to prosecute should not be exercised fairly. 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.

1416 '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.

1417 The Act also amends the *Corporations Act 1989* (Cth) and the *Judiciary Act 1903* (Cth) which have been amended to ensure that, where a prosecution is proposed to be commenced by a Commonwealth officer in a state or territory court, or where a prosecution or consequent appeal is already before such a court, the Supreme Court in the State or Territory (rather than the Federal Court) has jurisdiction over s 75(v) proceedings relating to related criminal justice process decisions.

1418 *Maxwell v The Queen* (1996) 184 CLR 501.

Private contractors

10.123 In recent years, there has been an increase in use of private contractors by government departments and administrative agencies. The ALRC defines 'private contractors' for present purposes as non-government bodies, such as corporations or not-for-profit organisations, which perform regulatory functions.[1419]

10.124 The devolution of public power to private bodies raises questions about how the exercise of regulatory power is controlled. Where contracts confer regulatory functions on private bodies, it is doubtful whether citizens are privy to these contractual arrangements. There are also implications for the availability of legal remedies against private bodies.

> 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.[1420]

10.125 This area of concern has been highlighted in relation to the Job Network.[1421]

Job Network scheme

10.126 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 under the law they cannot impose 'breach penalties' (quasi-penalties) themselves.

10.127 The Draft Employment Services Contract 2000–2003, released by the DEWRSB[1422] 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.

1419 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, recommendatory and investigative powers.

1420 Administrative Review Council, *The Contracting Out of Government Services — Report to the Attorney-General*, Report no 42 (1998), Administrative Review Council, 83.

1421 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.

1422 Now Department of Employment and Workplace Relations (DEWR).

> 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.[1423]

10.128 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.

10.129 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.[1424] Around 21% of all quasi-penalties imposed by Centrelink in 1998–99 and 24% in 1999–2000 originated in breach recommendations from the Job Network. In the six months from September 2000 to February 2001, 39% of quasi-penalties imposed by Centrelink originated in breach recommendations from the Job Network.[1425]

10.130 The discretion exercised by private contractors is of great concern. In 1999–2000, Centrelink officers overturned between 35%[1426] and 38%[1427] of breach recommendations made by private service providers. This amounted to between 172,000[1428] and 188,000[1429] breaches recommended but not imposed, or imposed but later overturned[1430] — in addition to the 302,000 quasi-penalties actually imposed. That almost one in three breach recommendations was overturned in 1999–2000 suggests that an unacceptably high proportion of recommendations were unfounded.[1431]

10.131 Of greatest concern is the suggestion that Centrelink officers accept Job Network recommendations without affording the client procedural fairness and the opportunity to offer an explanation.[1432] If this is the case 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. The private

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1423 Department of Employment, Workplace Relations and Small Business, Draft Employment Services Contract 2000–2003, Part A (General Conditions), Cl 19 ('Notification to Centrelink').

1424 See, for example, *Social Security Act 1991*, ss 601A and 577C.

1425 Australian Council of Social Services, *Breaching the Safety Net: The Harsh Impact of Social Security Penalties*, ACOSS Info 305 (2001), Australian Council of Social Services, 15.

1426 Department of Family and Community Services, *Annual Report 1999–2000*, Commonwealth of Australia, Canberra.

1427 J Moses and I Sharples, 'Breaching — History, Trends and Issues' (Paper presented at 7th National Congress on Unemployment, Sydney, 30 November–1 December 2000), 8.

1428 Department of Family and Community Services, *Annual Report 1999–2000*, Commonwealth of Australia, Canberra.

1429 J Moses and I Sharples, 'Breaching — History, Trends and Issues' (Paper presented at 7th National Congress on Unemployment, Sydney, 30 November–1 December 2000), 8.

1430 Ibid, 8.

1431 Australian Council of Social Services, *Breaching the Safety Net: The Harsh Impact of Social Security Penalties*, ACOSS Info 305 (2001), Australian Council of Social Services, 15.

1432 Welfare Rights Centre, *Consultation*, Brisbane, 15 December 2000.

contractor's recommendation then may directly result in the imposition of a quasi-penalty.

Implications of using private contractors

10.132 In August 1998, the ARC published its report, *The Contracting Out of Government Services*.[1433] As part of this review, both the ARC and Senate Legal and Constitutional Committee suggested expanding the range of administrative law remedies such as merits review, complaints to the Ombudsman and access to Freedom of Information legislation.[1434] In contrast, Professor Mark Aronson has questioned whether we 'really want to subject everything done by government to judicial review':

> [I]n a mature administrative law system, some parts of the administrative law 'package' might be inappropriate to some of the less traditional forms of government and service delivery, whilst others might more appropriately be governed solely by revamped consumer protection laws, FOI regimes, and publicly accessible watchdog committees concerned with cross-subsidies, infrastructure reinvestment and other collectivist concerns.[1435]

Judicial review

10.133 Judicial review under the Constitution and s 39B of the *Judiciary Act* is not limited to review of decisions taken under an enactment. However, while s 39B(1) is not constrained by the 'decisional' requirements of the *ADJR Act*, the remedy must still be sought against 'a Commonwealth officer'. Judicial review of Job Network members in this context will not extend to breach recommendations and will be limited to Job Network activities undertaken in an agency capacity such as negotiating Activity Agreements. It is only in this capacity, if at all, that Job Network members' actions can be imputed with the necessary official status.[1436]

10.134 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, this does not include breach recommendations.[1437]

1433 Administrative Review Council, *The Contracting Out of Government Services — Report to the Attorney-General*, Report no 42 (1998), Administrative Review Council.

1434 Ibid. This should be achieved by deeming the actions of the private contractor to be those of the government agency, and deeming the documents held by the contractor to be in the possession of the government agency.

1435 M Aronson and B Dyer, *Judicial Review of Administrative Action* (1996) LBC Information Services, Sydney, 6.

1436 K Owens, 'The Job Network; How Legal and Accountable are its (Un)employment Services?' (2001) 8(2) *Australian Journal of Administrative Law* 49, 56.

1437 Ibid, 56–57.

Merits review

10.135 Decisions that are not based in statute, such as breach recommendations, cannot be reviewed on their merits by the AAT. 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.[1438] The ARC noted that, where the service is one that the Commonwealth could not deliver directly, there may 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.[1439]

Commonwealth Ombudsman

10.136 Complaints to the Ombudsman can be made in relation to 'a matter of administration'.[1440] 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 Job Network members 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.[1441] Members may therefore be scrutinised only by investigations of the Department.[1442]

Australian National Audit Office

10.137 The expenditure of public funds by private bodies has the potential to make it more difficult for the Auditor-General to report to the Parliament on the financial operations of the government. The ARC has expressed the view that it is imperative that agencies ensure that their contracts make appropriate provision for contractors to provide sufficient information to the agency to enable the ANAO to fulfil its role as the external auditor of government agencies.[1443] It is not known to what extent this occurs.

Privacy Commissioner

10.138 Private contractors are now subject to the *Privacy Act 1988* (Cth) due to the commencement of the *Privacy Amendment (Private Sector) Act 2000* (Cth).[1444]

1438 Administrative Review Council, *The Contracting Out of Government Services — Report to the Attorney-General*, Report no 42 (1998), Administrative Review Council, 86.
1439 Ibid, 86.
1440 *Ombudsman Act 1976* (Cth), s 5(1).
1441 Ibid, s 3 and 5.
1442 Ibid, s 5.
1443 Administrative Review Council, *The Contracting Out of Government Services — Report to the Attorney-General*, Report no 42 (1998), Administrative Review Council, paras 2.31–2.32.
1444 Various parts and principles of the *Privacy Amendment (Private Sector) Act 2000* (Cth) are to commence at different times starting in December 2001.

The amended privacy legislation provides privacy protections across the private sector, including organisations providing outsourced services. This legislation is 'light touch' so as 'to provide minimum standards for the protection of people's personal information that is handled by private sector organisations without imposing high costs or red tape on business'.[1445]

Parliamentary scrutiny

10.139 The ARC recommended that agencies include provisions in their contracts that require contractors to keep and provide sufficient information to allow for proper Parliamentary scrutiny of the contract and its management. The information required to meet this need will vary from contract to contract according to a number of factors including the value of the contract, the nature of the service to be delivered under the contract and the characteristics of the service's recipients.[1446]

10.140 While there is no express requirement for agencies to make available to Parliament and others additional information about the performance of contractors delivering government services,[1447] it is important that agencies make sufficient information about contracts and contractors available to enable Parliament and members of the public to identify areas of interest and concern that can be the subject of further inquiry and investigation.

Some options

10.141 The general principle to emerge from this discussion is that when private contractors are used by a regulator, accountability for any decision to impose an administrative penalty should not be lost or diminished. See Proposal 10-5 below.

10.142 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.

10.143 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.

1445 Attorney-General's Department, 'Privacy Guidelines for the Private Sector', *Media Release*, 24 August 2001.

1446 Administrative Review Council, *The Contracting Out of Government Services — Report to the Attorney-General*, Report no 42 (1998), Administrative Review Council paras 2.19–2.23.

1447 Agencies are required to publish details of contracts in the *Commonwealth (Purchasing and Disposals) Gazette*.

10.144 Of course, if the regulator is wholly responsible for making the decision to impose the penalty, and does not in practice simply adopt a contractor's recommendations, the risk of excluding administrative review or other accountability mechanisms is minimised.

Infringement notice schemes

10.145 The *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act* replaces 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. There is no avenue of appeal to the AAT in relation to the decision to issue an infringement notice under the second and third tier of this model. 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. It has been 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;[1448]

- 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.[1449]

10.146 In response the ACS has stated that there is currently no merits review of a decision to issue an administrative penalty notice under s 243T of the *Customs Act* — AAT review is only available for a decision on penalty remission under s 243U. In addition, it 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;

1448 Customs Brokers and Forwarders Council of Australia in '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.

1449 Law Council of Australia in '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.

- 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 infringement notice operates as a 'confession and avoidance' — 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 a decision of a judge or magistrate. There is therefore no 'final decision' made by a decision maker that could be reviewed by the AAT.[1450]

10.147 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 was subject to review it would possibly undermine the policy objectives of speed and expedition.

10.148 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 12.48, 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 internal review, or a court or tribunal could effectively review the decision.

10.149 Additionally, 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. As suggested at para 10.107, 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.

Other sources of public accountability

Introduction

10.150 The Parliament, the Commonwealth Ombudsman, the Privacy Commissioner and the ANAO are examples of organisations that can provide some accountability and recourse in relation to penalty decisions and processes. A review by the Ombudsman or even a Senate Committee could potentially result in a spe-

1450 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.

cific penalty decision being corrected. An audit by the Privacy Commissioner may result in a finding that a regulator has not complied with privacy legislation, for example in the investigation leading to a penalty. However, most of these bodies described in this section provide general oversight to ensure that regulators remain democratically accountable rather than a direct avenue for the correction of a particular penalty decision.

10.151 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.[1451] However, others have argued that these avenues of oversight need expansion. For example, in its report, *Competitive Tendering and Contracting by Public Sector Agencies,* the Industry Commission drew attention to the need to preserve accountability when services are contracted out.[1452]

10.152 Of course, these methods of accountability and review 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.

The Commonwealth Ombudsman

10.153 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. During an investigation, the Ombudsman may refer a specified question about the taking of the action, or the exercise of the power to the AAT.[1453] Alternatively, the office may recommend to the relevant government department that it refer the question to the AAT.[1454]

10.154 Provision of a more detailed explanation of an agency's decision or action continues to be the most common remedy. However, the trend over the last five years is for other remedies of a more corrective kind to be increasingly significant. Further, through the investigation of complaints, the Ombudsman identifies systemic deficiencies or issues which become the basis of major projects. In 1999–

1451 See comment by J Longo in T Sykes, 'Battling With the Law', *The Australian Financial Review* (Sydney), 13 August 2001, 53.
1452 Industry Commission, *Competitive Tendering and Contracting by Public Sector Agencies*, Report no 48 (1996), AGPS, Melbourne, 4–5.
1453 *Ombudsman Act 1976* (Cth), s 10A.
1454 Ibid, s 11.

2000 an investigation of the internal complaint handling of the individual agencies resulted in a major report on Centrelink.[1455]

10.155 In its *2000–2001 Annual Report* the Ombudsman reported a total of 22,045 complaints. It is not known what percentage of these complaints related to penalty decisions. However, complaints in 2000–01 were made against a number of regulators who impose penalties including 3,354 complaints against the ATO (16% of the total of complaints received by the Ombudsman); 46 complaints against the ACCC; 10,161 complaints against Centrelink (representing 47% of the overall total of complaints received by the Ombudsman); 91 complaints against ASIC; and 83 complaints against the ACS.

Australian National Audit Office

10.156 The ANAO has the potential to provide correction of inefficient bureaucratic processes. This is 'long term' accountability, however, rather than accountability for day-to-day or individual penalty decisions.

10.157 The ANAO aims to provide an independent view of the performance and financial management of public sector agencies and bodies.[1456] It does this through providing a series of audit services and products. Its main task is the preparation of performance audits, financial statement audits and better practice guides. The Auditor-General has a discretion to undertake performance audits of all government bodies other than Government Business Enterprises (GBEs) or individuals employed under the *Members of Parliament (Staff) Act 1984* (Cth).[1457] In addition, the Auditor-General can be requested to undertake an audit by a minister, the Finance Minister or the Joint Committee of Public Accounts and Audit (JCPAA).[1458] The ANAO can also act as a result of findings arising from other audits.

10.158 Most of the reports published by the ANAO are the result of performance audits. One such performance audit was the audit of the administration of tax penalties.[1459] This audit found that there was scope for improvement in the ATO's administration of the penalty regime. It found that, although penalties are an important enforcement strategy featured in the ATO Compliance Model, the ATO lacks appropriate control structures to oversee the accountability, consistency and effectiveness of its penalty administration. During the course of the audit, the ATO

1455 Office of the Commonwealth Ombudsman, *Centrelink's Complaint Handling System*, (2000), Commonwealth of Australia.

1456 Australian National Audit Office, *Website*, Australian National Audit Office, <www.anao.gov.au>, 22 October 2001, 22 October 2001.

1457 *Auditor-General Act 1997* (Cth), Pt IV.

1458 Ibid, s 20.

1459 Australian National Audit Office, *Administration of Tax Penalties*, Report 31 (2000), Australian Government Printing Service, Canberra. Another audit report relevant to the ALRC's current inquiry is the ANAO Performance Audit of Aviation Safety Compliance: Australian National Audit Office, *Aviation Safety Compliance*, 19 (1999), Australian Government Printing Service, Canberra.

initiated a review of penalties and has proposed legislative amendments aimed at streamlining and simplifying the current penalty regime. The ATO also advised the ANAO that it was to review corporate governance of its penalty regime.

Privacy Commissioner

10.159 The Privacy Commissioner can provide some accountability of regulator's actions in the penalty process. 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 Commissioner has formal complaint determination powers under the *Privacy Act*,[1460] in practice these powers are rarely used. The Commissioner will generally not investigate a complaint until it has first been made directly to the agency.

10.160 The Privacy Commissioner has responsibilities under the federal *Privacy Act*. Relevantly, the Act provides protection for personal information that is handled by federal government agencies. The Privacy Commissioner also has certain responsibilities under other legislation including:

- *Crimes Act 1914* (Cth), regulating the handling of information about old minor convictions;
- *Data-matching Program (Assistance and Tax) Act 1990* (Cth), regulating the conduct of federal government data-matching programs; and
- *Telecommunications Act 1997* (Cth), monitoring disclosure of personal information to law enforcement agencies and consulting on privacy codes.

10.161 Commonwealth agencies must comply with 11 Information Privacy Principles which are set out in s 14 of the *Privacy Act*. They 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* and guidelines issued by the Privacy Commissioner under that Act governing the conduct of data-matching using tax file numbers. Commonwealth government agencies are also affected by privacy rules set out in other laws, including secrecy provisions in their own legislation.

10.162 The Privacy Commissioner has powers under the *Privacy Act* to visit an agency to audit its compliance with the Information Privacy Principles. The audit is a key method for determining the extent of compliance with the Act and the existence of the audit functions and program encourages organisations subject to the Act to take compliance seriously.

1460 *Privacy Act 1988* (Cth), s 52.

10.163 Most federal government agencies are required to maintain a Federal Personal Information Digest setting out:

- the nature of the various types of records of personal information kept by the agency;
- the purpose for which the records are kept;
- the class of individuals to which the records apply;
- the period for which the records are kept; and
- details of how individuals can get access to records about themselves.

Parliamentary committees

10.164 The Parliamentary committee system is another means of ensuring accountability. Each House of Parliament has the power to require members of the executive government and public servants to produce information to it. This power derives from s 49 of the Constitution and is reflected in s 5 of the *Parliamentary Privileges Act 1987* (Cth).[1461]

10.165 The direction and extent of a Senate committee's inquiry is determined by its terms of reference. Committees do not have powers of their own: they possess only the authority delegated to them by the Senate itself. The Senate has very wide powers of inquiry which include the power to inquire into any matter of public interest and to acquire whatever information it considers necessary to discharge its constitutional responsibilities.

10.166 For reports on matters on which the Senate has power to act, the presentation of a report may be followed by a motion that it be adopted or agreed to. Reports from select, legislative and general purpose standing committees frequently recommend changes to policies, legislation and administrative practices — matters which the Senate cannot by itself undertake but which require the combined action of the Government and the Parliament. The usual practice with such reports, therefore, is for a senator to move that the report be noted. Governments give careful consideration to reports and frequently act on committee recommendations.

10.167 Senators serve on more than 30 parliamentary committees. One example, relevant to the current inquiry is the Senate Estimates Committee. Legislation committees carry out the work previously performed by the Estimates Committees,

1461 A person failing to comply with a lawful order of a committee to appear or produce documents may be found to be in contempt of Parliament and be subject to a fine of up to $5,000 for a natural person or $25,000 for a corporation: *Parliamentary Privileges Act 1987* (Cth), s 7.

whose reports and recommendations have resulted in a number of improvements in public service management practices and in greater accountability to Parliament. In June 2001 the Department of Employment, Workplace Relations and Small Business[1462] commenced an inquiry into the largest Job Network contractor as part of an investigation of a 'phantom' job scheme run by the agency. The inquiry was commenced as a result of the scheme being raised in a Senate Estimates Committee.[1463] Senate committees have also recently made inquiry into recent complaints about the mass-marketed tax schemes, such as Budplan, ATO delays in bringing test cases, and ATO settlement processes.

Annual reporting

10.168 Regulators must prepare annual reports in accordance with the requirements of legislation. 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.[1464]

Freedom of information

10.169 The *Freedom of Information Act 1982* (Cth) (*FOI Act*) enables Australians to scrutinise, discuss and contribute to government decision making.[1465] The importance of FOI remedies was highlighted in early 2001 when the ATO was trying to persuade thousands of investors in mass-marketed tax schemes to forfeit their rights under the *FOI Act* in return for settlement of long-running tax disputes. Tax officers were asking investors to agree to surrender their right to see ATO documents dealing with their involvement in the schemes. The ATO noted that there would be huge resources involved in providing this information under the *FOI Act* to thousands of taxpayers without any conclusive result. These moves have been described as

> contrary to public policy … if a term in a contract [once signed by a taxpayer] is contrary to public policy, the ATO could not stop a person exercising rights under the FOI Act. But assuming the terms are valid, which I very strongly doubt, the tax office would still be obliged under the FOI Act to deal with requests for information. No contract could over-ride the statutory obligation of a government agency to provide FOI information.[1466]

1462 Now Department of Employment and Workplace Relations (DEWR).

1463 L Tingle, 'Employment Contractor Raided Over "Fake" Jobs', *The Sydney Morning Herald*, 8 June 2001, 5.

1464 These requirements will differ depending on whether the regulator can be classified as a department, Commonwealth authority or Commonwealth company.

1465 Administrative Review Council, *The Contracting Out of Government Services — Report to the Attorney-General*, Report no 42 (1998), Administrative Review Council, para 3.12.

1466 P Bayne and M Laurence, 'Tax Deal Anger', *BRW*, 8 June 2001.

Independent review bodies

10.170 A recent example is the Independent Review into Breaches and Penalties in the Social Security System.[1467] The terms of reference for the Independent Review are, in part, to identify factors affecting, and the consequences of, recent changes in the incidence of breaches and penalties and to recommend any improvements in the effectiveness and fairness of the system in relation to statutory provisions and policies and practices of government and non-government agencies.

> A comprehensive and independent Review is necessary because the Centrelink internal review announced last week by Community Services Minister Larry Anthony will not include an examination of all relevant law and policies and nor will it be independent. …
>
> The focus will be on providing recommendations for improvements and to help the development of a fairer and more effective social security system.[1468]

The review reported in early March 2002, too close to the publication of this Paper for any detailed reference to be made to it here.

Media

10.171 The role of the media in providing accountability and mobilising public scrutiny of regulators should not be underestimated. There are daily news features on the role, successes and failings of regulation. Recent examples of the regulation debate include:

- How closely should regulators monitor business and respond to corporations that appear to be in difficulty? Do we need harsher penalties for individuals to deter corporate crime and mismanagement? These issues have been debated extensively in relation to the role of ASIC and APRA and the collapse of HIH Insurance and One.Tel.

- How do regulators choose whom they take action against? There has been media comment on the ATO's announcement that it intends reducing the penalty interest payable on tax debts relating to some investments in mass-marketed 'tax effective' schemes.[1469] There have also been media debates on 'high profile' cases brought by ASIC (for example, the Nicholas Whitlam/NRMA, Water Wheel, One.Tel, HIH Insurance and Harris Scarfe cases).

1467 See <www.breachreview.org>.

1468 Australian Council of Social Services, *Independent Group to Conduct Review of Social Security Penalties*, Australian Council of Social Services, <www.acoss.org.au/review.htm>, 24 October 2001.

1469 Australian Taxation Office, *Media Release Nat 01/30 — Tax Office Reduces Interest Applying to Some Mass Marketed "Tax Effective" Scheme Debts*, Australian Taxation Office, <www.ato.gov.au/ content. asp? doc=/content/corporate/mr200130.htm>, 25 May 2001.

- How 'heavy handed' regulators should be in enforcing the law, such as the 'watchdog' approach of the ACCC in the implementation of the GST?

- Publicity has also been given to the number and harshness of administrative penalties imposed by Centrelink on welfare recipients as part of the 'mutual obligation' system.

Proposals and questions

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.

Proposal 10-3. Subject to Proposals 10-1 and 10-2, 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.

Proposal 10-4. Subject to Proposals 10-1 and 10-2, 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.

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?

Question 10-2. Are there any circumstances where internal review should be a mandatory precursor to access to external review?

Question 10-3. Should legislation 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?

Proposal 10-5. 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.

11. Recovery of Monetary Penalties

Contents

11.1 The Terms of Reference ask the ALRC to report on the 'enforcement' of civil and administrative penalties. 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. Before discussing infringement notice and other specific enforcement procedures, it is useful to outline conventional mechanisms used to recover criminal and non-criminal monetary penalties imposed for contraventions of federal laws.

11.2 Although the Terms of Reference mention the 'enforcement' of penalties, in this context the ALRC takes this to refer to the recovery of monetary penalties that have been imposed by one of the various enforcement procedures that are open to regulators. Elsewhere in this Discussion Paper, 'enforcement' has been used to also refer generally to enforcement procedures under which penalties are imposed (ie, to refer to the taking of civil actions or criminal prosecution and other, non-court-based compliance activities).

Enforcement options

11.3 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). Enforcement of criminal and most civil regulatory offences involves a court process following the investigation by the regulator or specialist investigation agencies such as the AFP of the alleged contravention.

11.4 In the case of administrative penalties, the regulator controls the entire enforcement process. Some penalties (or 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 powers to withhold payments or seek offset.[1470]

11.5 The effect of such systems on the rights to have penalty decisions reviewed is considered in chapter 10.

Enforcement of criminal penalties

11.6 The ALRC's review of federal penalty legislation reveals that fines and imprisonment are the most common penalties for federal criminal offences. Criminal penalties imposed for offences against Commonwealth laws are enforced under state or territory law.[1471]

Imprisonment

11.7 Part 1B of the *Crimes Act 1914* (Cth) provides detailed guidance on imprisonment for federal offences. Section 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 term of imprisonment in months by five. 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.

11.8 Section 20AB of the *Crimes Act* specifies a range of alternative sentencing orders which may be made in respect of federal offenders, including community service orders and periodic or weekend detention orders.

1470 See for example *Social Security Act 1991* (Cth), s 1230C.
1471 *Commonwealth of Australia Constitution Act 1900* (Imp), s 120.

Recovery of fines

11.9 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.

11.10 Thus, the remedies available for recovery of fines under the relevant state or territory law are available to enforce fines for federal offences.[1472] 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.[1473] 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'.[1474]

> The New South Wales Fines Act 1996 provides a good example of the diversity of fine enforcement mechanisms that are increasingly becoming available under state and territory law. The Fines Act 1996 lays down a sequence of steps for the enforcement of a fine imposed by a New South Wales court, that a person has failed to pay. After warnings have been given, a person's driver's licence is to be suspended and then cancelled. A person's vehicle registration may also be cancelled. If these measures are unavailable or ineffective, civil enforcement action such as the seizure of property or the garnishment of wages may be instituted. If the fine remains unpaid, community service may ordered. Imprisonment is then the option of last resort for non-compliance with a community service order.[1475]

11.11 In particular, the amendments made fine enforcement options such as the suspension or cancellation of a vehicle's registration or a driver's licences available in respect of fines imposed by a court for federal offences. For constitutional reasons, the 1998 amendment limited the exercise of federal jurisdiction in respect of fine enforcement to magistrates.

> The requirements of the Commonwealth constitution do, however, necessitate special rules for federal offenders in one respect. Some state and territory laws allow serious penalties, such as community service orders and imprisonment, to be imposed for fine default on the order of a justice of the peace or an administrative agency. Under the separation of powers requirements of the Commonwealth constitution, such orders

1472 See, for example, *Chief Executive Officer of Customs v Rota Tech Pty Ltd* (1999) 201 LSJS 390; *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2000) 157 FLR 395.

1473 Sections 15A(1AA)–(1AD) were inserted by the *Crimes Amendment (Enforcement of Fines) Act 1998* (Cth) and the *Crimes Amendment (Fine Enforcement) Act 1999* (Cth).

1474 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 22 June 1998, 5075 (D Williams (Attorney-General)), 5076.

1475 Ibid, 5075–5076.

> may only be made in respect of a federal offender by a court exercising federal judicial power. Under the amended section 15A, there will be a special procedure under which a magistrate is to make such orders in the case of a federal offender. Those orders will then feed back into the normal state or territory enforcement system.[1476]

11.12 The 1999 amendment was made to allow 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).

> As a result of the separation of powers requirement in the Commonwealth Constitution, penalties ranging from imprisonment to property seizure can only be imposed on a federal fine defaulter by a court. This requirement has caused some administrative difficulties, because the Commonwealth relies on states and territories to enforce its fines, and many of these states and territories have moved to devolve enforcement powers to administrative agencies or to enforcement units within the court system.
>
> The effect of the amendments in this bill will be to allow some corresponding devolution in federal cases. The bill will exempt fine enforcement from the general rule that only a magistrate can exercise federal judicial jurisdiction. Instead, federal judicial jurisdiction to enforce fines will be available to any officer of a summary court with equivalent jurisdiction under state or territory law, subject to one qualification I will outline below. …
>
> As a matter of federal constitutional law, a state or territory court officer can only exercise federal judicial power if his or her decision can be appealed to or reviewed by a magistrate. States and territories will be notified that their law must allow some scope for appeal or review if they want officers of their courts of summary jurisdiction to be able to impose penalties on federal fine defaulters.[1477]

11.13 It is not clear to what extent state and territory fine enforcement legislation meets this requirement.

11.14 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.[1478]

1476 Ibid, 5076.
1477 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 30 June 1999, 7865 (P Slipper).
1478 Ibid, 7865.

11.15 The extent to which such state and territory enforcement processes have been used to enforce fines for federal offences is unclear.[1479] The nature of such state and territory procedures is discussed further in chapter 12.

11.16 Fine enforcement highlights the importance of the criminal/non-criminal distinction in the classification of regulatory offences. The state and territory enforcement processes are limited to fines imposed for criminal offences.[1480]

Imprisonment in default of payment of a fine

11.17 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 gaoled even if imprisonment was not a penalty available for the primary offence.[1481] 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'.[1482]

Limits on application of state and territory sentencing laws

11.18 The precursor to s 15A of the *Crimes Act*, s 18A, was considered by the High Court in *Thomas v Ducret*.[1483] The applicant, Thomas, had pleaded guilty to offences concerning false and misleading statements for which criminal liability was imposed under Part V of the *Trade Practices Act 1974* (Cth). The matter was heard by the Federal Court sitting in Victoria. The judge imposed a total penalty of $35,000, including a provision for imprisonment in default of payment of the fine.

1479 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 of New South Wales, *Annual Report 2000–2001*, (2001), Attorney-General's Department of New South Wales, Sydney, 61.

1480 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. 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).

1481 *Crimes Act 1914* (Cth), s 15A(1AB); *Reardon v Nolan* (1983) 74 FLR 309.

1482 The same wording is used in s 79A of the *Trade Practices Act*. Note, however, that s 79A incorrectly refers to s 18A, rather than s 15A, of the *Crimes Act*.

1483 *Thomas v Ducret* (1984) 52 ALR 269.

The applicant argued that the judge had erred in ordering imprisonment in default of payment of the fine as there was no relevant Victorian law in force at the time that allowed for imprisonment of a defendant in default of payment of a fine where the defendant had been dealt with summarily.

11.19 The High Court agreed with the applicant, noting that, for a state law to be applied in accordance with s 18A, the law must apply to similar types of offence. That is, if the Commonwealth offence is a summary offence, the sentencing law that may be applied is limited to the law applicable to summary offences in the relevant State or Territory.

Question

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?

Recovery of civil penalties

11.20 Civil penalties will usually be described in the legislation as a 'debt due' by the offender 'to the Commonwealth'[1484] or an amount payable to the Commonwealth.[1485] Enforcement of civil penalties is by way of civil action taken through the normal court process.[1486] Legislation may prescribe who has standing to pursue an outstanding civil penalty; for example, s 77 of the *Trade Practices Act* provides that the ACCC may take civil action for recovery of a penalty imposed under s 76 of that Act.

11.21 The usual process involves seeking an order for a judgment debt from a state or territory court; then using appropriate debt collection procedures. 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.

1484 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; *Corporations Act 2001* (Cth), s 1317G, which provides that a pecuniary penalty is a 'civil debt payable to ASIC on the Commonwealth's behalf'.

1485 See, for example, *Trade Practices Act*, s 76.

1486 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 *Trade Practices Act* specifically grants preference to the payment of civil compensation over payment of fines or pecuniary penalties. A similar provision was inserted into the *ASIC Act* (s 12GCA) by the *Financial Services Reform (Consequential Provisions) Act 2001* (Cth).

11.22 For both criminal and civil penalties, therefore, state and territory law is the conventional enforcement mechanism.

Problems with recovery of penalties

Speed of court processes

11.23 The speed of the litigation process may be an issue for regulators. Issues relating to speed of criminal prosecutions are discussed in chapter 6. Information released by ASIC provides an example of the time taken from the commencement of investigation to handover to the DPP for criminal prosecution. ASIC refers criminal matters to the DPP when it has completed its own investigations. The DPP accepts and considers matters for prosecution in accordance with its Prosecution Policy. In 2000–01, ASIC completed 80% of criminal investigations within nine months. ASIC states that in most cases charges are laid within three months of the DPP accepting a brief.[1487]

11.24 The speed of civil proceedings is difficult to assess. Most civil proceedings would be commenced in the Federal Court, which has set a target of completing 85% of cases within 18 months. In 2000–01, 90.9% of cases were completed within 18 months.[1488] As at 30 June 2001, the Federal Court had 507 current matters under the *Trade Practices Act*, 247 (or 49%) of which were over 18 months old.[1489] The information released by the Federal Court does not identify how many of these matters were initiated by the ACCC. Of the 85 matters noted by the ACCC to be in court in 2000–01, 42 matters (or 49%) were continuing from the previous year.[1490] Many of the ACCC's continuing cases would not be penalty cases but would include complex competition cases that inevitably take some time.

11.25 However, the actions to which this material appears to relate are the primary enforcement actions for the imposition of a penalty rather than the follow-up recovery actions. The information available to the ALRC does not specify whether a matter is 'completed' when final orders are obtained or when the judgment debt (assuming the regulator to have been successful) is paid or recovery action is completed or abandoned. The ALRC anticipates, however, that the duration of recovery actions are not included in these figures.

1487 Australian Securities & Investments Commission, *Annual Report 2000–2001*, Australian Securities & Investments Commission, 23.
1488 Federal Court of Australia, *Annual Report 2000–2001*, (2001), Federal Court of Australia, 13.
1489 Ibid, 152–153.
1490 Australian Competition & Consumer Commission, *ACCC Annual Report 2000–2001*, (2001), ACCC Publishing Unit, Canberra, 1–2.

Cost of litigation

11.26 The cost of conventional court-based enforcement is also difficult to assess. In 1999–2000, the ACCC noted that it spent over $12 million on litigation in over 70 court actions.[1491] Information about the ACCC's actual litigation costs for 2000–01 is not available but it is unlikely to have declined as the number of court actions increased to 85.[1492] In its 2000–01 annual report, the ACCC notes: 'A litigation reserve fund, initially of $10 million, will assist court actions. The fund will build to a reserve of $20 million and will strengthen the Commission's ability to deal with major litigation.'[1493]

11.27 There is no information available to the ALRC to allow it to determine how much of the costs of litigation are spent on recovery as opposed to enforcement actions, nor how much is recovered through specific recovery action to force payment from non-complying judgment debtors.

11.28 Recovery of the costs of litigation and the expenses of investigations is considered in detail below in chapter 13.

Enforcement outcomes

11.29 Measuring enforcement success is difficult for many regulatory agencies.[1494] Even where it is quantifiable, it is not the whole picture. For some agencies (such as tax, where collection of revenue is the primary aim of regulation) measuring enforcement success is a relatively straightforward task involving a financial analysis of revenue collected. For other agencies, enforcement success is less easy to quantify. For example, whilst market regulators such as ASIC and the ACCC do go to court and achieve awards of fines, penalties and costs, the amounts imposed in this way are not necessarily a sign of the success of the regulator. Indeed, declining levels of litigation may be a better indicator of success as they may demonstrate increasing levels of compliance within the regulated community, removing the need for formal enforcement action to be taken by the regulator.

11.30 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

1491 Australian Competition & Consumer Commission, *Annual Report 1999–2000*, Commonwealth of Australia, Canberra, 2.
1492 Australian Competition & Consumer Commission, *ACCC Annual Report 2000–2001*, (2001), ACCC Publishing Unit, Canberra, 1.
1493 Ibid, 5.
1494 For a general discussion of the difficulties in measuring effective regulation see chapter 4.

> 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.[1495]

11.31 Education and deterrence do not easily translate into statistics and, therefore, measurement of enforcement success is difficult. More 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 there is a problem with conventional enforcement.

Enforcement activities of selected agencies

11.32 The information set out below details the enforcement activity of a number of federal regulators. However, the material available to the ALRC does not allow it to discern how much of this activity was recovery actions rather than principal actions for the imposition of a penalty, nor how much of the amounts recovered resulted from specific recovery actions.

ACCC

11.33 *Criminal referrals.* In 2000–01, the DPP dealt with four summary criminal matters referred to it by the ACCC.[1496]

11.34 *Civil litigation.* The ACCC was involved in more than 85 court actions during 2000–01;[1497] and almost $43 million dollars in fines and costs were imposed.[1498]

11.35 *Enforceable undertakings.* In 2000–01, the ACCC accepted 66 enforceable undertakings or variations to existing undertakings under s 87B.[1499] These undertakings were not all given in possible penalty actions, they include undertakings given in merger and product safety matters.

1495 Australian Competition & Consumer Commission, *Corporate Plan 2001–02*, (2001), ACCC Publishing Unit, Canberra, 8.

1496 Commonwealth Director of Public Prosecutions, *Annual Report 2000–2001*, Commonwealth Director of Public Prosecutions, 21.

1497 Australian Competition & Consumer Commission, *ACCC Annual Report 2000–2001*, (2001), ACCC Publishing Unit, Canberra, 1.

1498 Ibid, 15. A substantial increase from the $14 million in penalties imposed in 1999–2000: Australian Competition & Consumer Commission, *Annual Report 1999–2000*, Commonwealth of Australia, Canberra, 2.

1499 Australian Competition & Consumer Commission, *Electronic Public Registers: Section 87B Undertakings Register*, <www.accc.gov.au>, 21 January 2002.

ASIC

11.36 *Criminal referrals.* ASIC referred 75 matters to the DPP in 2000–01.[1500] Outcomes of criminal litigation completed included the gaoling of 25 individuals[1501] and the recovery of $1.8 million in fines in summary prosecutions.[1502]

11.37 *Civil litigation.* In 2000–01, ASIC completed 72 civil enforcement actions.[1503] Assets worth $77 million were frozen — including orders totalling $45 million against former directors and officers of one company alone.[1504] It was said that investors were saved $400 million by the prevention of unlawful investment schemes or schemes which inadequately disclosed material information.[1505]

11.38 *Administrative action.* ASIC took administrative action in 79 matters in 2000–01 resulting in eight licences to deal or advise in securities being revoked, 17 people being banned for life from giving investment advice, eight insurance brokers being deregistered, suspended or subject to conditions, 16 company auditors and liquidators being disciplined, and 10 people being disqualified from managing companies.[1506]

11.39 *Enforceable undertakings.* In 2000–01, ASIC accepted 46 enforceable undertakings.[1507]

ATO

11.40 The ANAO found that the ATO Annual Report does not report the gross value of penalties applied or the net value of penalties after remission;[1508] it only gives information about the total amount of penalties remitted during the year. These deficiencies in information about penalties make it difficult to gain a clear picture of how penalties impact on taxpayers.

11.41 *Criminal matters.* The DPP 'dealt with' 236 summary offences and 15 indictable offences by the ATO in 2000–01.[1509]

1500 Thirty-five summary matters and 40 indictable matters: Commonwealth Director of Public Prosecutions, *Annual Report 2000–2001*, Commonwealth Director of Public Prosecutions, 21.

1501 Australian Securities & Investments Commission, *Annual Report 2000–2001*, Australian Securities & Investments Commission, 21. The longest sentence was 11 years.

1502 Ibid, note 22(d), 97.

1503 Ibid, 20.

1504 One.Tel: Ibid, 24.

1505 Ibid, 24.

1506 Ibid, 24–27.

1507 Ibid, 27.

1508 Australian National Audit Office, *Administration of Tax Penalties*, Report 31 (2000), Australian Government Printing Service, Canberra, para 2.50–2.52.

1509 Commonwealth Director of Public Prosecutions, *Annual Report 2000–2001*, Commonwealth Director of Public Prosecutions, 21. This figure does not include any cases referred by the ATO to the AFP for inves-

11.42 *Administrative penalties.* Despite the absence of publicly available ATO data on penalties, limited information about tax penalties is available elsewhere. According to ANAO estimates, in 1998–99 the value of penalties applied by the ATO was $1.122 billion (compared with a total tax revenue collected by the ATO of $135.3 billion). In 1998–99, the ATO remitted $139 million worth of penalties,[1510] or about 12 per cent. By 2000–01, this amount had risen to $239 million.[1511]

Centrelink

11.43 *Criminal referrals.* Referrals of suspected criminal breaches are made by Centrelink to the DPP. The 2000–01 benchmark of 3,800 referrals to the DPP was exceeded by 1.8% with 3,868 referrals.[1512] The DPP actually prosecuted 2,854 cases (or 74% of referrals), resulting in 2,820 convictions involving fraud worth $26.5 million — a prosecution success rate of 99.4%.[1513]

11.44 *Administrative penalties.* The key source of information about administrative penalties in social security is a joint research paper by the National Welfare Rights Network and the Australian Council of Social Services (ACOSS).[1514] The report found that 'the number of harsh social security penalties being imposed on people receiving unemployment benefits has dramatically increased' by about 250% between 1997–98 and 1999–2000, from 120,000 to 302,000 penalties.[1515] The 302,000 penalties in 1999–2000 were imposed on 200,000 recipients (out of 1.7 million people on social security payments subject to activity testing), reflecting the prevalence of multiple penalties against individuals[1516] and that some breaches are not overturned in time to be discounted.[1517]

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tigation which may have been subsequently referred to the DPP for prosecution. This figure also does not reflect the total number of referrals made by the ATO to the DPP, but only referrals which resulted in charges being laid. Neither the ATO nor the DPP has made the total number of ATO referrals publicly available. The DPP's *Annual Report 2000–2001* states more broadly that the DPP dealt with 291 summary charges and two indictable charges under 'taxation legislation' in 2000–2001, which would include any additional taxation charges not referred by the ATO (for example, AFP referrals): Commonwealth Director of Public Prosecutions, *Annual Report 2000–2001*, Commonwealth Director of Public Prosecutions, 19. It is not clear how many charges resulted in convictions.

1510 Australian National Audit Office, *Administration of Tax Penalties*, Report 31 (2000), Australian Government Printing Service, Canberra, para 1.

1511 Australian Taxation Office, *Commissioner of Taxation Annual Report 2000–01*, (2001), Australian Taxation Office, note 20A, 191. In 1999–2000, the value of remissions was $167 million: Ibid.

1512 Centrelink, *Annual Report 2000–01*, (2001), Commonwealth of Australia, Canberra, 41.

1513 Ibid, 81.

1514 Australian Council of Social Service and National Welfare Rights Network, *Doling out Punishment; The Rise and Rise of Social Security Penalties*, (2000), ACOSS, Sydney.

1515 Ibid. ANAO figures show activity test breach levels of 78,182 for 1998–99, 176,314 for 1999–2000 and 207,852 for the period July 2000–April 2001: Australian National Audit Office, *Management of Fraud and Incorrect Payment in Centrelink*, (2001–2002), AGPS, Canberra, 77.

1516 'This is an estimate calculated by multiplying the number of breaches by state and territory shown in figure 8 by the penalty amounts shown in figure 2. It underestimates the full amount of breach penalties by

11.45 Despite the significant increase in breach penalties, 'there has been no corresponding increase in the instance of actual welfare fraud'.[1518] The 2,881 criminal convictions for 'welfare fraud' in 1999–2000 reflected a small decrease from the 3,011 convictions in 1998–1999.[1519]

11.46 *Savings.* The Minister for Family and Community Services, Senator Vanstone, announced in January 2002, that data-matching between Centrelink, the ATO and the Department of Veterans' Affairs had 'saved taxpayers over $550.1 million in three years' by allowing the identification of incorrect payments and undeclared or understated income.[1520] The data-matching program resulted in 210,921 payment cancellations or reductions.

Question

11.47 The Terms of Reference specifically ask the Commission to report on issues surrounding the 'enforcement' (or recovery) of civil and administrative penalties. The Commission'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 they are in some way specific to civil and administrative penalties, and the Commission is concerned to learn whether there is any issue in this area that warrants reform in the context of this inquiry.

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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assuming that all Activity Test penalties are at the rate that applies to first breaches only': Australian Council of Social Service and National Welfare Rights Network, *Doling out Punishment; The Rise and Rise of Social Security Penalties*, (2000), ACOSS, Sydney.

1517 J Moses and I Sharples, 'Breaching — History, Trends and Issues' (Paper presented at 7th National Congress on Unemployment, Sydney, 30 November–1 December 2000), 9.

1518 Australian Council of Social Service and National Welfare Rights Network, *Doling out Punishment; The Rise and Rise of Social Security Penalties*, (2000), ACOSS, Sydney.

1519 Ibid. The 2000–01 figure of 2,820 convictions reflects a further slight decrease: Centrelink, *Annual Report 2000–01*, (2001), Commonwealth of Australia, Canberra, 81.

1520 Senator the Hon Amanda Vanstone, 'Data Matching Saves Taxpayers $550 Million', *Media Release 8 January 2002*, <www.facs.gov.au>, 18 January 2002.

12. Infringement notices

Contents

12.1 The Terms of Reference ask 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 offences, 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 11. 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 and non-criminal offences out of the court system. This chapter considers the latter.

Infringement notice schemes

12.3 An infringement notice (sometimes called a penalty notice) is a notice authorised by statute setting out particulars of an alleged offence. It gives the al-

leged offender 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 (payments can often be made electronically using a credit card) and the consequences if the alleged offender fails to respond to the notice either by making payment or electing to contest the offence.

12.4 Infringement notices 'are traditionally issued for offences of a more regulatory rather than criminal nature, such as parking offences'.[1521] Infringement notices are generally issued only in respect of criminal offences, not civil contraventions. This is mainly due to the large number of lesser criminal offences that occur frequently (for example, importation of prohibited goods such as food by tourists) and cause little harm to the community but would be difficult to deal with through the normal criminal process (because of issues such as the use of public resources for expensive proceedings which are unlikely to result in any significant penalty).

12.5 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.[1522]

12.6 Payment of the penalty set out in the infringement notice finalises the matter without a conviction being recorded:

> Expiation finalises the rights and liabilities of the prosecuting authority and the alleged offender. The choice to expiate the offence rests with the alleged offender. The scheme is designed to facilitate the efficient disposal of matters involving minor offences. It is in the public interest that matters be finalised pursuant to the scheme of the legislation.[1523]

12.7 Infringement notices are a coercive penalty as the alleged offender is offered the opportunity to 'make the problem go away' by paying the infringement notice penalty, 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% 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 penalty without question. Not paying the penalty and contesting the offence is made less attractive by the prospect of a heavier sanction if a court determines the

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1521 New South Wales Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996), New South Wales Law Reform Commission, Sydney, para 3.1.

1522 *Brian William Mcquade v Marion City Council* (1998) 100 ACrimR 203, 206, discussing the *Expiation of Offences Act 1996* (SA).

1523 *Riessen v The State of South Australia* (2001) 79 SASR 82, 88–89, discussing the *Expiation of Offences Act 1996* (SA).

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.

> The smooth running of a complex society demands that laws creating even minor offences be enforced. Current means of enforcement through the courts, even the lower courts, are expensive. The cost of prosecution is borne by the prosecuting agency (which may, however, recover its costs if the prosecution is successful) and ultimately by society as a whole and the cost of the infrastructure (the courts and their personnel) is also borne by society as a whole. The prosecution of minor offences in courts that are already congested adds considerably to their workload.[1524]

12.8 An infringement notice could 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.

12.9 In its report ALRC 57 *Multiculturalism and the Law*, the ALRC described infringement notices as 'a diversionary tool' designed 'to divert offenders in minor cases away from the criminal courts'.[1525] 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 alleged offender elects to contest the offence in court.

Advantages

12.10 Infringement notices have been described as 'instant justice'[1526] and 'justice on the spot'.[1527] But the reality is that infringement notices are not primarily about improving the quality of justice or the speed of conventional court processes: their primary purpose is to deal with contraventions of the law without involving the courts. The justifications for avoiding the traditional justice system have been stated to include that:

> [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.[1528]

1524 Australian Law Reform Commission, *Multiculturalism and the Law*, ALRC 57 (1992), Australian Law Reform Commission, Sydney, para 9.5.

1525 Ibid, para 9.8.

1526 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.

1527 R Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria* (1995) Australian Institute of Criminology, Canberra.

1528 R Fox, 'Infringement Notices: Time for Reform' (1995) 50 *Trends and Issues in Criminal Justice* 1, 4.

12.11 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'.[1529] 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 *Customs and Excise* 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.[1530]

12.12 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.[1531]

12.13 In his opening address at the ALRC's Penalties conference held in June 2001, the Attorney-General, the Hon Daryl Williams AM QC MP, commented favourably on the increasing use of 'on-the-spot' penalties in Commonwealth law:

> Administrative penalties have generally been employed in situations where a quick and efficient penalty is likely to be preferred by both prosecution and defence to a full-blown committal trial. … In essence, civil penalties have evolved largely to provide a financial deterrent to corporate misconduct. Administrative penalties, especially on the spot fines, provide a quick and efficient resolution of minor transgressions of the law.[1532]

Disadvantages

12.14 Disadvantages previously noted by the ALRC include:

- lack of court scrutiny;

1529 Australian Law Reform Commission, *Multiculturalism and the Law*, ALRC 57 (1992), Australian Law Reform Commission, Sydney, para 9.2.

1530 Australian Law Reform Commission, *Customs and Excise*, ALRC 60 (1992), Australian Law Reform Commission, Sydney, Vol III, 309–310.

1531 New South Wales Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996), New South Wales Law Reform Commission, Sydney, para 10.20.

1532 The Hon D Williams AM QC MP, 'Official Opening and Keynote Address' (Paper presented at Penalties; Policy, Principles and Practice in Government Regulation, Sydney, 8 June 2001), 5.

- risk that innocent people will pay the infringement notice penalty to avoid 'the expense of contesting proceedings';[1533]

- possibility of discriminatory enforcement against vulnerable members of the community; and

- 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.

12.15 The New South Wales Law Reform Commission identified the same disadvantages as the ALRC and some additional disadvantages:[1534]

- 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.

12.16 Both Dr Mirko Bagaric and Professor Richard Fox have noted the potential of infringement notice schemes to 'trivialise crime'[1535] 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.[1536] Bagaric notes the possibility of a 'reduction in the quality of criminal justice due to fewer people having their day in court'.[1537]

12.17 Bagaric describes offences dealt with by way of infringement notices as 'on-the-spot' offences and notes that 'most of these offences are simply regulatory in nature aimed at controlling and deterring certain behaviour. They are typically victimless strict liability offences'.[1538] He is critical of the criminalisation of such offences as they 'do not seek to protect any recognisable right'.[1539]

1533 Australian Law Reform Commission, *Customs and Excise*, ALRC 60 (1992), Australian Law Reform Commission, Sydney, Vol III, 309.

1534 New South Wales Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996), New South Wales Law Reform Commission, Sydney, para 10.21.

1535 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.

1536 R Fox, 'Infringement Notices: Time for Reform' (1995) 50 *Trends and Issues in Criminal Justice* 1, 5.

1537 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.

1538 M Bagaric, 'The "Civil-isation" of the Criminal Law' (2001) 25(4) *Criminal Law Journal* 184, 189.

1539 Ibid, 190.

> It could be argued that 'on the spot' offences are, in effect, a separate category of offence and hence need not be accounted for or taken into consideration in developing a general theory of the criminal law.[1540]

12.18 However, this criticism seems to be more directed at the status of the offence itself rather than the infringement notice procedure. There is in principle no reason that such procedures could not be used in lieu of formal civil court proceedings to expiate non-criminal offences. The reality is probably that the procedures have been applied to existing low-level criminal offences without any thought having been apparently given to whether the offences should in fact remain criminal.

12.19 Infringement notice procedures are used to deal with large volumes of minor criminal offences. Using a truncated procedure for dealing with criminal offences (which are usually subject to rigorous procedural protections) raises concerns about access 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'.[1541] 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.[1542] 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.

12.20 Professor Arie Freiberg notes that this type of administrative penalty is growing and is critical of this process as creating a new class of offence:

> This new class of offence, falling somewhere below summary offences, has grown in volume to such a degree that these infractions/offences now far outnumber the number of cases brought before the courts. What they lack in seriousness they make up in bulk. The procedures governing their use are diverse, inconsistent and are essentially pragmatic. Little jurisprudential theory has underpinned them, but that is changing as the types of offences they are slowly being extended to are growing more serious and the sanctions permitted more severe.[1543]

Use at state and territory level

12.21 The inquiry's Terms of Reference require the ALRC to report specifically on state and territory infringement notice schemes such as the SETONS ('Self-

1540 Ibid, 190.

1541 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.

1542 R Fox, 'Infringement Notices: Time for Reform' (1995) 50 *Trends and Issues in Criminal Justice* 1, 5.

1543 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), 6.

enforcing ticketable offence notice system') procedure in Queensland,[1544] the PERIN ('Procedure for enforcement and registration of infringement notices') procedure in Victoria[1545] and the SEINS ('Self-enforcing infringement notice system') procedure in New South Wales.[1546] Infringement notice schemes also operate in the Northern Territory,[1547] South Australia,[1548] Western Australia[1549] and, to a lesser extent, Tasmania.[1550] In the 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.

12.22 Generally, these procedures 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.

Outline of procedures

12.23 The SPER system in Queensland covers any offence (other than indictable offences or offences against the person) prescribed by regulation as coming under the SPER system.[1551] The PERIN system in Victoria is similarly broad and 'may be used in relation to any infringement notice, whenever issued'.[1552] The New South Wales penalty notice system uses similar jurisdictional wording to the PERIN system. The New South Wales scheme covers 'an offence under a statutory provision

1544 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.

1545 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.

1546 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.

1547 See Division 2A of Part IV of the *Justices Act* (NT).

1548 See *Expiation of Offences Act 1996* (SA), s 6 and 13.

1549 See *Fines Penalties and Infringement Notices Enforcement Act 1994* (WA).

1550 A general scheme was enacted by the *Justices Amendment (Infringement Notices) Act 1997* (Tas) but has not yet commenced operation. 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 Control Act 1994* (Tas). The Fines Enforcement Unit of Justice Tasmania administers payment of most infringement notices.

1551 Definition of 'infringement notice offence': *State Penalties Enforcement Act 1999* (Qld), sch 2.

1552 *Magistrates' Court Act 1989* (Vic), sch 7, cl 1. The PERIN scheme is specified entirely in Schedule 7 to the Act: *Magistrates' Court Act 1989* (Vic), s 99.

for which a penalty notice may be issued'.[1553] A list of statutory provisions under which penalty notices may be issued is included in the Schedule to the *Fines Act 1996* (NSW).

12.24 The basic form of the procedures in all three jurisdictions is as follows.

- An officer (or 'authorised person') issues an infringement notice giving details of the alleged offence and the penalty payable. These notices include the information that the alleged offenders are entitled to have their liability for the penalty determined by a court. If they do not elect to test 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 alleged offender fails to pay the full amount within the required time, the officer serves a reminder notice (or 'courtesy letter') providing further time for payment.

- If the alleged offender fails to pay the penalty and does not elect to have the matter heard by a court before the further time limit expires, the officer registers the penalty with the registrar of the PERIN Court under the Victorian scheme.[1554] In Queensland, the penalty is registered with SPER.[1555] In New South Wales, the penalty is registered with the State Debt Recovery Registry.[1556]

- In Victoria, the registrar of the PERIN Court,[1557] makes an order, enforceable as a court order, that the person pay the penalty and an additional enforcement fee provided for under the legislation, and stating the consequences if they fail to do so. In Queensland, the registrar of SPER,[1558] and in New South Wales, the State Debt Recovery Office,[1559] issues an enforcement order giving the person a further 28 days to pay the penalty and setting out the consequences if they fail to do so.

- In none of these schemes is a court required to consider the case and pronounce a conviction or sentence.

1553 *Fines Act 1996* (NSW), s 19.
1554 *Magistrates' Court Act 1989* (Vic), s 99 and sch 7, cl 4.
1555 *State Penalties Enforcement Act 1999* (Qld), s 33.
1556 *Fines Act 1996* (NSW), s 40.
1557 *Magistrates' Court Act 1989* (Vic), sch 7, cl 5.
1558 *State Penalties Enforcement Act 1999* (Qld), s 38.
1559 *Fines Act 1996* (NSW), s 42.

Why are infringement notice schemes so common?

12.25 In New South Wales and Western Australia the current infringement notice schemes were introduced following (or, in New South Wales, partly concurrently with) law reform commission inquiries that raised concerns about the level of imprisonment of fine defaulters.[1560] In Western Australia, prior to the introduction of the present scheme, 34% of people sent to prison were fine defaulters.[1561]

12.26 Prior to the introduction of the PERIN scheme in Victoria, 70% of the Magistrates' Court's time was spent on traffic offences; by 1991 (five years after the PERIN scheme commenced) this had been reduced to 28.8%.[1562] 'The ratio of matters dealt with on the spot to that determined by the courts exceeds 7:1'.[1563] The success of the PERIN scheme may also be measured in financial terms. A 1996 report of the Auditor-General of Victoria showed that 83% of fines imposed by infringement notices were paid within the required period; with a further 5% finalised at court and a further 4% finalised by the Sheriff's Office — leaving only 8% unpaid.[1564]

12.27 In 1999–2000, 516,000 cases were initiated under the PERIN system in the Magistrates' Court of Victoria.[1565] In 2000–01, the Magistrates Courts in Queensland processed 266,791 matters through the SETONS and SPER systems.[1566] In 2000–01, the New South Wales State Debt Recovery Office collected more than $90 million in fines, penalties and enforcement costs.[1567]

12.28 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 alleged offender and the state as it can make payment of the notice penalty the easiest option.

> Most enforcement actions will be achieved through efficient computerised transactions which will allow the system to speedily manage the majority of defaulters. The

1560 New South Wales Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996), New South Wales Law Reform Commission, Sydney; The Law Reform Commission of Western Australia, *Report on Enforcement of Orders under the Justices Act 1902*, Report no 55(III) (1994), The Law Reform Commission of Western Australia, Perth.

1561 'Fines, Penalties and Infringement Notices Enforcement Act 1994' (1996) 22 *Commonwealth Law Bulletin* 650, 651.

1562 R Fox, 'Infringement Notices: Time for Reform' (1995) 50 *Trends and Issues in Criminal Justice* 1, 3.

1563 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, 231.

1564 Cited in Ibid, 263.

1565 Magistrates' Court of Victoria, *Annual Report*, (2000), Magistrates' Court of Victoria, 34.

1566 Department of Justice and Attorney-General (Queensland), *Annual Report 2000–01*, (2001), Department of Justice and Attorney-General (Queensland), Brisbane, 128. SETONS was replaced by SPER with effect from 27 November 2000, when the substantive provisions of the *State Penalties Enforcement Act 1999* (Qld) commenced.

1567 Attorney-General's Department of New South Wales, *Annual Report 2000–2001*, (2001), Attorney-General's Department of New South Wales, Sydney, 61.

suspension of a driver's licence or vehicle licence is an effective enforcement strategy because for most people a licence is essential for mobility.[1568]

Use at federal level

12.29 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 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.[1569] Examples in legislation looked at by the ALRC are set out below:

1. Section 1313 of the *Corporations Act 2001* (Cth) 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',[1570] 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 penalty and (where applicable) rectifies an omission within 21 days of the issue of the notice, ASIC will not take further action.

2. Section 497 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) allows regulations enabling 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 alternative penalty at one-fifth of the maximum penalty that could be imposed by a court as a penalty for the offence.

3. The *Fisheries Management Regulations 1992* (Cth) set up an administrative infringement notice system allowing a notice carrying a monetary penalty of $200 to be issued as a substitute for criminal proceedings.[1571] Payment of an infringement notice penalty means that the person's liability in relation to the offence is taken to be discharged, further proceedings cannot be taken against the person for the offence and the person is not to be regarded as having been convicted of the offence.[1572] An example of the discrepancy be-

1568 'Fines, Penalties and Infringement Notices Enforcement Act 1994' (1996) 22 *Commonwealth Law Bulletin* 650.

1569 Including the *Air Navigation (Fuel Spillage) Regulations 1999, Air Navigation Regulations 1947, Airports (Building Control) Regulations 1996, Airports (Control of On-Airport Activities) Regulations 1997, Civil Aviation Regulations 1988, Customs Act 1901* (as amended by the *Customs and International Trade Modernisation Act 2001), Defence Force Discipline Act 1982, Fisheries Management Regulations 1992, Interstate Road Transport Regulations 1986*.

1570 A 'prescribed offence' is an offence for which no penalty is prescribed in Schedule 3 or in any other provisions of the *Corporations Act*. The current penalty is 5 penalty units ($550).

1571 Examples of offences under the system are non-compliance with requirements to show identification codes, radio call signs and names on boats; reporting boat positions; and failing to return documents when a concession is cancelled.

1572 *Fisheries Management Regulations 1992* (Cth), reg 41.

tween the criminal and infringement notice penalty processes is contravention of s 93, relating to returns of fish received by a holder of fish receiver permits. The infringement notice penalty is $200;[1573] however, if criminal proceedings are taken under the *Fisheries Management Act* the offence is punishable by six months' imprisonment.[1574]

4. A similar infringement notice regime is set up in the *Migration Act 1958* (Cth). The *Migration Regulations 1994* (Cth) provide for alternative penalties for breaches of s 137 (fraudulent provision of information in respect of holders of business visas), s 229 (carriage of a non-citizen to Australia without documentation) and s 230 (carriage of concealed persons to Australia). As an alternative to prosecution, the Department can serve an infringement notice setting out the alleged offence and the penalty payable. Upon payment, no further proceedings will be taken and the person is not to be regarded as having been convicted of the offence. Under s 137, conviction can lead to a penalty of $5,000; the infringement notice penalty ranges from $250 to $1,000. For breaches of s 229 and 230, criminal fines are up to $10,000. The infringement notice penalties are $3,000 for natural persons and $5,000 for a body corporate.

5. The administrative infringement notice scheme established by the *Radiocommunications Regulations 1993* covers much of the conduct which is subject to the criminal offence provisions in the *Radiocommunications Act 1992* (Cth). The Australian Communications Authority 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.[1575] On payment, any liability for the alleged offence is regarded as being discharged and no further proceedings may be taken. The difference between the maximum administrative 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.

Customs administrative penalties infringement notice scheme

12.30 There is some controversy regarding amendments to the penalty provisions of the *Customs Act 1901* (Cth) in relation to a range of Customs cargo reporting

1573 Ibid, reg 46.
1574 *Fisheries Management Act 1991* (Cth), s 93.
1575 For an offence 'of a minor nature' against s 315 of the *Radiocommunications Act 1992* (Cth).

and commercial activities.[1576] Cargo management runs on a self-assessment system whereby industry reports cargo and identifies the correct amount of duty to be paid within the prescribed timeframe. Under the previous system, administrative penalties were only available for duty-related errors on import duties. However, there was dissatisfaction with the enforcement of administrative penalties involving the initial imposition of large penalties (200% of the duty shortfall) followed by a near-automatic remission. In consultations, it was noted that a 50% remission rate was standard. This high remission rate had led to a significant reduction in the use of administrative penalties by the Australian Customs Service (ACS).[1577]

12.31 Under the new scheme, there will be a range of strict liability offences for breaches of statutory obligations. The ACS advised the Senate Legal and Constitutional Legislation Committee in its Inquiry into the Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2001 that:

> Strict liability offence regimes are common across jurisdictions to encourage compliance with regulatory requirements ranging from speeding offences to not being able to substantiate entitlement to diesel fuel rebate. The approach in this Bill reflects overall Government policy on strict liability. Strict liability is a deliberate (and necessary) policy to catch inadvertent errors because otherwise the self-assessment scheme would be seriously undermined by people failing to take sufficient care. In accordance with criminal law policy, the penalties for these offences are relatively modest … there is no compulsion to issue a penalty — that decision must take into account the circumstances of each case.[1578]

12.32 An infringement notice scheme will be available for some strict liability offences.[1579] Administrative penalties can be imposed for errors on export entries, refunds or drawback applications, late or inaccurate cargo reports and unauthorised

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1576 The *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* (Cth), was passed by Parliament on 26 June 2001. The Act has not yet been proclaimed. Due to the significant changes to administrative systems required by the legislation the date of proclamation has been extended to no later than 21 July 2003. Further consultation on the implementation of the legislation is occurring with industry and enforcement guidelines are under development: 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, 4. It is presently intended that the infringement notice scheme commence on 1 July 2002. The provisions discussed here are administrative penalties; they are not related to Customs prosecutions under Part XIV discussed separately in this Discussion Paper (in chapter 3).

1577 Customs Brokers and Forwarders Council of Australia, *Consultation*, 15 December 2000. This fact was also noted in Australian Law Reform Commission, *Administrative Penalties in Customs and Excise*, ALRC 61 (1992), Australian Law Reform Commission, Sydney.

1578 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, 31.

1579 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.

movements of goods.[1580] An important change to the system is that most of these offences will carry strict liability although in some cases the errors might relate to information which the Customs agents cannot check and do not create (see para 12.42).

12.33 The *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* (Cth) proposes a three-tiered approach. The first tier, offences for which fault must be proved, relate to intentional false or misleading statements and will be prosecuted in court. The ACS may elect to prosecute under s 234 of the *Customs Act*. The second tier is for strict liability offences which will be prosecuted in court. This will arise if it is not considered appropriate to issue an infringement notice or the alleged offender does not pay an infringement notice penalty. 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.[1581]

12.34 As a result of the debate on Customs changes, the issue of use of strict and absolute liability offences in Commonwealth legislation was referred to the Standing Committee for Scrutiny of Bills, which has not yet reported.[1582]

Customs infringement notice requirements

12.35 Under the new scheme, infringement notices can only be served for the strict liability offences set out in s 243X of the *Customs Act*.[1583] Section 234Y provides that the CEO of Customs (or delegate) 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 (see para 12.39–12.41 and 12.60–12.61 below). Only one infringement notice may be served for each offence.[1584] The *Customs Act* does not require the CEO to serve an infringement notice where an offence is detected, and it may be deemed that no action is warranted

1580 Explanatory Memorandum, Customs Legislation Amendment and Repeal (International Trade Modernisation Bill) 2000 (Cth), 106.

1581 Ibid, 107.

1582 The report was originally due by 28 February 2002. The work of the Committee was interrupted by the general election held in November 2001 and it had not reported, nor had a new reporting date been set, by 31 March 2002.

1583 That is, offences under *Customs Act 1901*, 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 is scheduled to commence on 1 July 2002.

1584 *Customs Act 1901* (Cth), s 243ZC.

or a warning alone may be issued.[1585] A notice may be served up to 12 months from the day after the date of the alleged offence.

12.36 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 Customs 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.[1586]

12.37 If the penalty 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 alleged offender's liability is discharged and he or she is not considered to have been convicted of an offence. No further action can be taken to prosecute.[1587]

12.38 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).[1588]

Guidelines for the administration of the strict liability offences

12.39 Section 243XA now requires the CEO of Customs to make guidelines for the administration of the strict liability scheme. 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.[1589]

12.40 The Senate Legal and Constitutional Legislation Committee noted that the power to be conferred on certain Customs officers to issue infringement notices is significant and that no merits review of those decisions is available (see para 12.43–12.45 below). The Committee found that, in these circumstances, the Bill should be amended to provide that the Guidelines be a disallowable instrument for the purpose of the *Acts Interpretation Act 1901* (Cth) and therefore subject to

1585 Ibid, s 243ZD. 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, 95.

1586 *Customs Act 1901* (Cth), s 243ZA.

1587 Ibid, s 243ZB. Despite this, the ALRC has been advised that infringement notice histories form part of the compliance record of the person and are taken into account when considering whether to issue a future notice or renew a licence: A Hudson, *Consultation*, Sydney, 26 February 2002. It is yet to be resolved whether the receipt of an infringement notice under this scheme may have an adverse effect on a Customs broker's, warehouse operator's or depot operator's licence.

1588 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.

1589 Ibid, 94.

the scrutiny of the Parliament. The ACS has issued draft Guidelines for industry comment.[1590]

12.41 In response to other comments from the Senate Committee Inquiry, the Minister for Justice and Customs also endorsed recommendations that:

- Customs officers with a delegated authority to issue infringement notices will be required to complete a training course for that purpose;
- The issuing of infringement notices will be monitored through an annual audit process and statistics included in the annual report;
- The operation of the legislation will be reviewed within three years of the legislation receiving royal assent.[1591]

Criticisms of the scheme

12.42 As noted above,[1592] the Customs Brokers and Forwarders Council of Australia and the Law Council of Australia have both argued that strict liability in a commercial setting is inappropriate as the infringement notices will impose liability without a test for reasonableness and do not allow for inadvertent, careless or third party mistakes.[1593] In particular, industry has criticised the regime for not allowing an appeal mechanism.[1594]

12.43 There is no avenue of appeal to the AAT in relation to the decision to issue an infringement notice. Instead, a person served with an infringement 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.

1590 Draft Infringement Notice Guidelines were published by the CEO of the ACS on 11 February 2002: Australian Customs Service, *Infringement Notice Guidelines: Draft 11 February 2002*, Australian Customs Service, <www.customs.gov.au/ cmr/cmr_leg/industry_guidelines0202.pdf>, 18 February 2002. Public comment on the Guidelines is sought by 3 May 2002.

1591 See ACS, *Letter to Industry from the Minister for Justice and Customs: June 2001*, <http://www.customs.gov.au/cmr/cmr_leg/leg_ov.htm>, 18 January 2002.

1592 See para 12.32.

1593 Customs Brokers Council of Australia, *Consultation*, Brisbane, 16 February 2001; 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>, accessed on 8 April 2002, 7. This criticism goes to the characterisation of the offences rather than the use of an infringement notice procedure. There have been similar criticisms of new strict liability administrative penalties proposed under the Border Security Legislation Amendment Bill 2002. Amongst other things, the Bill would give the ACS extensive new information gathering powers. It is argued that strict liability is inappropriate for the types of offences created by the Bill.

1594 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.

12.44 It has been 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;[1595]

- 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 for people involved in the industry.[1596]

12.45 In response, the ACS has stated that there is currently no merits review of a decision to issue an administrative penalty notice under s 243T of the *Customs Act* — AAT review is only available for a decision on penalty remission under s 243U. In addition, it 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. No debt to the Commonwealth is created by non-payment;

- Payment of the infringement notice operates as a 'confession and avoidance' — payment of the lower amount prevents further proceedings being taken; and

- Non-payment shifts the onus back to Customs to decide whether to prosecute; any decision in relation to the offence is a decision of a judge or magistrate. There is therefore no 'final decision' made by a decision maker that could be reviewed by the AAT.[1597]

12.46 Senator Nick Bolkus observed of the scheme:

1595 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 2001, Import Processing Charges Bill 2000, and the Customs Depot Licensing Charges Amendment Bill 2000* (2001), 35.

1596 Ibid.

1597 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, para 1.40–1.41.

> There is no indication in the legislation as to how this regime will be administered. Customs have advised that there are non-binding draft principles for administering the proposed penalty regime. Given that this has had a 10-year gestation period, you would have thought they could come up with something better than draft non-binding principles. The committee recommended that these guidelines become a disallowable instrument. It is our understanding that the government may very well be forced into accepting that recommendation — and so it should. We will support such an amendment, but it is not sufficient for us to address the problems associated with the proposed strict liability regime. Such a regime would confer an unfettered discretion on decision makers in relation to the imposition of penalties. The absence of merit review is of concern to us. The cargo reporting offences prescribed relate in the main to data provided by unrelated parties. Local cargo reporters are primarily a conduit for this data; they are not originators of it at all.[1598]

12.47 It should be noted that in ALRC 61 *Administrative Penalties in Customs and Excise*, the ALRC argued against penalising non-careless or unavoidable errors in relation to the previous administrative penalties scheme on the basis that

> the policy goal of an administrative penalty scheme should be to encourage people to take reasonable care in the preparation of entries and returns, [for this reason] the Commission [ALRC] is of the view that only errors that can be categorised as at least careless should be penalised.[1599]

Restrictions on infringement notice schemes

Fallback penalties

12.48 The major difference between state and federal infringement notice schemes is that federal schemes do not have a 'fallback' penalty that will be imposed if the person fails to pay the penalty set out in the infringement notice. 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 alleged offender (that is, by paying the amount specified 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 alleged offender 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.

1598 Commonwealth of Australia, *Parliamentary Debates*, Senate, 20 June 2001, 24691 (Senator N Bolkus), 24694. The operation of a 'disallowable instrument' is outlined in s 46A of the *Acts Interpretation Act 1901* (Cth). That section states that a 'disallowable instrument' is subject to the same rules as regulations in relation to notification, date of effect, disallowance, prescribing matters by reference to other instruments and repeal.

1599 Australian Law Reform Commission, *Administrative Penalties in Customs and Excise*, ALRC 61 (1992), Australian Law Reform Commission, Sydney, para 2.9.

12.49 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 accused. 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.

Constitutional limits

12.50 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. The penalty imposed is pre-determined by law, although non-judicial officers often have — and frequently exercise — powers to remit it in part or full upon subsequent submission by the party on whom the penalty is imposed.

12.51 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.

12.52 Typically the offences dealt with by infringement notice schemes involve strict or absolute liability.

Extension of infringement notice schemes

12.53 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, *Multiculturalism and the Law*.[1600] 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 penalty, the matter would be prosecuted in the normal way. In its report on the use of administrative penalties in Customs and excise mat-

1600 Australian Law Reform Commission, *Multiculturalism and the Law*, ALRC 57 (1992), Australian Law Reform Commission, Sydney, para 9.17.

ters,[1601] 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[1602] and recommended that penalties imposed under the scheme should be subject to internal review and subsequent review by the AAT.

12.54 The New South Wales Law Reform Commission gave cautious approval to expansion of the use of infringement notices. It recommended that certain safeguards should be implemented:

> Such safeguards should include, for example, a provision which stipulates that receipt of an infringement notice should not result in a conviction being recorded for that offence. There should be a discretion not to issue an infringement notice, and guidelines should be established which set out criteria against which this discretion is to be exercised. As well, the agencies responsible for the issue of infringement notices should be properly monitored to guard against abuse and to ensure that infringement notices are not imposed on people who would not ordinarily be punished.[1603]

12.55 The use of infringement notice schemes to deal with minor criminal offences is growing at both state and federal level. The schemes reviewed by the ALRC apply only to criminal offences but there seems to be no reason why minor non-criminal offences could not be dealt with using an infringement notice scheme: for example, failing to return an identity card[1604] and failing to collect air passenger ticket levies[1605] currently attract a penalty of one penalty unit ($110). There seems no reason why these type of contraventions could not be dealt with by use of infringement notices.[1606]

12.56 Use of infringement notices to deal with continuing offences raises 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.[1607] 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 regu-

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1601 Australian Law Reform Commission, *Administrative Penalties in Customs and Excise*, ALRC 61 (1992), Australian Law Reform Commission, Sydney.

1602 Ibid, Appendix A.

1603 New South Wales Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996), New South Wales Law Reform Commission, Sydney, para 3.51.

1604 For example *Air Passenger Ticket Levy (Collection) Act 2001* (Cth), s 19; *Australian Radiation Protection and Nuclear Safety Act 1998* (Cth), s 62; *Aged Care Act 1997* (Cth), 118; *Stevedoring Levy (Collection) Act 1998* (Cth), s 15.

1605 *Air Passenger Ticket Levy (Collection) Act 2001* (Cth), s 11.

1606 Although the payment required by the infringement notice — $22 if set at 20% of the amount that a court could impose — could be too low to justify any action.

1607 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 *International Trade Modernisation Act* 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 infringement notice penalty.

lator has several opportunities to issue a notice in order to penalise a continuing failure by the regulated to comply with its obligations.

12.57 As discussed above, fallback penalties are not currently available in federal infringement notice schemes for constitutional reasons. However, the constitutional barriers to their use could be overcome if the fallback penalty was specified in the legislation under which the offence triggering the infringement notice arises (that is, if the fallback penalty was itself a true administrative penalty). There seems to be no reason why an infringement notice penalty should only be a monetary penalty (as is currently the case at federal level). At present, the fact that payment of an infringement notice penalty expiates liability for the underlying offences and that generally no record is kept of the issue of the infringement notice provides little incentive for future compliance. Because payment finalises any liability, payment of infringement notice penalties might be considered to be just the 'price' of doing business.

12.58 Use of a demerits point system or an associated loss or suspension of benefits may add an element of deterrence of future contraventions. 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 infringement notice penalty should not be an admission of liability and should not have the status of a conviction. Liability for the underlying offence 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 is likely to 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 has been committed.

12.59 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 2 years)[1608] or the use which may be made of compliance histories.

12.60 The ALRC notes with some concern that, under the *Customs Act* draft 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 to

1608 *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.

issue an infringement notice.[1609] The issue of notices is no more than an allegation, which is never tested unless the alleged offender chooses to defend the matter in court.

12.61 The form in which an infringement notice should be issued has also been raised as a concern with the ALRC in one consultation.[1610] The form of an infringement notice may be an issue where there is on-going contact between the regulator and the regulated as infringement notices might get overlooked if they have the appearance of ordinary correspondence. It was suggested to the ALRC that infringement notices should be in a form which is readily recognisable and which carries warnings as to the importance of responding to the notice. Under the proposed Customs scheme, the minimum content of an infringement notice is specified in s 243Z of the *International Trade Modernisation Act*. It does not include an explanation of the nature of the alleged offence (that is, what is meant by 'strict liability') or a statement that payment of the infringement notice penalty prevents prosecution and does not amount to a conviction of the alleged offence.[1611]

Proposals for model legislation

Developing a model scheme

12.62 Existing federal infringement notice schemes are discussed at para 12.29–12.47. Fox has suggested the development of uniform legislation to apply nationally across federal, state and territory jurisdictions.[1612] He considered that a model scheme should have the following features:

- It should apply only to summary offences;
- Payment of the penalty should fully expiate the offence (that is, no conviction should be recorded);
- Associated loss of benefits such as licence suspension or demerit points may apply but no suspension or cancellation should exceed six months;

1609 Australian Customs Service, *Infringement Notice Guidelines: Draft 11 February 2002*, Australian Customs Service, <www.customs.gov.au/cmr/cmr_leg/industry_guidelines0202.pdf>, 18 February 2002, para 3.3.2. In one consultation, the ALRC was advised that the issue of infringement notices is also taken into account when licences are renewed: A Hudson, *Consultation*, Sydney, 26 February 2002.

1610 A Hudson, *Consultation*, Sydney, 26 February 2002.

1611 This latter point is included in the draft Infringement Notice Guidelines as a matter that may be included in an infringement notice if the 'CEO considers [it to be] necessary': Australian Customs Service, *Infringement Notice Guidelines: Draft 11 February 2002*, Australian Customs Service, <www.customs.gov.au/ cmr/cmr_leg/industry_guidelines0202.pdf>, 18 February 2002, para 4.

1612 R Fox, 'Infringement Notices: Time for Reform' (1995) 50 *Trends and Issues in Criminal Justice* 1, 5–6.

- The maximum penalty payable should not exceed $500 or one-quarter of the maximum statutory penalty if the matter is dealt with by a court;

- The scheme should be administered by the public officials responsible for enforcing the legislation which creates the offence;

- The discretion to issue a warning in less serious cases or to take immediate court action in more serious cases should be available, such discretion to be exercised in accordance with published guidelines;

- Infringement notices should be written in Plain English with foreign language warnings;

- The infringement notice must clearly state that contesting the offence in court is an option;

- The infringement notice should give the person the opportunity to bring factual matters to the attention of the agency issuing the notice, with the aim of having the notice withdrawn; and

- If a court hears the matter, it should be heard by way of a 'hand-up brief'.

12.63 Fox's proposed scheme is not dissimilar to the schemes previously proposed by the ALRC with two significant differences — for constitutional reasons, an alternative or additional penalty (such as licence suspension or cancellation) is not an option at federal level; and if a matter is contested in court, the full criminal process (rather than a truncated 'hand up' brief process) should apply. The ALRC also considered that a lower penalty, calculated as one-fifth or 20% of the maximum that might be imposed by a court, was the appropriate level of penalty.[1613]

12.64 The ALRC considers that there is a need for consistency across federal infringement notice schemes and suggests that development of a model federal scheme is appropriate. The features of a proposed federal scheme are outlined below:

(a) It should apply only to strict or absolute liability offences of a 'less serious nature' — the meaning of 'less serious nature' would need to be defined by legislation. It is inappropriate to issue an infringement notice for an offence that requires any detailed forensic analysis, particularly of a state of mind.

1613 Australian Law Reform Commission, *Multiculturalism and the Law*, ALRC 57 (1992), Australian Law Reform Commission, Sydney, para 9.28.

(b) The amount payable under an infringement notice should not exceed one-fifth or 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 authorising the issue of the infringement notice. The amount of the specified penalty should be sufficiently lower than the maximum amount likely to be imposed by the court to make the payment of that amount attractive to the alleged offender.

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

(d) Guidelines on the use of infringement notices by the regulator should be issued in the form of a disallowable instrument to permit parliamentary scrutiny and published in locations that are easily accessible to the public.

(e) Only one notice should be issued for each alleged offence. If the conduct might amount to several different offences, the regulator must choose which offence it will base the infringement notice on.

(f) The regulator should have the discretion to give a warning 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 in 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 must 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 (that is, that it acts as a bar to proceedings being instituted for prosecution of the alleged offence).

(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.

(k) The consequence of failing to pay an amount set out in an infringement notice should be prosecution for the alleged offence and not an alternative or substitute penalty such as licence suspension or cancellation. The imposition of licence variations, demerit points or similar on-going penalties would have an effect similar to that of keeping an infringement notice history of an

offender in that the expiation of the offence is illusory and the record of it persists in one way or another.

(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. If substantiated, this would nullify the whole process. However, there should not be any scope for the alleged offender to seek a variation of the penalty, as this would place the regulator in the position of a court.[1614]

(m) The payment of an amount by a person under an infringement notice should prevent any record of the alleged offence being kept by the regulator. On balance, the ALRC's provisional view is that the coercive power of an infringement notice to persuade an alleged offender to pay even if liability is in doubt because of the costs of contesting the matter in court is such that to maintain any record of the issue and outcome of infringement notices is unfair.

Proposals and questions

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:

(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;

1614 A right to seek remission of a penalty, rather than variation, does not raise the same concerns about the impermissible exercise of judicial power. See the discussion of remission of penalties in chapter 15.

(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.

Question 12-1. Is it appropriate for infringement notice schemes to seek to deal with 'continuing offences'? If so, how should they be structured?

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?

13. Costs of Investigation

Contents

13.1 The inquiry's Terms of Reference 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.

13.2 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 contraventions of regulatory offence provisions.

13.3 It focuses on the expenses associated with the *investigation* of contraventions and does not address issues concerning the responsibility of a person found to

have contravened legislation to pay the costs of remediation of the effects of that contravention. 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 chapter.

General right to recover expenses of an investigation

13.4 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 13.10–13.31.

13.5 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.

13.6 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. 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.[1615]

13.7 It is intended that gene technology regulation will ultimately be self-funding through payment of annual licence charges.[1616] 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.[1617]

13.8 The indirect funding of investigations by industry funding of regulators is discussed further at para 13.61–13.80.

1615 'In 2000–2001, APRA planned to collect $61 million from industry including $12.6 million on behalf of ASIC and $2.4 million for the ATO': Australian Prudential Regulation Authority, *Annual Report 2001*, Australian Prudential Regulation Authority, 37.

1616 *Gene Technology (Licence Charges) Act 2000* (Cth). A licence charge may be set by regulation. At present, no charge is payable.

1617 *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.

13.9 Other legislation permits recovery of specific costs associated with some aspects of an investigation. For example:

- APRA has the power to order an audit of the affairs of a life insurance company to be undertaken at the expense of the company.[1618] A similar provision in relation to general insurance was inserted in s 49E of the *Insurance Act 1973* (Cth) by the *General Insurance Reform Act 2001* (Cth).

- Where organisms have been seized in relation to the commission of an offence, the 'reasonable costs' of storing, transporting, maintaining or disposing of organisms seized under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) may be recovered by the Commonwealth from the person from whom the organisms were seized.[1619]

- The ACCC may charge for performing a range of functions. For example, the ACCC may charge the party notifying an access dispute a 'pre-hearing fee' in relation to an arbitration of that dispute under Part IIIA[1620] or Part XIC[1621] of the *Trade Practices Act 1974* (Cth). The ACCC may also charge an application fee for authorisation of anti-competitive conduct[1622] and for authorisation of an acquisition of shares or assets.[1623] The level at which these fees have been set suggests that an attempt has been made to partially compensate the ACCC for the time spent by it in investigating the application.

Express right to recovery — Corporations legislation

Expenses of an investigation: *ASIC Act*, s 91

13.10 Section 91 of the *Australian Securities and Investment Commission Act 2001* (Cth) (*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.[1624] The order must have been made in relation to the administration of corporations legislation, a managed investment scheme, securities or futures contracts,[1625] or to unconscionable conduct and consumer protection in relation to

1618 *Life Insurance Act 1995* (Cth), s 230B.
1619 *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 445 and 454.
1620 *Trade Practices Regulations 1974* (Cth), r 6F. The fee is currently $10,850.
1621 Ibid, r 28W. The fee is currently $10,850.
1622 Ibid, r 28(4). The fee is currently $7,500.
1623 Ibid. The fee is currently $15,000.
1624 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).
1625 *Australian Securities and Investments Commission Act 2001* (Cth), s 13, which outlines ASIC's investigatory powers.

financial services.[1626] The conviction, judgment, declaration or order must have been made as a result of an investigation by the 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.[1627]

13.11 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.[1628] 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.[1629]

13.12 For s 91 to apply, the offenders must have been subject to court proceedings and to have had a conviction recorded or other court order made against them; that is, the investigation by ASIC must have led to a successful prosecution.[1630] 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 prosecution in accordance with the rules of the relevant court. Costs assessed by ASIC under s 91 are, therefore, not subject to the same taxing assessment that applies to costs awarded by a court.

13.13 Section 91 was based on s 309 of the *Companies Act 1981* (Cth). The Explanatory Memorandum to the Australian Securities Commission Bill 1988 noted that s 91

> is based on CA sub-ss 309(3) to (6), FIA sub-ss 39(3) to (6) and SIA sub-s 33(3) to (6), but reflects a more reasonable policy in not enabling the ASC to recover costs of an investigation where the investigation has not resulted in a person being convicted or having judgment awarded against him or her. … Where a person is convicted of an offence, or has judgment awarded against him or her in federal proceedings, as a result of an ASC investigation, the ASC may order the person to pay the costs of the investigation and may recover the costs in Court proceedings if the order is not fully complied with.[1631]

1626 Ibid, Part 2, Div 2.
1627 Ibid, 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).
1628 *Australian Securities and Investments Commission Act 2001* (Cth), s 91(3).
1629 Ibid, s 91(4).
1630 See *Boys v Australian Securities Commission & Ors* (1997) 24 ACSR 1, 31.
1631 Cited in *Westpac Banking Corporation v ASC* (1997) 72 FCR 318, 329.

13.14 The right to recover investigation expenses under s 91 is limited by s 90, which provides that (subject to section 91), 'ASIC must pay the expenses of an investigation'. Cases in which s 90 and 91 (and similar provisions) have been considered are discussed below.

Meaning of 'expenses of an investigation'

13.15 The Federal Court specifically considered s 90 and 91 of what is now the *ASIC Act* in *Westpac Banking Corporation v ASC*.[1632] 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). 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 'expenses' dealt with by s 90 and s 91 are those incurred by the ASC or for which it becomes liable to pay by operation of any provision of the Act, not the expenses of some third party in compliance with a requirement under Part 3 of the Act. … 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).
>
> The relationship between s 90 and s 91 of the Act is that although the primary obligation to pay may be imposed on the ASC, the expenses may ultimately be borne by another if the conditions prescribed are satisfied. …
>
> The legislative history of s 90 and s 91 of the Act and the operation of the two sections in relation to each other satisfies me that the sections are concerned only with the duty of the ASC to pay its expenses of an investigation and its right to effect recovery of those expenses together with its other outgoings and costs of an investigation. So understood, s 90 was not intended by the legislature to create rights or entitlements in third parties to recover the costs and expenses of compliance with a requirement of the ASC albeit one made by the ASC as part of an investigation by it under Division 1 of the Part.[1633]

13.16 An order was made by the Federal Court in *ASC v EBC Zurich AG* directing EBC Zurich to pay the ASC's investigation costs assessed under s 91.

> [A]ny 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

1632 Ibid.
1633 Ibid, 329–330.

> extent that they remain unpaid). The balance of the proceeds should be dealt with in accordance with s.577 and Part 9.7 of the Corporations Law.[1634]

13.17 This order was made in addition to a general order that the costs of the proceedings be paid by EBC Zurich.

Meaning of 'expenses'

13.18 The New South Wales Supreme Court has considered a provision similar to s 91 of the *ASIC Act*.[1635] The Court was required to decide whether expenses incurred by the Corporate Affairs Commission in investigating the conduct of a company were recoverable from the company. 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 into affairs of a company' be reimbursed by the company. The provision expressly stated that any such reimbursement could include 'the remuneration of any servant of the Crown concerned with the investigation'.

13.19 The company argued that the order for reimbursement of the expenses of the investigation should not properly include charges for:

- general overheads;
- remuneration of special investigators (including employment on-costs).

13.20 The Court relied upon the definition of 'expenses' formulated by the Victorian Supreme Court[1636] that a 'person's "expenses", if that word is used in its ordinary natural sense, are confined to moneys expended by him and obligations incurred by him; and they do not include sums which he claims a right to charge against others for his own services'.[1637] On this basis, Lusher J held that 'the term "expenses" is of limited application and does not include "overheads"'.[1638]

Meaning of 'remuneration'

13.21 In *Hunter*, reimbursement was claimed for the salaries and 'on costs (holiday pay, long service leave etc) of special investigators and support staff'.[1639] The company argued that the 'on costs' were not within the meaning of 'remuneration'

1634 *Australian Securities Commission v EBC Zurich AG* (Unreported, Federal Court of Australia, Sackville J, 14 December 1995), order 10.

1635 *Attorney-General for New South Wales v Hunter* [1983] 1 NSWLR 366 (Lusher J).

1636 *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.

1637 *Attorney-General for New South Wales v Hunter* [1983] 1 NSWLR 366, 379–80.

1638 Ibid, 380. But note that s 439 of the *Companies Act 1985* (UK) expressly provides that 'general staff costs and overheads' are recoverable.

1639 Ibid, 371.

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)'.[1640]

13.22 The English authority relied upon concerned a scheme under which regular employer contributions to a pension fund was held to form part of the employee's compensation as 'delayed remuneration for his current work'.[1641] The case before the Court was distinguished as, unlike the English scheme, the right to long service leave in the present case arose under legislation and did not arise until the end of a period of employment and

> does not provide for any sum to be paid weekly or periodically together with and in addition to the wage or salary and it is thus difficult to see how the benefit of the statutory entitlement which accrues at the end of the period can be evaluated so as to in effect be added to the weekly or other periodical wage.[1642]

13.23 Whilst payments attributable to long service leave were excluded by the Court, the holiday pay issue was not addressed.

Who may be 'remunerated'?

13.24 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*. 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'.[1643] 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'.

13.25 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.[1644] 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.[1645]

1640 Ibid, 382.
1641 *The Halcyon Skies* [1977] QB 14, 16.
1642 *Attorney-General for New South Wales v Hunter* [1983] 1 NSWLR 366, 382.
1643 They were required to be employed under the *Public Service Act 1902* (NSW).
1644 *Australian Securities and Investments Commission Act 2001* (Cth), s 9.
1645 Ibid, s 5 referring to s 120–122. Section 122(b) refers to 'persons whose services are so made available under arrangements made under section 249'. The *ASIC Act* has no provision equivalent to s 249. This section was in the *Australian Securities Commission Act 1989 (Cth)* but was repealed by the *Corporations Legislation Amendment Act 1990* (Cth). The *ASIC Act* has not been renumbered.

13.26 In 2000–01, 12 consultants were employed under the *ASIC Act* 'for essential specialist services including investigatory, legal, corporate regulatory and accounting functions'.[1646] Provided that people involved in investigations are properly appointed under the relevant legislation, it seems clear that the costs of remunerating such staff would be recoverable by ASIC under s 91.

Costs of ASIC in relation to a hearing of the Companies Auditors and Liquidators Board: *ASIC Act*, s 223

13.27 Section 223 of the *ASIC Act* gives the Companies Auditors and Liquidators Board power to make an award of costs (including in favour of ASIC) in relation to a hearing concerning the cancellation or suspension (or other discipline) of a person as an auditor or liquidator. This right is similar to the right of a court to award costs. A decision of the Companies Auditors and Liquidators Disciplinary Board may be appealed to the Administrative Appeals Tribunal (AAT).[1647]

13.28 Section 223(1)(d) was considered by the AAT in June 2000 in *Young v Companies Auditors and Liquidators Disciplinary Board*.[1648] The proceedings before the AAT resulted from a decision of the Disciplinary Board that Young's registration as a liquidator should be suspended for eight months. The Disciplinary Board 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.

13.29 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 Board is not unreasonable. However, I consider that the Board's period of suspension ought to be reduced to some extent because of the deterrence of its costs order when it is properly quantified'.[1649]

13.30 McMahon DP's consideration of the effect of the costs order in making his decision is important as he lacked the jurisdiction to review the costs order itself directly:

> The Board has made a decision to the effect that Mr Young should pay 75% of ASIC's costs of the proceedings before it, although no specific order has been made for payment of a particular amount. ASIC contends that its costs should be quantified at $61,950.50, covering counsels' fees, experts' fees and ASIC's own legal and inves-

1646 Australian Securities & Investments Commission, *Annual Report 2000–2001*, Australian Securities & Investments Commission, 54.
1647 *Corporations Act 2001* (Cth), s 1317B(1)(c).
1648 *Young v Companies Auditors and Liquidators Disciplinary Board* (2000) 61 ALD 698.
1649 Ibid, 714.

> tigative costs. Seventy five per cent of that is $46,449.38. Power to award costs is found in section 223 of the ASIC Law. An order made by the Board under that section is not reviewable by this Tribunal, whose jurisdiction is limited by section 1317B of the Corporations Law … I am unable to review the Board's costs order in the light of the findings I have made. I can, however, take that order into account as a pecuniary imposition on the applicant which he will suffer. The prospect of such impositions on others will act as a deterrent. To the extent that it serves that purpose, Mr Young would submit that any proper order should be influenced so that any period of suspension should be reduced.[1650]

13.31 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 contravention of the relevant legislation. This mitigation effect of a substantial award of costs is discussed further at para 13.57–13.58.

Recovery of the costs of investigations under the *Trade Practices Act*

13.32 In its report on the *Trade Practices Act*, the ALRC recommended 'that the *Trade Practices Act* (TPA) be amended to provide that the court may order a person who is found to have breached the *Trade Practices Act* to pay the reasonable investigation costs of the Trade Practices Commission, as determined by the court'.[1651]

13.33 The reason given for this recommendation was that:

> The Commission [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 [*Trade Practices Act*]. The court has considerable expertise in determining whether or not costs are reasonable. The Commission [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 ability of the TPC to recover reasonable investigation costs will put it in a similar position to other regulators such as the ASC.[1652]

13.34 The ALRC's recommendations were not acted upon and no right to recover costs was included in the *Trade Practices Act*.

13.35 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'.[1653] It is not clear whether this continues to be the case. The ACCC's guide to enforceable undertakings states that the 'Commission will seek to ensure that s. 87B undertakings and their development, implementation and monitoring are

1650 Ibid, 713.
1651 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), Australian Law Reform Commission, Sydney, para 11.24.
1652 Ibid, para 11.24.
1653 Ibid, para 11.24.

cost neutral to the Commission and may require cost recovery for the Commission as part of the undertaking'.[1654] 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.

13.36 Several undertakings have included commitments to pay the 'Commission's costs of and incidental to the proceedings' or 'to contribute to the Commission's costs'.[1655] 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 which might have been awarded by the court if the proceedings had continued (ie, legal costs) or whether they include a component for reimbursement of the ACCC's costs of investigating the contraventions of the *Trade Practices Act*.

Potential problems of recovery of the costs of investigations

Industry capture of regulators

13.37 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 apprehension 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.

1654 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.

1655 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), <http://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), <http://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), <http://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), <http://www.accc.gov.au/pubreg/87B_2000/d00_35677.pdf>, 30 August 2001.

13.38 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. A state agency has been publicly criticised for accepting from a person under investigation a payment purportedly made to help offset the expenses of the investigation. The Victorian Casino and Gaming Authority accepted $400,000 from a poker machine manufacturer that had been under investigation by the Authority in relation to allegations that an associated company had engaged in 'bad corporate practices' in Turkey.[1656] The Chairman of the Authority, Brian Forrest, said:

> The company, as I understand the decision, did offer a sum of money because that was the American experience — they were used to this … I don't see it as a bribe. You may, but I don't.[1657]

13.39 The Authority's investigation of the company took three years and cost $600,000. The payment made to the Authority was not retained by the Authority but was paid into consolidated revenue. The matter has been referred to the Victorian Ombudsman for investigation.[1658]

Direct recovery — awards of costs in litigation

13.40 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.

13.41 The general principles concerning the award of costs were considered in detail most recently by the High Court in *Cachia v Hanes*.[1659] 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 Rule 19) 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'.[1660] The Court noted:

> It has not been doubted since 1278, when the Statute of Gloucester ((4) 6 Edw.I c.1.) introduced the notion of costs to the common law, that costs are awarded by way of indemnity (or, more accurately, partial indemnity) for professional legal costs actually incurred in the conduct of litigation. They were never intended to be comprehensive compensation for any loss suffered by a litigant.[1661]

1656 R Baker, 'Probe into Pokies Payment', *The Age* (Melbourne), 5 October 2001.
1657 Ibid.
1658 As at 31 March 2002, the Ombudsman had not yet reported on his investigation.
1659 *Cachia v Hanes* (1994) 179 CLR 403.
1660 Ibid, 409.
1661 Ibid, 410–411.

Costs 'necessary or proper for the attainment of justice'

13.42 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 proceeding. In his article about the effect of *Cachia*,[1662] Paul Lynch considered in detail the line of authority concerning the rights of litigants in person to recover the costs associated with preparation of the case and how this compared to the rights of represented litigants. He concluded that *Cachia* (and the preliminary decisions before the High Court appeal) supported the potential recovery by a *represented* litigant of:

1. a fee for time spent in court other than when actually giving evidence, when a state of evidentiary flux existed;

2. a fee for the first conference at which instructions are given to the solicitor or counsel; and

3. 'a fee for preparatory investigation, analysis and collection of evidence ... on the basis that this be regarded as fees for qualifying a witness to give skilled evidence'.[1663]

13.43 Lynch's position is based on an extension of the principle that permits the recovery of witness fees as part of the costs of a proceeding. If it is accepted, then it potentially increases the scope for recovery of the costs of investigations undertaken prior to the commencement of proceedings.

13.44 This view is supported by *Higgins v Nicol (No 2)*,[1664] where the recovery of certain costs incurred before the initial proceeding commenced was permitted. *Higgins* was concerned with a review of the taxation of costs by the Deputy Industrial Registrar in a case concerning the relationship between a state and federal branch of the Storeman and Packers Union. The Industrial Court was required to apply Order 71, Rule 74 of the High Court Rules, which provided that costs 'necessary or proper for the attainment of justice' were allowable.

13.45 The costs associated with activities undertaken before the proceedings were commenced had been disallowed on taxation. In finding these particular costs to be allowable, the Court noted that:

1662 P Lynch, 'Cachia v Hanes; The Resurgence of the Indemnity Principle in Australia' (1995) 13 *Australian Bar Review* 177.
1663 Ibid, 204.
1664 *Higgins v Nicol (No 2)* (1972) 21 FLR 34.

> [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.[1665]

13.46 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;

2. was the work done to ascertain facts which were later proved in evidence?

13.47 Other items which were reviewed by the Court, and allowed, included:

- additional conferences with counsel. The Court held that the complexity of the issues constituted a 'special reason' supporting allowance of these costs;

- travel and accommodation costs of a potential witness who was located interstate;

- charges relating to attempted settlement of the dispute after the hearing had commenced. The Court held that it was 'not irrelevant that the negotiations took place at the instance of the court itself'.[1666]

13.48 *Higgins* was followed in 2001 by the Federal Court in *Charlick Trading Pty Ltd v Australian National Railways Commission*,[1667] 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 noted that

> there were a number of witnesses based in Sydney and one in Melbourne, who were required to be interviewed. 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.[1668]

1665 Ibid, 37 (Spicer CJ, Smithers J).
1666 Ibid, 43 (Spicer CJ, Smithers J).
1667 *Charlick Trading Pty Ltd v Australian National Railways Commission* [2001] FCA 629.
1668 Ibid, para 61.

13.49 Mansfield J allowed travel expenses relating to the interview of interstate witnesses. Travel and accommodation expenses for interstate counsel were also allowed. However, he significantly reduced all costs claimed:

> There are clearly items of work some of which would not be recoverable on a party and party basis, such as 'research and consideration of questions of law and fact' or like items. In my view, allowance for those matters to some extent is properly reflected in the 'care and conduct' allowance under Item 41 of the Second Schedule.[1669]

Order to pay the ACCC's costs of investigating the conduct

13.50 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.

13.51 In *ACCC v Trayling*, an order was made 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'.[1670] No further explanation of this order was given by the Court and no authority was referred to.[1671] The *Trade Practices Act* has no provision equivalent to s 91 of the *ASIC Act*. The ALRC recommended that such a provision be inserted in the *Trade Practices Act*. That recommendation was not acted upon.[1672]

13.52 Trayling was found by the Court to have been directly knowingly concerned in contraventions of s 52 and 59(2) of the *Trade Practices Act*. The case was originally initiated against both Trayling and his company, A1 Mobile Radiators, but when the company went into liquidation the ACCC amended its claim to proceed only against Trayling. An injunction was granted and compensation orders made against Trayling. The main orders in the case provided for refunds to be made to consumers who had purchased mobile radiator repair and service business franchises from Trayling.

1669 Ibid, para 25.

1670 *Australian Competition & Consumer Commission v Trayling* [1999] FCA 1133, order 5(ii).

1671 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.

1672 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), Australian Law Reform Commission, Sydney. See para 13.32–13.34.

Order to pay investigation costs of Australian Federal Police

13.53 In *Irvine v Hanna-Rivero*,[1673] the defendant was convicted of offences under the *Copyright Act 1968* (Cth) concerning infringing copies of computer software. The defendant had been involved in trading computer programs via a 'swap network'. When the programs were seized under search warrant, several items of computer hardware were also removed from the defendant's home. 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*.

13.54 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 $2,148.50. 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.

13.55 The Court held that the costs associated with the second trip were not recoverable as the affidavits 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'.[1674]

13.56 The costs awarded in the case relate to activities which 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 neatly with 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.

13.57 As in *Young's* case,[1675] the Court took the award of costs into account when deciding on the severity of the penalty to be imposed for the substantive contraventions.

1673 *Irvine v Hanna-Rivero* (1991) 23 IPR 295.
1674 Ibid, 301.
1675 See discussion at para 13.27–13.31.

> 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.[1676]

13.58 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.[1677]

13.59 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.

Crimes Act: costs of prosecution

13.60 Section 16B of the *Crimes Act* provides that where a person is discharged by a court without a conviction for an offence being recorded, the court may order that person to pay the costs in respect of his or her prosecution for the offence.[1678] A similar provision applies to persons released after a conviction has been recorded.[1679] The practical effect of these provisions is that persons who have been investigated and charged with offences may be required to contribute towards the costs of those proceedings in circumstances where no fine, pecuniary penalty or other sanction has been imposed.

Indirect funding of investigations: cost recovery schemes

13.61 There is an increasing trend towards full or partial cost recovery schemes in Australian legislation. Statutory schemes may provide for full funding of the regulator through industry levies[1680] or partial funding of particular functions or ac-

1676 *Irvine v Hanna-Rivero* (1991) 23 IPR 295, 300.
1677 Ibid, 301. The Court could have awarded up to $11,500 in fines under s 133 of the *Copyright Act*.
1678 *Crimes Act 1914* (Cth), s 19B(1)(d)(ii).
1679 Ibid, s 20(1)(a)(ii).
1680 See the *Australian Prudential Regulation Authority Act 1998* (Cth) and the Gene Technology Regulator scheme. The *Gene Technology (Licence Charges) Act 2000* (Cth) establishes a self-funding scheme by way of annual licence charges. The Explanatory Memorandum to the Gene Technology (Licence Charges) Bill 2000, noted that 'it is intended that the costs incurred by the Gene Technology Regulator as a result of fulfilling his/her functions under the legislation be 100% cost recovered from the users of the regulatory regime'.

tivities.[1681] By assisting in the overall funding of these regulatory agencies, these schemes indirectly contribute to the recovery of the costs of investigating criminal and non-criminal regulatory offences created by the legislation administered by those agencies.

Fully funded regulators

13.62 The APRA is an example of a fully funded regulator.[1682] APRA's funding is obtained from levies imposed on financial institutions by s 50 of the *Australian Prudential Regulation Authority Act 1998* (Cth).[1683] The Treasurer sets the levy amount and the levy monies are collected by APRA and paid into consolidated revenue from which an amount is then allocated by specific appropriation back to APRA.[1684] In 2000–01, APRA's expenditure was $52.5 million, of which an estimated 57% was spent on supervision, rehabilitation and enforcement.[1685]

13.63 When the levy scheme was proposed, it was noted that 'APRA will be funded by the industries it regulates on a full cost recovery basis ... The levies are designed to raise funds to cover the cost of all regulation of prudentially regulated institutions'.[1686] The purpose of the levy is to 'cover the costs to the Commonwealth of providing market integrity and consumer protection functions for prudentially regulated institutions'.[1687]

13.64 The scheme aims to recover 100% of the operating costs of APRA.[1688] Levies are imposed in advance, based on the asset value of the institution (subject to minimum and maximum levy amounts).[1689] If the amount of money available from the levy is smaller or greater than APRA's actual operating costs, the deficit or surplus is carried forward to the following year and offset against that year's levies.

1681 *Telecommunications (Annual Licence Charges) Act 1997* (Cth), s 15.

1682 It is also intended that the Gene Technology Regulator will in future be fully funded by industry. An initial appropriation of $7.6 million over two years has been made to fund 'the development of gene technology legislation and establishment of the [Gene Technology] Regulator. Once the Regulator is established, it is intended that the costs incurred by the Regulator as a result of fulfilling his/her functions under the legislation be 100% cost recovered from the users of the regulatory regime (for example, those seeking a license under this Bill)': Explanatory Memorandum to the Gene Technology Bill 2000 (Cth), Financial Impact Statement.

1683 See *Australian Prudential Regulation Authority Act 1998* (Cth), s 50. Levies are collected under the *Financial Institutions Supervisory Levies Collection Act 1998* (Cth).

1684 *Financial Institutions Supervisory Levies Collection Act 1998* (Cth), s 11.

1685 Australian Prudential Regulation Authority, *Annual Report 2001*, Australian Prudential Regulation Authority, 36.

1686 Explanatory Memorandum to the Australian Prudential Regulation Authority Bill 1998 (Cth), 11.

1687 *Australian Prudential Regulation Authority Act 1998* (Cth), s 50(2).

1688 In 1999–2000, APRA recovered 104% of its costs: Productivity Commission, *Cost Recovery by Government Agencies: Inquiry Report*, Report no 15 (2001), Productivity Commission, Melbourne, xxxvi.

1689 The current maximum levy is $1.005 million: Minister for Financial Services & Regulation, 'Financial Sector Levies for 2000–01', *Media Release No FSR/047*, 13 June 2001.

Partially funded regulators

13.65 ASIC and the ATO are examples of partially funded regulators. ASIC and the ATO are entitled to some monies collected under the APRA scheme to fund their consumer protection and market integrity functions. In 2000–01, $15 million of the APRA levy was retained in consolidated revenue for allocation to these functions.[1690] In 2000–01, ASIC's costs for compliance monitoring and licensing of participants in the financial system to protect consumer interests and protect market integrity were stated to be $25.6 million.[1691] The ALRC was unable to obtain information about the ATO's costs for this Discussion Paper.

13.66 The Australian Communications Authority (ACA) and the ACCC are also examples of partially funded regulators. Under the telecommunications carrier licence charging scheme, the annual charges that apply to telecommunications carrier licences are calculated by reference to the amount which the ACA and the ACCC determine 'to be the proportion of the [agency's] costs for the immediately preceding financial year that is attributable to the [agency's] telecommunications functions and powers'.[1692] The amount determined by the ACA for 1999–2000 was $16,120,345.[1693] In its submission to the Productivity Commission's Cost Recovery Inquiry,[1694] the ACCC noted that 'the total value of the ACCC portion of the levy for 1999/2000 is $3,990,833'.[1695] In its statement of directions and priorities,[1696] the ACCC noted:

> Consistent with Government policy, the Commission adopts a 'user pays' approach to many of its activities, especially those which are a service to industry or government. Furthermore, industry will fund much of the Commission's regulatory work in telecommunications. It is hoped that over time this will be extended to other areas.[1697]

13.67 The scheme allows for recovery of 100% of the costs of the relevant regulation as it is calculated in arrears on actual costs incurred.[1698] Money is collected under the scheme by the ACA, which then remits the collected money to consoli-

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1690 Australian Prudential Regulation Authority, *Annual Report 2001*, Australian Prudential Regulation Authority, 37.

1691 Australian Securities & Investments Commission, *Annual Report 2000–2001*, Australian Securities & Investments Commission, 12.

1692 *Telecommunications (Annual Licence Charges) Act 1997* (Cth), s 15(1)(a), (b).

1693 *Telecommunications (Costs Attributable to Telecommunications Functions and Powers) Determination 2001* (Cth), made on 2 August 2001.

1694 Productivity Commission, 'Cost Recovery by Commonwealth Regulatory Administrative and Information Agencies — Including Fees Charged under the Trade Practices Act 1974', *Terms of Reference*, 16 August 2000.

1695 Australian Competition & Consumer Commission, *Submission to the Inquiry on Cost Recovery by Commonwealth Regulatory, Administrative and Information Agencies Including Fees Charged under the Trade Practices Act 1974*, (2000), Productivity Commission, Melbourne, 3.

1696 Australian Competition & Consumer Commission, *Making Markets Work — Directions and Priorities*, (1999), ACCC Publishing Unit, Canberra.

1697 Ibid, 34.

1698 In 1999–2000, the ACA recovered 90% of its costs: Productivity Commission, *Cost Recovery by Government Agencies: Inquiry Report*, Report no 15 (2001), Productivity Commission, Melbourne, xxxvi.

dated revenue. Appropriations to fund the activities of each agency are then made from consolidated revenue.

13.68 The policy rationale for the scheme was expressed by the ACCC thus:

> The ACCC understands that the Government chose to recover the costs of regulating the telecommunications industry direct from industry because regulation was seen as a general benefit to industry.[1699]

Private regulators

13.69 The Australian Communications Industry Forum (ACIF), the Australian Stock Exchange (ASX) and the Telecommunications Industry Ombudsman (TIO) are examples of private regulators. The growth in private regulators has occurred in response to the Government's stated policy to increase the use of self-regulation of industry. Private regulators are usually either industry-funded or 'user pays' regulators.

Industry-funded regulators

ACIF

13.70 ACIF's role is to develop and administer technical and operating arrangements for the Australian telecommunications industry. This involves developing technical standards and industry codes of practice. Failure to comply with a registered industry code after being given a direction by the ACA attracts a civil penalty under s 121 of the *Telecommunications Act 1997* (Cth). ACIF is the major source of telecommunications industry self-regulation, including codes registered under s 117 of the *Telecommunications Act.*

13.71 ACIF is funded by its members. It is a company limited by guarantee, owned by its members. ACIF membership is open to any person, whether involved in the telecommunications industry or not. ACIF had 42 members as at 30 June 2001.[1700] Membership fees range from $1,000 for a residential/small business consumer association up to $1.14 million for a carrier that has annual telecommunications revenue in excess of $10 billion. ACIF received $2.8 million from its members in 2000–01.[1701]

1699 Australian Competition & Consumer Commission, *Submission to the Inquiry on Cost Recovery by Commonwealth Regulatory, Administrative and Information Agencies Including Fees Charged under the Trade Practices Act 1974*, (2000), Productivity Commission, Melbourne, 3.

1700 Australian Communications Industry Forum, *ACIF Annual Report 2001*, (2001), Australian Communications Industry Forum, 48. ACIF also had 34 affiliates who pay annual fees of $75 for individuals and $500 for organisations: <www.acif.org.au>, 25 January 2002.

1701 Ibid, 51.

ASX

13.72 The ASX's role is to encourage market integrity and to protect investors in the Australian stock market. It monitors market activity to identify unusual trading and supervise the activities of brokers. It develops and administers business rules and listing rules and generally supervises the Australian stock market. It works closely with ASIC. [1702]

13.73 The ASX has a National Adjudicatory Tribunal (NAT) that operates as a disciplinary panel to determine whether breaches of the ASX Business Rules have occurred.

> An investigation by Investigations and Enforcement may find evidence suggesting that a broker or broking firm has breached the Business Rules. In this case, the results of the investigation are put before NAT, and the broker or broking firm is given the opportunity to present their position.
>
> The NAT makes a determination upon the allegations and, if the breach is proved, can impose penalties where appropriate. These include censure, suspension, disgorgement of profit and commission, completion of education and compliance programs, and fines of up to $250,000.[1703]

13.74 Breaches of the ASX Business Rules are generally referred to the ASIC for investigation whether the conduct also constitutes a contravention of the *Corporations Act 2001* (Cth). Business Rules are binding on members of the ASX under s 772A of the *Corporations Act*. A court has power to direct a person to comply with the Business or Listing Rules of the ASX under s 777 of the *Corporations Act*.

13.75 The ASX is a listed company, funded by market participants. Participants pay an initial application fee, an annual fee, and trading and transaction charges for clearing and settlement services provided by the ASX. Application fees vary depending on the type of membership sought. The annual fee is $16,500 for all participating organisations.[1704] As it charges both membership fees and transaction fees, the ASX is a hybrid industry-funded/'user pays' regulator. In 2000–01, the ASX received almost $210 million from participating organisations, listed companies and customers.[1705]

1702 See discussion of the role of the ASX in chapter 5.

1703 Australian Stock Exchange, *National Adjudicatory Tribunal*, Australian Stock Exchange, <www.asx.com.au/about/l3/NAT_AA3.shtm>, 14 September 2001.

1704 Australian Stock Exchange, *The Cost of Joining*, Australian Stock Exchange, <www.asx.com.au/about/l3/CostJoining_AA3.shtm>, 14 September 2001.

1705 Australian Stock Exchange Ltd, *Consolidated Financial Report for the Year Ended 30 June 2001*, (2001), Australian Stock Exchange Ltd, 49.

'User pays' regulators

TIO

13.76 The TIO has power to resolve complaints made by consumers against telecommunications carriers and carriage service providers by making binding decisions (up to $10,000) or recommendations (up to $50,000). Decisions are legally binding as members must comply with the TIO scheme under s 132 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth).

13.77 The TIO is a 'user pays' self-regulatory scheme. It is funded by fees charged to members for the provision of dispute resolution services. The TIO is a company limited by guarantee, owned by its members. All telecommunications carriers and carriage service providers are required by law to be members of the TIO scheme.[1706] The TIO scheme had 1,089 members as at 30 June 2001.[1707] Eligible carriage service providers include internet service providers in addition to providers of ordinary telephone services.

13.78 Members are charged for each complaint received by the TIO from a customer of the member. The TIO received 72,264 complaints in 2000–01.[1708] Members are invoiced quarterly for complaint-handling fees. There are four levels of fee ranging from $18 to $1,200, depending on the category of the complaint. Fees are not charged for giving information, 'first resort' complaints (ie, where the consumer has not first contacted the service provider), anonymous complaints, reviews, or frivolous or vexatious complaints.

> During 2000/01, around 12% of members were invoiced by the TIO; the majority of members were therefore not required to contribute funds to the TIO.[1709]

13.79 If no complaints are lodged against a member, that member is not charged any fees. 'Therefore, the funding system acts as an incentive for members to keep TIO investigations to a minimum by developing and maintaining effective complaint handling and customer service procedures'.[1710] The TIO received almost $5.2 million from its members in 2000–01.[1711]

1706 *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth), s 128.

1707 Telecommunications Industry Ombudsman, *Annual Report 2000:2001*, Telecommunications Industry Ombudsman20. Nearly 82% of members are internet service providers.

1708 Telecommunications Industry Ombudsman, 'Ombudsman Releases Annual Report Card on Telecommunications Industry', *Media Release*, 25 October 2001.

1709 Telecommunications Industry Ombudsman, *Annual Report 2000:2001*, Telecommunications Industry Ombudsman, 13.

1710 Telecommunications Industry Ombudsman, *About the TIO*, Telecommunications Industry Ombudsman, <www.tio.com.au/about_tio.htm>, 13 September 2001.

1711 Telecommunications Industry Ombudsman, *Annual Report 2000:2001*, Telecommunications Industry Ombudsman, 75.

Issues relating to industry-funding of regulators

13.80 The funding of regulators by the regulated community raises issues in relation to the collection and retention of money by the regulator:

- Is levy funding in advance preferable to recovery of the costs directly attributable to compliance activities in arrears? Levy funding seems to allow the regulator to maintain an 'arms length' relationship with the regulated community as the amount collected is not directly linked to the amount expended on particular investigations or to any particular member of the regulated community. If funding is assessed on the basis of directly attributable costs, there is the potential for the regulator to be required by the regulated community to justify those costs and indirectly to justify the way it undertakes its compliance activities.

- 'User pays' funding creates the potential for abuse by competitors within the regulated community, who may see an opportunity to inconvenience a rival by making numerous complaints, the investigation of which may tie up the resources of the regulator to the detriment of other compliance and enforcement activities.

- Should any money collected be retained by the regulator, or paid into consolidated revenue, with any unused money refunded to the regulated community? Would this put undue pressure on the regulator to justify how it chooses to undertake its compliance activities?

Government inquiries into cost recovery

13.81 Two major government inquiries have recently considered the question of cost recovery by Australian regulatory agencies. In 2000, the Australian National Audit Office (ANAO) reported on the use of non-primary industry levies to fund the activities of regulatory agencies.[1712] In 2001, the Productivity Commission completed a year-long inquiry into cost recovery by Commonwealth regulatory, administrative and information agencies.[1713]

ANAO Report

13.82 In conducting its audit, the ANAO took a restricted view of the meaning of 'levy' and excluded significant cost recovery schemes, such as industry licensing

1712 Australian National Audit Office, *Management of Commonwealth Non-Primary Industry Levies*, (2000), Australian National Audit Office, Canberra.

1713 Productivity Commission, 'Cost Recovery by Commonwealth Regulatory Administrative and Information Agencies — Including Fees Charged under the Trade Practices Act 1974', *Terms of Reference*, 16 August 2000.

regimes, from the scope of its inquiry. The audit also excluded primary industry levies. Despite these limitations, the report makes some interesting observations on the use of levies to fund public initiatives.

13.83 Of the 15 levies examined in the audit, seven were categorised as having the objective of 'industry regulation'.[1714] All but two of the levies aimed at industry regulation were administered by APRA. The Private Health Insurance Administration Council and the Private Health Insurance Ombudsman administered the two other levies: the Private Health Insurance levy and the Private Health Insurance Ombudsman levy. The other levies examined in the audit were classified as having outcomes related to safety and environment (four levies), universal service obligations (two levies) and employment (two levies).

13.84 The ANAO noted that 'most levies examined in the audit were designed with the intention of recovering the costs associated with the levy activity'.[1715] Revenue collected under the levies in 1998–1999 was $485 million: the industry regulation levies collected $65 million.[1716]

13.85 The cost recovery outcomes of the levies were examined by the ANAO. The 'success' of levies aimed at industry regulation ranged from 63% to 965% of cost recovery. The average cost recovery (excluding the abnormal result of 965% for the Superannuation (Excluded Funds) Supervisory Levy) was 80%.[1717] The ANAO concluded that 'as a general principle, levy revenue should aim to recover, over a defined period, the total costs of the levy including administrative costs of the activities associated with the levy'.[1718]

13.86 Issues identified by the ANAO as requiring consideration included:

- the extent to which discrete industry groups should bear the costs of all services provided by government to that group;
- the disaggregation of costs to allow attribution of levy costs to particular industry sectors;
- the division of industry groups into sectors on the basis of operational, functional or other characteristics.[1719]

1714 Australian National Audit Office, *Management of Commonwealth Non-Primary Industry Levies*, (2000), Australian National Audit Office, Canberra, 11.
1715 Ibid, 15.
1716 Ibid, 11.
1717 Based on the results reported in Figure 1: Ibid, 11.
1718 Ibid, 28.
1719 Ibid.

13.87 Whether levies should aim for comprehensive coverage of all costs for the provision of facilities and services as opposed to recovery of specified costs only was also identified by the ANAO as an important issue. The APRA levy scheme is an example of a comprehensive cost recovery model compared to the selective cost recovery aim of the ACA and ACCC telecommunications annual licence charges scheme.

Productivity Commission: Cost Recovery Inquiry

13.88 In August 2000, the Assistant Treasurer asked the Productivity Commission to undertake a review of cost recovery by Commonwealth regulatory, administrative and information agencies (Cost Recovery Inquiry). The Productivity Commission was directed to report on:

a. the nature and extent of cost recovery arrangements across Commonwealth Government regulatory, administrative and information agencies, including identification of the activities of those agencies for which cost recovery is undertaken;

b. factors underlying cost recovery arrangements across Commonwealth Government regulatory, administrative and information agencies;

c. who benefits from the regulations, administrative activity and information to which cost recovery arrangements are applied;

d. the impact on business, particularly small business, consumers and the community of existing cost recovery arrangements, including any anti-competitive effects and incentive effects;

e. the impact of cost recovery arrangements on regulatory, administrative and information agencies, including incentive effects;

f. the consistency of cost recovery arrangements with regulatory best practice;

g. appropriate guidelines for:

   i. where cost recovery arrangements should be applied;

   ii. whether cost recovery should be full, partial or nil;

   iii. ensuring that cost-recovered activities are necessary and are provided in the most cost-effective manner;

   iv. the design and operation of cost recovery arrangements, including the treatment of small business;

   v. the review of cost recovery arrangements; and

vi. where necessary, implementation strategies to improve current arrangements.

13.89 The scope of the inquiry was broad. The Productivity Commission adopted a wide definition of 'Commonwealth regulatory or administrative agency' to include not only agencies directly established under Commonwealth legislation 'but also joint Commonwealth-State agencies such as the Murray-Darling Basin Commission'.[1720] The payment of fines and pecuniary penalties was specifically excluded from the scope of the Productivity Commission's inquiry.[1721]

13.90 The Productivity Commission's final report of the Cost Recovery Inquiry was given to the Government on 16 August 2001. The report was tabled in Parliament on 14 March 2002.[1722]

13.91 The report found that there is currently a lack of transparency and accountability in many cost recovery arrangements of regulatory and information agencies. [1723] The report made several recommendations about improving the identification of cost recovery revenue. For example:

> Revenue from the Commonwealth's cost recovery arrangements should be separately identified in budget documentation and in the Consolidated Financial Statements. It should also be identified separately in each agency's Annual Report and Portfolio Budget Statements.[1724]

13.92 The report also highlighted the desirability of linking cost recovery more closely with the actual costs of the administration of regulation and with ensuring that costs are borne by the users of regulatory services. 'As a general principle, the administrative costs of regulation should be recovered, so that the price of each regulated product incorporates the costs of efficient regulation'.[1725] It was critical of the use of cross-subsidisation between user groups, unless the activity being funded benefited the industry as a whole.[1726]

13.93 The Productivity Commission supports a more direct link between the revenue raised and the funding of a specific regulatory activity, rather than general funding of the agency.[1727]

1720 Productivity Commission, *Cost Recovery: Issues Paper*, (2000), Productivity Commission,, Melbourne, 10.
1721 Ibid, 11.
1722 Productivity Commission, *Cost Recovery by Government Agencies: Inquiry Report*, Report no 15 (2001), Productivity Commission, Melbourne.
1723 Ibid, 45.
1724 Ibid, Recommendation 3.2.
1725 Ibid, Recommendation 7.9.
1726 Ibid, xliv.
1727 Ibid.

> Costs recovery charges should be linked as closely as possible to the costs of activities or products. Fees-for-service reflecting efficient costs should be used wherever possible. Where this is not possible, specific taxation measures (such as levies) may be appropriate but only where the basis of collection is closely linked to the costs involved.[1728]

13.94 It was also critical of the use of cost recovery targets for the reason that:

> Externally imposed targets, even for individual activities, can create perverse incentives, such as information agencies losing sight of their public interest obligations and regulatory agencies focusing on new ways in which to extend their revenue raising activities.[1729]

13.95 The report proposed guidelines for cost recovery by Commonwealth regulatory and information agencies. These would emphasise the need for a review of existing cost recovery arrangements that involves consultation with affected industries, independent scrutiny and transparency. The aim of the review would be the production of a regulation impact statement or a cost recovery impact statement which would form the basis for development of future cost recovery proposals.

Proposals

13.96 The ALRC's preliminary view is 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. However, any such right should be subject to the following constraints:

- The legislation or rules of court should make it plain precisely which items may be recovered by a regulator in its claim for its costs of investigation.

- There must be some mechanism to review, assess or (in the context of costs awarded by a court) tax the regulator's claim for its costs of investigation. Alternatively (though more difficult to draft), the legislation or rules of court could provide a fixed or maximum amount recoverable or a formula for calculating this amount. Otherwise, the party from whom they are claimed may have little guidance as to the amount that it should fairly pay, and the right of recovery is open to possible abuse.

- The right of recovery should only be available where the offence is proved or admitted, even if it is not formally recorded.

1728 Ibid, Recommendation 7.10.
1729 Ibid, xliv.

13.97 In any event, the amount of investigation costs recovered by the regulator should be a factor taken into account by a court when assessing a penalty, just as court and other costs are.

Proposal 13-1. There should be no general right for a regulator to recover the costs of investigation from the person investigated unless:

(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.

14. Insolvency

Contents

14.1 The inquiry's Terms of Reference require the ALRC to report on the enforcement of administrative and civil penalties including the effect of insolvency[1730] upon a liability to pay an administrative or civil penalty.

14.2 An in-depth analysis of all aspects of individual and corporate insolvency is beyond the scope of this chapter, which will examine the particular aspects of individual and corporate insolvency that may affect the liability of a person to pay

1730 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 individual insolvency; and 'corporate insolvency' is used to refer to the inability of a corporation to pay its debts.

a pecuniary penalty or the imposition of such a penalty at all. This chapter also discusses issues relating to the use of insolvency provisions to avoid payment of pecuniary penalties and how the potential for such abuse might be limited.

Outline of insolvency legislation

14.3 Insolvency is regulated at federal level by two distinct but related legislative schemes. Individual 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*.

Individual insolvency – *Bankruptcy Act*

14.4 The general policy objective of the *Bankruptcy Act* is to allow individuals who find themselves in financial difficulties to be given a 'fresh start'— rebirth. 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 them.

14.5 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.

- 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.

Corporate insolvency – *Corporations Act*

14.6 The general policy objective of the insolvency provisions in the *Corporations Act* is to allow for the orderly winding up and ultimate deregistration of in-

solvent companies — dignified death. The basic components of the legislative corporate insolvency scheme are these:

3. If a corporation cannot pay its debts as and when they fall due (ie, the corporation is insolvent),[1731] 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.[1732]

4. Once the liquidation has commenced, the directors no longer manage the affairs of the corporation; the liquidator manages them. The liquidator is the only person 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[1733] and other legal proceedings may not be brought or pursued against the corporation without the leave of the court.[1734]

5. 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.[1735]

6. Once the creditors have been paid, the surplus assets of the corporation (if any) are distributed to its members, also on a proportional basis.[1736]

7. 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,[1737] or after the lapse of a specified period of time by operation of law in a voluntary winding up.[1738]

14.7 People survive insolvency; corporations do not. These contrasting outcomes influence the liability for payment of penalties by an insolvent entity: individual or corporation.

1731 *Corporations Act 2001* (Cth), s 95A.
1732 Ibid, s 459P.
1733 Ibid, s 468(4) and 500(1).
1734 Ibid, s 471B and 500(2).
1735 In certain circumstances, some creditors may be granted priority. Priority payments are specified in Ibid, s 556.
1736 Subject to any provisions in the constitution of the corporation that may provide for preferential treatments of certain classes of shareholders.
1737 *Corporations Act 2001* (Cth), s 480.
1738 The statutory period is three months after the completion of the winding up: Ibid, s 509.

General principles for recovery in insolvency

14.8 The general principle for recovery of debts in insolvency is the same in both bankruptcy and corporate insolvency. For a debt to be recoverable it must be 'provable in bankruptcy'[1739] or 'admissible to proof'.[1740]

Provable debts: bankruptcy

14.9 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.

14.10 Exceptions to this general rule are specified in s 82(2)–(3B) to include, generally, demands for unliquidated damages, penalties or fines imposed by a court (see discussion of this exception at para 14.21–14.26), certain civil penalties imposed under the *Corporations Act* (see discussion of this exception at para 14.27–14.29) and penalties imposed in respect of the proceeds of crime (see discussion of this exception at para 14.54–14.62).

14.11 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. 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'.[1741] Creditors are paid on a proportional basis subject to rules about priority payments set out in s 109 of the *Bankruptcy Act*.

Exceptions to the general rules about provable debts

14.12 Certain demands in the nature of unliquidated damages are not provable in bankruptcy. In *Australian Competition & Consumer Commission v Kritharas*,[1742] 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 did

1739 *Bankruptcy Act 1966* (Cth), s 82.
1740 *Corporations Act 2001* (Cth), s 553B.
1741 *Bankruptcy Act 1966* (Cth), s 108.
1742 *Australian Competition & Consumer Commission v Kritharas* (2000) 105 FCR 444.

not fall within s 82(2) of the *Bankruptcy Act* and was therefore not provable in the bankruptcy.[1743]

14.13 Penalties or fines imposed by a court are also generally not provable in bankruptcy and are not affected by the offender's discharge from bankruptcy. With some exceptions, the liability to pay court-imposed penalties and fines survives the bankruptcy. What is meant by 'penalties or fines imposed by a court' is considered below at para 14.21–14.26. The court's power to stay proceedings for recovery of a pecuniary penalty payable in consequence of non-payment of a provable debt is outlined at para 14.71–14.73.

14.14 The recovery of certain classes of pecuniary penalties as part of the insolvency process is expressly provided by statute. The special treatment given to penalties relating to recovery or confiscation of the proceeds of crime is outlined at para 14.54–14.62.

14.15 Debts incurred by fraud also form an exception to the general rules about debts provable in bankruptcy. Any debt incurred by fraud is both provable in the bankruptcy and, if not paid in full as part of the distribution of the bankrupt's assets, survives the discharge of bankruptcy.[1744] Michael Murray cites overpayment of a social security benefit resulting from a failure to disclose income as an example of a debt incurred by fraud.[1745] In *Tarea Management (North Shore) Pty Ltd (In liq) v Glass*,[1746] 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.[1747]

14.16 Legislation expressly provides that some other debts are not provable in bankruptcy.[1748] 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'.[1749]

1743 Claims for damages under s 82 of the *Trade Practices Act* have also been held to be outside 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*.

1744 *Bankruptcy Act 1966* (Cth), s 153. See *Tarea Management (North Shore) Pty Ltd (In liq) v Glass* (1991) 28 FCR 93.

1745 M Murray, 'Bankruptcy's Impact on "Innocent" Parties' (2000) 10(2) *New Directions in Bankruptcy* 30.

1746 *Tarea Management (North Shore) Pty Ltd (In liq) v Glass* (1991) 28 FCR 93.

1747 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).

1748 *Social Security Act 1991* (Cth), s 1061ZZFR; *Student Assistance Act 1973* (Cth), s 12ZW.

1749 Ibid, s 1061ZZFR(2); *Student Assistance Act 1973* (Cth), s 12ZW(3).

Provable debts: corporate insolvency

14.17 Section 553 of the *Corporations Act* specifies the debts and claims that will be admissible to proof against the 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.

14.18 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 *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 considered in more detail at in chapter 13.

Exceptions to the general rules about provable debts

14.19 Special conditions apply to the admissibility of debts owed to members and shareholders of corporations.[1750] Penalties or fines imposed by a court are generally not provable in insolvency[1751] 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 at para 14.21–14.26.

14.20 The recovery of certain classes of pecuniary penalties as part of the insolvency process is expressly protected by statute.[1752] The special treatment given to penalties relating to recovery or confiscation of the proceeds of crime is outlined at para 14.54–14.62.

Recovery of criminal penalties

14.21 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'[1753] or in a corporate insolvency.[1754] The ALRC noted in its *General Insolvency Inquiry* report that:

1750 *Corporations Act 2001* (Cth), s 553A, 553AA.
1751 Ibid, s 553B(1).
1752 Ibid, s 553B(2).
1753 *Bankruptcy Act 1966* (Cth), s 82(3).
1754 *Corporations Act 2001* (Cth), s 553B.

> 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.[1755]

14.22 Murray notes a further 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.[1756]

14.23 Use of the term 'offence' limits this exemption to criminal offences.[1757] In *Re Curtis*,[1758] 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.

14.24 Punishment has also been considered to be an essential element of the 'penalties' referred to in s 82(3). 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'.[1759]

14.25 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.

Recovery of civil penalties

14.26 Monetary penalties imposed by a court in respect of non-criminal regulatory offences 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.

1755 Australian Law Reform Commission, *General Insolvency Inquiry*, ALRC 45 (1988), Canberra, para 787.

1756 M Murray, 'Fines and Penalties — Provable in Bankruptcy?' (2000) 10(3) *New Directions in Bankruptcy* 13, 13–14.

1757 *He Kaw Teh v The Queen* (1985) 157 CLR 523; *Cheng v The Queen* (2000) 175 ALR 338. See also s 2.1 of the *Criminal Code Act 1995* (Cth).

1758 *Re Curtis; Ex parte Deputy Commissioner of Taxation* [1951] QSR 246.

1759 See *Re Higgins; Ex parte Higgins* (1984) 4 FCR 533, 537 cited with approval in *Marshall v Western Australia* (1998) 84 FCR 363, 366.

Exceptions for certain civil penalties

14.27 One exception to this general rule is that 'an order made under section 1317G of the *Corporations Act 2001* is not provable in bankruptcy'.[1760] 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.

14.28 Section 1317E of the *Corporations Act* provides for the court to make a declaration that a person has breached a civil penalty provision of that Act. 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.

14.29 No explanation is available for the special treatment of 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. The result is that these penalties, unlike other civil penalties, survive bankruptcy and remain payable after discharge.

Recovery of penalties imposed administratively

14.30 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*. Murray contends that liability to pay 'on-the-spot' fines (ie, those issued under infringement notices) will be subject to, and extinguished by, the bankruptcy.[1761] If this is correct, a broad range of criminal penalties imposed administratively (either by government agen-

1760 *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: as specified in s 1317E.

1761 M Murray, 'Bankruptcy's Impact on 'Innocent' Parties' (2000) 10(2) *New Directions in Bankruptcy* 30, 30.

cies or by operation of the relevant legislation) will be adversely affected by the bankruptcy of the person penalised.

14.31 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.[1762]

14.32 Murray's position contradicts Grant Webster,[1763] who argues that PERIN court fines are likely to be provable in bankruptcy. 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)'.[1764] 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'.[1765]

14.33 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.

14.34 If it satisfies the first test, it will not be a provable debt in insolvency; it cannot be recovered as part of the insolvency and the right to recovery will remain. 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.[1766]

14.35 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.

1762 M Murray, 'Fines and Penalties — Provable in Bankruptcy?' (2000) 10(3) *New Directions in Bankruptcy* 13, 13.

1763 G Webster, 'PERIN Court Fines; Provable in Bankruptcy?' (1998) 72(7) *Law Institute Journal* 53. The PERIN scheme is described in chapter 12.

1764 Ibid, 54.

1765 Ibid, 54.

1766 See para 14.77–14.80, however, for a discussion of reinstatement of deregistered corporations for the purposes of civil penalty proceedings.

When is a penalty or fine imposed by a court in respect of an offence?

14.36 Webster argues that it is important to maintain a distinction between fines imposed by a court as a sentencing order and PERIN fines.[1767] 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 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.

14.37 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.[1768]

14.38 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.[1769]

14.39 Discussing the PERIN scheme and similar legislation in South Australia,[1770] Murray suggests that such orders will be caught by s 82(3) of the *Bankruptcy Act* (ie, they will not be provable in the insolvency) but that prior to registration with the court, 'the fine is provable'.[1771]

Does an administrative penalty create a civil debt?

14.40 The penalties considered by Murray and Webster 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 notice penalties under federal legislation do not take effect as a

1767 G Webster, 'PERIN Court Fines; Provable in Bankruptcy?' (1998) 72(7) *Law Institute Journal* 53.
1768 Ibid, 55.
1769 Ibid, 55.
1770 The *Expiation of Offences Act 1996* (SA) which permits an enforcement order to be made and 'taken to be an order of the Court imposing the fine': M Murray, 'Fines and Penalties — Provable in Bankruptcy?' (2000) 10(3) *New Directions in Bankruptcy* 13, 13.
1771 Ibid.

penalty imposed by a court or as a debt due to the Commonwealth. The status of infringement notice penalties at federal level is considered in detail in chapter 12. Other administrative penalties, such as taxation penalties and social security overpayments and penalty interest, do take effect as a debt due to the Commonwealth[1772] and will therefore be treated in the same way as other debts (ie, they will be debts provable in the insolvency).

Different treatment for individuals and corporations

14.41 The right to recover a criminal fine or 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.

14.42 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 her or his liability to pay the penalty? Murray argues that these 'bankrupts remain personally liable for these debts during and after bankruptcy'.[1773] 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.

14.43 In the ALRC's report in its *General Insolvency Inquiry*,[1774] the ALRC recommended that 'fines imposed before or after the commencement of a winding up with respect to offences committed before or after the commencement of the winding up should be admissible in a corporate insolvency'.[1775] The rationale for this recommendation was stated in the Explanatory Memorandum to the Corporate Law Reform Bill 1992 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'.[1776]

1772 *Taxation Administration Act 1953* (Cth), sch 1, s 255-5; *Social Security Act 1991* (Cth), s 1223, 1229A.

1773 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'.

1774 Australian Law Reform Commission, *General Insolvency Inquiry*, ALRC 45 (1988), Canberra.

1775 Ibid, para 790.

1776 Hansard, *Parliamentary Debates*, House of Representatives, (Mr Duffy); Explanatory Memorandum to the Corporate Law Reform Bill 1992 (Cth), para 854, 170.

14.44 This recommendation was not adopted in the revisions made to corporations laws subsequent to the ALRC's inquiry.[1777] 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.[1778]

14.45 Whether directors of an insolvent corporation should be held individually liable for penalties outstanding against the corporation after its deregistration is an issue for discussion. 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 then corporations. The potential use of serial insolvency to avoid penalties is discussed further at para 14.81–14.99.

14.46 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.[1779] If the regulator decided not to seek penalties against individual directors, is it fair or reasonable to seek to impose sanctions at a later date purely on the basis of the corporate insolvency? The protection against double jeopardy (discussed in chapter 8) may restrict this.

14.47 Support for seeking to impose liability on directors was expressed in one consultation:

> 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.[1780]

14.48 The difficulty in obtaining meaningful penalties where both the corporation and the directors are insolvent was considered by Dr George Gilligan, Helen

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1777 Most of the ALRC's recommendations were implemented by the Corporate Law Reform Bill 1992 (Cth).
1778 Explanatory Memorandum to the Corporate Law Reform Bill 1992 (Cth), para 854, 170.
1779 See for example, Part IV of the *Trade Practices Act*.
1780 M Gething, *Consultation*, Sydney, 12 June 2001.

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.[1781]

14.49 The changes proposed to be 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 would allow the court to set aside a bankruptcy that was an 'abuse of process' (see discussion of these proposals below at para 14.87–14.88). However, it is a simple fact that a penniless entity cannot pay a fine any more than it can pay an award of civil damages or any other debt.

Importance of distinguishing between criminal, civil and administrative penalties

14.50 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.

14.51 Civil penalties (with the exception of specified *Corporations Act* penalties considered above at para 14.27–14.29) 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 individual bankruptcy or by deregistration of the penalised corporation.

14.52 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 separately to or after the insolvency.

1781 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.

14.53 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 the legislation between liability for a criminal as opposed to a non-criminal regulatory offence and between the penalties imposed. See chapter 17 recommendations for reform for a discussion of whether the distinction between criminal and non-criminal penalty actions should be maintained.

Special treatment for certain penalties

Proceeds of crime

14.54 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:

> 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.

14.55 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*'.

14.56 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'.[1782] In general, the penalty amount will equal the value of the benefit,[1783] 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.[1784] A relevant pecuniary penalty order is limited to one made by a court under s 26 of the *Proceeds of Crime Act*.

14.57 An 'interstate pecuniary penalty order' is defined by 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*

1782 *Bankruptcy Act 1966* (Cth), s 26(1).
1783 Ibid, s 26(2).
1784 Ibid, s 26(3)–(5).

Regulations 1987 (Cth) refer to orders or declarations made under numerous state and territory Acts directed at confiscation of criminal assets and profits.[1785]

14.58 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.[1786]

14.59 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'.[1787] These orders are defined in the same way as in the *Bankruptcy Act* by reference to the *Proceeds of Crime Act*.

Limits on definition of 'pecuniary penalty order'

14.60 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'.[1788]

1785 *Proceeds of Crime Regulations 1987* (Cth), reg 4.
1786 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)).
1787 *Corporations Act 2001* (Cth), s 553B(2)
1788 *Proceeds of Crime Act 1987* (Cth), s 4.

Priority of pecuniary penalty orders

14.61 In a bankruptcy[1789] or winding up[1790] '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'.

14.62 In the provisions which provide for priority to be given to specified payments,[1791] '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 winding up or bankruptcy. This seems inconsistent with the legislative intent of ensuring the recovery of the proceeds of crime. It seems unlikely that it was the intention of Parliament to allow other creditors to receive a benefit by way of a larger distribution from the assets realised in the insolvency proceedings by allowing the inclusion of the proceeds of crime amongst the assets available to satisfy the claims of creditors. 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).

Recovery of certain taxation penalties and taxation debts

14.63 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).

Certainty of amounts payable by way of taxation

14.64 In *Kavich v Official Trustee in Bankruptcy*,[1792] 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 *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[1793]

14.65 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 tax-

1789 *Bankruptcy Act 1966* (Cth), s 108.
1790 *Corporations Act 2001* (Cth), s 555.
1791 *Bankruptcy Act 1966* (Cth), s 109; *Corporations Act 2001* (Cth), s 556.
1792 *Kavich v Official Trustee in Bankruptcy* (1995) 58 FCR 82.
1793 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 ITAA as the source of power for the Commissioner to 'redirect' monies owed by third parties to a taxpayer.

payer 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'.[1794] 'Service of a notice creates a s 218 statutory charge in favour of the Commissioner'.[1795]

14.66 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 commencement of the winding up or the declaration of bankruptcy.

> 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).[1796]

14.67 This re-establishes to a limited extent the priority of tax debts abolished in 1993 following recommendations by the ALRC in its *General Insolvency Inquiry* report.[1797] 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 con-

1794 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.

1795 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.

1796 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.

1797 Australian Law Reform Commission, *General Insolvency Inquiry*, ALRC 45 (1988), Canberra.

> tinued existence of this de facto priority is inconsistent with Parliament's approach and offends these general principles.[1798]

14.68 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*.[1799] 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 Federal Court confirmed the decision at first instance.

14.69 The full 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.[1800]

14.70 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*,[1801] 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.[1802]

1798 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.

1799 *Macquarie Health Corp Ltd v Commissioner of Taxation* (1999) 96 FCR 238.

1800 Ibid, 258. An application for special leave to appeal to the High Court was refused.

1801 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.

1802 Ibid, para 12.4.5.

Stay of proceedings for recovery of certain pecuniary penalties

14.71 Section 60(1)(b) of the *Bankruptcy Act* allows for a stay of proceedings for the recovery of certain pecuniary penalties.[1803] 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; …

14.72 Since its introduction the section has been used several times.[1804] The critical issue is the meaning of 'pecuniary penalty payable in consequence of the non-payment of a provable debt'.[1805] This phrase has been considered in several cases. It has been held to encompass an order to make restitution,[1806] to pay compensation under the New South Wales *Companies Code*,[1807] and to pay compensation in the nature of restitution to the victim of a crime.[1808] However, it has been held to exclude an order to pay a fine and costs of the prosecution[1809] 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

1803 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.

1804 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.

1805 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).

1806 *Re Lenske; ex parte Lenske* (1986) 9 FCR 532 concerning payment of restitution to a former employer.

1807 *Tarea Management (North Shore) Pty Ltd (In liq) v Glass* (1991) 28 FCR 93 concerning the misuse of company cheques by a director.

1808 *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)* (Unreported, Federal Court of Australia, Beaumont J, 12 August 1998) concerning compensation payments ordered to be paid for the theft of a truck.

1809 *Marshall v Western Australia* (1998) 84 FCR 363 concerning a fine imposed for contraventions of Western Australian occupational health and safety legislation.

> 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 penalties imposed by a court in respect of an offence for the purposes of subsection 82(3), and thus not provable debts.[1810]

14.73 Use of this reprieve is, however, at the discretion of the court. In *Re Lenske; ex parte Lenske*,[1811] 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'.[1812]

Effect of insolvency on imposition of penalties

Deregistration of a corporation: effect on liability of individuals

14.74 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'.[1813] This position is well established in Australian jurisprudence. In *ACCC v Black on White Pty Ltd*,[1814] Spender J reviewed the relevant authorities, discussing the leading case on this issue, *Richardson & Wrench (Holdings) Pty Ltd v Ligon No 174 Pty Ltd*:[1815]

> 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.[1816]

14.75 In the case under consideration, Spender J held that

1810 Ibid, 366.
1811 *Re Lenske; ex parte Lenske* (1986) 9 FCR 532.
1812 Ibid, 534.
1813 This is the usual expression of accessorial liability of persons who, under criminal law, could be said to have been accomplices. See s 11.2 in part 2.4 of the *Criminal Code Act 1995* (Cth).
1814 *Australian Competition & Consumer Commission v Black on White Pty Ltd* (2001) 110 FCR 1.
1815 *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* was made against a corporation and claims relating to involvement in the contravention were made against individuals under s 75B of the *Trade Practices Act*. By the time the matter came to court, the corporation had been deregistered and the proceedings against it discontinued.
1816 *Australian Competition & Consumer Commission v Black on White Pty Ltd* (2001) 110 FCR 1, 14.

> 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 commission by a natural person of a crime, the accessorial liability of that person does not cease on the death of the principal offender.[1817]

14.76 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

14.77 In April 2000, the NSW Supreme Court accepted an application by the ACCC for the reinstatement of a deregistered corporation.[1818] 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 s 45 of the TPA prohibitions of price fixing (ie, civil penalties). The ACCC was seeking pecuniary penalties and a declaration that the TPA had been breached.

14.78 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.[1819]

14.79 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.[1820]

1817 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.

1818 *Australian Competition and Consumer Commission v Australian Securities and Investments Commission* (2000) 174 ALR 688.

1819 Ibid, 693.

1820 Ibid, 695.

14.80 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.[1821] 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 company, he left these matters to be considered by the Federal Court as part of the ACCC claim.

Misuse of insolvency

Serial bankruptcy

14.81 Bankruptcy laws are underpinned by the policy of providing the opportunity for a 'fresh start' to people who find themselves in serious financial difficulties. Paul Lewis suggests that the fresh start concept is given effect in the United States through three legal components:[1822]

- discharge of bankrupts coupled with an automatic injunction restraining 'post-bankruptcy collection efforts by pre-bankruptcy creditors';[1823]
- exemption of designated assets from the bankruptcy; and
- prohibition on certain forms of discrimination against bankrupts.

14.82 Lewis argues that the incentives for serial bankruptcy include:

- 'a strong perception that there is a declining social stigma attached to filing for bankruptcy';[1824]
- the ease of filing;
- the frequency of discharge;

1821 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) ATPR ¶41–815. In August 2001, the case against the remaining parties was transferred from the Federal Court in Melbourne to Sydney for trial: *Australian Competition and Consumer Commission v ABB Transmission & Distribution Ltd* (2001) ATPR ¶41–834.

1822 P Lewis, 'The Repeat Bankruptcy Filer; Some Economic Considerations' (2000) 10(2) *New Directions in Bankruptcy* 18. These components also exist in Australian law.

1823 Ibid, 18.

1824 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.

- the exemption of designated assets from the bankruptcy; and
- the automatic injunction granted against proceedings.

Prevention of serial bankruptcy

14.83 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'.[1825]

14.84 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 bankruptcy. 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,[1826] after discharge there is no restriction on that person once again being a director.

14.85 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.[1827] 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.[1828]

14.86 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).[1829] Murray considers that 'such a de-

1825 *Bankruptcy Act 1978* (USA), s 105(a).
1826 *Corporations Act 2001* (Cth), s 206B(3).
1827 Ibid, s 206D.
1828 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.
1829 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.

liberate 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'.[1830]

Proposed changes to bankruptcy law to prevent misuse

14.87 In June 2001, legislation was introduced into federal Parliament to 'clamp down on people who try to use bankruptcy as a way of avoiding paying their debts'.[1831] The proposed changes include:

- 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.

14.88 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.[1832]

14.89 The Bill was read a second time in September 2001 but lapsed with the dissolution of Parliament for the general election in November 2001. The Bill was reintroduced into Parliament on 21 March 2002.[1833]

Regulators' attitudes to insolvency

14.90 The problem of the use of serial insolvency to avoid liabilities has been identified by the Commissioner of Taxation as an area of concern. In the Annual Report for 1999–2000, the Commissioner noted that

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1830 M Murray, 'Pursuit of a Claim after Winding Up' (2000) 1(3) *Insolvency Law Bulletin* 37, 39.
1831 Commonwealth Attorney-General, 'Bankruptcy Reforms Legislation Package', *News Release*, 5 June 2001.
1832 Explanatory Memorandum to the Bankruptcy Legislation Amendment Bill 2001, para 65.
1833 As the Bankruptcy Legislation Amendment Bill 2002: Commonwealth Attorney-General, 'Bankruptcy Crackdown', *News Release*, 21 March 2002.

> 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.[1834]

14.91 The Commissioner announced an increased 'focus on persistent tax debtors',[1835] 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.[1836]

14.92 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.[1837]

14.93 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.[1838]

14.94 In 2000–01, the ATO referred the cases of 104 barristers to its in-house prosecution area[1839] and identified 16 barristers who had been bankrupt more than once in the past decade.[1840]

14.95 Company directors are also the focus of scrutiny by the ATO. 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

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1834 Australian Taxation Office, *Commissioner of Taxation Annual Report 1999–2000*, (2000), Commonwealth of Australia, Canberra, 6.
1835 Ibid, 7.
1836 Commonwealth Attorney-General and Assistant Treasurer, 'Bankruptcy and Taxation Obligations', *Joint News Release*, 9 March 2001.
1837 Commonwealth Attorney-General, 'Getting Tough on Lawyers Who Avoid Tax', *News Release*, 25 July 2001.
1838 Commissioner of Taxation, *Annual Report 2000–2001*, (2001), Australian Taxation Office, 61. This agreement was implemented in New South Wales by the *Legal Profession Amendment (Disciplinary Provisions) Act 2001* (NSW), which commenced on 27 July 2001.
1839 Ibid, 63.
1840 Ibid, Table 6.1, 62.

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'.[1841]

14.96 A recent decision by the NSW Supreme Court is consistent with this policy. In *R v Walters,*[1842] 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. Justice Sully 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.[1843] …
>
> 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.[1844]

14.97 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.[1845]

14.98 One commentator 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:

1841 Australian Taxation Office, *ATO Prosecution Policy*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/index.htm>, 9 March 2001, para 11.2.1.
1842 *R v Walters* [2001] NSWSC 640.
1843 Ibid, para 23.
1844 Ibid, para 28.
1845 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.

> 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.[1846]

14.99 There is obviously concern that insolvency may be being misused to avoid the payment of tax liabilities. 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.

Proposal and questions

14.100 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 pecuniary penalties although they have no priority. On the other hand, if the offender is an individual, a criminal fine can be pursued at any time once he or she is discharged from bankruptcy but the civil pecuniary penalty will only be paid pro rata in line with all other unsecured and non-priority debts. Although there is an argument that bona fide creditors should not be disadvantaged by the insolvent debtor's illegal actions, some creditors of an insolvent offending company could well be the employees or officers responsible for the offence (particularly with small companies). In those circumstances, equitable treatment for all creditors (including the state) would warrant some discounting of debts to those people.

14.101 In any event, the difference in treatment between criminal and non-criminal monetary penalties is more 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. The ALRC's provisional view is, however, that the benefits of simplicity and consistency prevail and this distinction should be removed.

14.102 The ALRC proposes that both criminal and non-criminal penalties should be provable in corporate insolvencies so that the return to the state is maximised before the company is deregistered and all prospect of recovery is lost, but that neither be provable in personal bankruptcies so that both will persist and be recoverable in principle after the offender's discharge from bankruptcy. 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 can pursue other parties.

1846 M Murray, 'The Commissioner of Taxation's Views on Bankruptcy' (2000) 1(5) *Insolvency Law Bulletin* 81, 81.

14.103 That leaves open the question whether monetary penalties should be given any priority in corporate insolvencies or simply rank *pari passu* with other unsecured and non-priority creditors. The ALRC acknowledges policy reasons that support negative and affirmative answers to this question and seeks community comment on this issue.

14.104 Finally, the status of true administrative monetary penalties could be clarified and defined with greater precision. The ALRC seeks submissions on what status they should be accorded if that were to happen.

Proposal 14-1. The distinction in insolvency law between the status of criminal and civil penalties should be removed so that both criminal and civil monetary 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

Question 14-1. Should criminal and civil monetary penalties be given priority in corporate insolvency proceedings?

Question 14-2. Does the status of administrative penalties need to be clarified in relation to personal and corporate insolvency proceedings? If so, what status should they be given?

15. Discretion, Leniency and Immunity

Contents

15.1 This chapter considers the use of discretion in practice and, in particular, examines how major federal regulators exercise penalty-related discretions by analysing the use of leniency and immunity powers and policies (including powers to remit penalties in whole or part). The exercise of leniency, immunity and remission discretions is closely linked to more general issues of fairness (considered in chapter 7). The exercise of leniency and immunity discretions can have significant impact on third parties, highlighting the need for these discretions to be exercised consistently and transparently.

Regulatory discretion

15.2 Discretion has been defined as the power to choose between alternative courses of action in contrast to rule-dictated decisions.[1847] Discretion was tradition-

1847 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.

ally understood as an enemy of the rule of law.[1848] 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.

15.3 However, discretion is a useful tool in mitigating the rigidity and inflexibility of legal rules.[1849] 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,[1850] allowing administrators to 'translate broad legal aspirations into routinely workable practices'.[1851]

> Having discretion means having the freedom to choose between courses of action. Giving someone discretion is giving them that freedom.[1852]

15.4 Some areas of enforcement arguably involve 'a large core element of unavoidable discretion'.[1853] Other areas require regulatory discretion in order to respond appropriately to continuously changing technical, economic and political environments,[1854] or because Parliament lacks the expertise to legislate prescriptively for adequate regulation.[1855] Discretion may also be preferable to prescriptive rules where it is necessary to secure public and political credibility in the balancing of public interests.[1856]

15.5 The presence of detailed and prescriptive rules does not necessarily mean that discretion will be absent. As 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

1848 Justice B McLachlin, 'Rules and Discretion in the Governance of Canada' (1992) 56 *Saskatchewan Law Review* 167, 169.
1849 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.
1850 Justice B McLachlin, 'Rules and Discretion in the Governance of Canada' (1992) 56 *Saskatchewan Law Review* 167, 171.
1851 R Baldwin and K Hawkins, 'Discretionary Justice: Davis Reconsidered' (1984) *Public Law* 570, 574.
1852 J Black, 'Managing Discretion' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001), 2.
1853 R Baldwin and K Hawkins, 'Discretionary Justice: Davis Reconsidered' (1984) *Public Law* 570, 593.
1854 M Seidenfeld, 'Bending the Rules: Flexible Regulation and Constraints on Agency Discretion' (1999) 51(2) *Administrative Law Review* 429, 431.
1855 D Kingsford-Smith, 'Interpreting the Corporations Law — Purpose, Practical Reasoning and the Public Interest' (1999) 21 *Sydney Law Review* 161, 163.
1856 R Baldwin and K Hawkins, 'Discretionary Justice: Davis Reconsidered' (1984) *Public Law* 570, 593.

> decision: bureaucratic and organisational norms will continue to operate, as will broader political and economic pressures, and moral and social norms.[1857]

15.6 The convenience and efficiency of discretion may be contrasted with the formalities, costs and delays attending the operation of legal rules and procedures. The prescription of discretionary powers in relation to certain affected parties might serve to damage — rather than protect — their interests[1858] where, for instance, the substantive rules prescribed are less generous, unenforceable or unobserved.[1859] Powers to remit penalties are examples of the use of discretionary enforcement decisions to ameliorate the harshness of prescribed penalties (see discussion below at para 15.57–15.73).

15.7 Attempts to limit the exercise of discretion at various stages in the penalty process by the use of prescriptive rules may also 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 whether to commence or pursue an investigation may be an important, but often overlooked, exercise of discretion by a regulator.[1860] Targeting decisions are discussed in more detail in chapter 7.

Types of administrative discretions

15.8 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. 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.[1861] For this reason, many decisions must take account of a myriad of factors.[1862]

15.9 Regulators with power to recommend or initiate penalty proceedings can utilise a variety of concessionary arrangements short of penalty proceedings to improve compliance. Such arrangements rely on the regulator's officers exercising their discretion not to enforce the penalty provisions of its regulatory statute strictly

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1857 J Black, 'Managing Discretion' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001), 2.

1858 R Baldwin and K Hawkins, 'Discretionary Justice: Davis Reconsidered' (1984) *Public Law* 570, 593.

1859 Ibid, 587.

1860 For example, in 2000–01, the ACCC pursued 2,882 non-GST-related inquiries and complaints and did not pursue 28,893 (an investigation rate of 10%): Australian Competition & Consumer Commission, *ACCC Annual Report 2000–2001*, (2001), ACCC Publishing Unit, Canberra, 180. ASIC received 6,964 complaints, of which only 2.6% resulted in investigations: Australian Securities & Investments Commission, *Annual Report 2000–2001*, Australian Securities & Investments Commission, 48.

1861 R Baldwin and K Hawkins, 'Discretionary Justice: Davis Reconsidered' (1984) *Public Law* 570, 590.

1862 Ibid, 591.

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 3).

> 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. [footnotes omitted][1863]

15.10 Regulators with power to impose penalties exercise a variety of penalty-related discretions. These include the interpretation of legal rules, the setting of enforcement priorities, targeting decisions, decisions about granting leniency or immunity, and decisions about whether to remit penalties in whole or part.

Formal statutory design of discretion

15.11 The terms of a statutory power to grant immunity or leniency decisively shapes its operational scope. Grants of discretion may, for example, be subject to certain conditions, qualifications or limitations. Legislation can structure discretion by:

- limiting an agency's purposes or policy goals;
- limiting subject matter;
- permitting or requiring action after prerequisite findings;
- stating factors which must (or must not) be taken into account;
- setting standards; or
- limiting an agency's choice of regulatory methods.[1864]

15.12 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

1863 J Black, 'Managing Discretion' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001), 3.

1864 T Wilkins and T Hunt, 'Agency Discretion and Advances in Regulatory Theory: Flexible Agency Approaches Toward the Regulated Community as a Model for the Congress-Agency Relationship' (1995) 63 *George Washington Law Review* 479, 507. For example, while the ATO need not suspect that a taxpayer is involved in unlawful activity before invoking its investigative powers under s 267 of the *Income Tax Assessment Act 1936* (Cth), there is an implied condition that the power will be used for the purposes of the Act.

standards for decision making.[1865] Statutory rules can be drafted prescriptively or very broadly, depending upon the scope of discretion desired by Parliament.[1866] 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.[1867] The discussion below at para 15.57–15.73 of the exercise of penalty remission powers by the ATO and the ACA highlights the difference between a 'detailed rule' versus a 'general fairness' approach.

15.13 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.[1868]

15.14 Another means of structuring discretion is through informal rule making by the regulator. Whilst rules are likely to promote consistency, this does not always lead to more positive outcomes for the regulated as their individual circumstances are not or cannot be taken into account. Administrative agencies can use 'structuring to circumvent the interests of individuals'.[1869] 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.[1870]

15.15 Informal rules may create legitimate expectations within the regulated community as to how the regulator will exercise discretion. Regulators may be bound to exercise discretion in accordance with these expectations and may be subject to appeal or review if they depart from their own guidelines.[1871] The use of rules and guidelines to improve the procedural and substantive fairness of penalty decisions is considered in detail in chapter 7.

1865 M Seidenfeld, 'Bending the Rules: Flexible Regulation and Constraints on Agency Discretion' (1999) 51(2) *Administrative Law Review* 429, 433.

1866 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.

1867 M Seidenfeld, 'Bending the Rules: Flexible Regulation and Constraints on Agency Discretion' (1999) 51(2) *Administrative Law Review* 429, 449.

1868 Ibid, 433–434.

1869 R Baldwin and K Hawkins, 'Discretionary Justice: Davis Reconsidered' (1984) *Public Law* 570, 576.

1870 R Baldwin, 'Accounting for Discretion' (1990) 10(3) *Oxford Journal of Legal Studies* 422, 428. An example of administrative rule making which was held to be beyond statutory power was the requirement that an annual return be completed in a particular form and include certain information about staffing and program production costs: *Amalgamated Television Services Pty Ltd v Australian Broadcasting Tribunal* (1989) 91 ALR 363.

1871 See, for example, *One.Tel Ltd v Deputy Commissioner of Taxation* (2000) 101 FCR 548, in which ATO guidelines about access to information held by a taxpayer's accountant were held to give rise to legitimate expectations about how the ATO would exercise its powers to access information: 567–568.

Immunity

15.16 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 chapter 9). 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.

Immunity Discretion: DPP

15.17 The Prosecution Policy of the Commonwealth[1872] guides the exercise of discretion by the Director of Public Prosecutions (DPP). 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. Use immunities are considered in more detail in chapter 9.

15.18 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'.[1873] 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'.[1874] The Prosecution Policy specifies that an immunity undertaking will only be given if certain mandatory, threshold conditions are met. First, the accomplice's evidence must not be available from other sources and must be necessary to secure the conviction of the defendant. Second, the accomplice must be significantly less culpable than the defendant.[1875]

1872 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*, Commonwealth Director of Public Prosecutions, <www.cdpp.gov.au/cdpp/>, 16 November 2001.
1873 Ibid, para 5.1.
1874 Ibid, para 5.2.
1875 Ibid, para 5.5.

15.19 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.[1876] The DPP 'should' consider a number of factors in making this judgment:

> (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.[1877]

15.20 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.

15.21 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.[1878] 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.

1876 Ibid, para 5.6.
1877 Ibid, para 5.6.
1878 Ibid, para 5.7.

15.22 The DPP's power to grant immunity relates to criminal proceedings. The ALRC's legislation mapping exercise revealed very few formal powers to grant immunity from civil proceedings. The ACCC's powers discussed in para 15.23–15.26 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.[1879] The exercise of this type of discretion is discussed in chapter 7. 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. The use of guidelines to structure the regulator's discretion to take no action is considered below at para 15.52–15.54.

Immunity Discretions: ACCC

15.23 One example of a formal power to grant immunity from civil proceedings is the ACCC's power under the *Trade Practices Act 1974* (Cth) (*Trade Practices Act*) to grant immunity from the exclusive dealing prohibitions in Part IV of the *Trade Practices Act* and to authorise some mergers and anti-competitive conduct. Immunity from the exclusive dealing provisions of the *Trade Practices Act* is available automatically once a person 'notifies' the ACCC of the conduct. The type of conduct that may be notified includes third line forcing[1880] and other forms of exclusive dealing.

> Under the Notification process, immunity from court action for **third line forcing** is obtained automatically 14 days after lodgment of the Notification. The Commission may, however, take action (issue a draft notice) within the 14 day period after lodgment 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.[1881]

15.24 Notification immunity prevents action being taken by the ACCC or a third party seeking remedies for contravention of the *Trade Practices Act*. 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 ap-

1879 This may include accepting an enforceable undertaking instead of taking court action. Although acceptance of an undertaking does not formally bar proceedings being commenced, the practice of both the ACCC and ASIC is to accept an undertaking as an informal bar to proceedings. Enforceable undertakings are discussed in chapters 3 and 7.

1880 Third line forcing occurs when a supplier refuses to supply goods or services unless other goods or services are acquired from a third party.

1881 Australian Competition & Consumer Commission, *Notifications Recently Received*, <www.accc.gov.au>, 19 February 2002.

pears to be no countervailing public benefit'.[1882] Before immunity is revoked, the ACCC must issue a draft notice and seek submissions from interested parties.

15.25 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 *Trade Practices Act*. 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.[1883] The ACCC issues a draft determination and seeks submissions from interested parties.

15.26 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 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

15.27 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. Leniency is a partial exemption from legal rules or proceedings if certain specified conditions are met. 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 further below at para 15.57–15.73.

Purposes of leniency policies

15.28 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.[1884] Such leniency policies

1882 *Trade Practices Act 1974* (Cth), s 93.

1883 Ibid, s 88.

1884 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

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'[1885] and ASIC's policy statement 'No-action Letters'[1886] 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.

15.29 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, a higher level of discretion is often appropriate. ASIC's policy statement on 'Enforcement Action Submissions'[1887] 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

15.30 In October 1998 the ACCC published its policy on 'Cooperation and Leniency in Enforcement'.[1888] The policy provides two levels of 'amnesty' or concession: (1) immunity from prosecution and (2) leniency in the imposition of a civil penalty.[1889] The policy is investigation-focussed as it encourages offenders to confess wrongdoing to the ACCC to assist the ACCC in investigating alleged breaches of the *Trade Practices Act*.

> Recognition of such cooperation and assistance takes a variety of forms, e.g. complete or partial immunity from action by the Commission, submissions to the Court for a reduction in penalty or even administrative settlement in lieu of litigation.
>
> The policy on litigation necessarily relates only to civil matters. The Commission does not have power to grant immunity for actions for criminal conduct under Part V

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for Economic Cooperation and Development, <www.oecd.org/pdf/M00018000/M00018135.pdf>, 20 December 2001, 3.

1885 Australian Competition & Consumer Commission, *Cooperation and Leniency in Enforcement*, Australian Competition & Consumer Commission, <www.accc.gov.au/compliance/leniency.htm>, 23 October 2001.

1886 Australian Securities & Investments Commission, *Policy Statement 108: No-action Letters*, Australian Securities & Investments Commission, <www.cpd.com.au/asic/ps/>, 20 December 2001.

1887 Australian Securities & Investments Commission, *Policy Statement 52: Enforcement Action Submissions*, Australian Securities & Investment Commission, <www.cpd.com.au/asic/ps/>, 20 December 2001.

1888 Australian Competition & Consumer Commission, *Cooperation and Leniency in Enforcement*, Australian Competition & Consumer Commission, <www.accc.gov.au/compliance/leniency.htm>, 23 October 2001.

1889 The New Zealand Commerce Commission's Leniency Policy provides the same levels of amnesty: New Zealand Commerce Commission, *Leniency Policy: August 2000*, New Zealand Commerce Commission, <www.comcom.govt.nz/about/documents/leniency_policy.pdf>, 20 December 2001.

of the Trade Practices Act. In such cases the discretion lies with the Director of Public Prosecutions.[1890]

15.31 The policy applies to corporations and individuals differently as there may be circumstances in which information obtained from individuals will be critical in establishing the culpability of a corporation. The aim of the individual leniency policy appears to be to encourage officers or employees to provide information about their own company in circumstances where the company itself is not seeking leniency (ie, to 'dob in the boss').

Corporate immunity

15.32 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 co-operates 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.[1891]

1890 Australian Competition & Consumer Commission, *Cooperation and Leniency in Enforcement*, Australian Competition & Consumer Commission, <www.accc.gov.au/compliance/leniency.htm>, 23 October 2001, Introduction.

1891 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.

Individual immunity

15.33 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 co-operate fully with the ACCC and comply with that undertaking;
- 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.[1892]

15.34 Not all of the criteria must be met and the ACCC assesses each case on its merits.[1893] Whereas regulators in the European Union and the United States have prescriptive factors determining grants of leniency,[1894] the ACCC states that it 'has adopted an overtly flexible cooperation policy'.[1895] The policy is intended only as 'an indication of the factors the Commission will consider relevant when considering a request for leniency'.[1896]

15.35 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[1897] and the UK Office of Fair Trading's 'Whistleblow-

1892 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.

1893 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).

1894 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/abc/doc/off/bull/en/9607/p103032.htm>, 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.

1895 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).

1896 Ibid.

1897 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, *Leni-*

ers' policy[1898] 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.[1899] In the US and the UK immunity may be granted by the responsible regulator. In Canada, the Competition Bureau makes an immunity recommendation to the Attorney General, who then authorises or rejects immunity in accordance with a general immunity policy.[1900]

15.36 The ACCC policy does not specify a particular level of immunity or reduction in penalty.[1901] Again, this contrasts with overseas policies that specify levels of penalty reductions of up to 50%[1902] or a range of reductions from 10% to 75%.[1903]

15.37 The 'flexibility' of the ACCC's policy has been criticised for creating uncertainty and confusion about the rights of offenders who come forward with information about a breach.[1904] 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 that the policy has received has also been a cause of concern since offenders are unlikely to come forward if they are not aware of its existence.[1905]

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ency 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.

1898 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.

1899 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.

1900 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.

1901 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.

1902 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.

1903 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/abc/doc/off/bull/en/9607/p103032.htm>, 19 November 2001.

1904 M Kind, 'Is the Watch Dog's Bark Enough to Make Whistleblowers Bite? The ACCC Leniency Policy' (2001) (March) *Law Institute Journal* 57, 58.

1905 Ibid, 58. Development of a more comprehensive leniency policy was on the agenda for the ACCC's competition and consumer protection law enforcement conference (scheduled to be held 8–9 October 2001) which was cancelled because of the terrorist attacks in the US on 11 September 2001.

Rationale for the ACCC leniency policy

15.38 The development of an ACCC leniency policy is part of a regulatory trend towards more co-operative, less coercive forms of regulation. The ACCC sees favourable treatment as the best 'carrot' for encouraging 'persons to blow the whistle on themselves and their co-conspirators'.[1906] 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.[1907] 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.[1908]

15.39 Leniency is an early intervention strategy aiming to encourage offenders to come forward at the earliest opportunity. It is also a way of encouraging greater compliance and improving regulation in a global environment, as the ACCC noted:

> Internationally, most competition authorities are recognising the growing importance of cooperation from offenders in mounting a successful prosecution in respect of violations of the antitrust laws. This is based on the realisation of the increasing difficulty of detecting and proving the existence of anti-competitive conduct, which is further compounded by the fact that such conduct is very commonly global in its scope and effect.[1909]

15.40 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.[1910] 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'.[1911]

1906 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).

1907 Ibid.

1908 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.

1909 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).

1910 Ibid.

1911 Ibid.

Judicial consideration of the ACCC policy

15.41 The first case which considered the effect of the ACCC's leniency policy confirmed that regulatory guidelines do not bind the courts. 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 co-operation offered to the Commission.[1912]

15.42 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.

15.43 Clearly, the Federal Court is 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.

15.44 In *ACCC v Roche Vitamins*, 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.[1913]

15.45 In *ACCC v Ithaca Ice Works Pty Ltd*,[1914] the full 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 co-operation 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 co-operation.[1915]

15.46 The co-operation had resulted in the ACCC agreeing not to seek any penalty against one individual defendant and an agreed penalty against one corporate

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1912 *Australian Competition and Consumer Commission v SIP Australia Pty Ltd* (1999) ATPR ¶41–702.
1913 *Australian Competition & Consumer Commission v Roche Vitamins Australia Pty Ltd* (2001) ATPR ¶41–809 (Goldberg J).
1914 *Australian Competition & Consumer Commission v Ithaca Ice Works Pty Ltd* [2001] FCA 1716 (Wilcox, Hill and Carr JJ).
1915 Ibid, para 27.

defendant (of $25,000). The trial judge used the agreed penalty as a factor relevant to assessing the penalty to be imposed against the other parties to the price fixing arrangement.[1916] The ACCC claimed that the penalties were inadequate, that the

> primary judge had given inadequate weight to the degree of co-operation 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 co-operation.[1917]

15.47 The ACCC submitted that the penalty which should have been imposed, without the discount for co-operation, 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 hade been made by the ACCC to the primary judge about the level of appropriate penalty in the absence of co-operation — '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'.[1918]

15.48 The full Federal Court emphasised the importance of the parity principle,[1919] 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 co-operated with the ACCC when determining the penalties to be imposed on the other participants.

15.49 The Court considered that the case raised several procedural issues. Because the penalties for those who had co-operated 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'.[1920] 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 co-operation, 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 co-operation 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 appro-

1916 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).

1917 *Australian Competition & Consumer Commission v Ithaca Ice Works Pty Ltd* [2001] FCA 1716, para 41.

1918 Ibid, para 44.

1919 See further discussion of this principle in chapter 18.

1920 *Australian Competition & Consumer Commission v Ithaca Ice Works Pty Ltd* [2001] FCA 1716, para 55.

> priate range of penalty absent co-operation and have been in a position to calculate an appropriate discount to take into account the exceptional level of co-operation afforded by QIS. It is only in this way that a comparison could properly be made between the penalty payable where the offender had offered a high level of co-operation and the penalty payable where the level of co-operation was of a lesser magnitude.[1921]

15.50 The decision in *Ithaca Ice Works* raises questions about the future of the ACCC leniency policy. Co-operating with the ACCC will be less attractive for offenders if they have to wait until the case against other participants is finalised before knowing their own fate. The decision also suggests that the ACCC may be more reluctant to accept low agreed penalties if there is the risk that this will result in lower penalties for other participants.

ASIC leniency policies

15.51 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.[1922] 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.[1923]

PS 108: No-action letters

15.52 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'.[1924] 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'[1925] will take precedence.

1921 Ibid, para 56.

1922 Australian Securities & Investments Commission, *Policy Statement 108: No-action Letters*, Australian Securities & Investments Commission, <www.cpd.com.au/asic/ps/>, 20 December 2001.

1923 Australian Securities & Investments Commission, *Policy Statement 52: Enforcement Action Submissions*, Australian Securities & Investment Commission, <www.cpd.com.au/asic/ps/>, 20 December 2001.

1924 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.

1925 Australian Securities & Investments Commission, *Policy Statement 52: Enforcement Action Submissions*, Australian Securities & Investment Commission, <www.cpd.com.au/asic/ps/>, 20 December 2001.

15.53 A no-action letter is not legally binding on ASIC and does not preclude third parties, such as the DPP, from taking legal action.[1926] It is 'an indication as to the future regulatory action that ASIC will take'.[1927]

> 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.[1928] …
>
> 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.[1929]

15.54 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'.[1930] 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.[1931]

PS 52: Enforcement action submissions

15.55 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'.[1932] An enforcement action submission will be directed to-

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1926 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.

1927 Ibid, para PS 108.11.

1928 Ibid, para PS 108.19.

1929 Ibid, para PS 108.18.

1930 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.

1931 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 (discussed above at para 15.30–15.50), 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': Australian Competition & Consumer Commission, *Cooperation and Leniency in Enforcement*, Australian Competition & Consumer Commission, <www.accc.gov.au/compliance/leniency.htm>, 23 October 2001.

1932 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.

wards 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.[1933]

15.56 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.[1934] Where the matter involves a 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.[1935]

> 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.[1936]

Remission of penalties

15.57 A power to remit a penalty is a specific form of leniency discretion. The nature of a power to remit a penalty is problematic as it arises predominantly in relation to true administrative penalties. It appears to be a power to determine and impose an administrative penalty as the regulator appears to have the discretion to modify the statutory quantum of penalty after considering the individual circumstances of the case. Characterised in this way, the exercise of the power to remit a penalty looks substantially similar to the exercise of sentencing discretion by a court. Formally, however, power to remit a penalty must be characterised as a promise not to recover a portion of a penalty. For constitutional reasons, liability to pay an administrative penalty arises by operation of the relevant legislation rather than by the action of the regulator. What the regulator is doing, therefore, is not deciding liability or what penalty should be imposed, but merely determining after the penalty has been imposed, 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.

1933 Ibid, para PS 52.10.
1934 Ibid, para PS 52.15.
1935 Ibid, para PS 52.21.
1936 Ibid, para PS 52.25.

15.58 Several pieces of federal legislation give regulators the power to remit administrative penalties.[1937] 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 is at present a discretion to remit penalties under the *Customs Act 1901* (Cth), but this will be repealed once the *Customs Legislation Amendment and Repeal (International Trade Modernisation Act) 2001* (Cth) comes into effect.[1938]

Factors relevant to remission of penalties

15.59 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.[1939] Determinations made by the ACA are disallowable instruments,[1940] 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.[1941] ATO tax rulings are not disallowable instruments (and therefore not subject to scrutiny by Parliament) and are only 'administratively binding' on the ATO.[1942] 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 Taxa-

1937 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 163A, 220AU and 221N; *Sales Tax Assessment Act 1992* (Cth), s 100; *Taxation Administration Act 1953* (Cth), s 8AAG, 8AAM, 8AAS and 48; *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).

1938 The legislation is scheduled to come into effect gradually from 1 July 2002.

1939 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*, 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).

1940 *Telecommunications Act 1997* (Cth), s 73(10).

1941 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.

1942 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.

tion Ruling and to depart from a Taxation Ruling only where there are good and substantial reasons to do so'.[1943]

Australian Communications Authority

15.60 Considerations relevant to the remission of penalties by the ACA are set out in its formal determinations.[1944] Penalties that may be remitted relate to late compliance with obligations to pay 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 *and* 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;
- 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.

15.61 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;[1945] 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.[1946]

Australian Taxation Office

15.62 The ATO has legislative power to fully or partially remit a number of tax penalties.[1947] ATO staff have been instructed to remit penalties only 'in exceptional

1943 Australian Taxation Office, *TR 92/1 Taxation Ruling — Income Tax and Fringe Benefits Tax: Public Ruling*s, <www.ato.gov.au>, 19 February 2002, para 23.
1944 See for example Australian Communications Authority, *Telecommunications (Annual Numbering Charge – Late Payment Penalty) Determination 2000*, <www.aca.gov.au>, 19 February 2002, s 10.
1945 *Telecommunications Act 1997* (Cth), s 555.
1946 Ibid, s 562.
1947 *Income Tax Assessment Act 1936* (Cth), s 163A, 220AU, 221N; *Taxation Administration Act 1953* (Cth), s 8AAG, 8AAM, 8AAS.

circumstances'[1948] although remission may be exercised more freely during transitional periods.[1949] 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.[1950]

15.63 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 multi-stage process administered in accordance with detailed rules published as a tax ruling by the ATO.[1951]

> 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.[1952]

15.64 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.

15.65 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.[1953]

15.66 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

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1948 Australian National Audit Office, *Administration of Tax Penalties*, Report 31 (2000), Australian Government Printing Service, Canberra, para 1.11.

1949 Senate Economics References Committee, *Inquiry into the Operation of the Australian Taxation Office*, (2000), Commonwealth of Australia, Canberra, chapter 3. For example, during the first two years of operation of the GST scheme, activity statement late lodgment penalties were not routinely imposed: ATO, 'Lodgement and Penalties', Letter to Tax Practitioners, 20 February 2002, <http://www.ato.gov.au/content.asp?doc=/content/Professionals/20075.htm>, 27 February 2002.

1950 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 lodgment] 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.

1951 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.

1952 Ibid, para 6.

1953 Ibid, para 50.

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%.

15.67 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 co-operation during the examination — 10% reduction;
    - positive co-operation — 25% reduction.
- Aggravating circumstances which increase the typical culpability rate by a factor of up to 25% and include the following:
    - lack of reasonable co-operation causing delay of the examination — 10% increase;
    - deliberate false and misleading statement — 25% increase.[1954]

15.68 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

15.69 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:[1955]

1. 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

2. 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

1954 Ibid, para 8.

1955 *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.

cause *and*, in the circumstances, it is reasonable to remit all or part of the GIC; or

3. other special circumstances apply *and*, in the circumstances, it is reasonable to remit all or part of the GIC.

15.70 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.

15.71 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'.[1956]

15.72 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.

15.73 In contrast, the ATO's power to remit penalties applies extremely widely to a broad, undifferentiated community (taxpayers). In 2000–01, the ATO remitted $239 million in penalties.[1957] 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 consistent exercise of discretion, whereas broad statements of principle require greater individual interpretation and would pose a greater risk of inconsistency.

Effectiveness of leniency policies

15.74 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 con-

1956 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.

1957 Australian Taxation Office, *Commissioner of Taxation Annual Report 2000–01*, (2001), Australian Taxation Office, note 20A, 191. In 1999–2000, the value of remissions was $167 million: Ibid.

trasts 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).

15.75 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'.[1958] Transparency has been one of the strengths of the US leniency policies.[1959] 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.[1960]

15.76 A comparative analysis of the leniency programs currently in operation in various jurisdictions provides an indication of the requirements for an effective leniency policy. The characteristics of a successful investigatory leniency program in the area of anti-competitive business behaviour differ somewhat from the characteristics of a successful compliance-focussed leniency program. In general terms, an effective leniency policy is:

1. transparent and provides certainty to those corporations and individuals who apply for leniency;

2. supported by the threat of penalties imposed by law enforcement agencies; and

3. supported by active law enforcement agencies, creating an environment in which corporations and individuals 'perceive a significant risk of detection'.[1961]

1958 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.

1959 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).

1960 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. Note that this aspect of the leniency policy is currently being reviewed.

1961 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.

15.77 The leniency, immunity and remission policies discussed above take a variety of 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 and this raises the question as to whether there are any problems with the existing schemes. In particular, whether the disparate approaches taken raise any issues about the consistent exercise of discretion within and between regulators with similar powers.

Proposal and questions

15.78 Although the discussion in this chapter has focussed on the exercise of discretions in connection with leniency and immunity policies and the remission of penalties, the points of principle that can be derived from it have broader application to all areas of regulatory conduct where discretion is exercised.

15.79 The transparent exercise of discretion is one way in which regulators can balance the conflicting demands of consistent but individualised justice. It is a particular aspect of fairness in regulatory practice. It seems beyond argument that good regulation requires regulators to formulate guidelines to direct its own 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.

15.80 It seems no less axiomatic that these guidelines should be published. The second, and no less important, role of such guidelines is in guiding the public to understand how they will be treated.

15.81 The real issues for consideration appear to relate to when the regulators should consider the drafting of such guidelines, what form they should take, and what status they have upon publication. Generally speaking, the ALRC considers that regulators should formulate and publish guidelines to cover all areas of their activity where there is the non-trivial exercise of discretion. However, the ALRC is keen to know if there are any areas of discretionary activity where the publication of such guidelines would so unduly interfere with a regulator's ability to conduct its affairs properly that they should not be published even if they have been developed for the regulator's own internal purposes. For instance, is there any risk, or purpose, in publishing guidelines in areas where the exercise of discretion is not reviewable, such as the discretion to take a particular form of penalty action, or no action at all?

15.82 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.

15.83 Finally, the status and binding nature of guidelines on the exercise of discretion must be considered. These characteristics may vary with the content, style and intention of the particular regulator. The ALRC would imagine 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.[1962] There is an argument that the more prescriptive these guidelines, the more closely bound to them the regulator might be. They might be legally binding in the sense that they constrain the regulator to take certain matters (and only those matters) into account, but ultimately the decision is for the regulator to make in the light of those matters, and the scope for review might be limited.

Proposal 15-1. Subject to Proposals 10-1 and 10-2, regulators should develop and publish detailed guidelines describing how penalty-related discretions will be exercised.

Question 15-1. Are there any particular areas of discretion where guidelines on the exercise by regulators of their discretion should not be published as a matter of policy or principle?

Question 15-2. What form should guidelines on the exercise by regulators of their discretion take? What status should attach to any such guidelines?

Question 15-3. Should regulators be bound, either legally or administratively, to follow published guidelines on the exercise of their discretions?

1962 See para 15.62–15.68 above.

Part D
Corporations

16. Corporate Responsibility

Contents

Introduction

16.1 The inquiry's 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.

16.2 The ALRC's research and consultations reveal 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 and in which there is an extensive body of case law overlapping and supplementing statutory provisions.

16.3 This chapter will examine criminal liability as it relates specifically to corporate responsibility.[1963] As many pieces of federal legislation under which criminal and regulatory penalties may be imposed are directed at the activities of corporations, notions of corporate responsibility are critical.[1964]

16.4 Several key threshold questions arise:

- Whether and to what extent should corporations be liable for criminal and non-criminal regulatory offences?
- If corporate responsibility is accepted, how should liability be assigned to the corporation? In particular:
    - For whose conduct should the corporation be responsible? and
    - How should corporate intention be determined?
- Whether and to what extent should individual liability be concurrent with or extinguished by corporate liability?

16.5 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 corporations for wrongdoing into a coherent system of legal responsibility. In the second and third sections, the methods used to assign liability to corporations at common law and under statute are considered. The fourth section of this chapter looks at the circumstances, if any, in which an individual may be held liable for the conduct of a corporation and considers whether individual liability should be direct (ie, as a principal) or indirect (ie, as an accessory). The question of

1963 The general aspects of criminal liability are discussed in chapter 2.

1964 Corporate responsibility for the death of a person, sometimes called 'corporate homicide' or 'corporate manslaughter' is not discussed in this chapter as it is usually covered by the general criminal law of each state and territory and not by federal legislation.

whether corporations should be subject to the same sanctions as individuals or whether tailored corporate penalties should be available is considered in chapter 18.

16.6 In this chapter, the term 'corporate responsibility' (and 'corporation') has been used to describe all situations where liability is assigned to a legal entity other than an individual, natural person. 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.

16.7 Much has been written about the criminal responsibility of corporations for death and physical injury[1965] and it is beyond the scope of this Discussion Paper to review that literature in detail. Instead, this Discussion Paper reviews the prevailing theories as those principles relate to corporate responsibility, individual responsibility, and the formulation and assessment of penalties for criminal and non-criminal regulatory offences.

16.8 Whilst the focus of this inquiry is the imposition of penalties *by statute*, 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 and non-criminal regulatory offences. 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.

16.9 In general terms, corporate responsibility assigned by statute has followed the principles established by the common law. As with all regulatory offences (whether the target of the penalty is an individual or corporation), the particular terms of the statute will be critical in determining how, and to what extent, responsibility for breach of a regulatory offence provision will be assigned. It is beyond the scope of this Discussion Paper 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 corporation to be liable for the conduct of an individual have been used.

16.10 Many of the examples given in this chapter relate to the *Trade Practices Act 1974* (Cth). The *Trade Practices Act* regulates the conduct of corporations. 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 under the *Trade Practices Act* is always expressed as attaching to corporations. This Act imposes primary liability on corporations for both criminal offences and civil

1965 See in particular the writings of Braithwaite, Coffee, Fisse and Wells.

contraventions by looking at the conduct of individuals. As the conduct of individuals is deemed to be the conduct of the relevant corporation, the *Trade Practices Act* provides a useful source of jurisprudence on the issue of corporate responsibility. Assigning liability 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.

Should corporations be liable for regulatory offences?

16.11 Whilst it is generally accepted that corporations should be accountable for their conduct, particularly where that conduct introduces harm into the community and causes damage, there is an ongoing debate about whether corporations have a separate collective identity from the individuals who make up the corporation or undertake activities in its name. This section considers the attempts to reconcile philosophical difficulties with the notion of collective intention and moral considerations about blame with legal rules developed from a history of individual legal responsibility.

Philosophical and moral considerations

> Even in the corporate context, moral condemnation remains a valid aim of the criminal law. Indeed, the attributes of modern corporate existence support the argument that corporations, like individuals, can and should be morally condemned for actions that transgress the law.[1966]

16.12 Professor John Coffee supports the retention of criminal responsibility for corporations, arguing that 'if corporations were sanctioned exclusively by civil penalties, their wrongdoing would seem "less blameworthy than the conduct of individuals who were still being processed through the criminal justice system"'.[1967] Coffee's point is that 'since the criminal law is saved for society's most egregious acts, denying the ability to criminally prosecute corporations sends the signal that corporate wrongdoing is not as serious as individual wrongdoing'.[1968]

16.13 In its inquiry into sentencing, the ALRC noted the serious social impact of corporate crime and 'the economic harm sustained by society' as reasons for developing notions of corporate criminal responsibility.[1969]

1966 L Friedman, 'In Defense of Corporate Criminal Liability' (2000) 23(3) *Harvard Journal of Law and Public Policy* 833.

1967 J Coffee cited in R Mokhiber, *No Mind, No Crime?*, <http://multinationalmonitor.org/focus/focus.9704.html>, 2 December 1997.

1968 J Coffee cited in Ibid.

1969 Australian Law Reform Commission, *Sentencing: Penalties — Discussion Paper*, DP 30 (1987), Australian Law Reform Commission, Sydney, para 284.

Legal difficulties

16.14 In addition to philosophical and moral considerations about blame (considered briefly above), there are several major legal barriers to holding corporations responsible for criminal and non-criminal regulatory offences.

> As an abstract legal construct, a company has no physical existence and thus no capacity for physical action or the possession of intention or knowledge.[1970]

16.15 This obstacle has largely been overcome by the legal fiction of corporate personality. A corporation is recognised at law as a legal person with substantially the same general rights and obligations as a natural person.[1971] Clearly, however, the law cannot treat a corporation in entirely the same way as a natural person.[1972] Modifications must be made to accommodate the two fundamental differences between corporate legal persons and natural persons:

- the corporation's lack of a physical body; and
- the corporation's absence of a single mind capable of forming the intention to act.

16.16 This second limitation has caused the most difficulty for the development of a coherent theory of corporate responsibility.

16.17 Generally, corporate liability will be founded on the basis of the actions of those natural persons involved in the activities of the corporation (that is, the liability of the corporation will be derivative):

> To facilitate the application of general common law rules, the actions, knowledge and intentions of those natural persons involved in the enterprise are attributed to the company.[1973]

16.18 Difficulty arises, however, in deciding *which* natural persons (and their actions) involved in the affairs of the corporation can be held to be indicative of the intention of the corporation as a whole. It is only by determining for *what* actions of *which* personnel a corporation should be held accountable that corporate liability can be assigned.

1970 R Grantham, 'Attributing Responsibility to Corporate Entities; A Doctrinal Approach' (2001) 19 *Companies and Securities Law Journal* 168, 169.

1971 This legal fiction has been given statutory force by s 124 of the *Corporations Act*, which states that a 'company has the legal capacity and powers of an individual both in and outside this jurisdiction'.

1972 Although many statutory provisions attempt to do this. See for example, s 4B of the *Crimes Act*, 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.

1973 R Grantham, 'Attributing Responsibility to Corporate Entities; A Doctrinal Approach' (2001) 19 *Companies and Securities Law Journal* 168, 169.

16.19 Assigning liability is not a wholly legal process but also includes considerations of policy. The intended purpose for which a sanction is imposed will be an important factor in determining corporate responsibility.

16.20 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, at law. Yet there is tension between the fundamental legal nature of corporations (as entities designed to limit the liability of investors) and the expansion of notions of corporate responsibility. Developing notions of corporate responsibility attempt to balance the competing interests of investors with those of the community at large, which expects that corporations will be held accountable for the consequences of their conduct.

Theories of corporate responsibility

16.21 A range of theories of corporate responsibility have been developed in an attempt to found a principled basis for the modification of the general law as it applies to corporations as legal persons. The two main theories of corporate responsibility are outlined below.

The 'organic' approach

16.22 Ross Grantham describes the central element of the organic approach to corporate responsibility (also referred to as the doctrine of 'identification' or 'directing mind and will'):

> 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.[1974]

16.23 He notes that this approach merges the individual and the corporation 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.

16.24 One criticism of the identification theory is that it takes too limited a view of corporate liability.[1975] Diffusing or decentralising responsibility in a corporation makes it easy to avoid liability. It is easy for senior management to remain removed from the activities of the corporation that constitute contraventions, yet it is senior management that sets the policies and business objectives of the corporation which may lead to the contravening conduct.

1974 Ibid, 170–171.

1975 See for example S Field and N Jorg, 'Corporate Liability and Manslaughter; Should We be Going Dutch?' (March 1991) *Criminal Law Review* 156.

16.25 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.[1976]

16.26 They are critical of the gap allowed by the identification doctrine between the 'mind' (senior management) of the corporation and its 'hands' (ordinary workers), the assumption being that the hands do not act under the control of the mind.

16.27 The current law concerning the attribution of corporate criminal responsibility on the basis of the 'directing mind and will' principle is discussed below at para 16.82–16.89.

16.28 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*.[1977] 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 corporation for the conduct of the relevant individuals. The current law concerning attribution liability is discussed below at para 16.90–16.95.

Organisational blameworthiness

16.29 In contrast to the organic approach, which examines the actions of individuals and then allocates responsibility to the corporation if the individuals responsible for those actions satisfy certain tests, the theory of organisational blameworthiness treats the corporation as an entity capable of aggregate action and intention.

16.30 Enterprise liability or organisational blameworthiness is a concept developed in Australia primarily by Brent Fisse[1978] to overcome some of the limitations of the organic approach developed in *Tesco Supermarkets Ltd v Nattrass*.[1979] Fisse

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1976 Ibid, 159.

1977 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.

1978 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).

1979 *Tesco Supermarkets Ltd v Nattrass* [1972] 8 AC 153.

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'.[1980] This is because in a large corporation, the activities that might give rise to a contravention are often undertaken by middle or lower management without the direct involvement of upper management.

16.31 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.[1981]

16.32 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 corporation as a whole.[1982]

16.33 Australian law has adopted two of the three elements of organisational blameworthiness:

- vicarious responsibility for the physical element of the offence (discussed below at para 16.67–16.80); and
- corporate culture and policy as expressing corporate intention or the fault element of the offence is embodied (to some extent) in the corporate criminal responsibility provisions of the *Criminal Code* (discussed below at para 16.115–16.127).

16.34 The third element, reactive corporate fault, has not been adopted to date in Australian law. Fisse defines 'reactive corporate fault' as

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1980 B Fisse, 'The Attribution of Criminal Liability to Corporations; A Statutory Model' (1991) 13 *Sydney Law Review* 277, 277.

1981 Ibid, 279–280, footnotes omitted.

1982 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 16.128–16.129.

> 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.[1983]

16.35 Fisse argues that reactive fault is an appropriate basis of corporate liability as it looks at the response of a corporation once it has committed the physical elements of an offence. He notes that:

> Communal attitudes of resentment intensify if corporations fail to react diligently where their activities have led to unjustified harm-causing or risk-taking; it is highly provocative for a company to remain inactive despite having been put on notice that responsive action is required.[1984]

16.36 Fisse identifies the advantages of the reactive fault approach to corporate liability as including ease of proof. He argues that it will often be easier to show whether a corporation has implemented a 'specific policy and programme for undertaking internal discipline or preventive reform'[1985] in response to a situation than to assess the adequacy of a general compliance program.

Individual or corporate responsibility?

16.37 The theories of corporate liability outlined above are based on the assumption that corporate responsibility should exist independently from individual responsibility. Whether there is a need for corporate responsibility or whether individual responsibility of corporate officers is sufficient to achieve the policy purposes of deterrence and compliance is problematic. The question of whether individuals within corporations should be held liable for their own conduct (either in place of or concurrently with corporate responsibility) is complex and has provoked much theoretical debate. The current law on individual liability is considered below at para 16.136–16.170.

16.38 Fisse argues 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.[1986]

1983 B Fisse, 'Sentencing Options against Corporations' (1990) 1(2) *Criminal Law Forum* 211, 253.

1984 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.

1985 B Fisse, 'The Attribution of Criminal Liability to Corporations; A Statutory Model' (1991) 13 *Sydney Law Review* 277, 286.

1986 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.

16.39 Business regulatory agencies have historically been more likely to take action against corporations than individuals,[1987] although this tendency appears to be diminishing.[1988]

> The court proceedings filed this week against the GIO executives over forecasts made during the AMP takeover are an example. The law does provide for action against 'officers', but in practice this has largely been confined to directors rather than managers.
>
> 'It's a big shift from where we have been', says one senior corporate lawyer. 'Normally the only people who get hooked in are directors of the main board. ASIC has signalled that this has changed and that responsibility starts well before they get to that level so that plenty of senior executives are suddenly going to be worrying about their liability and putting their assets in their wives' names'.[1989]

16.40 The corporate structure, it is argued, 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.[1990]
>
> If company directors are able to reallocate liability during pre-trial negotiations onto a corporation, dispersing any penalty amongst the shareholders of the company, this not only diminishes the deterrent effect of the punishment, but may ultimately shift it onto those who may be entirely innocent.[1991]

16.41 Another argument in favour of individual accountability is that the punishment for corporate crime is likely to fall upon innocent third parties (sharehold-

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1987 B Fisse and J Braithwaite, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1988) 11 *Sydney Law Review* 468, 470.

1988 In the wake of the recent high profile corporate collapses such as One.Tel and HIH, ASIC has instituted cases against several directors, including Jodee Rich and Rodney Adler. ASIC has also commenced action against GIO executives concerning forecasts made during the AMP takeover: J Hewett, 'Watchdog with Bark and Bite', *The Sydney Morning Herald*, 23 June 2001, 45. See also G Moodie and I Ramsay, 'The Expansion of Civil Penalties under the Corporations Act' (2002) 30 *Australian Business Law Review* 61, Table 2, 67 and G Acquaah-Gaisie, 'Enhancing Corporate Accountability in Australia' (2000) 11 *Australian Journal of Corporate Law* 146, 223–4. In 2000–01, 25 individuals were imprisoned for corporations offences — the longest sentence imposed was 11 years for defrauding investors of $2.2 million: Australian Securities & Investments Commission, *Annual Report 2000–2001*, Australian Securities & Investments Commission, 21–22.

1989 J Hewett, 'Watchdog with Bark and Bite', *The Sydney Morning Herald*, 23 June 2001, 45. ASIC has filed civil penalty proceedings against individuals involved with HIH Insurance, One.Tel, Harris Scarfe, NRMA, GIO Insurance and Water Wheel: A Hepworth, 'Judges Face Busy Time as Watchdogs Pounce', *The Australian Financial Review*, 11 January 2002, 8. See also G Moodie and I Ramsay, 'The Expansion of Civil Penalties under the Corporations Act' (2002) 30 *Australian Business Law Review* 61, particularly Table 2, 67.

1990 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.

1991 Ibid, 1070.

ers, employees and consumers). 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.[1992]

16.42 In support of corporate liability, critics of personal liability question whether it will 'hopelessly compromise the limited liability company'.[1993] By facilitating moves towards the removal of the corporate veil, personal liability unavoidably detracts from 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.

16.43 Thus, the corporate structure, established in part to encourage enterprise by limiting investors' civil financial liability — regarded as socially beneficial — also has the potential to shield individual corporate officers from their criminal liability, which must be socially detrimental.

16.44 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'.[1994]

16.45 One notable criticism of current corporate liability measures is that they assume that corporations will react by using their internal disciplinary systems to enforce individual responsibility. However, the law makes little or no attempt to ensure that such a reaction occurs, and in practice individuals generally escape accountability,[1995] particularly those high in the corporate structure.

> The impact of enforcement can easily stop with a corporate pay-out of a fine or monetary penalty, not because of any socially justified departure from the traditional value

1992 G Acquaah-Gaisie, 'Enhancing Corporate Accountability in Australia' (2000) 11 *Australian Journal of Corporate Law* 146, 146–7.

1993 N Hawke, *Corporate Liability* (2000) Sweet and Maxwell, London, 89.

1994 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.

1995 B Fisse and J Braithwaite, *Corporations, Crime and Accountability* (1993) Cambridge University Press, Cambridge, 1. Note, however, that enforceable undertakings often include a requirement that compliance programs be implemented.

> of individual accountability, but rather because that is the cheapest or most self-protective course for a corporate defendant to adopt.[1996]

16.46 Fisse and Professor John Braithwaite propose that the law, rather than imposing direct personal liability, should place greater reliance on the accountability mechanisms within corporations. They argue that legal systems need to 'recognise corporate systems of justice and fully utilise their power', by, for example, threatening a range of penalties — culminating in liquidation — against corporations who have committed a criminal act, unless the corporation undertakes a self-investigation and reports back to the court as to its findings.[1997] Through reforms such as this enforced accountability strategy, modifications of existing corporate liability systems may be preferable to expanding personal liability.

Defining criminal liability

16.47 Criminal liability requires proof beyond reasonable doubt that an offence has been committed.[1998] There are two major components to establishing criminal liability:

- A physical element, or *actus reus*, constituting the offence must have taken place; and

- The mental element, or *mens rea*, to commit the offence must have been present in the mind of the offender (also commonly called the 'fault element').

16.48 These two elements raise particular difficulties when considering the activities of corporations. As discussed earlier, the recognition of corporations as legal persons is a fiction. A corporation has no readily identifiable physical body (in fact, many corporations have multiple physical presences in our community — the individuals who work for the corporation, the premises from which the corporation operates and more intangible presences such as brands, trademarks, advertising and goodwill) and no readily discernible mind.

16.49 Whilst it is fairly straightforward to determine whether the required physical element of a criminal offence has taken place and to look to the conduct of officers, employees and agents of a corporation to determine the level of responsibility of the corporation for such actions,[1999] it can be extremely difficult to prove that the corporation (as an entity separate from the individual perpetrators of the of-

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1996 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.

1997 B Fisse and J Braithwaite, *Corporations, Crime and Accountability* (1993) Cambridge University Press, Cambridge, 15.

1998 See the discussion of criminal offences generally in chapter 2.

1999 See further discussion of vicarious liability below at para 16.67–16.79 and 16.97–16.104.

fence) possessed the required fault element. Methods of determining corporate intention are discussed further below at para 16.112–16.135.

16.50 Corporate criminal liability for offences against federal laws has been largely codified by the *Criminal Code Act 1995* (Cth) (*Criminal Code*). The *Criminal Code* is discussed, in the context of corporate responsibility, below at para 16.96 and 16.115–16.129 and, in the more general context, in chapter 2.

Defining liability for civil and administrative penalties

16.51 Regulatory offences are often almost indistinguishable from criminal offences. In most circumstances, a physical element (be it an act, an omission or a set of circumstances) will be required to constitute the offence. The main difference is whether a fault element[2000] will also be required. In addition to offences where it is necessary to prove that the corporation had a particular intention to commit the act constituting the offence, many non-criminal regulatory offences are 'strict liability' or 'absolute liability' offences, which do not require proof of a fault element.[2001]

16.52 For offences of strict or absolute liability, it will be enough to prove that the proscribed conduct took place and that the persons who engaged in that conduct were acting 'as' or 'on behalf of' the corporation. For regulatory offences which require a fault element also to be proved, it will be necessary to make a further enquiry to determine whether the persons who engaged in the proscribed conduct had the necessary 'intention' and whether that intention can be attributed to the corporation. Corporate intention is discussed below at para 16.112–16.135.

16.53 Common law principles may be used to attribute liability to a corporation where the relevant legislation does not impose strict or absolute liability (or adequately define the necessary fault element to be proved).

16.54 As noted in the introduction, this chapter focusses on corporate responsibility for contraventions of statutory provisions rather than responsibility for conduct traditionally considered by the common law to be criminal (ie, offences against persons, property and the Crown). This focus on statutory wrongdoing has meant that it has not been possible to maintain a strict distinction between liability for criminal and non-criminal regulatory offences. In the area of corporate responsibility this distinction does not provide a useful method of analysis. 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. Even these categories are not mutually exclusive — there is significant

2000 For convenience, the terminology used in the *Criminal Code* to distinguish between the *actus reus* as the physical element of an offence, and the *mens rea* as the fault element of the offence has been adopted. Traditionally, the fault element is more commonly described as the 'mental element'.

2001 See the discussion of the nature of offences generally in chapter 2.

overlap — and, in many cases, principles used to assign liability for conduct will be the same as those used to discern corporate intention.

Whose conduct is the corporation's conduct?

16.55 Traditionally, corporations have been liable under common law for the conduct of two classes of individuals:

- agents of the corporation acting within the scope of their actual or apparent authority; and
- employees or officers of the corporation acting in the course of their employment.

16.56 In the latter part of the 20th century, a new basis for assigning liability to corporations was developed — the identification theory, based on identification of those individuals who could properly be described as the 'directing mind and will' of the corporation as a whole.[2002] In the 1990s, a variant of this theory was proposed whereby liability was attributed on the basis of the functional responsibility of the individuals involved in the contravention, allowing a closer analysis of the substantive organisation of corporate structures than the broader identification approach.[2003]

16.57 The methods of determining for whose conduct a corporation 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.[2004] Each of these methods of determining corporate liability is outlined briefly below and the question of whether a uniform system for determining corporate liability can and should be developed is considered.

Liability for persons 'acting as an agent'

> Historically, the attribution to a company of rights, duties and liabilities was conceived of entirely in terms of the principles of agency.[2005]

16.58 Directors were regarded as the agents of the shareholders or members of the corporation and subject to the specific direction of the shareholders. This rela-

2002 See *Tesco Supermarkets Ltd v Nattrass* [1972] 8 AC 153.
2003 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.
2004 Section 84(2) of the *Trade Practices Act* and other similar deeming provisions are discussed below at para 16.97–16.104.
2005 R Grantham, 'Attributing Responsibility to Corporate Entities; A Doctrinal Approach' (2001) 19 *Companies and Securities Law Journal* 168, 169.

tionship of agent and principal was important in founding both criminal and civil liability in pre-20th century cases.

16.59 During the 20th century, courts accepted the separate legal personality of the corporation. Directors were no longer regarded as subject to the specific direction of shareholders. The source of a corporation's separate legal identity and of its authority to act came to be regarded as arising from the corporation's constitution or memorandum and articles of association. Accepting that a corporation was a separate legal entity did not wholly displace the principal/agent concept:

> For many purposes the actions, knowledge and intention of senior employees and individual directors will be attributed to the company by way of the principle of the law of agency. Thus, for much of the day-to-day operation of the company's business, agency remains the basis upon which attribution occurs.[2006]

16.60 Attribution of liability for the actions of less senior employees than would be liable under identification theory may be directly assigned to the corporation using agency principles. An agent may also include a non-employee acting on behalf of the corporation such as a sub-contractor or independent contractor. In this way it can extend liability beyond the boundaries imposed by identification theory (see discussion below at para 16.82–16.95).

16.61 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 corporation under s 84(2) of the *Trade Practices Act* and similar provisions in other legislation.[2007]

16.62 Attribution of liability using agency principles was considered by the High Court in *Scott v Davis*.[2008] Although the case concerned civil liability for a tortious act (negligence), the discussion of agency is relevant to non-tortious situations. Two elements 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? and
- Was the agent acting within the 'scope of his or her actual or apparent authority'?

16.63 In a dissenting judgment in *Scott*, 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.

2006 Ibid, 170.
2007 See discussion below at para 16.97–16.104.
2008 *Scott v Davis* (2000) 204 CLR 333.

> [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.[2009]

16.64 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.

16.65 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.

16.66 Questions raised by these principles are considered below at para 16.105–16.108.

Vicarious liability for employees

16.67 A corporation 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.[2010] Once primary liability of the employee, servant or agent is established (using general principles of liability and taking into account any available defences), the corporation, as employer, is vicariously liable provided that the person was acting within the course and scope of his or her employment when the offence was committed.

16.68 In *Hollis v Vabu Pty Ltd* (the *Bicycle Couriers* case),[2011] 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

2009 Ibid, 346 (McHugh J).

2010 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.

2011 *Hollis v Vabu Pty Ltd* (2001) 181 ALR 263.

whilst riding on a footpath) on the basis that the courier was an employee acting in the course of his employment.[2012]

Policy basis of vicarious liability

16.69 In the *Bicycle Couriers* case, the policy rationale for the vicarious liability of corporations for the conduct of their employees was described as relying on two main concepts:

- enterprise risk; and
- deterrence of future harm.

16.70 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**'**;[2013] 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 Court approved this policy rationale:

> In general, under contemporary Australian conditions, the conduct by the defendant of an enterprise in which persons are identified as representing that enterprise should carry an obligation to third persons to bear the cost of injury or damage which may fairly be said to be characteristic of the conduct of that enterprise.[2014]

16.71 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.[2015]

16.72 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

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2012 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.

2013 *Hollis v Vabu Pty Ltd* (2001) 181 ALR 263, 275 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

2014 Ibid, 275 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ). McHugh J also approved this policy basis: 288–9.

2015 Quoting McLachlin J of the Supreme Court of Canada in *Bazley v Curry* [1999] 2 SCR 534, 552–555; Ibid, 288 (McHugh J).

wrongs by efficient organisation and supervision'.[2016] 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 incentive for the discipline of workers guilty of wrongdoing'.[2017] This concept of organisational reform is advocated by Fisse[2018] and underpins the use of organisational reform orders as tailored corporate sanctions (see discussion in chapter 18).

Importance of the concept of control

16.73 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 justices 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.[2019]

16.74 The majority justices found that the requisite level of control existed:

> Vabu's whole business consisted of the delivery of documents and parcels by means of couriers. 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. In this way, Vabu's business involved the marshalling and direction of the labour of the couriers, whose efforts comprised the very essence of the public manifestation of Vabu's business. It was not the case that the couriers supplemented or performed part of the work undertaken by Vabu or aided from time to time; rather, 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.[2020]

16.75 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 from vicarious liability where an employee performs an allocated task in an unauthorised manner.

2016 Quoting McLachlin J of the Supreme Court of Canada in *Bazley v Curry* [1999] 2 SCR 534, 552–555; Ibid, 288 (McHugh J).
2017 Ibid, 289 (McHugh J).
2018 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.
2019 *Hollis v Vabu Pty Ltd* (2001) 181 ALR 263, 273 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).
2020 Ibid, 279 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

Meaning of 'acting within the course of employment'[2021]

16.76 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*,[2022] the Full Federal Court (Ryan, Moore and Goldberg JJ) considered 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.

16.77 The Federal Court noted with approval the description of the 'course of employment' used in Fleming's *The Law of Torts*, 9th edition:

> In general terms, the 'course of employment' is said to encompass such unauthorised acts by the servant as can be regarded as wrongful and unauthorised modes of performing an authorised task. The precise terms of the authority conferred on him is not the test but rather the function, the operation, the class of act to be done — whatever be the instructions as to the time, the place or the manner of doing it.[2023]

16.78 In *Tiger Nominees Pty Ltd v State Pollution Control Commission*,[2024] 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 fulfillment of the statutory purpose requires that employers be regarded as potentially vicariously responsible for acts of their employees.[2025]

16.79 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.

2021 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 corporations for the conduct of their employees and must be distinguished. For this reason they have not been discussed in this chapter.

2022 *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530.

2023 Ibid, 546.

2024 *Tiger Nominees Pty Ltd v State Pollution Control Commission* (1992) 25 NSWLR 715.

2025 Ibid, 720 (Gleeson CJ).

Effect of employee's personal liability

16.80 A corporation 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*,[2026] 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.[2027]

16.81 Direct personal liability of individuals is discussed further below at para 16.143–16.146 and 16.162–16.170.

'Directing mind or will' theory

16.82 Another important way in which liability for conduct will be assigned to a corporation is the 'directing mind or will' or identification approach. The House of Lords first described this concept in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* as requiring the identification of the person

> who is really the directing mind and will of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority to co-ordinate with the board of directors given to him under the articles of association.[2028]

16.83 The notion of primary liability of a corporation by identification of the conduct of directors or senior managers as conduct of the corporation was firmly established in *Tesco Supermarkets Ltd v Nattrass*.[2029] 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'.[2030]

2026 *Mallan v Lee* (1949) 80 CLR 198.
2027 Ibid, 215 (Dixon J).
2028 *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705, 713 (Haldane LC).
2029 *Tesco Supermarkets Ltd v Nattrass* [1972] 8 AC 153.
2030 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':

> The general view of the House of Lords was that rationality and fairness dictated that corporate criminal liability could be triggered only through default on the part of those to be described as the directing mind of the company in question.[2031]

16.84 *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;[2032]
- persons having actual control of the operations of the corporation and not required to report to others on how control is exercised;[2033] and
- normally the board of directors, the managing director and perhaps superior officers.[2034]

16.85 The rule established in *Tesco* was adopted in Australia by the High Court in *Hamilton v Whitehead*.[2035] 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**'**.[2036]

16.86 *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. The fact that it was the officer's conduct that formed the basis of the liability of the corporation did not preclude the officer also being liable as an accessory. The Court held that 'the company is the principal offender and [Whitehead] is charged as an accessory'[2037] on the basis that he was 'knowingly concerned' in the offence. This concept of being 'knowingly concerned' in the contravention as the basis for accessorial liability has been adopted in numerous pieces of federal legislation[2038] and is discussed below at para 16.153–16.161.

Criminal Code, s 12.3(6). This definition includes references to all three theories of corporate liability: scope of authority, attribution and culture.

2031 N Hawke, *Corporate Liability* (2000) Sweet and Maxwell, London, 35.

2032 *Tesco Supermarkets Ltd v Nattrass* [1972] 8 AC 153, 200 (Diplock LJ).

2033 Ibid, 187 (Dilhorne LC).

2034 Ibid, 171 (Reid LJ).

2035 *Hamilton v Whitehead* (1988) 166 CLR 121.

2036 Ibid, 128.

2037 Ibid, 128.

2038 See for example s 243A of the *Customs Act 1901* (Cth), s 75B of the *Trade Practices Act 1974* (Cth), s 484 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 12GB of the *Australian Securities and Investments Commission Act 2001* (Cth), and s 79 of the *Corporations Act 2001* (Cth).

16.87 On the *Tesco* principle, the conduct of junior employees and managers below the top tier of control of the corporation would be unlikely to be held to constitute conduct of the corporation itself. Applying *Tesco* strictly, direct liability of a corporation would only be found in limited circumstances. This limitation of the *Tesco* principle has been criticised by numerous commentators.[2039] 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.[2040]

16.88 Fisse is also critical of this discriminatory effect:

> The Tesco principle is relatively easy to establish in the context of a small company but much more difficult in the case of larger organisations. This means that the directors of large companies will rarely be exposed … whereas the officers of small companies will be much easier to catch in the net. Bias of this kind is indefensible.[2041]

16.89 The issue raised by *Tesco* about whether liability should be assigned on the basis of the formal management structure of the corporation is considered below at para 16.105–16.108.

'Attribution' theory

16.90 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*.[2042] In *Meridian*, the issue to be determined was whether the corporation could be held to have 'knowledge' of investment decisions made by the corporation's investment managers (and, therefore, to have breached disclosure provisions concerning acquisition of shares in a public company). 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 etc. of the company?[2043]

2039 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.

2040 T Woolf, 'The Criminal Code Act 1995 (Cth); Towards a Realist Vision of Corporate Criminal Liability' (1997) 21 *Criminal Law Journal* 257, 258.

2041 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.

2042 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.

2043 Ibid, 507.

16.91 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.[2044]

16.92 The principles of attribution developed in *Meridian* have not been expressly adopted by the Australian High Court[2045] but have been considered in recent cases by the Federal Court. The principles were applied by Heerey J in *Australian Competition & Consumer Commission v Simsmetal Ltd*.[2046] 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'.[2047]

16.93 Justice Goldberg of the Federal Court also referred to *Meridian* in *Australian Competition & Consumer Commission v Australian Safeway Stores Pty Ltd (No 2)*.[2048] 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.

16.94 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

2044 R Grantham, 'Corporate Knowledge: Identification or Attribution?' (1996) 59 *Modern Law Review* 732.

2045 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 16.133–16.134).

2046 *Australian Competition and Consumer Commission v Simsmetal Ltd* (2000) ATPR ¶41–764.

2047 Ibid, 40,997.

2048 *Australian Competition & Consumer Commission v Australian Safeway Stores Pty Ltd (No 2)* [2001] FCA 1861.

> four' (or five or six) directors whom *Tesco v. Nattrass* recognizes as the nerve-centre of command.[2049]

16.95 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 at para 16.105–16.108.

Criminal Code

16.96 The *Criminal Code* uses traditional agency and vicarious liability principles to establish the culpability 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'. The *Criminal Code* method of determining liability for fault elements is discussed below at para 16.115–16.129.

Trade Practices Act, s 84(2)

16.97 Section 84(2) of the *Trade Practices Act* deems a corporation liable for the conduct of specified individuals.[2050] 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, 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.

16.98 Section 84(2)(a) restates traditional common law formulations of liability on the basis of agency and vicarious liability for the actions of directors, servants and agents in the same way as in the *Criminal Code*. Section 84(2)(b) extends these principles to the conduct of persons other than directors, servants or agents (pre-

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2049 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.

2050 This expression of liability (or a substantially similar expression) is used in many statutes; see for example s 762(4) of the *Corporations Act 2001* (Cth), s 257 of the *Customs Act 1901* (Cth), s 145A of the *Excise Act 1901* (Cth), s 85 of the *Proceeds of Crime Act 1987* (Cth) and s 12GH of the *Australian Securities and Investments Commission Act 2001* (Cth).

sumably sub- and 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.

16.99 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'

16.100 This phrase has been considered in a number of cases and has generally been viewed as having no 'strict legal meaning'.[2051] 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.[2052]

16.101 In *Tubemakers*, 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'.[2053] More recently, in *NMFM Property Pty Ltd v Citibank Ltd (No 10)*[2054] 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.[2055]

2051 *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27, 37.
2052 Ibid, 37, cited in *NMFM Property Pty Ltd v Citibank Ltd (No 10)* (2000) 107 FCR 270, 549–550.
2053 *Trade Practices Commission v Tubemakers of Australia Ltd* (1983) 76 FLR 455, 475.
2054 *NMFM Property Pty Ltd v Citibank Ltd (No 10)* (2000) 107 FCR 270.
2055 Ibid, 550.

Does s 84(2) extend the common law?

16.102 The leading authority on s 84(2) is *TPC v Tubemakers of Australia Ltd*.[2056] 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.[2057]

16.103 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).[2058]

16.104 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.[2059]

A need for reform?

16.105 The ALRC notes that the approach taken in the *Criminal Code* to liability for the physical elements of an offence does not differ from the traditional common law tests of primary liability of a corporation 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.

16.106 Whilst substantially restating the common law, s 84(2) of the *Trade Practices Act* has been held to extend the common law to encompass at least the identification approach, and possibly the attribution approach, to assigning corporate liability.

16.107 The ALRC notes the criticisms of the identification approach and the lack of case law on the attribution approach. The ALRC's research and consultations to

2056 *Trade Practices Commission v Tubemakers of Australia Ltd* (1983) 76 FLR 455.
2057 Ibid, 474–475.
2058 Ibid, 476.
2059 *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27, 38.

date have not identified any significant criticism of the other methods used to assign liability to a corporation for the conduct of individuals.

16.108 The ALRC seeks views on the following questions:

Question 16-1. Do the current legal tests for determining liability for conduct adequately address the issues of:

(a) identifying the extent of direction and control exerted by management over individuals involved in offences or contraventions?

(b) identifying the limits of the actual or apparent authority of individuals involved in offences or contraventions?

Question 16-2. Given the complexity of modern corporate structures, is formal delegation of authority the appropriate test for corporate liability or is functional authority more important?

Question 16-3. Would a 'corporate culture' approach to liability for conduct be appropriate as it would allow recognition that issues of authority involve questions of intention, representation and belief?

Question 16-4. Do provisions which deem the conduct of agents of corporations acting within their actual or apparent authority to be conduct of the corporations allow liability to be appropriately assigned?

16.109 The ALRC acknowledges that it may be difficult to look at liability for conduct in isolation from liability for intention. Do the provisions in the recently enacted *Corporations Act 2001* (Cth),[2060] the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBC Act*)[2061] and Parts V and VC of the *Trade Practices Act* — which provide that where the physical elements of an offence have been made out civil 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[2062] — suggest that the distinction between criminal and non-criminal conduct is a legislative rather than moral or general legal distinction? Recent calls for criminal penalties to be available in respect of conduct proscribed by Part IV of the *Trade Practices Act* (which presently attracts civil penalties

2060 *Corporations Act 2001* (Cth), s 181 and 184.
2061 See generally, s 486C of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and s 142 and 142A as a specific example.
2062 See discussion of multiple proceedings and multiple penalties in chapter 8.

only),[2063] suggest that there may be no true distinction between criminal conduct and other conduct proscribed by legislation. The difficulty in clearly distinguishing between conduct which is criminal and conduct which attracts civil consequences is considered further in chapter 17.

16.110 If this is the case, the ALRC's preliminary view is that the provisions relating to liability for the physical elements of an offence specified in the *Criminal Code* should apply to determining liability for conduct that attracts civil penalties.

16.111 The ALRC also considers that, where consent or agreement to conduct is an issue, the provisions relating to liability on the basis of corporate culture specified in the *Criminal Code* should apply to determining liability for conduct which attracts civil penalties.

How is corporate intention identified?

16.112 As previously noted in this Discussion Paper, the majority of non-criminal regulatory offences are offences of strict or absolute liability for which no fault element need be proved.[2064] Where a fault element is required, it will be necessary to prove that the corporation, not just the individuals involved in the offence, had the necessary intention to commit the offence.[2065]

16.113 The methods for assigning liability to a corporation for the conduct of individuals are also relevant in determining corporate intention. To the extent that individuals may be described as acting 'as' or 'on behalf of' the corporation, then those individuals' intentions will be held to be the intention of the corporation.

16.114 Statutory formulations are also relevant. The *Criminal Code* sets out principles for determining corporate criminal responsibility for the fault elements of an offence (where those elements are not specified in the legislation creating the offence) and various provisions in other statutes deem the state of mind of a specified individual to be the corporate state of mind.

Criminal Code

16.115 Under the *Criminal Code*, liability for the fault element of an offence may be assigned to a corporation on a broader basis than liability for the physical element. Section 12.3(1) of the *Criminal Code* provides:

2063 Australian Competition & Consumer Commission, *ACCC Annual Report 2000–2001*, (2001), ACCC Publishing Unit, Canberra, 8; A Fels, 'Jail Would Hurt More Than Fines', *The Canberra Times*, 5 July 2001, 11.

2064 See chapter 3 for a discussion of the types of penalty.

2065 'Fault', as it relates to individual offenders, is discussed in chapter 2.

> 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.

16.116 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.[2066]

16.117 Authorisation or permission may be established by proving that the corporation's board of directors or high managerial agents:[2067]

- 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.[2068]

16.118 These two tests focus on the actions of senior management and are not dissimilar to the tests discussed in relation to liability for conduct. The significant departure that the *Criminal Code* makes from the established legal position is in its adoption of a compliance culture approach to determining corporate liability. Under the third and fourth limbs of s 12.3(2), liability 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'.[2069]

16.119 Gayle Hill notes that:

2066 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.

2067 'High managerial agent' is defined in the *Criminal Code* as 'an employee, agent of 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* 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*.

2068 *Criminal Code Act 1995* (Cth), s 12.3(2)(a)–(b). Section 12.3(3) provides a defence to assigning liability to a corporation for the conduct of a high managerial agent where 'the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission'.

2069 Ibid, s 12.3(2)(c)–(d).

> 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.[2070]

16.120 The need for corporate compliance programs to be meaningful indications of corporate responsibility was also 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.[2071]

16.121 The Explanatory Memorandum to the Criminal Code Bill 1994 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.[2072]

16.122 This is a substantive 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 and procedures. Corporate culture 'theory locates corporate blame in the procedures, operating systems or culture of a company'.[2073] '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'.[2074]

16.123 Fisse notes:

2070 G Hill, 'Is Your Corporate Culture Criminal?' (2000) 10(4) *Australasian Risk Management* 5, 6.

2071 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.

2072 Explanatory Memorandum to the Criminal Code Bill 1994 (Cth), 44.

2073 C Wells, 'Corporate Criminal Liability; Developments in Europe and Beyond' (2001) 39(7) *Law Society Journal* 62, 62.

2074 *Criminal Code Act 1995* (Cth), s 12.3(6).

> 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.[2075]

16.124 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 individuals with the culpability of the corporation, without an investigation of the entire corporate structure.[2076]

16.125 Wells describes the use of 'corporate culture' as 'a clear endorsement of an organizational or systems model' of corporate liability.[2077] In its final report, the Model Criminal Code Officers Committee noted:

> 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.[2078]

16.126 Factors relevant to the existence of a compliance culture include:

- 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
- 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.[2079]

16.127 As Professor Bob Baxt argued in his paper presented at the ALRC's Penalties conference,[2080] this move towards assigning liability on the basis of the par-

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2075 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.

2076 T Woolf, 'The Criminal Code Act 1995 (Cth); Towards a Realist Vision of Corporate Criminal Liability' (1997) 21 *Criminal Law Journal* 257, 259.

2077 C Wells, *Corporations and Criminal Responsibility* (2nd ed, 2001) Oxford University Press, Oxford, 136.

2078 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.

2079 *Criminal Code Act 1995* (Cth), s 12.3(4).

2080 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).

ticular compliance culture of the organisation has significant practical implications for Australian business. It gives legislative force to the emphasis placed on development and implementation of legal compliance programs supported by the Federal Court in *ACCC v Safeway Stores Pty Ltd*[2081] 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.[2082]

Liability for negligence

16.128 If negligence is the required fault element but it cannot be shown that any individual employee, agent or officer was negligent, '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)'.[2083] Evidence of negligence may exist if the conduct was 'substantially attributable to' either 'inadequate corporate management, control or supervision' or 'failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate'.[2084] This arrangement is consistent with Fisse's concept of 'organisational blameworthiness' as the determinant of liability for corporations.[2085]

16.129 The Explanatory Memorandum to the Criminal Code Bill 1994 noted of this aggregation of individual conduct to establish negligence:

> 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. This changes the common law on this point.[2086]

2081 See *Australian Competition and Consumer Commission v Safeway Stores Pty Ltd* (1997) 145 ALR 38 and *Australian Competition and Consumer Commission v Rural Press Ltd and Others* (1999) 96 FCR 141.

2082 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.

2083 *Criminal Code Act 1995* (Cth), s 12.4(2).

2084 Ibid, s 12.4(3).

2085 B Fisse, 'The Attribution of Criminal Liability to Corporations; A Statutory Model' (1991) 13 *Sydney Law Review* 277, 374.

2086 Explanatory Memorandum to the Criminal Code Bill 1994 (Cth), 45–46.

Trade Practices Act, s 84(1)

16.130 Section 84(1) 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'.[2087] This section is similar to the expression of liability for conduct used in s 84(2).

16.131 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'.

16.132 As discussed above, principles used to assign liability to a corporation for the conduct of individuals will be relevant to assessing whether the corporation possessed the relevant state of mind. Where, on the basis of the common law tests enunciated in *Tesco* and *Meridian*, it is possible to show that an individual acted as the 'directing mind or will' of the corporation, or that that individual's knowledge may be attributed to the corporation, the state of mind of that individual will amount to the state of mind of the corporation.

16.133 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*.[2088] *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. They adopted a functional rather than structural approach, holding that:

> 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.[2089]

16.134 This approach is similar to that taken by the Privy Council in *Meridian*, where the particular circumstances, rather than the formal corporate structure, were

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2087 This expression of liability (or a substantially similar expression) is used in many statutes; see for example s 224 of the *Airports Act 1996* (Cth), s 12GH of the *Australian Securities and Investments Commission Act 2001* (Cth), s 762 of the *Corporations Act 2001* (Cth), s 164 of the *Fisheries Management Act 1991* (Cth), s 188 of the *Gene Technology Act 2000* (Cth), s 250 of the *Life Insurance Act 1995* (Cth), s 306 of the *Radiocommunications Act 1992* (Cth), s 229 and 231 of the *Social Security (Administration) Act 1999* (Cth), s 338 of the *Superannuation Industry (Supervision) Act 1993* (Cth), and s 575 and 576 of the *Telecommunications Act 1997* (Cth).

2088 *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563.

2089 Ibid, 583.

decisive of the liability of the corporation for the conduct of individuals involved in the contravention.

A need for reform?

16.135 The ALRC notes the view of the Criminal Law Officer's Committee of the Standing Committee of Attorneys-General[2090] and other commentators[2091] that the test of liability established in *Tesco* is too restrictive in the criminal context. The ALRC sees no reason why the *Tesco* test should continue to be used in respect of liability for non-criminal regulatory offences as it is too narrow to be used as a general rule in that context as well.

Proposals

Proposal 16-1. Subject to clear, 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.

Proposal 16-2. Subject to clear, express statutory statements to the contrary, where a civil penalty provision requires proof that a corporation had a particular state of mind, the provisions relating to liability for the fault elements of an offence specified in the *Criminal Code* should apply to determining liability for conduct that attracts civil penalties.

Concurrent individual and corporate liability?

16.136 Whilst the focus of this chapter is the circumstances in which a corporation will be held responsible for criminal and non-criminal regulatory offences, it is important to note that liability does not just flow from the individual to the corporation, it may also extend from the corporation to the individual — so that an individual may be liable separately from the corporation, either primarily or as an accessory, in respect of the same offence.

16.137 The theoretical debate about individual versus corporate responsibility has been discussed above at para 16.37–16.46. This section considers the way in which individual liability may arise in the context of corporate responsibility in circumstances where the individual has either:

2090 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.

2091 See especially Fisse and Wells.

- been involved in the proscribed conduct; or

- is deemed to be responsible because of the individual's involvement in the overall management of the corporation.

16.138 Professor Neil Hawke argues that assigning personal liability may encourage greater transparency in management processes, and improve accountability and performance standards accordingly.[2092] 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.

16.139 Dr Gerald Acquaah-Gaisie advocates that

> as a starting point the directors of a company should bear the responsibility for allowing things that breach the law to occur within their area of jurisdiction unless they show that they did everything reasonably possible to prevent that. Punishments that may be imposed on directors could include imprisonment, fines and performance of community-based orders.[2093]

16.140 There are therefore three different types of individual liability which need to be considered in relation to corporate responsibility:

- concurrent liability — where both the individual and the corporation may be separately liable as principals in respect of the same offence;

- accessorial liability — where the individual is liable as an accessory to an offence for which the corporation is principally liable; and

- managerial liability — where the individual is deemed to be liable as a principal for an offence because of that individual's role and status in the management of the corporation.

16.141 These different types of liability might also be described as 'direct', 'indirect' and 'deemed'.

16.142 If it is accepted that, in respect of certain regulatory offences, individuals should be held liable on a concurrent or separate basis to the corporation, it is necessary to consider how such liability may be assigned. As with corporate liability, the present law uses a mix of common law principles and statutory provisions to assign liability to individuals involved in corporate contraventions.

2092 N Hawke, *Corporate Liability* (2000) Sweet and Maxwell, London.

2093 G Acquaah-Gaisie, 'Enhancing Corporate Accountability in Australia' (2000) 11 *Australian Journal of Corporate Law* 146, 227.

Direct liability of individuals referred to in the statute

16.143 Individuals will be directly liable for regulatory offences where there is a clear legislative intent that individuals can be liable in addition to corporations and those individuals have taken part in the prohibited conduct. Liability, therefore, depends upon the statute giving rise to the offence. Australian regulatory legislation has imposed a range of binding obligations on directors as a means of attempting to raise standards and increase transparency.[2094] For example, the *Corporations Act* specifies duties of directors,[2095] environmental protection laws impose liability on directors and other corporate officers,[2096] and directors can be liable for taxation offences.[2097] Directors may be directly liable as individuals or deemed to be liable on the basis of their involvement in the management of the corporation.[2098] In imposing individual penalties, courts will be conscious of deterrence principles and of the structure of the corporation in question.

16.144 The individual liability of a director was considered in *Australian Prudential Regulation Authority v Holloway*,[2099] which related to a contravention of s 85(1) of the *Superannuation Industry (Supervision) Act 1993* (Cth) concerning the investment of superannuation funds in unit trusts. Justice Mansfield of the Federal Court found that the director, Holloway, was liable in addition to the corporation.

> Mr Holloway is the human face of Holloway & Co. He is its principal, its manager and its working director. He principally gave instructions and advice on its behalf. He and his wife are its shareholders.

16.145 His Honour held that there was a clear legislative intent that directors could be individually liable in addition to corporations, and that they should therefore be exposed to monetary penalties. However, since Holloway was in effect the 'alter ego' of the corporation, it was 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.

2094 N Hawke, *Corporate Liability* (2000) Sweet and Maxwell, London, 80.
2095 R Schulte, 'The Future of Corporate Limited Liability in Australia' (1994) 6 *Bond Law Review* 64.
2096 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.
2097 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.
2098 See discussion of managerial liability at para 16.162–16.170.
2099 *Australian Prudential Regulation Authority v Holloway* (2000) 35 ACSR 276.

> 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.[2100]

16.146 Acquaah-Gaisie supports holding directors responsible for corporate conduct:

> The management of a corporation has 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.[2101]

Indirect liability of individuals: common law

16.147 The second type of liability is accessorial: where the individual may be held liable as an accessory to an offence for which the corporation is principally liable.

16.148 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).

16.149 The common law expression of accessorial liability has been incorporated into numerous federal statutes.[2102]

Indirect liability of individuals: *Criminal Code*, s 11.2(1): 'aid, abet'

16.150 Section 11.2(1) of the *Criminal Code* restates the common law definition of accessorial liability:

> 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.[2103]

2100 *Tiger Nominees Pty Ltd v State Pollution Control Commission* (1992) 25 NSWLR 715, 722.

2101 G Acquaah-Gaisie, 'Enhancing Corporate Accountability in Australia' (2000) 11 *Australian Journal of Corporate Law* 146, 226.

2102 See fn 146 and para 16.153

2103 This provision replaced s 5(1) of the *Crimes Act*, which also referred to being 'knowingly concerned in, or party to, the commission of an offence'.

16.151 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*.[2104] 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.[2105]

16.152 *Giorgianni* has been criticised by leading commentators as too restrictive, that 'knowledge' *plus* 'intention' is too stringent a test.[2106]

Indirect liability of individuals: *Trade Practices Act*, s 75B: 'involved in a contravention'

16.153 The liability of individuals for contraventions of the *Trade Practices Act* is expressed as accessorial liability to the contravention committed by the corporation.[2107] Accessorial liability of natural persons is defined by s 75B(1) of the *Trade Practices Act*:[2108]

> 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.

16.154 In *Yorke v Lucas*,[2109] the High Court considered the circumstances in which an individual could be held liable as an accessory to a contravention by a

2104 *Giorgianni v R* (1985) 156 CLR 473.
2105 Ibid, 487–488 (Gibbs CJ).
2106 B Fisse, *Howard's Criminal Law* (5th ed, 1990) The Law Book Company Ltd, Sydney.
2107 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).
2108 The constitutional validity of this method of assigning liability was upheld by the High Court in *Fencott v Muller* (1983) 152 CLR 570.
2109 *Yorke v Lucas* (1985) 158 CLR 661.

corporation of the *Trade Practices Act*. *Yorke* concerned the individual liability of a managing director (Lucas) for contravention of s 52 of the *Trade Practices Act* by his corporation. The facts involved representations about turnover and profit made to the buyer of a business.

16.155 The critical issue in determining whether Lucas was held individually liable was the meaning of s 75B of the *Trade Practices Act*. The buyers alleged that Lucas was liable either as a person who had 'aided, abetted, counselled or procured' or as a person who had been 'knowingly concerned in, or party to, the contravention'. The High Court held that in order for Lucas to be liable as a person who had 'aided, abetted, counselled or procured the contravention', it would be necessary to show that he had intentionally participated in the contravention.

> To form the requisite intent he must have knowledge of the essential matters which go to make up the offence whether or not he knows that those matters amount to a crime. … Upon the findings of the trial judge, however, Lucas lacked the knowledge necessary to form the required intent. … Whilst Lucas was aware of the representations — indeed they were made by him — he had no knowledge of their falsity and could not for that reason be said to have intentionally participated in the contravention.[2110]

16.156 The High Court also held that Lucas could not be held liable as a person 'knowingly concerned in, or party to, the contravention' because:

> In our view, the proper construction of par. (c) requires a party to a contravention to be an intentional participant, the necessary intent being based upon knowledge of the essential elements of the contravention.[2111]

16.157 In holding that 'knowledge' was an essential prerequisite to accessorial liability for a contravention of the *Trade Practices Act*, the High Court established a more stringent test than that required to found liability for the primary contravention. The primary contravention was of s 52 — engaging in misleading and deceptive conduct. The High Court reaffirmed the principle that:

> Contravention of that section [52] does not require an intent to mislead or deceive and even though a corporation acts honestly and reasonably, it may nonetheless engage in conduct that is misleading or deceptive or is likely to mislead or deceive.[2112]

16.158 In *Yorke*, therefore, it was established that, whilst no mental element was required to found liability for the primary contravention of the *Trade Practices Act*, accessorial liability of an individual could not be proven without at least knowledge of the essential facts. This 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

2110 Ibid, 667–8.
2111 Ibid, 670.
2112 Ibid, 666.

liability provides a level of protection for individuals involved in corporate misconduct.

Who may be held liable as an accessory?

16.159 A person may not be held liable as an accessory unless a corporation has committed a contravention. Where the corporation is *vicariously* liable for the 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 corporation. This general principle was established in *Mallan v Lee*[2113] and was affirmed in the trade practices context in *Wright v Wheeler Grace & Pierucci Pty Ltd*.[2114]

16.160 Where the corporation 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 corporation where that person is the 'directing mind or will' of the corporation. This principle was established in *Hamilton*,[2115] 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 (ie, as an accessory). Mason CJ, Wilson and Toohey JJ quoted Bray CJ in *Queen v Goodall* (1975) 11 SASR 94 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.[2116]

16.161 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 corporation.

Deemed direct liability of individuals 'concerned in or taking part in management'

16.162 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 corporation. This type of liability is used in the *EPBC Act*[2117] and in the *Taxation Ad-*

2113 See discussion of *Mallan v Lee* at para 16.80.
2114 *Wright v Wheeler Grace & Pierucci Pty Ltd* (1988) ATPR ¶40–865, 49,377 (French J).
2115 See also discussion of *Hamilton v Whitehead* at para 16.85–16.86.
2116 *Hamilton v Whitehead* (1988) 166 CLR 121, 128.
2117 *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 493–496.

ministration Act 1953 (Cth).[2118] It is also the proposed basis for liability under the Crimes (Workplace Deaths and Serious Injuries) Bill 2001 (Vic).[2119]

16.163 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[2120] 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[2121]
- failed to take all reasonable steps to prevent the contravention.[2122]

16.164 The 'reasonable steps' defence is defined in s 496 to include:

- whether any action was taken to arrange regular professional assessment of the level of compliance;
- the extent of implementation of recommendations from compliance reviews;
- the existence of an appropriate system for managing the effects of activities on the environment;

2118 *Taxation Administration Act 1953* (Cth), s 8Y(2).

2119 The Bill was introduced into the Victorian Legislative Assembly on 21 November 2001 and read a second time on 22 November 2001. Debate on the bill was adjourned until the Autumn session. It will introduce new criminal offences for corporations of corporate manslaughter (proposed s 13) and negligently causing serious injury (proposed s 14) into Part 1 of the *Crimes Act 1958* (Vic).

2120 In the Crimes (Workplace Deaths and Serious Injuries) Bill 2001 (Vic), a 'senior officer' is defined as having the same meaning as officer in the *Corporations Act*: cl 3 (proposed s 11). An officer includes 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.

2121 A similar formulation of the liability of a 'senior officer' is used in the Crimes (Workplace Deaths and Serious Injuries) Bill 2001 (Vic). In certain circumstances, senior officers will be deemed to be personally liable if it is proved that the corporation has committed the offence of corporate manslaughter or negligently causing serious injury. Senior officers will be personally criminally liable if they were organisationally responsible for the conduct of the corporation; materially contributed to the commission of the offence; knew that there was a substantial risk that conduct involving a high risk of death or serious injury would occur; and, in the circumstances, it was unjustifiable to allow the substantial risk to exist: cl 3 (proposed s 14C).

2122 Although no specific defences are provided under the Crimes (Workplace Deaths and Serious Injuries) Bill 2001 (Vic), the degree of participation of the senior officer in the management of the corporation, including involvement in decisions about how the conduct was performed, will be relevant to an assessment of the organisational responsibility of the senior officer: cl 3 (proposed s 14C(3)).

- the knowledge and understanding of compliance requirements of the corporation's employees, agents and contractors (the relevant standard is 'reasonable knowledge and understanding'); and

- what action was taken once the contravention was known to have occurred or be occurring.

16.165 The legislation, which preceded the *EPBC Act* at federal level, did not provide for the individual liability of company officers.[2123] 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 the Commonwealth level, have moved to impose penalties on those personally responsible for environmental damage.[2124]

16.166 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.

16.167 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.

16.168 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'.[2125]

16.169 This provision is used to establish the criminal liability of directors for tax offences committed by their companies.[2126] It was introduced in 1984 to overcome perceived problems in ascribing liability to corporation officers under existing provisions in the *Income Tax Assessment Act 1936* (Cth). These problems

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2123 *Environment Protection (Impact of Proposals) Act 1974* (Cth).

2124 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.

2125 *Taxation Administration Act 1953* (Cth), s 8Y(2).

2126 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.

stemmed from the interpretation given by the Full Federal Court to s 252(1)(j) of the *Income Tax Assessment Act*.[2127]

16.170 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.[2128]

A need for reform?

16.171 In considering the circumstances in which an individual should be liable in respect of the conduct of a corporation it is important to maintain a distinction between legal liability and moral accountability. The ALRC's research and consultations to date have not identified problems with the principles used to assign legal liability to an individual for criminal and non-criminal regulatory offences committed by a corporation. The three types of liability — direct, indirect and deemed — do not appear to create any particular difficulties and in the legislation analysed by the ALRC which type of individual liability was to apply was clearly expressed.

16.172 The extent to which individuals should be held morally responsible for corporate conduct, whether because of participation in that conduct or because of occupying a position of control within the management of the corporation is a different issue. The question of tailoring corporate penalties to encourage individual accountability is considered in chapter 18.

2127 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. The director, Reynolds, had been convicted of offences relating to the failure of his company to pay group instalments of tax deducted from the wages of its employees. His convictions were set aside on appeal to the Full Federal Court. The majority justices on appeal (Lockhart and Neaves JJ) construed the provision narrowly, holding that a director could become personally liable only in circumstances where the director had failed to comply with a notice served upon him or her. The dissenting judge, Blackburn J, supported a broad interpretation, seeing no justification for imposing the additional requirement that a director be given notice before liability could ensue for a default of the company or its public officer. He held that the plain meaning of the provision did not require notice to be given.

2128 Australian Taxation Office, *ATO Prosecution Policy*, Australian Taxation Office, <http://law.ato.gov.au/atolaw/index.htm>, 9 March 2001, para 11.2.3.

Proposal

Proposal 16-3. The liability of individuals should remain concurrent with corporate liability. The basis of such liability — direct, indirect or deemed — should be clearly expressed in the legislation creating the offence or contravention.

16.173 The ALRC does not consider that any additional or special legal rules need to be developed in the context of assigning individual liability for corporate misconduct.

The need for an overall corporate liability scheme

16.174 It is important to maintain a strict distinction between liability for truly individual conduct and both corporate liability for the conduct of individuals and individual liability for the conduct of corporations. Australian law does not yet have a fully integrated approach to assigning liability directly to a corporation as a discrete entity without the need to rely on the derivative liability of a corporation for the conduct of individuals.

16.175 The *Criminal Code* recognition of the role of corporate culture in the formation of corporate intent and in controlling the conduct of corporations and individuals acting as or on behalf of corporations is an important development. Whilst the relevant sections of the *Criminal Code* have only been in operation since December 2001 and it is too early to see how the corporate culture provisions will be applied, the ALRC considers that they provide an appropriate model to guide the development of general principles of corporate liability for civil and administrative penalties.

16.176 In their commentary to the *Criminal Code*, the Model Criminal Code Officers Committee stated that their objective in developing general principles of corporate criminal responsibility had been to 'develop a scheme of corporate criminal responsibility which as nearly as possible, adapted personal criminal responsibility to fit the modern corporation'.[2129]

16.177 As part of this inquiry, the ALRC has considered whether this is also a valid objective for corporate liability for civil and administrative penalties and considers that, to the extent possible, the principles specified in the *Criminal Code*

2129 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.

should be adapted to develop a scheme of corporate responsibility which as nearly as possible adapts corporate criminal responsibility to fit the liability of the modern corporation for civil and administrative penalties.

16.178 The trend towards parallel civil and criminal penalty schemes in the *Corporations Act* and the *EPBC Act* and the calls to make criminal penalties available for conduct prohibited under Part IV of the *Trade Practices Act* supports this harmonisation approach. The ALRC considers that adopting a consistent set of principles to determining liability of corporations for criminal and non-criminal regulatory offences is an important step towards the objective of achieving effective and efficient regulation and supervision and of developing a compliance culture based on broad notions of corporate moral and social responsibility.

Part E

Options for Reform

17. The Criminal/Non-Criminal Distinction

Contents

Introduction

17.1 The debate about the use of criminal, civil and administrative penalties focusses on concerns about how to achieve effective regulation. It turns on the traditional dichotomy between criminal law as the vehicle for punishment and civil law as the vehicle for compensation and it reflects an inherent tension between, on the one hand, the protections of criminal procedure for the defendant and, on the other, the labelling of a convicted person as a 'criminal'. The trade-off for the lesser protections for the defendant and enhanced capacity to prove a contravention by the regulator in civil procedure is the lack of the 'criminal' label where the contravention is proved.

17.2 Many commentators have noted the blurring of distinctions between criminal and non-criminal sanctions. At one end of the spectrum is the argument that a very clear divide between the two should be re-established and rigidly main-

tained, 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.[2130] 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.[2131] 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.

17.3 By and large, regulatory theorists emphasise the need for a substantive and practical approach to categorisation of contraventions and appropriate procedures.[2132] These theorists tend to value proportionality between harm done, seriousness of penalty and degree of procedural protection and complexity, and emphasise the need for regulators to make the most efficient use of their resources and select targets and approaches to maximise the regulatory or deterrent effect of their actions (the 'risk management' approach).[2133]

17.4 At times the values of this approach directly conflict with the judicial approach, which must apply principles and procedural protections to the facts of specific cases and 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.

17.5 The debate, therefore, is divided between those who focus on a rights approach, emphasising the legitimate rights of the accused together with the broader concerns of the legal system for fairness and justice, and those who emphasise the broader public policy objectives of regulators with other equally legitimate aims such as promoting a cleaner environment, regulating the entry of goods and people into Australia, promoting competition to benefit consumers or a corporate environment to encourage and safeguard investment. For regulators, there are considerable differences in investigatory and enforcement strategies between criminal and civil proceedings and this has important implications in terms of staffing and budgets and potentially in the choice or success of proceedings.

17.6 In noting the debate in this area, it is useful to note the views of the Law Reform Commission of Ireland in its *Report on Aggravated, Exemplary and Restitutionary Damages* that

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2130 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.

2131 For example, A Freiberg, '"Civilizing" Crime: Reactions to Illegality in the Modern State', *Thesis*, 1985 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).

2132 For example, Freiberg, Braithwaite, Sparrow, Ogus.

2133 See Sparrow in particular.

> historically, the idea of a strict divide between the civil and criminal laws is a relatively recent one and there is a long tradition of including some punitive remedies within the civil law. In the present law, it remains difficult to separate out the purposes of the civil and the criminal law so as to exclude all punitive elements from civil law remedies. … It should also be noted, as an analogy, that just as punishment is not exclusive to the criminal law, so compensation is not exclusive to the civil law. … In the interests of a more rational organization of the law, it is also desirable that punitive and deterrent elements should be recognized and labelled as such, rather than hidden within large "compensatory" or "substantial" damages awards. … Labelling such elements as "anomalous" is an inadequate response.[2134]

17.7 There is one very significant difference between criminal regulatory offences and non-criminal contraventions in that gaol sentences are not available for non-criminal contraventions, at least under current federal law. There are also different consequences for failure to pay a fine and failure to pay a pecuniary penalty.[2135] However, the seriousness of some non-criminal regulatory contraventions is reflected both in the maximum penalties available in the legislation and in the large size of some pecuniary penalties. These point to some of the difficulties inherent in categorising contraventions as 'criminal' or 'civil'.

17.8 Further issues arise over differences between corporate and individual defendants. Are the protections for the individual necessary or appropriate for the corporate defendant? If a corporation is simply writing a cheque to pay a monetary penalty, does it matter whether it was as a result of criminal or civil proceedings? What is the implication of the size of the penalty? Can monetary penalties provide sufficient deterrence, especially in the corporate arena?

17.9 The debate assumes at first sight a bright line between criminal offences and non-criminal contraventions. But Professor Arie Freiberg and Pat O'Malley describe a 'blurring of the civil/criminal distinction' suggesting that this

> is increasingly prevalent over a wide range of legal ordering, and legislators and policy-makers are actively exploiting it in order to facilitate and disguise state regulation.[2136]

17.10 They note a 'continual debate about when it is appropriate to prefer one mode of regulation over another', suggesting that debate is often resolved 'by a willingness to manipulate the differences between civil and criminal procedures for various ends'.[2137]

2134 Irish Law Reform Commission, *Report on Aggravated, Exemplary and Restitutionary Damages, LRC 60-2000*, [2000] IELRC 1, para 1.08–1.10.

2135 See the discussion in chapter 11.

2136 A Freiberg and P O'Malley, 'State Intervention and the Civil Offense' (1984) 18(3) *Law & Society Review* 373, 374.

2137 Ibid, 376.

17.11 Rather than having ad hoc regulatory enforcement, the ALRC is seeking to identify the principles to be applied for the consistent application of civil and administrative penalties.

17.12 Many administrative penalties have an appearance of being something other than a penalty, such as an interest charge (tax) or the withholding of benefits (social security) but, whatever their name, they act like a penalty and can have serious implications for those affected. Loss of 26 weeks' benefits for a social security recipient for moving to an area with fewer employment prospects might be potentially more serious for that person than a $100,000 penalty for a business executive knowingly concerned in a trade practices contravention. This disparity raises issues of substantive fairness.

17.13 Infringement notices add a further layer of complexity. Where an infringement notice is served and the penalty is paid, there are no subsequent proceedings and no criminal record results. However, if the notice is challenged or if the amount required to be paid under the notice is not paid and the matter proceeds to a hearing and is lost by the person challenging, the result is a criminal conviction. This may apply even though the matter is essentially regulatory and lacks 'criminality' either because of its relatively trivial nature or the lack of intent.[2138]

Two main legislative approaches

17.14 As has been discussed,[2139] there are two main legislative approaches to criminal regulatory offences and non-criminal regulatory contraventions:

- one which draws a distinction within the legislation between offences that may lead to criminal proceedings and contraventions that may result in civil proceedings; and

- one which allows criminal and civil proceedings to be undertaken simultaneously or sequentially in respect of the same breach.

Legislative bifurcation

17.15 An example of the former is found in the *Trade Practices Act 1974* (Cth), which draws a distinction between conduct that is to be regarded as criminal,[2140] attracting fines (Part VC),[2141] and conduct that attracts only civil pecuniary penalties

2138 See discussion of infringement notice schemes in chapter 12.
2139 See discussion of types of penalties in chapter 3.
2140 However it is possible to bring private civil proceedings for breaches of Part V as well at Part IV. These aim to compensate loss.
2141 Under the *Trade Practices Act*, s 79A a fine defaulter may be subject to a prison sentence. This means that the imposition of a civil penalty could lead to the quintessentially criminal penalty of imprisonment, blurring the distinction between the criminal and non-criminal penalties.

(Part IV).[2142] Under this model regulators or prosecutors are not required to choose which proceeding is appropriate: Parliament determines the conduct to be regarded as criminal. This has the advantage of making the status of the offences or contraventions clear to the regulated and it gives clear indications to the regulator or prosecutor which procedure is appropriate.

17.16 From a theoretical perspective, the apparently clear distinction can be blurred where the criminal offences are strict liability offences not requiring the prosecutor to prove what many would regard as the essence of a criminal offence, the intent to do the forbidden act.[2143] Under the *Trade Practices Act* the offences described in Part VC are not *mens rea* offences although the strict liability is mitigated by the effect of s 85(1), which provides for defences based on reasonable mistake, reasonable reliance on information, act or default of another with reasonable precautions and due diligence.[2144]

17.17 As the *Trade Practices Act* illustrates, it is sometimes difficult to discern a jurisprudential basis for the civil/criminal distinction.[2145] For example, price fixing is not regarded as a criminal activity[2146] although it can attract a $10 million pecuniary penalty for a corporation or $500,000 for individuals,[2147] but bait advertising is regarded as criminal, although it attracts maximum fines of $1.1 million for corporations and $220,000 for individuals. It might be argued that Part IV's focus is economic regulation while Part VC seeks to curb sharp practices, practices that have some parallels with criminal offences of dishonesty. However, this distinction can only be taken so far. The distinction is better explained by the political difficulties of making competition contraventions criminal offences.

2142 Pecuniary penalties are civil penalties imposed under s 76 of the *Trade Practices Act 1974* (TPA), with civil standards of proof. Fines are criminal penalties with criminal standards of proof and are imposed under s 79 of the TPA. Pecuniary penalties are only applicable in relation to contravention of Pt IV (restrictive trade practices) and s 75AU (price exploitation in relation to the New Tax System). Criminal penalties are applicable to contraventions of Pt VC other than s 52, 65Q, 65R and 65F(9).

2143 A Freiberg and P O'Malley, 'State Intervention and the Civil Offense' (1984) 18(3) *Law & Society Review* 373, 380.

2144 Section 85(1)(a)–(c).

2145 French J in *Trade Practices Commission v CSR* (1991) ATPR ¶41-076, 52,152 did suggest some basis stating that two of the elements of punishment in the criminal law, retribution and rehabilitation, did not 'have any part to play in economic regulation of the kind contemplated by Part IV'.. He further suggested that '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'.

2146 The Chairman of the ACCC, Professor Alan Fels, was reported in *The Australian Financial Review*, 22 November 2001, 6 as calling for price fixing to be treated as a criminal offence with gaol sentences for offenders. The Australian Competition & Consumer Commission, *ACCC Annual Report 2000–2001*, (2001), ACCC Publishing Unit, Canberra, states that the ACCC believes that criminal sanctions should apply to price fixing, bid rigging, market sharing and collective exclusionary boycotts by big business. However, Professor Bob Baxt has said that 'the introduction of criminal sanctions for breaches of Part IV … requires very careful consideration notwithstanding … that Australia is … out of line with developments in other jurisdictions': (2001) 29 *Australian Business Law Review* 516.

2147 In *Australian Competition & Consumer Commission v Roche Vitamins Australia Pty Ltd* (2001) ATPR ¶41–809 Lindgren J ordered Roche to pay $15 million for breaches of s 45 of the *Trade Practices Act* and two other corporations involved in the same price fixing $7.5 million and $3.5 million respectively.

17.18 Further, the bifurcation of the Act does not draw any distinction between intentional or advertent wrongdoing and an inadvertent breach. This issue led the ALRC in ALRC 68 to recommend that civil penalties be available for Part V breaches.[2148] In recommending choice of proceedings for Part V, the ALRC indicated that criminal liability should depend on proof of the relevant advertent mental state.[2149] This proposal was akin to the model, discussed below,[2150] which permits choices to be made at the time of proceedings. This aspect of ALRC 68 has not been implemented. However, the ALRC does not see any reason at this time to depart from its earlier recommendation. Of note, too, is the fact that the ACCC in its 2000–01 Annual Report also called for the inclusion of civil penalties in relation to Part V.[2151]

17.19 There are also important procedural ramifications in the current structure of the Act. The criminal standard of proof is required for Part VC offences (allowing for the fact that *mens rea* does not need to be proven because they are strict liability offences) although it is the civil standard only for Part IV breaches notwithstanding the significantly greater potential size of the maximum penalties under this Part. One of the noteworthy features of civil proceedings under the *Trade Practices Act*, by comparison with civil proceedings under some other legislation under review (eg, the *Corporations Act 2001* (Cth)[2152] and the *Customs Act 1901* (Cth)), is that there appears to be little issue within the judiciary about the standard of proof required despite the potential size of the penalties. However, some judges have acknowledged that the standard is a high one, even if the matter is civil. This is discussed further below at para 17.71–17.73.

17.20 Further examples of Parliament determining that some contraventions result only in civil penalties occur throughout the legislation under review in relation to more minor matters where it would seem the focus is on seeking regulatory compliance but without attaching the label 'criminal'. Provided that one accepts the fundamental premise of penalties being applied using the civil standard of proof and procedure, the use of such penalties to encourage regulatory compliance across a range of areas is appropriate. A monetary, or other, penalty is the price of the failure to comply but no or little moral opprobrium is attached.

2148 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), Australian Law Reform Commission, Sydney, para 9.11.

2149 Similarly, in the new *Criminal Code Act 1995* (Cth), most conduct described as 'criminal' requires a fault element.

2150 Australian Competition & Consumer Commission, *ACCC Annual Report 2000–2001*, (2001), ACCC Publishing Unit, Canberra, para 17.21–32.

2151 Ibid, 8.

2152 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, 445 report complaints by ASIC regulators that some judges 'place almost a criminal standard of proof with regard to civil penalty provisions'.

Choice of Proceedings

17.21 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 conduct.[2153]

17.22 Under the *Corporations Act*, for example, criminal proceedings may be commenced after a civil penalty has been imposed but a civil penalty cannot be imposed if a person has been convicted of an offence for the same conduct (s 1317P). Where criminal proceedings have been commenced in respect of substantially the same conduct, proceedings for the enforcement of civil penalties must be stayed. If the person is convicted of the offence, the civil penalty proceedings must be dismissed. However, where no conviction results, the civil proceedings may be resumed (s 1317N(2)).

17.23 The *Corporations Act* now distinguishes between the criminal offence of a director not acting in good faith and the parallel civil contravention, placing the former in s 184 and the latter in s 181. The former requires proof of the requisite intent.

17.24 Under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) it is possible for both civil and criminal proceedings to occur simultaneously. The Act prevents civil proceedings from being initiated after a criminal prosecution. However, it is possible for a criminal prosecution to be commenced after civil proceedings. Section 486C of the Act states:

> 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 pecuniary penalty order has been made against the person.

17.25 Section 486C ensures that criminal prosecutions are not excluded when a regulatory agency takes a civil action expeditiously to ensure that environmental harm is prevented or quickly stopped and remedied. These provisions attempt to ensure that a regulator does not have to decide too early whether to pursue a civil or criminal prosecution. Criminal prosecution may occur later, once the scope of the damage is fully understood and the evidence available has been carefully considered.

17.26 In the *Superannuation Industry (Supervision) Act 1993* (Cth) fault is the basis of the choice between civil or criminal proceedings. An advantage of this approach is that it focusses on the particular behaviour of the person charged. A range

2153 See discussion of multiple proceedings in chapter 8.

of sanctions may also be seen to be more just[2154] in that it allows the criminal law to be reserved for the worst examples of dishonest or reckless[2155] behaviour.[2156] There are said to be a number of advantages of allowing civil proceedings as well as or instead of criminal ones:

- Faster proceedings with the capacity to obtain orders preserving property or remedying damage. By the time criminal proceedings are completed, it may be too late to rectify the harm done;

- Enhanced pre-trial disclosure requirements that allow the prosecuting regulator to compel disclosure of information;

- Lower standard of proof. This is important because of difficulties in proving the mental element beyond reasonable doubt in cases of any complexity, especially where corporations are involved and there is a need to prove *mens rea* by several directors;

- Greater range of available remedies;

- Opportunity for the regulator to use persuasion and negotiation to achieve compliance;

- Availability of compensation to aggrieved persons; and

- A better ordered structure of penalties.

17.27 Certain features of civil procedure, such as pre-trial discovery, cause concerns within the courts that the rights of the accused are being unfairly diminished.[2157] Simultaneous or parallel proceedings also have the potential, without clear safeguards, to expose a defendant to prejudice because of actions taken in other proceedings.[2158]

2154 See for example M Gething, 'Do We Really Need Criminal and Civil Penalties for Contraventions of Directors Duties?' (1996) 24 *Australian Business Law Review* 375, 376. See also Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), AGPS, Canberra, para 26 and 28–29.

2155 For example, the *Environment Protection and Biodiversity Conservation Act 1999*, utilises the concept of 'recklessness' in determining whether proceedings are criminal or civil.

2156 The 1989 *Report on the Social and Fiduciary Obligations of Company Directors* by the Senate Standing Committee on Legal and Constitutional Affairs ('the Cooney Committee') recommended that company directors not be subjected to criminal liability for breaches of the *Corporations Law* unless their conduct had been 'genuinely criminal in nature': Recommendation 22.

2157 See the discussion on proceedings against corporate directors in chapter 2 and on Customs prosecutions in chapter 3.

2158 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, 129. However, s 1317Q of the *Corporations Act* prevents evidence given in earlier civil proceedings from being admissible. See the discussion on potential double jeopardy in chapter 7.

17.28 Legislation permitting a choice of proceedings using fault as the basis of the choice is not without difficulties.[2159] Continuation of the option for parallel or sequential proceedings calls for the development of clear principles governing the choice. It also calls for transparency in the application of discretions. The danger with the approach is that it can lead to uncertainty both for regulators and the regulated. It can also be difficult to discern the purpose of the civil penalty: is it supplementing the criminal penalty or providing an alternative to it?[2160]

17.29 In the case of the former Part 9.4B of the *Corporations Law* there were complaints that the civil and criminal penalty regimes were competing, thereby weakening the pyramidal enforcement structure that was supposed to underlie the Part.[2161] 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) there has been an increase in the use of civil penalties.[2162]

17.30 Prior to these legislative changes there was a disincentive for ASIC to commence civil penalty proceedings because civil penalty proceedings acted as a bar to criminal proceedings. However, under s 1317P (which replaced s 1317FB) criminal proceedings can now be commenced against a person for the same conduct, regardless of any civil penalty orders that have been made (although evidence given in the course of proceedings for a pecuniary penalty order is not admissible in criminal prosecutions: s 1317Q).

17.31 A cautionary note about legislation involving choice of proceedings is sounded by the US academic, Stuart Green:

> Ultimately, the responsibility for preserving the moral integrity of the criminal law belongs to the legislatures that enact the laws and the prosecutors who execute them. In order to preserve that integrity, legislatures must stop enacting statutes that allow identical conduct to be dealt with either criminally or civilly without any indication of which kind of sanction is preferred. Likewise, prosecutors must develop, and adhere to, guidelines that offer a principled basis for choosing one kind of remedy over the

2159 In its submission to the Commission in relation to ALRC 68, the DPP criticised the then Pt 9.4B of the *Corporations Law,* claiming its effect had been '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.

2160 F Zimring, 'The Multiple Middlegrounds Between Civil and Criminal Law' (1992) 101 *Yale Law Journal* 1901, 1905.

2161 H Bird, 'The Problematic Nature of Civil Penalties in the Corporations Law' (1996) 14 *Company and Securities Law Journal* 405, 423. However, Bird's comments were made prior to the 1999 amendments to the *Corporations Law*. Under the former legislation s 1317GE imposed a bar to criminal proceedings following the commencement of civil proceedings and hence there was a disincentive for ASIC officers to commence civil proceedings.

2162 G Moodie and I Ramsay, 'The Expansion of Civil Penalties under the Corporations Act' (2002) 30 *Australian Business Law Review* 61.

> other. In developing such rules, legislatures and prosecutors must be cognizant of the moral content of the acts involved.[2163]

17.32 As discussed below and in chapter 8, the ALRC believes that regulatory authorities and prosecutors ought to have clear and transparent guidelines governing choice of proceedings.

Criminal laws for criminal offences?

17.33 Rather than allowing choice of proceedings within the same legislation, another approach could be to provide for the general criminal law to be the vehicle for prosecutions where there are fraudulent breaches of civil penalty provisions. That is, regulatory legislation such as the *Corporations Act* would provide for civil penalties only and criminal offences would be confined to crimes legislation.

17.34 Alex Steel argues that criminal prosecutions of corporate officers could be limited to the *Criminal Code* and the respective state and territory *Crimes Acts*.[2164] Others reject this approach. Michael Gething argues that fraudulent breaches of directors' duties are a 'particular species of fraud' and suggests that maintaining an option for a criminal conviction under the *Corporations Act* emphasises that such breaches are treated seriously.[2165] It is difficult to see how the approach advocated by Steel would overcome the problems of competing regimes or inter-agency rivalry. Nor is the use of general criminal laws apposite for many of the regulatory offences under discussion that deal with conduct relevant to specific legislation.

17.35 The ALRC is not proposing to recommend this approach. However, the Commission notes that the *Crimes Act 1914* (Cth) can be the source of prosecutions for a range of offences involving fraud or dishonesty. In this area, therefore, it supplements the specific legislation.

Criminal/civil distinctions

17.36 As discussed above, it is sometimes difficult to discern the jurisprudential basis for the criminal/civil distinction in the regulatory area, particularly in relation to bifurcated legislation such as the *Trade Practices Act*, because it is not always easy to determine why a particular offence has been treated more seriously than

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2163 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, 1615.

2164 Steel argues this in relation to offences of dishonesty constituting fraud, suggesting that conduct short of fraud could be confined to civil actions under the relevant sections of the *Corporations Act*. In his view 'the waters have been muddied by the incorporation of criminal sanctions in the *Corporations Act*, which is primarily a civil scheme': A Steel, 'From "Hard Labour" to Spies v The Queen: Prosecuting Corporate Officers under the Crimes Act' (2001) 75 *Australian Law Journal* 479, 501.

2165 M Gething, 'Do We Really Need Criminal and Civil Penalties for Contraventions of Directors Duties?' (1996) 24 *Australian Business Law Review* 375, 384.

another. However, it is useful to acknowledge the public policy and political dimensions behind the choice. If serious pollution, for example, is seen by the community as just as much a threat to its welfare as traditional criminal offences against people or property, then Parliament may choose to respond by making the contravention criminal.

17.37 Equally, the decision not to criminalise may be in response to political imperatives or because of a perception that the contravention, while serious, does not deserve the moral opprobrium that attaches to a criminal offence. Or it may be because civil procedure increases the chances of a successful action. This can be especially important if the penalty is linked to restorative justice, both in preventing recurrences of the contravention and in allowing for orders that seek to compensate.

17.38 There are a number of distinctions between criminal and civil proceedings, both in the proceedings themselves and in the consequences that follow. Perhaps the most important difference is that successful criminal proceedings result in a criminal conviction with the attendant consequences. The consequences of a criminal conviction are far 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. However, as discussed in chapter 16 and at para 17.79 and 17.87–17.95 below, the ALRC's consultations have revealed support for maintaining criminal liability for corporations as well as for individuals.

Imprisonment

17.39 There are no federal non-criminal regulatory contraventions that include a prison sentence as part of the penalty.[2166] The ALRC is strongly of the view that, not only is there is no place for imprisonment for non-criminal regulatory contraventions, there is no place for imprisonment for non-payment of a civil penalty. If imprisonment is possible, the offence should be a criminal one with the defendant having all the procedural protections of criminal offences.

Principle

17.40 **Imprisonment should not be part of any civil penalty, either directly as a possible sentence or indirectly for non-payment.**

2166 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.

17.41 This is an issue because of the use of state courts for prosecuting some federal matters. As discussed in chapter 3, under s 245 of the *Customs Act* a Customs prosecution may be instituted, *inter alia*, in a Supreme or District Court of a State or Territory. While there has been a growing tendency within these jurisdictions to depart from the use of gaol for non-payment of fines and other penalties, this is not yet universal. The *Penalties and Sentences Act 1992* (Qld) permits imprisonment for non-payment of a 'penalty'[2167] and 'penalty' is defined to include any 'any fine, compensation, restitution or other amount of money'.[2168]

17.42 In *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd*,[2169] McMurdo P considered 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. As will be discussed below, the ALRC suggests that there are strong grounds for endorsing its earlier findings in relation to Customs prosecutions to clarify the procedural issue.

17.43 In relation to the general issue of imprisonment for non-payment of a civil penalty, the ALRC proposes recommending 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.

Proposal

Proposal 17-1. State or territory legislation that permits imprisonment in default of any non-criminal penalty should be amended to exclude imprisonment in relation to federal non-criminal regulatory contraventions.

Other issues

17.44 The other issues that arise as a result of the criminal/civil distinction concern the role of fault, purpose of the penalty, procedure and evidence. As in relation to Customs prosecutions, it is the quasi-criminal nature of some regulatory contraventions that leads to a blurring of the distinctions.

2167 Section 182A.
2168 Section 4.
2169 *CEO of Customs v Labrador Liquor Wholesale Pty Ltd* (2001) 162 FLR 230. The Australian Customs Service is understood to be seeking leave to appeal to the High Court in this matter.

Role of fault

17.45 The need to prove fault, or the mental element, is usually an important difference between criminal and civil contraventions, with criminal proceedings generally requiring proof of the mental element making up the offence together with the relevant physical element.

17.46 Under the *Criminal Code,* fault is an element of a criminal offence unless specifically excluded. The fault elements are intention, knowledge, recklessness and negligence, with provision for other fault elements as relevant to a particular physical element. But fault *per se* is not a perfect indicator of the difference between criminal and non-criminal acts. Although criminal offences generally require an intention to commit the offence, criminal offences of strict and absolute liability do not require proof of fault. While the necessity to prove *mens rea* may have been true of common law crimes, it is not true of all statutory offences.[2170]

17.47 The emphasis in strict and absolute liability offences is on the manifestation of the conduct and there has been an assumption they are usually reserved for minor offences.[2171] Strict liability offences do allow for the *Proudman v Dayman*[2172] defence of reasonable mistake of fact. This is reflected in the *Criminal Code.*[2173] Absolute liability offences do not permit this defence[2174] although reasonable mistake may go to mitigation.

17.48 Ian Leader-Elliott describes the elements of fault as resembling a 'descending ladder or staircase of culpability' with intentional liability at the top as the 'most blameworthy form of fault' and absolute liability at the foot.[2175] Using this analogy one would not expect non-criminal contraventions to contain any elements of fault. Indeed, fault is not usually an element of non-criminal contraventions. Occasionally, however, some legislation requires fault to be shown before the imposition of a civil penalty. For example, under the *Sydney Airport Demand Management Act 1997* (Cth) the operator of an aircraft is only liable for a civil penalty for an 'off-slot movement' if this is done 'knowingly or recklessly'.[2176]

2170 D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (1996) Federation Press, Sydney, 326.

2171 I Leader-Elliott, 'Elements of Liability in the Commonwealth Criminal Code' (2002) 26(1) *Criminal Law Journal* 28, 37.

2172 (1941) 67 CLR 536.

2173 Section 6.1

2174 See also the *Criminal Code Act 1995* (Cth), 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.

2175 I Leader-Elliott, 'Elements of Liability in the Commonwealth Criminal Code' (2002) 26(1) *Criminal Law Journal* 28, 36.

2176 Section 13.

17.49 In the case of parallel or sequential proceedings, fault is usually the distinguishing feature between the two. For example, the difference between s 181 and s 184 of the *Corporations Act* is the intent of the person charged. Both deal with the requirement that a director act in good faith and in the best interests of the company, but the latter 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.[2177]

17.50 The decision to take civil proceedings may be made either because, while the physical element was present, there was no dishonesty or recklessness, because of difficulties with proving the intent, or because, even where a criminal offence has been committed, there may be resource or policy reasons for a decision not to prosecute. In considering, therefore, how the circumstances and conduct giving rise to civil as distinct from criminal penalties should be expressed, the ALRC notes the importance of the role of fault.

17.51 Unless otherwise indicated, reckless or dishonest conduct is regarded as criminal. Negligence is somewhat more problematic. As indicated, negligence is one of the fault elements under the *Criminal Code*. There are regulatory offences where negligence could be an important fault element — those involving public safety or the environment, for example. However, as the example from the *Corporations Act* cited above demonstrates, it seems that negligent performance of a director's duty to act for a proper purpose would bring into play the civil penalty provision, while reckless performance would bring in the criminal offence.

17.52 Where legislation distinguishes between civil and criminal contraventions on the basis of fault, the ALRC believes that it is important that there are transparent and clear guidelines governing the choice of proceedings and proposes recommending that regulators without published guidelines make these available through websites and by other publicly accessible means. Similarly, to avoid confusion, the ALRC proposes recommending that where parallel or sequential proceedings are possible, there should be no role for fault as an element in the non-criminal regulatory contravention. That is, in the case of parallel or sequential proceedings, the non-criminal contravention should be made up of the physical element only.

Proposal

Proposal 17-2. Where parallel or sequential proceedings are possible, there should be no role for fault as an element of the non-criminal contravention.

2177 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.

17.53 The *Criminal Code* has clarified and amended the role of fault in criminal offences. As Leader-Elliott says, the 'implications of the change effected by the Code are profound'.[2178] One feature of the Code is that it sets out the defences available to a person charged with a federal offence. As discussed, the defence of mistake is normally available unless the offence is one of absolute liability. The position is not so clear with non-criminal regulatory contraventions because there is no equivalent code. Most non-criminal regulatory contraventions act like absolute liability offences. However, absolute liability offences still do have available other defences under the Code.[2179] These defences include involuntariness,[2180] act of a stranger[2181] and duress.[2182]

Proposal and question

Prp[psa; 17-3. General defences should be available for non-criminal regulatory contraventions that consist of a physical element only. In particular, a defence of 'reasonable mistake' should be available unless specifically excluded by clear, express statutory statement.

Question 17-1 If there is a need for defences to be clarified in relation to non-criminal regulatory contraventions, is a regulatory contraventions code the way to achieve this or would legislative guidelines be sufficient?

Civil penalties — a role for punishment?

17.54 Penalties, generally, serve a variety of purposes such as punishment, specific or general deterrence, compensation, protection, education, and most serve more than one. An issue is how far penalties for non-criminal regulatory contraventions should be used to punish. On one view, the purpose of all penalties is to punish and, 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 …[2183]

17.55 If all penalties 'punish' an inquiry into the different purposes served by penalties might be regarded as just a semantic exercise but they do have important ramifications for both the quantum of the penalty and procedural issues.

2178 Ibid, 36.
2179 Section 6.2(3).
2180 Section 4.2.
2181 Section 10.1.
2182 Section 10.2.
2183 *Knockaert v Canada (Commissioner of Corrections)* [1987] 2 FCR 202, 205, cited in Butterworths, *Words and Phrases Legally Defined* (3rd ed, Supplement 2001), 351.

17.56 Professor Kenneth Mann has described a punitive sanction as one that does 'not merely mirror the damage caused'.[2184] This definition covers penalties imposed either in retribution, to deter, or in order to protect third parties. The penalties under discussion in this inquiry reflect many or all of these purposes.

17.57 The more a penalty is seen as having punitive and retributive elements, the more the courts will seek, with good reason, to insist on criminal procedural protections. If the aim of a penalty is ultimately to compensate loss or to require a disgorgement of profits, there is less concern about procedural protections such as the privilege against self-incrimination. The action looks more like a traditional civil action.

17.58 The issue becomes complex when it comes to areas such as the *Trade Practices Act*, for example, where the respondents in a Part IV matter might be both a corporation and its senior executives. As will be discussed below, if the principal purpose of the penalty against the corporation is to force it to disgorge the profits it has made from a breach, there may be little basis for an argument that the penalty is essentially punitive and that the corporation deserves the protections of criminal procedures. This is so even if the penalty also has a punitive role, particularly when a penalty at the high end of the scale is imposed to signify the seriousness of a breach. But what of the executives who are involved?

17.59 Where proceedings are taken against corporate executives for being involved in any breach, the issue is not one of disgorgement of profits: they personally may well not have profited directly from the breach. Arguably their penalty will be based on a need to deter them and others from like behaviour. But where the quantum of a penalty is potentially or actually large, it becomes more difficult to draw a distinction between punishment and deterrence. As Goldberg J said in *Australian Competition & Consumer Commission v Australian Safeway Stores Pty Ltd*:

> 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*.[2185]

17.60 Because penalties in the criminal arena increase with the perceived seriousness of an offence, reflecting a wish to demonstrate retribution and moral opprobrium, there is an understandable perception that the higher the civil penalty, the higher the element of retribution, particularly where the penalty is not obviously linked to the damage that has been caused or the profit that has been made.

2184 K Mann, 'Punitive Civil Sanctions; The Middleground Between Criminal and Civil Law' (1992) 101(5) *Yale Law Journal* 1795, 1814.

2185 (1997) 75 FCR 238, 241.

17.61 This raises procedural issues. One of the protections of the criminal law is the protection against self-incrimination where giving evidence might expose a person to a criminal, and possibly, a civil penalty. Once a pecuniary penalty is seen as having elements of punishment, issues of procedure therefore arise.

17.62 There are a number of cases in which courts have discussed the nature of particular penalty provisions.[2186] The court's focus is not on how a contravention is described in legislation but whether in the court's opinion the defendant — in particular a natural person — is facing a serious penalty, one that might be described as punitive. Where punishment is seen as the purpose, the courts frequently lean towards the criminal standard of proof and other procedural matters. In a recent study, 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.[2187]

17.63 As has been discussed, there are also particular problems with the use in the *Customs Act* of the hybrid[2188] notion of *civil prosecutions*. For example, as discussed in chapter 3, the Supreme Court of WA 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.[2189]

17.64 There are a number of trade practices cases where the courts have recognised a privilege against exposure to a penalty and declined to order individual respondents to file their statements of evidence prior to trial.[2190] The protection for individual respondents in such cases is balanced, to some extent, by the principle of

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2186 In tax matters, distinctions about the nature of the proceedings assist to clarify whether additional tax to be paid is a penalty or a tax. In *DTR Securities v Deputy Commissioner of Taxation DTR Securities Pty Ltd v Deputy Commissioner of Taxation for Commonwealth of Australia* (1987) 8 NSWLR 204, 210, the Supreme Court of NSW held that, because the additional tax was 'directly punitive, and only indirectly fiscal, it was to be characterised as a penalty and not as tax'.

2187 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. But the courts have confirmed the civil standard of proof in trade practices proceedings: *Heating Centre Pty Ltd v TPC* (1986) 65 ALR 429; *TPC v Nicholas Enterprises Pty Ltd* (1979) ATPR ¶40-126; *TPC v Ansett Transport Industries (Operations) Pty Ltd* (1978) ATPR ¶40-071.

2188 The Full Court of the Federal Court in *Chief Executive Officer of Customs v Jiang* [2001] FCA 145, para 82 described Customs prosecutions as 'quasi-criminal' or 'hybrid in nature', saying that 'decisions taken in relation to them cannot be regarded as being divorced from the criminal justice process'.

2189 (1996) 140 ALR 681, 684.

2190 *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96; *Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd* (1999) 163 ALR 465; and *Australian Competition and Consumer Commission v J McPhee & Son (Australia) Pty Ltd* (1997) 77 FCR 217.

Jones v Dunkel,[2191] which allows a court to draw 'appropriate inferences' should a respondent choose not to give evidence at all.[2192]

17.65 Mann notes the approach of the US Supreme Court in *Boyd v United States*[2193] where it ruled that a monetary penalty containing a punitive element was 'quasi-criminal' and therefore some of the protective procedures pertaining to criminal law had to apply. Mann suggested that

> rather than calling the sanction compensatory in order to avoid unwanted procedural requirements, legislatures and courts must develop measures of punitiveness that determine at what point, on a continuum of increasing punitive severity, to apply heightened procedural protections.[2194]

17.66 The trade practices and corporations law cases discussed above raise competing issues of protection for individual respondents against the aims of the regulator to act in the broad public interest. Interestingly, private civil (compensatory) actions that may have serious consequences for the defendant directly — large damages — or indirectly — loss of reputation or even a licence to practice — do not cause the courts the same problems. The special nature of penalties and punishment of individuals has long attracted the protections of the courts.[2195] The High Court in *Pyneboard Pty Ltd v Trade Practices Commission* drew little distinction between privilege against self-incrimination in relation to a criminal offence and privilege in relation to civil penalties.[2196]

17.67 Equally, where punishment is not regarded as the purpose of the penalty even though the outcome may be serious, the courts are less likely to move towards quasi-criminal procedural protections. As discussed earlier, in *ASC v Kippe*, the Federal Court held that the purpose of a banning order under the *Corporations Law* was protective and not a penalty or punishment.[2197] This led to the use of civil procedures and the privilege against self-incrimination did not apply.[2198] 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.

2191 (1959) 101 CLR 298.

2192 This point was made by Sackville J in *Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd* (1999) 163 ALR 465, 469.

2193 116 US 616 (1886).

2194 K Mann, 'Punitive Civil Sanctions; The Middleground Between Criminal and Civil Law' (1992) 101(5) *Yale Law Journal* 1795, 1837.

2195 See the discussion of the High Court in *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 335–337, (Mason ACJ, Wilson and Dawson JJ).

2196 Ibid, 337 (Mason ACJ, Wilson and Dawson JJ).

2197 (1996) 67 FCR 499.

2198 It does not apply in any case to corporations: *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 and *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96. See the discussion in chapter 9. See also *Corporations Act 2001*, s 1316A and *Evidence Act 1995* (Cth), s 128 and 187.

17.68 Where the purpose is said to be deterrence, this may only serve to mask punitive aspects of the penalty. In *Australian Competition & Consumer Commission v Roche Vitamins Australia Pty Ltd*,[2199] Lindgren J noted that 'general deterrence is of paramount importance in the present case because of overseas arrangements'.[2200] Although the focus of 'general deterrence' is to influence the behaviour of others in the regulated community, it is difficult to escape the conclusion that 'specific deterrence' has some punitive aspects even if punishment is not its chief purpose.

17.69 Although the Federal Court in the trade practices cases discussed above confirmed the privilege against exposure to a penalty applied to the civil penalty regime under Part IV of the legislation, the Court generally appears less troubled by the fact that punishment is an element of the penalties. There are many examples of trade practices cases where the Court has expressly noted punishment as one of the purposes of the civil penalty.[2201] Nor has the Court overall been particularly troubled by the fact that individuals, as well as corporations, may be subject to the same civil penalty regime. In *ACCC v J McPhee & Son (Australia) Pty Ltd* Heerey J noted that:

> There is no basis in s 76 for concluding that Parliament intended different regimes to apply to corporate and individual contravenors. 'Person' in s 76(1) includes both bodies corporate and individuals.[2202]

17.70 It is not easy to find a coherent theoretical basis for the courts' concerns about the use of civil procedure for Customs prosecutions and in relation to company officers under the *Corporations Act* but less concern for the use of civil penalties with a punitive element in relation to the *Trade Practices Act*.[2203] It cannot just be the difference between corporate and individual respondents although that is an important distinction and does account for some of the judicial comments in relation to the former. The individual/corporation distinction could be the basis for some reforms in the area.

2199 *Australian Competition & Consumer Commission v Roche Vitamins Australia Pty Ltd* (2001) ATPR ¶41–809.

2200 Ibid, 42,812.

2201 In *Trade Practices Commission v Stihl Chain Saws (Aust) Pty Ltd* [1978] ATPR ¶40-091, 17,896 Smithers J said that the penalty 'should constitute a real punishment proportionate to the deliberation with which the defendant contravened the provisions of the Act'. See also *Australian Competition and Consumer Commission v J McPhee & Son (Australia) Pty* Ltd [1998] ATPR ¶41-628 and the cases noted therein and *ACCC v Australian Safeway Stores Pty Ltd* (1995) 75 FCR 238. The Full Federal Court in *J McPhee & Son (Australia) Pty Ltd v ACCC* (2000) 172 ALR 532, 581 resisted the opportunity 'to consider whether punishment is a relevant factor to be taken into account'.

2202 *Australian Competition and Consumer Commission v J McPhee & Son (Australia) Pty* Ltd (1998) ATPR ¶41-628, 40,891. Heerey J imposed penalties on various executives of the respondent company ranging from $15,000 to $100,000.

2203 In *McPhee*, ibid, Heerey J took account of the financial circumstances of one of the individuals charged in fixing the lowest penalty.

Evidence and procedure

17.71 As the quote from Mann above highlights, the issue about the punitive purpose of penalties ultimately concerns procedural and evidentiary matters. The courts do make allowances when civil proceedings concern matters of some seriousness. As the Commission noted in ALRC 60 on Customs and Excise, the standard of proof required for proceedings with a quasi-criminal appearance, be they Customs prosecutions, taxation, trade practices[2204] or proceedings under corporations law, is known as the *Briginshaw*[2205] standard of 'reasonable satisfaction' and, as the ALRC said:

> 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. [2206]

17.72 However, the Report also said in relation to Customs prosecutions:

> The preservation of civil rules of evidence in what are, in substance, criminal prosecutions would be more than a mere anomaly. It would go to matters of substantive unfairness.[2207]

17.73 As well as the standard of proof accommodating proceedings with serious consequences, as highlighted previously,[2208] the rules of civil procedure can be modified where a particularly serious civil penalty is a possibility. As discussed above, 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. [2209] This case highlights the dilemma when considering the application in court of civil procedures. Although criminal procedures are well known, clearly structured and strongly adhered to in order to protect the accused, civil procedures are much more variable 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.

2204 See, for example, *Heating Centre Pty Ltd v TPC* (1986) 9 FCR 153, 159–160 (Pincus J) and the cases noted above in relation to the privilege against exposure to a penalty.

2205 *Briginshaw v Briginshaw* (1938) 60 CLR 336. See also the discussion in chapter 3.

2206 Australian Law Reform Commission, *Customs and Excise Volume II*, ALRC 60 (1992), ALRC, Sydney, para 14.11.

2207 Ibid, para 14.10.

2208 See para 2.94–2.96.

2209 ASIC *Consultation*, Sydney, 1 May 2001. The directors were facing monetary penalties of up to $4 million each (case unreported).

Proposal and questions

Proposal 17-4. Legislation providing for penalties for non-criminal regulatory contraventions should clearly and expressly state the nature of the procedures that are to apply.

Question 17-2. What is the best way to achieve appropriate procedural protections for respondents facing civil or administrative penalties? Should legislation be specific about 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?

Question 17-3. Do we need to develop a quasi-criminal procedure or a hybrid civil/criminal procedure for those non-criminal contraventions that are identified as having serious and punitive consequences? Should there be any distinction between corporations and individual defendants when developing these procedures? How would 'serious and punitive consequences' be measured?

Question 17-4. Alternatively, if the civil/criminal distinction is to be maintained, should legislation establishing civil penalties expressly state that Parliament intends the civil standard of proof and civil procedures to apply?

Range of views – regulatory approach

17.74 Discussion at the ALRC's Conference, *Penalties: Policy, Principles & Practice in Government Regulation*, revealed a range of views about use of the criminal law and the appropriate mix of sanctions. Professor John Coffee would limit resort to the criminal law, reserving it for conduct considered to lack any social utility, whereas he would use the civil law as a financial instrument to deter or price the consequences of certain misbehaviour.

17.75 However, Professor Arie Freiberg expressed concern at the Coffee approach, suggesting that, although it can assist to identify conduct suitable for criminal sanctions, it does not address the problem of the 'intrusive or inflictive nature of the wide range of non-criminal sanctions'. He noted that in Australia, the vast majority of federal penalties are criminal and that most of the civil penalties are in the *Corporations Act*, which permits a choice of penalty types, reflecting, he suggests, Mann's pragmatic approach of using the range of criminal, civil and ad-

ministrative penalties either in combination, in sequence or individually, to attack a particular problem.[2210]

17.76 For Coffee, Mann's approach has dangers of over-criminalisation, imprecise standards caused by judicial interpretation, and inter-agency rivalry.[2211] Freiberg supported Mann's argument that

> the procedure followed in deciding whether to impose a sanction should be related to the function of the sanction. This proposition is based on two core norms of American constitutional due process: (1) the more severe the sanction, the more the procedure must protect against the sanctioning of the innocent, and (2) the more it must protect the accused's dignity and privacy.[2212]

17.77 Freiberg suggested that any new sanction structure must reflect the Australian reality, noting that the majority of criminal sanctions are fines, usually of a relatively trivial nature, whose symbolic function is questionable and the effectiveness of which in terms of changing behaviour is also dubious. He suggested that the use of fines as the main criminal sanction makes it difficult to distinguish criminal penalties from civil ones.

17.78 Freiberg contended that a strict civil/criminal dichotomy does not sit easily within a sanctions hierarchy or pyramid where criminal sanctions are a last resort against contumacious defendants, and argued that the use of imprisonment, 'the only truly criminal sanction in Australia', is either rarely available or rarely used in relation to 'white collar crime'. Dr Mirko Bagaric supports Freiberg's approach, suggesting there has been an over-use of the criminal law and proposing that it be limited to 'breaches of important moral principles'.[2213]

17.79 The ALRC's consultations have revealed general support for retention of the civil/criminal distinction. A number of commentators indicated that they believed that criminal convictions did matter and that corporations did take them seriously. One commentator said that if, for example, criminal penalties were introduced for breaches of Part IV of the *Trade Practices Act*, corporations would be more vigorous in fighting the actions than under the current penalty regime.[2214] Professor Ian Ramsay and Helen Bird have suggested that the value of a criminal penalty should not be underestimated.[2215] A number of submissions have suggested that criminal penalties coupled with adverse publicity were particularly likely to be

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2210 Mann argues for an increase in the size and use of punitive civil monetary penalties with a concomitant reduction in the use of the criminal law: K Mann, 'Punitive Civil Sanctions; The Middleground Between Criminal and Civil Law' (1992) 101(5) *Yale Law Journal* 1795, 1802.

2211 Noted by Freiberg in 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).

2212 Freiberg said the US norms of due process also applied to Australia: Ibid.

2213 M Bagaric, 'The "Civil-isation" of the Criminal Law' (2001) 25(4) *Criminal Law Journal* 184, 193.

2214 Advisory Committee, *Meeting*, Sydney, 21 February 2002.

2215 I Ramsay and H Bird, *Consultation*, Melbourne, 26 February 2001.

effective in changing corporate behaviour. Other commentators have supported the retention of both criminal and civil sanctions as being the most effective way to regulate corporate behaviour.[2216] But there is general caution about over-use of the criminal law for the reasons expressed by Paul Robinson:

> [T]he use of criminal conviction in the absence of serious criminal harm that deserves moral condemnation weakens that very force. As the label "criminal" is increasingly applied to minor violations of a merely civil nature, criminal liability will increasingly become indistinct from civil and will lose its particular stigma.[2217]

17.80 Freiberg and O'Malley have noted that civil sanctions are seen to have advantages where the conduct is such as to require continuous surveillance, for example, consumer protection, pollution, occupational health and safety, and where the sanctions are coupled with techniques likely to bring about voluntary compliance, such as negotiation or persuasion. They described them as 'formidable weapons and valuable bargaining chips'.[2218] On the other hand, they said, criminal sanctions are thought to be better suited to 'isolated or instantaneous conduct'.[2219]

17.81 While these distinctions do not entirely reflect the approaches in the legislation under review, the idea of the use of civil penalties as a tool for social and regulatory control, particularly in relation to on-going activities, has some validity. This approach, however, is not always applied consistently. Customs prosecutions, for example, would appear to be more like criminal proceedings aimed at isolated conduct.

17.82 In general, the focus of non-criminal regulatory contraventions is on the physical elements of the contravention (the fact of pollution) or the effect of the contravention (distortions in prices) rather than on the intent of the person who has brought the contravention about. They are particularly suited to contraventions involving corporations because of difficulties with proof at the criminal standard and to deal with systematic long-term behaviour.

17.83 But, as discussed by Robinson above,[2220] non-criminal regulatory offences often also lack an essentially 'criminal' element. They are established as contraventions because they are a means of ensuring compliance with government policy regulating a wide-range of activities that have a public impact or they are

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2216 J Braithwaite and P Grabosky, *Occupational Health and Safety Enforcement in Australia: A Report to the National Occupational Health and Safety Commission*, (1985) Australian Institute of Criminology, Canberra, 83–90; B Fisse and J Braithwaite, *Corporations, Crime and Accountability* (1993) Cambridge University Press, Cambridge, 141–145.

2217 P Robinson, 'Moral Credibility and Crime', *Atlantic Monthly*, March 1995, 72, 77 cited by 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.

2218 A Freiberg and P O'Malley, 'State Intervention and the Civil Offense' (1984) 18(3) *Law & Society Review* 373, 388.

2219 Ibid.

2220 See para 17.79.

minor breaches of the law. If, therefore, there is indiscriminate use of criminal law, its value as a tool to highlight society's condemnation is weakened.

17.84 Fiona Haines confirms the conclusions of a number of writers:

> [G]reater numbers of more intrusive and punitive measures against organizations is [sic] unlikely to be the ultimate solution to corporate harm. While an argument can be made for applying severe sanctions in the case of flagrant breaches of the law … criminal penalties against organizations and their members may have several negative side-effects, which work against the ultimate goal of regulation.[2221]

17.85 She notes the paradigm of the regulatory pyramid, suggesting that:

> While the pyramid metaphor may have considerable merit in bringing some order to bear on internal strategies of a single regulatory agency, it can make the task of regulation appear deceptively simple. At the very least the … escalation and de-escalation of penalty may be far more difficult than previously anticipated. While escalation of sanction may be a perfectly reasonable response to non-compliance, analysts and practitioners should be aware that this produces important effects in companies, which in response to threat, aim to reduce their vulnerability to scrutiny, and so, to liability, It is therefore sensible to suggest, as Fisse and Braithwaite (1993) do, that breaking down the corporate veil may be less effective than ensuring a penalty structure which demands internal disciplinary action.[2222]

17.86 This is discussed further in chapter 18.

Distinction between corporate and individual defendants?

17.87 As is frequently observed,[2223] the growth in the use of civil penalties can be ascribed in part to the difficulties with corporate prosecutions: imprisonment of the corporation is not possible and, if the corporation has no body, mind or soul, a criminal punishment cannot serve its true shaming purpose. One issue for the ALRC, therefore, is whether to recommend a distinction between corporate defendants and individual defendants, reserving the criminal law for individuals who are reckless or intentionally dishonest intending to gain an advantage[2224] but using only civil penalties for corporate defendants.[2225] This would both recognise the role of individuals in corporate misconduct and also give individuals the procedural protections of criminal proceedings that, it might be argued, are not necessary for corporate defendants.

2221 F Haines, *Corporate Regulation; Beyond Punish or Persuade* (1997) Clarendon Press, Oxford, 218.
2222 Ibid, 219.
2223 See chapter 16.
2224 This is drawn from the *Corporations Act 2001* (Cth), s 184.
2225 The NSW Law Reform Commission is currently enquiring into the sentencing of corporate offenders and has identified as an issue, 'When, if ever, is it desirable to impose criminal sanctions on corporations, as opposed to civil and/or administrative penalties?', New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Issues Paper 20 (2001) viii.

17.88 A number of submissions in relation to ALRC 68 questioned whether a criminal conviction has any more impact on a corporation than a civil penalty, particularly given that a corporation cannot be imprisoned.[2226] Others suggested it carried a greater stigma.[2227] In his paper to the ALRC's conference, Brent Fisse suggested 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.[2228]

17.89 Fisse argues that any strategy to proceed against individuals within a company *instead* of the corporation itself suffered from several weaknesses:

- it does not take account of corporate responsibility;
- the difficulties of investigation and enforcement largely responsible for the development of corporate criminal liability;[2229]
- retributive theories of punishment apply to corporations as much as individuals.

17.90 However, Fisse also noted an undermining of individual accountability with an emphasis on public enforcement and sanctions against corporate offenders. He suggested that difficulties with resourcing investigation and enforcement largely accounted for the development of corporate criminal liability and said:

> Stricter standards of individual criminal liability and compromises of evidentiary or procedural safeguards would be essential if corporate liability were to be abrogated … Where stricter standards need to be imposed, a more obvious approach is to rely on corporate liability and thereby to minimise the need to sacrifice liberal protections for individuals.[2230]

17.91 Fisse proposed a model that allows for both civil penalties and criminal prosecutions but reserves criminal law for more serious offences[2231] and utilises internal corporate controls.[2232] As with Braithwaite, Fisse advocates pyramidal en-

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2226 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), Australian Law Reform Commission, Sydney, para 9.9 and fn 26.

2227 Ibid, para 9.9 and fn 27.

2228 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.

2229 Ibid, footnote omitted.

2230 Ibid, footnote omitted.

2231 A Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225, 244 also argues that criminalisation should be reserved for substantial and not 'non-serious' wrongs.

2232 The Mitchell Committee in South Australia advocated internal disciplinary orders in its 1977 Report: Australian Law Reform Commission, *Sentencing: Penalties — Discussion Paper*, DP 30 (1987), Australian Law Reform Commission, Sydney.

forcement.[2233] Fisse's model requires internal disciplinary action as a condition of a punitive injunction under the direct and urgent supervision of all directors.[2234] Professor Anthony Ogus also argued for linkages between regulatory activity and internal corporate controls.[2235] He suggested that 'the primary role of regulation is to ensure that appropriate internal systems of control are in place' and

> insofar as regulatory contraventions are the result of the failings of individual employees, it is generally easier and cheaper for their conduct to be controlled by their employers rather than by an enforcement agency.[2236]

The ALRC's preliminary view

17.92 Most of the commentators discussed above support a criminal/civil distinction. While many caution against the over-use[2237] of criminal sanctions, most commentators support its use for the most serious of offences. The ALRC therefore suggests that there is no compelling reason to do away with the criminal/civil distinction and develop a continuum of offences.

17.93 Furthermore, there are cogent arguments in favour of retaining the criminal law for those offences that, in relation to individuals, concern dishonesty or fraud or, in some circumstances, reckless behaviour. The parallels are with the general criminal law. Additionally, where individuals have been implicated in corporate criminal behaviour, there is a role for criminal prosecutions. Offences should also be identified as 'criminal' where a prison sentence may be awarded as part of the punishment, or where a prison sentence may follow a failure to pay a pecuniary penalty.[2238] For corporations, there are sound arguments for the use of the criminal law where the behaviour of the corporation has caused, or is capable

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2233 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. See also 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.

2234 At the base are negotiated remedies and penalties together with internal disciplinary action as a condition of settlement. Higher up are court-ordered civil penalties (individual and corporate) that incorporate internal disciplinary action. Above that is criminal liability (individual and corporate) with second tier sanctions (fines, community service, probation, adverse publicity orders) and with internal disciplinary action as a condition of corporate probation. At the apex is first tier criminal liability (gaol for individuals; punitive injunctions and corporate capital punishment for corporations).

2235 A Ogus, 'Risk Control Strategies and Regulatory Enforcement' (Paper presented at Penalties; Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001).

2236 Ibid.

2237 Over use can mean overly prescribed by Parliament or overly resorted to by prosecutors. Green notes most critics suggest 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.

2238 An example of the latter is found in s 79A of the *Trade Practices Act* in connection with Part VC fines where a fine defaulter may be imprisoned for one day for each $25 of fines outstanding.

of causing, significant harm to others or where there are parallels with dishonest practices by individuals.

17.94 This suggests that some offences that might be described as 'regulatory' might nevertheless fall to be dealt with by criminal law if the consequences of a breach are sufficiently serious. The purpose of the use of criminal law in these circumstances is to indicate society's concern about, and condemnation of, the behaviour of the corporation.

17.95 Even if the outcome is really little more than symbolic for the corporation in that it cannot be imprisoned and would face a monetary penalty whether its conduct were criminal or non-criminal, the use of the criminal law is a mark of its wrongdoing and has implications for the corporate officers who might be charged with aiding and abetting. Examples of serious regulatory offences might be intentionally dumping toxic waste where it will cause harm, or knowingly selling dangerous goods.[2239] What needs to be considered further is the use of a greater range of sentencing options, especially in relation to corporate crime.[2240] This is discussed in chapter 18 in relation to tailored penalties.

17.96 As well as greater protections for the defendant, 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 utilise 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[2241] and limit information exchange between law enforcement agencies.

17.97 While supporting the retention of a general criminal/civil law distinction, the ALRC is not saying it believes that the present categorisation or range of available penalties within *each* of the statutes under review is necessarily satisfactory.

17.98 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 quite 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. In the case of legislators, the ALRC advocates caution about extending the criminal law into

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2239 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.

2240 As suggested by the ALRC in Australian Law Reform Commission, *Sentencing: Penalties — Discussion Paper*, DP 30 (1987), Australian Law Reform Commission, Sydney, para 307. Examples of sentencing options for corporations include divestiture and break-up. The *Trade Practices Act* provides for community service orders (among others) under s 87V.

2241 There have been a number of attempts to use the extradition powers in this area such as the long-running campaigns to extradite Christopher Skase from Majorca and Tony Oates from Poland.

regulatory areas unless the conduct being proscribed is clearly deserving of moral censure — either because of its parallels with the general criminal law or because of the seriousness of its effect — or where punishment is the chief purpose of the penalty.

17.99 Unless there are compelling reasons to make fault an ingredient, the general principle should be that a non-criminal regulatory contravention should consist only of a physical element. If fault is to be an element in particular cases, the ALRC suggests that it should be negligence. The chief focus of penalties for such contraventions should be to promote compliance with the relevant legislation by deterring the offender and others from non-compliance. This may call for substantial penalties (discussed below), including an element of punishment if necessary. As identified in the trade practices cases discussed above,[2242] civil penalties can have an element of punishment as well as deterrence or compensation, but if they include punishment, this should not be so onerous as to blur the criminal/civil distinction and to call for the use of criminal law procedural protections.

17.100 The ALRC's preliminary view is that all legislation where there are penalties for non-criminal regulatory offences should make clear the nature of the procedures which are to apply: civil or criminal. As discussed, a legislative statement that the procedure is to be civil does not always make clear, however, whether some of the criminal procedural protections might nevertheless apply. If there is any parliamentary wish to modify any of the common law privileges, there should be an express legislative statement to that effect.[2243]

Proposals

Proposal 17-5. 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.

Proposal 17-6. Subject to Proposal 17–2, unless there are compelling reasons otherwise, fault should not be an ingredient of a non-criminal regulatory contravention. If fault is to be an element in particular cases, it should be negligence.

2242 See para 17.69.
2243 See chapter 9 for a discussion of the privilege against self-incrimination and legal professional privilege.

Customs prosecutions — useful model or unhappy hybrid?

17.101 The discussion above has identified two main legislative approaches. It assumed that proceedings were distinguishable as either criminal or civil although noted the comments of the Court in relation to the 'quasi-criminal' nature of the proceedings against the directors in the Water Wheel case. Customs prosecutions in particular demonstrate how the label 'criminal' or 'civil' can be problematic.

17.102 As the ALRC's Terms of Reference for this reference highlight, and has been discussed in chapter 3, Customs prosecutions raise a number of issues because of their hybrid nature. They have been the source of much judicial comment and inconsistencies in the approaches of the courts. The actions look like criminal ones but they utilise civil procedures in the higher courts. Even the use of the word 'prosecution' suggests they are criminal proceedings. Unlike s 78 of the *Trade Practices Act*, there is no clear statement in the legislation that the proceedings are civil.

17.103 The ALRC proposes recommending that the *Customs Act* be amended to include clear legislative provisions about whether Customs proceedings are civil or criminal.[2244] The ALRC believes that the present state of judicial uncertainty requires a clear legislative clarification.

17.104 ALRC 60 recognised the penal character of the legislation apparent from its language. The Commission accordingly 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.[2245] The overseas links in many of the matters pose particular evidentiary problems. Customs legislation seeks to regulate conduct of a disparate range of people: those who deliberately smuggle goods in or out of Australia as well as tourists who may act without intent. Proving intent can raise particular difficulties.

17.105 The ALRC's recommendations sought to balance the true substance of the proceedings with the difficulty of proving the mental element in some Customs prosecutions. It made allowances for potential difficulties caused, for example, by the use of ignorance or mistake as defences in relation to barrier offences concern-

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2244 McMurdo P in *CEO of Customs v Labrador Liquor Wholesale Pty Ltd* (2001) 162 FLR 230 noted that recent changes to Customs and excise laws in the UK had clearly indicated that similar offences were criminal. Her Honour said that 'Australia does not have this advantage of clear legislative provisions, despite the recommendations of the Australian Law Reform Commission': 235. As discussed in chapter 3, other recent cases also reflect the uncertainty in this area.

2245 It said that 'barrier' offences were essentially regulatory as evidenced by the fact that only a pecuniary penalty may be imposed, and it noted that the overwhelming majority were offences that may be prosecuted in courts of summary jurisdiction: Australian Law Reform Commission, *Customs and Excise Volume II*, ALRC 60 (1992), ALRC, Sydney, para 9.8.

ing ports or airports. The exclusion of the mental element from some offences recognised some inherent difficulties with the area, but identifying the offences as 'criminal' would have allowed defendants to take advantage of criminal procedure.

17.106 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.[2246] 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.

17.107 One of the anomalies of the legislation is the use of summary criminal procedures for minor offences under the *Customs Act* but civil procedure in the higher courts for the more serious breaches. The ALRC proposes recommending that there be consistency in the legislation so that minor breaches and the more serious contraventions are treated similarly, allowing for the different procedures between courts of summary jurisdiction and higher courts.

17.108 ALRC 60 also recommended changes in relation to the use of averments. The ALRC acknowledged that averments are 'a substantial qualification to the fundamental principle that, in criminal prosecutions, the onus should lie on the prosecution.'[2247] However, the ALRC recognised a need for the use of averments 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.

17.109 But it noted the potential for their use to be 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.[2248] 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.[2249] 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

2246 The *Criminal Code Act 1995* (Cth) would now apply here.
2247 Australian Law Reform Commission, *Customs and Excise Volume II*, ALRC 60 (1992), ALRC, Sydney, para 12.12.
2248 Ibid, para 12.11.
2249 Ibid, para 12.12.

> – 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.[2250]

17.110 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.

17.111 The ALRC also notes that, in addition to pecuniary penalties, there are serious ramifications of a Customs prosecution on the ability of a person, including a corporation, to hold or retain a Customs broker's licence or a warehouse licence. This may be further justification for the argument that Customs prosecutions should be treated as criminal, requiring the prosecutor to prove the offence to the criminal standard.

Proposals

Proposal 17-7. Parliament should amend the *Customs Act* along the lines recommended in ALRC 60. In particular the Act should be amended so that:

(a) indictable offences are prosecuted in the same way as any other indictable offences;

(b) Customs prosecution procedures are criminal and not civil.

Proposal 17-8. Alternatively, if Proposal 17-7 were not adopted, the *Customs Act* should be amended to:

(a) include a clear legislative statement about whether Customs proceedings are civil or criminal; and

2250 Ibid.

(b) bring about consistency so that minor breaches and the more serious contraventions are treated similarly, allowing for the different procedures between courts of summary jurisdiction and higher courts.

18. Setting Penalties

Contents

Introduction

18.1 Two processes are involved in determining the quantum of penalties: the range of, or maximum, penalties for particular contraventions are set out in legislation; and the amount of the penalty in an individual case is determined by a decision maker taking into account relevant factors set out in legislation, case law, or departmental guidelines.

18.2 The considerations applying to the decisions of parliament in setting the legislative limits, and of judges or regulatory officers in making decisions on individual cases, are in some respects similar. Both depend on an understanding of how

serious the contravention is in comparison with other contraventions, and of how to determine the degree of culpability and the circumstances that aggravate or mitigate it. Continuing issues for both legislators and decision makers are the purpose and theoretical justification of the penalties (which affect the ultimate quantum) and how to ensure fairness and consistency in setting penalties.

Penalty setting in legislation

Approaches to setting penalty ranges[2251]

18.3 The setting of penalties in legislation is largely determined by the view taken of the purpose of the regulatory provisions and penalties. The range of penalties, as well as the individual decision on a penalty, will vary significantly according to whether the chief intention is to punish offenders for the contravention they have committed, deter them from repeating the offence, provide an example to deter others, repair damage, or prevent them from profiting from the unlawful act.

18.4 The traditional justification in criminal law for imposing punishment is the model described as 'just deserts' — a punishment is imposed that reflects the perceived gravity of the crime and the culpability of the offender. This model is generally accepted as the most significant one for criminal penalties, although other factors such as deterrence, and approaches such as restorative justice, are widely acknowledged and debated. The 'just deserts' model is less dominant for regulatory penalties since many of the relevant provisions are directed at enhancing social or economic organisation, and contraventions are, therefore, regarded as having less need for moral condemnation.[2252]

18.5 In the regulatory area the principal purpose of financial penalties is deterrence. As discussed in chapters 3 and 17, 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, or conversely, the benefits of compliance.

18.6 Professors Ian Ayres and John Braithwaite have developed a model of 'responsive regulation' with a 'pyramid' of sanctions ranging from the mildest and most frequently used to the most severe and very rarely used penalties. Under this model, which assumes a continuing relationship between regulator and regulated, minimal sanctions such as persuasion apply initially to contraventions, but more severe penalties are available where minimal sanctions have failed or are not ap-

2251 See also chapter 3. The ALRC has previously discussed federal criminal sentencing practices in detail: Australian Law Reform Commission, *Sentencing of Federal Offenders (Report No 15, Interim)*, (1980), AGPS, Canberra.

2252 See discussion of approaches to regulation in K Yeung, 'Quantifying Regulatory Penalties; Australian Competition Law Penalties in Perspective' (1999) 23(2) *Melbourne University Law Review* 440.

propriate.[2253] This model has been very influential[2254] and is particularly valuable for regulatory methods in which the regulator has long term or repeated contact with the regulated entities, such as licensing regimes.

18.7 Braithwaite's model of restorative justice is concerned more with repairing the damage done than ensuring the person who contravened the law is punished.[2255] This too has substantial potential application to regulatory penalties and it is reflected in provisions such as those in the *Trade Practices Act 1974* (Cth) that prefer compensation to the penalty if the person who has contravened cannot pay both.[2256]

Minimum penalties

18.8 Both the *Customs Act 1901* (Cth) and the *Excise Act 1901* (Cth) provide for minimum penalties for evasion of duty.[2257] Each of these provisions has given rise to cases in which judges 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 1914* (Cth).

18.9 In setting a penalty for evasion of duty under the *Excise Act*, Perry J identified a number of mitigating features which took the case 'out of the norm'[2258] and expressed the view that

> 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.[2259]

18.10 His Honour also alluded to the principle that 'it is not a proper exercise of the sentencing discretion to impose a fine which the defendant has no hope of pay-

2253 I Ayres and J Braithwaite, *Responsive Regulation; Transcending the Deregulation Debate* (1992) Oxford University Press, New York.

2254 The model was further developed in the context of environmental law by Neil Gunningham in N Gunningham, P Grabosky and D Sinclair, *Smart Regulation; Designing Environmental Policy* (1998) Clarendon Press, Oxford.

2255 See J Braithwaite, *'Restorative Justice and a Better Future'*, <www.realjustice.org/Pages/braithwaite.html>, and J Braithwaite, 'Global Markets, International regulation' (Paper presented at Penalties; Policy, Principles & Practice in Government Regulation, Sydney, 9 June 2001); A Von Hirsch and A Ashworth, 'Not Not Just Deserts; A Response to Braithwaite and Pettit' (1992) 12(1) *Oxford Journal of Legal Studies* 83.

2256 *Trade Practices Act 1974* (Cth), s 79B.

2257 *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.

2258 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 facts 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 the money he had unlawfully obtained: *Comptroller-General of Customs v Grills* (1992) 110 FLR 431, 434.

2259 Ibid, 435.

ing'.[2260] In order to reach an appropriate penalty despite the setting of minimum penalties in the legislation, his Honour exercised his power under s 19B(1) of the *Crimes Act* to dismiss six of the 10 charges.

18.11 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.[2261]

18.12 Minimum sentences have been adopted previously under criminal law but, as with mandatory sentencing, they have been subject to substantial criticism and are not widely accepted.[2262] The ALRC has previously recommended that minimum penalties not be used and is now seeking submissions as to whether there are any circumstances in which they should be set.[2263]

18.13 A point of distinction between minimum criminal sentences and minimum penalties under Customs and excise law is that the latter are not absolute amounts, but are proportionate to the amount of duty evaded or rebate improperly received. However, the cases referred to above illustrate that this degree of proportionality is not seen as necessarily providing a fair outcome.

Hierarchy of contraventions and penalties

18.14 It is apparent that, in order to achieve consistency in penalty setting, whatever the theoretical model adopted, it is necessary to establish reference points by which to calculate fair or effective penalties. It is clear from the brief outline above that the type and quantity of information required to establish these reference points varies substantially according to the theoretical approach adopted. However, it is normally the case that a number of theories are simultaneously relevant in the approach to setting a penalty. In New South Wales, Chief Justice Spigelman noted in the context of sentencing practices for criminal offences that:

2260 Ibid, 435. The effect of financial inability to pay a penalty is considered in chapter 14.

2261 *Hayes v Weller (No 2)* (1988) 93 FLR 64.

2262 Chief Justice Spigelman has noted that, as long ago as 1883, an Act introducing minimum sentences in NSW was abandoned following wide public dissatisfaction at the injustices caused: 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.

2263 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), AGPS, Canberra and Australian Law Reform Commission, *Customs and Excise Volume II*, ALRC 60 (1992), ALRC, Sydney, para 11.10. See Question 18–7.

> The ineluctable core of the sentencing task is a process of balancing overlapping, contradictory and incommensurable objectives. The requirements of deterrence, rehabilitation, denunciation, punishment and restorative justice — do not generally point in the same direction.[2264]

18.15 Chief Justice Spigelman and others have noted that the maximum penalty available for an offence must be seen by judges as an indication of how seriously it is viewed.[2265] It follows that those making the legislation setting the maximum penalty must have regard to how they treat the seriousness of a contravention relative to similar contraventions and to other types of contravention. The setting of parameters in the legislation must be done by reference to an understood hierarchy of seriousness and severity. Principles of fairness require that there be a degree of proportionality between the seriousness of the contravention and the quantum of the maximum penalty.

18.16 However, as will be discussed below,[2266] in the area of civil penalties where pricing the breach is an important factor, in some legislation the level set or fixed will need to be considerable reflecting the illicit gains made by the offender. Provided that it is clear that the emphasis is deterrence by disgorgement, and not retribution, the apparent anomaly will be clarified.

18.17 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;

- the characteristics of the offender that may mitigate his or her culpability for the offence or indicate the likelihood or otherwise of re-offending.[2267]

2264 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.

2265 Ibid; *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.

2266 See the discussion on proportionality at para 18.47.

2267 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.

18.18 The first of these categories is relevant to the setting of maximum penalties in legislation; the second and third relate to the issues discussed below in relation to penalties in individual cases.

18.19 In the context of criminal law, Freiberg and Fox outlined three reasons why a hierarchy of penalties should be established:

> First, criminological research on deterrence requires some measure of severity against which to measure the relative effectiveness of sanctions. Secondly, the development of 'just deserts' models of sentencing requires graduated sanction scales to match the … graduated scales of offence heinousness. Finally, the lack of a sentencing hierarchy exacerbates or creates problems of disparity in sentencing. Without some workable scale of severity, problems arise in deciding whether one sentencer has been more punitive or lenient than another, or whether, on appeal, a sentence has been increased or mitigated.[2268]

18.20 These comments are equally apt in relation to civil penalties with due allowance for the more limited role for 'just deserts' in regulatory contraventions.

18.21 An earlier report by the ALRC on sentencing in criminal matters described the maximum sentences as 'a lamentably confused morass of sanctions, which lacks any consistency, rationale or planning'.[2269] Similar comments apply to the range of non-criminal penalties in federal legislation. The following discussion examines options for establishing formal or informal hierarchies by which the seriousness of contraventions and the severity of penalties can be compared and consistency improved.

Hierarchy and parity of contraventions

18.22 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 legislation 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 across the range of penalties so that the relative seriousness of conduct and penalties can be compared. The ALRC is proposing the development of a table of comparative provisions across all areas of regulation.[2270]

18.23 Informal hierarchies of conduct within areas of legislation may be inferred from the existence of a range of severity of sanctions within each area. It is

2268 A Freiberg and R Fox, 'Sentencing Structures and Sanction Hierarchies' (1986) 10 *Criminal Law Journal* 216, 217.

2269 Australian Law Reform Commission, *Sentencing of Federal Offenders (Report No 15, Interim)*, (1980), AGPS, Canberra, 251.

2270 See Proposal 18–3 and Questions 18–2 and 18–3.

not clear that there is any attempt at overall consistency or equivalence between areas.

18.24 The ALRC notes the 1998 Scrutiny of Bills Committee report:

> 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.[2271]

18.25 As an example of the issue identified by the report, within the legislation under scrutiny there are numerous statutes that impose an obligation for record keeping. This does not mean that there needs to be an identical penalty for a failure to comply. Context is important. In most cases this 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 2001* (Cth), for example, record keeping plays a more central role. Company registers are key to the information available to members and would-be members of the company. Failure to keep the registers up to date can have serious ramifications for investors. In this light there need be no parity between the penalty for failing to keep records up to date under this 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 in all relevant legislation.

18.26 An example of apparently differential treatment of similar conduct occurs under the *Trade Practices Act* and under the reforms introduced by the *Financial Services Reform Act 2001* (Cth) in relation to the various forms of market manipulation. Market manipulation in the form of price fixing or various collusive arrangements is caught by Part IV of the *Trade Practices Act* and subject to a maximum $10 million penalty for a corporation or $500,000 for 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. 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.[2272]

18.27 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 has been discussed in chapter 7, the ALRC has noted considerable academic writ-

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2271 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.

2272 J Longo, 'Civil Penalties under the Corporations Act — Reflections of a Gamekeeper turned Poacher' (Paper presented at Corporation Law Workshop, 27–29 July 2001).

ings and comments from social and public welfare groups that the penalties under this legislation are too onerous, particularly in their comparative effect on offenders.

Principle

18.28 **Like contraventions should attract like penalties where the purpose of the regulatory provisions is similar.**

18.29 To promote relevant consistency, general principles should be developed indicating the seriousness of the offending conduct. The most important indicator would be the possible consequences of the contravention closely related to the purposes of the provision. For example, a contravention of record-keeping requirements where the only consequence is inconvenience to the regulator would be placed at the low end on a scale of seriousness. The same situation would be much more serious if the consequence was that information on which the public or the regulator relied for decision making was defective.

Range of orders — parity and consistency

18.30 As discussed above regulatory theorists such as Braithwaite propose a pyramidal structure of regulatory enforcement involving the use of a range of sanctions that go beyond monetary penalties and the use of imprisonment. However, the use of a range of sanctions could pose problems for determining parity and consistency unless the place of these other types of orders in a sanctions hierarchy is made explicit or, if they serve a role other than penalising, this too is made clear.

18.31 Freiberg and Fox noted problems for consistency caused by the range of sentencing permutations in Victoria:

> The problem might be alleviated by backing away from the current proliferation of options and by reducing the number and type of sanctions provided that this was accompanied by firmer guidelines in their use. If diversity of choice without guidance is insisted upon, then its price will be disparity.[2273]

18.32 The forms of order open to courts in non-criminal proceedings include pecuniary penalties, injunctions, orders to pay compensation to a third party or orders to repay losses, orders to comply with the regulator's directions or to pay money to the regulator, revocation or suspension of licences, and disqualification from holding office.[2274] All of these except the first are applicable only to certain circumstances and clearly have identifiable non-punitive purposes. These arguably

2273 A Freiberg and R Fox, 'Sentencing Structures and Sanction Hierarchies' (1986) 10 *Criminal Law Journal* 216, 233–4.

2274 See the discussion on types of penalties in chapter 3.

should be regarded as part of the range of reparative options available to the court rather than as having a place in the hierarchy of penalties. If they are seen in this light, the problem of lack of consistency is less likely to be an issue. Nevertheless, courts and regulators using such orders need to appreciate their interaction with any punitive penalties. This is discussed further below.[2275]

18.33 The establishment of a hierarchy of penalties would need to take into account the effects of particular penalties on various types of offender. For example, a modest monetary penalty might have no deterrent value for a company director but be crippling for a social security claimant. These impacts, as well as the relative seriousness of the contraventions, must be taken into account in the setting of maximum penalties as well as in individual decisions.

Hierarchy of contraventions — relationship between criminal and civil penalties

18.34 One issue that arises with the criminal/civil distinction is the comparative size of penalties. Ought civil penalties to be smaller than criminal ones, at least within the same legislation? The disparity within the *Trade Practices Act* between the civil pecuniary penalties and the criminal fines is a possible case in point. However, the *Trade Practices Act* 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 a Part VC breach.

18.35 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 manipulation. Dr Mirko Bagaric has suggested that there is considerable evidence that sizeable monetary penalties do deter.[2276] However, the ALRC has received some suggestions that the size of the penalties for breaches of Part IV was not high enough to deter major corporations who might be prepared to risk the penalties in the light of profits to be made.

18.36 While there is little argument that the impact of breaches of Part VC may be serious for individuals or groups of consumers, the potential for million dollar profits from breaches appears to be less than for breaches of Part IV. Additionally, 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 continuing effect is in itself a penalty. The issue is not so clear-cut with corporations. There is little to be gained from any suggestion to keep the civil penalties lower than the criminal ones in this legislation, given the disparate nature of the offences.

2275 See the discussion on double counting at para 18.53–18.54.
2276 M Bagaric, *Consultation*, Melbourne, 8 October 2001.

18.37 Removing the fault element from non-criminal regulatory contraventions can permit the courts to place greater emphasis on the impact of the contravention than on the behaviour giving rise to it. Criminal penalties seek to punish culpability. But by focussing on the resulting harm, civil penalties can be more closely aligned with the loss.

18.38 Where there is a choice of proceedings, parallel or sequential, the differences between the penalties can be more problematic if the focus is on the size of the monetary penalty. Under s 4B of the *Crimes Act*, 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 criminal offence carries a maximum five year term of imprisonment or a fine of $33,000 or both. Theoretically, therefore, a person convicted of a breach 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 an approach would ignore the impact of the fact of a criminal conviction on an individual.[2277]

18.39 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 acting dishonestly and breaching the obligation to act in good faith may face a fine of up to 2,000 penalty units (currently $220,000) and up to five years' imprisonment or both. Theoretically at least, a director convicted of a first offence breach could receive only a fine in a lesser amount than another director facing a pecuniary penalty for breaching the parallel non-criminal penalty provision.

Assessment of penalty in particular cases

18.40 In areas of law where monetary penalties are imposed by a court for breaches of legislation, the factors to be used by a judge in determining the exact sentence 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.[2278] Factors and guidelines for

2277 See Question 18–8 and Proposal 18–4, which suggests that the fact of a criminal conviction is a matter to be considered when considering the relative severity of penalties. The implication of this proposal would mean that a penalty for a non-criminal regulatory contravention could be larger than the penalty for a parallel criminal offence.

2278 Australian Law Reform Commission, *Sentencing of Federal Offenders (Report No 15, Interim)*, (1980), AGPS, Canberra, chapter 11.

judges imposing penalties are available through the legislation and case law. Assessment of penalties by courts in these circumstances is addressed in this section.

18.41 In relation to some breaches of corporations or trade practices law, the penalty imposed may be agreed between the regulator and the liable entity, before being submitted to the court. Tax penalties are also the subject of negotiation in some cases. Regulators sometimes have internal and published policies guiding such negotiations, and both parties will look to available judicial and legislative guidelines. That the penalty is actually imposed by a judge meets the requirements of Chapter III of the Constitution, and provides a means of promoting consistency of penalties since judges may disallow penalties that are outside the permissible range in the circumstances.[2279]

18.42 The majority of penalties relating to income tax and social security are imposed by legislation, either as a set amount or a proportion of, for example, the tax that should have been paid. Officers of the ATO have the power to remit the penalties in whole or in part, and their decisions in this regard are subject to departmental guidelines.[2280]

18.43 Penalties for minor breaches of certain legislation, such as Customs, quarantine and fisheries legislation, are imposed directly by the legislation under infringement notice regimes. Minimal discretion is required in imposition of these penalties as the only determination to be made is whether the breach occurred.

Issues and paradoxes in setting individual penalties

18.44 Karen Yeung has argued that, although the primary purpose of regulatory penalties is to deter, and determination of whether a person has contravened the law does not require a moral judgment, the imposition of individual penalties following such a determination can and should be guided by a wider range of purposes including punishment. Most importantly, the aim of deterrence must be modified by requirements of fairness, culpability and proportionality.[2281] The determination of 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 contravenor.

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

2279 See the discussion on negotiated penalties in chapter 7.
2280 See the discussion in chapter 15 on Discretion, Leniency and Immunity.
2281 K Yeung, 'Quantifying Regulatory Penalties; Australian Competition Law Penalties in Perspective' (1999) 23(2) *Melbourne University Law Review* 440, 461–2.

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).[2282]

18.46 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 (especially where deterrence is a primary purpose); steps taken by the contravenor to minimise or repair the damage, or to prevent it happening again and the degree of co-operation with the regulator, including bringing the contravention to the attention of the regulator. These matters are considered in chapter 15. These factors are sometimes specified in the legislation and sometimes adverted to by judges as matters of general principle.

Proportionality

18.47 It has been suggested to the ALRC that civil penalties reflect ambivalence concerning the punishment of corporate crime; frustration with the criminal justice system and concerns about the criminalisation of certain conduct like corporate negligence; and that what is required is a response proportional to the damage caused. This issue of proportionality between the penalty and the damage caused might explain in part the difference in the potential penalties in Parts IV and VC of the *Trade Practices Act.* Proportionality was also behind the ALRC's comments in ALRC 60 in relation to penalties under Customs legislation for evasion of duty. As the report noted:

> 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.[2283]

2282 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; *Attorney-General (NSW) v Radio 2UE & Laws* [1998] NSWSC 28.

2283 Australian Law Reform Commission, *Customs and Excise Volume II*, ALRC 60 (1992), ALRC, Sydney, para 11.12–11.13; *Customs Act 1901* (Cth), s 234(1).

18.48 In its submission in relation to ALRC 60, the Australian Customs Service stated that 'linking penalties to the amount of revenue at risk is both convenient and appropriate'.[2284] This approach has implications wider than Customs legislation.

18.49 The ALRC proposes recommending that the amount of pecuniary penalties for non-criminal regulatory contraventions be linked, where relevant, to the size of any financial gains as a result of the contravention in question.[2285] This means that where such contraventions could lead to multi-million dollar gains — as with the *Trade Practices Act* and the *Corporations Act* — the maximum penalty should allow this to be reflected.

18.50 The ALRC notes that linking penalties to financial benefits is the practice in relation to trade practices penalties, subject to the maximum in the legislation. In *Australian Competition & Consumer Commission v Roche Vitamins Australia Pty Ltd* Lindgren J accepted submissions that 'the Court can … proceed to assess what the appropriate penalty should be by considering sales and profit figures'. As his Honour indicated, there are a number of trade practices cases where the courts have adopted a similar approach utilising sales figures where there was no evidence about profit or loss. [2286]

18.51 French J in *Trade Practices Commission v CSR Ltd*[2287] provided a list of factors relevant to setting the level of the penalty. The 'French factors' have since been adopted by the courts in subsequent trade practices cases. These included 'the amount of the loss or damage caused'. Loss caused is not the same as profit made but for some legislation this will be the more relevant criterion. In *Roche Vitamins* Lindgren J noted US evidence in relation to collusive arrangements involving the respondents and, while noting that there was no evidence about the additional price paid in Australia, accepted the US figures that the damage caused by the contravening conduct was in the order of 6% to 7% of sales.[2288] On this basis he suggested the penalty was appropriate.

18.52 Linking a penalty to damage caused also allows a focus on restorative justice and draws parallels with private civil actions. This is important in the regulatory area where no single individual may have lost enough to make an action worthwhile, for example in relation to price fixing, and no individual may have

2284 Ibid, para 11.14.
2285 See Proposal 18–1.
2286 *Australian Competition & Consumer Commission v Roche Vitamins Australia Pty Ltd* (2001) ATPR ¶41–809, 42,813. For example, in *Australian Competition and Consumer Commission v Pioneer Concrete (Qld) Pty Ltd* (1996) ATPR ¶41–457 the court considered the value of sales and in *Australian Competition and Consumer Commission v Tubemakers Australia Pty Ltd* (2000) ATPR ¶41–745 the court considered the overall size of the market in dollar terms and the sales of the defendant
2287 *Trade Practices Commission v CSR Ltd* (1991) 13 ATPR ¶41–076, 52,152–3.
2288 *Australian Competition & Consumer Commission v Roche Vitamins Australia Pty Ltd* (2001) ATPR ¶41–809, 42,816.

sufficient standing to sue in relation to environmental degradation or pollution.[2289] Where the penalty is used to compensate for the loss caused, and this is the emphasis in fixing the penalty, the argument for the use of civil procedure is reinforced.

Double counting

18.53 Where loss or damage is a factor in determining the size of the penalty, caution needs to be exercised if there is also capacity within the legislation to order compensation separately for loss suffered as a result of the contravening conduct. That is, there could be an element of double counting if the penalty is set to reflect the size of the loss caused and the loss is also compensated through a compensation order or otherwise through private legal actions. This is possible, for example, under s 82 or 87 of the *Trade Practices Act* 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 the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), in determining the pecuniary penalty under s 481 the court must have regard, *inter alia*, to the extent of any loss suffered. Under s 500 the court may order compensation to be paid for any loss suffered.

18.54 The issue is further complicated because private civil proceedings may be determined or even instituted after the conclusion of criminal or civil penalty proceedings with the result that when the penalty is set to reflect loss, the issue of separate compensation might not have arisen or been determined.

Legislative Guidelines

18.55 The *Environment Protection and Biodiversity Conservation Act* provides in s 481(3) a good model for legislative guidelines for determining the amount of the pecuniary penalty. These include:

> (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.

18.56 Section 76 of the *Trade Practices Act* provides similar legislative guidelines, usefully supplemented by the 'French factors', discussed further below.[2290]

2289 J Gobert, 'Controlling Corporate Criminality: Penal Sanctions and Beyond' (1998) 2 *Web JCL* .

18.57 The ALRC proposes recommending for the sake of transparency that all legislation that provides for pecuniary penalties should provide guidelines for determining the amount of the penalty.[2291] These guidelines need not be exhaustive, leaving room for the courts to use additional principles as relevant. [2292]

18.58 In the area of criminal law, there are regular calls to ensure more consistency in sentencing, or to control the exercise of judicial discretion. One model for improving consistency is 'grid sentencing', exemplified by the US Sentencing Guidelines.[2293] These set out an elaborate set of criteria, each of which is allocated points within a set range, which is ultimately translated into the applicable sentence. Offences are allocated a range of levels according to gravity, establishing the range of possible sentences. Sentences above the base level are awarded for aggravating circumstances such as the degree of loss or damage suffered by the victim, or premeditation and planning by the offender. Sentences are adjusted according to the offender's criminal history. The US Sentencing Commission regularly updates the Guidelines. Such a project requires vast resources and constant updating for penalties under criminal law, and would encounter still greater difficulties applying to the range of regulatory offences. This approach has not found favour in Australia, although election campaigns often produce extensive discussion of its merits.[2294]

18.59 Given the disparate contraventions covered in the regulatory area, an exhaustive set of guidelines is likely to require a huge amount of resources. A better approach would seem to be for each statute to have guidelines bearing in mind the purpose of the legislation, and for legislators to pay attention to parity across legislation for like contraventions.

Judicial statements

18.60 The fundamental means of guiding judicial discretion is through judicial statements in caselaw. A well-known example concerning imposition of a specific legislative penalty is the judgment of French J in *TPC v CSR*[2295] noted above. His Honour identified the purposes of the legislation as 'of a regulatory rather than penal character'[2296] and indicated that the penalties imposed for breach of these pro-

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2290 See the discussion at para 18.60.
2291 See Proposal 18–2.
2292 Question 18–5 raises issues about mitigating and aggravating factors and how they might best be considered.
2293 US Sentencing Commission, *Federal Sentencing Guideline Manual*, US Sentencing Commission, <www.ussc.gov/2001guid/tabcon01_2.htm>, 12 December 2001, discussed in A Freiberg, 'Sentencing White-Collar Criminals' (Paper presented at Fraud Prevention and Control Conference, Surfers Paradise, 24–25 August 2000), 14–15.
2294 See further discussion at para 18.117.
2295 *Trade Practices Commission v CSR Ltd* (1991) 13 ATPR ¶41–076.
2296 Ibid, 52,151.

visions do not require proof of hostile intent or measurement 'against some general community morality in which the law is embedded' since the conduct penalised would often be accepted and even admired in a different context.[2297] In identifying the purpose of the penalty, therefore:

> 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.[2298]

18.61 His Honour proceeded to articulate nine factors to be taken into account in setting penalties for contravention of the provision.[2299] Now known as the 'French factors', these have been widely used.

18.62 Despite his Honour's strong support of the deterrence model, the content of some of the factors[2300] and his use of them indicate that he did not in fact draw on this model exclusively, and issues of culpability were clearly relevant to his reasons. Subsequent discussion and caselaw has further developed the factors and the view that the purpose of penalties under the TPA includes punishment.[2301] Yeung explains the dilemma by distinguishing between the determination of whether a

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2297 Ibid, 52,152. However, Karen Yeung has argued that in practice judgments on penalties for breaches of the *Trade Practices Act* indicate a tension between the aims of deterrence and punishment, and that the model in current use appears to be a hybrid of the approaches: K Yeung, 'Quantifying Regulatory Penalties; Australian Competition Law Penalties in Perspective' (1999) 23(2) *Melbourne University Law Review* 440, 443.

2298 *Trade Practices Commission v CSR Ltd* (1991) 13 ATPR ¶41–076, 52,152.

2299 Ibid. The nine (non-exhaustive) 'French factors' are the nature and extent of the contravening conduct; the amount of loss or damage caused; the circumstances in which the conduct took place; the size of the contravening company; the degree of market power it has, as evidenced by its market share and ease of entry into the market; the deliberateness of the conduct and the period over which it extended; whether the contravention arose out of conduct of senior management or at a lower level; whether the company has a corporate culture conducive to compliance programs and disciplinary or other corrective measures in response to an acknowledged contravention; and whether the company has shown a disposition to co-operate with the authorities responsible for the enforcement of the Act in relation to the contravention. It was suggested to the ALRC that the factors apply 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': Australian Compliance Professionals Association, *Consultation*, Brisbane, 14 December 2000.

2300 For example, factors 6 ('the deliberateness of the contravention and the period over which it extended'); 7 ('whether the contravention arose out of the conduct of senior management or at a lower level'); 8 (corporate culture promoting compliance) and 9 (co-operation with the regulator in relation to the contravention).

2301 See for example *NW Frozen Foods v Australian Competition & Consumer Commission* (1996) 71 FCR 285; *Australian Competition and Consumer Commission v Safeway Stores Pty Ltd* (1997) 145 ALR 38; *Australian Competition and Consumer Commission v J McPhee & Son* (1998) ATPR ¶41–628 and see K Yeung, 'Quantifying Regulatory Penalties; Australian Competition Law Penalties in Perspective' (1999) 23(2) *Melbourne University Law Review* 440, 471–2.

breach has occurred, which includes no moral element, and determining the appropriate penalty, which includes considerations of culpability.[2302]

Guideline judgments

18.63 Several jurisdictions have introduced 'sentencing guideline judgments' to improve the process of guiding judicial discretion through common law developments.[2303] The NSW Supreme Court has used these judgments to embark upon a program of strengthening the development of common law principles by identifying problematic areas and selecting cases for which detailed judgments are given to guide later sentencing decisions.

18.64 In the first of these cases, Spigelman CJ noted that the issuing of guideline judgments is 'a logical development' of the common practice of stating principles of general application with respect to appropriate sentences.[2304] The formalisation of this process by a declaration that a judgment is to constitute a guideline is a means of ensuring that the guidance is not overlooked.[2305] The guidelines are 'a relevant indicator, much as trial judges have always regarded statutory maximum penalties as an indicator'.[2306]

18.65 Guideline judgments are sought by prosecutors on some occasions, although the request is not necessarily granted. Generally the parties to a case which will result in a guideline judgment must co-operate to some degree and undertake some extra preparation. In deciding whether to issue a guideline judgment, the court considers whether previous sentences have shown inconsistency and whether there is a pattern of systematic excessive leniency.[2307] The Supreme Court has indicated that prevalence of a crime may be taken into account in deciding to issue a guideline judgment.[2308] Chief Justice Spigelman has noted that the viability of guideline judgments on this model depends on the availability of detailed statistical

2302 K Yeung, 'Quantifying Regulatory Penalties; Australian Competition Law Penalties in Perspective' (1999) 23(2) *Melbourne University Law Review* 440, 472–3.

2303 These are used in NSW and the UK, and are under consideration in Victoria. Legislation provides for sentencing guidelines judgments to be made in WA, and the SA Supreme Court has given judgments setting 'sentencing standards' although these are not formal guidelines. See *R v Jurisic* (1998) 45 NSWLR 209, 216–7 and discussion in A Freiberg, *Sentencing Review Discussion Paper*, Attorney-General (Victoria), <www.justice.vic.gov.au>, 23 January 2002, 83–96.

2304 *R v Jurisic* (1998) 45 NSWLR 209, 217.

2305 Ibid, 220.

2306 Ibid, 221.

2307 Excessive harshness is normally remedied by the availability of appeal; appeals by the Crown against leniency face much greater difficulties. The existence of a series of successful appeals by the Crown against leniency is one indicator that sentences imposed are generally too low: ibid, 221–2, 229. See also *R v Henry* (1999) 46 NSWLR 346, 371.

2308 *R v Henry* (1999) 46 NSWLR 346, 366–7.

information on several matters, including the range of sentences imposed in practice.[2309]

18.66 The NSW Supreme Court's approach to guideline judgments has recently been examined by the High Court, which overturned the Supreme Court's judgments and guidelines issued in *Wong* and *Leung*.[2310] 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.

18.67 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 Act*, which sets out a number of factors, all of which must be taken into account by the sentencing judge.[2311] Their Honours rejected the 'two-stage approach' of determining an objective sentence that is then adjusted, in favour of 'the instinctive synthesis approach'.[2312] Their Honours expressed the view that the table of guidelines, which was not relevant to the matter actually before the Court[2313] 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'.[2314]

18.68 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, although his Honour considered this a problem that could have been overcome.[2315] 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'.[2316] It was the fact of stepping outside the limits of judicial power that made the set of 'guidelines' unacceptable.

2309 See 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. See also *R v Jurisic* (1998) 45 NSWLR 209; *R v Henry* (1999) 46 NSWLR 346; *R v Wong; R v Leung* (1999) 48 NSWLR 340.

2310 *Wong v The Queen; Leung v The Queen* (2001) 185 ALR 233.

2311 Under s 16A(2) the court must take into account a range of matters including the nature and circumstance 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; co-operation 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.

2312 *Wong v The Queen; Leung v The Queen* (2001) 185 ALR 233, para 76 (Gaudron, Gummow, Hayne JJ).

2313 Ibid, para 83 (Gaudron, Gummow, Hayne JJ).

2314 Ibid, para 80 (Gaudron, Gummow, Hayne JJ).

2315 Ibid, para 118–24 (Kirby J).

2316 Ibid, para 129.

18.69 So far, this approach has not been used for the setting of individual regulatory penalties. Arguably, the conditions giving rise to a need for guideline judgments for criminal sentences do not apply to most types of regulatory penalty. Civil penalties are normally imposed at Federal Court or Supreme Court level, and there are comparatively few in most categories. One area in which there may be scope for this form of judicial guidance is in relation to penalties for breach of certain provisions of corporations and trade practices law.[2317] These penalties are frequently agreed between parties before being presented to the court for orders. The court will not generally alter the amount of the penalty unless it is outside what the court regards as the appropriate range. Some commentators have expressed concern that the large number of penalties imposed by this means reduces the scope for courts to develop principles guiding the proper range of penalties.[2318]

18.70 As suggested in *Wong* and *Leung*, the fact that penalties for contraventions of federal law are frequently determined in state and territory courts is a likely source of inconsistency.[2319] It is possible that the dispersal of these decisions across a large number of courts could increase the difficulty of ensuring consistency in decision making.

Compliance programs

18.71 The presence of a compliance program or other system to minimise contraventions is normally treated as a mitigating factor in cases where on-going regulation is a factor. This is important in trade practices cases, and is one of the factors established by French J in *TPC v CSR*.[2320] However, the mitigating effect of a compliance program can be nullified if it is shown to be ineffective.[2321] The importance of compliance schemes in determining penalties has also been discussed in relation to broadcasting in contempt cases.[2322]

Indirect penalties

18.72 Orders such as a licence suspension or a requirement to pay the costs of the investigation act like an indirect penalty raising the issue as to whether this is a factor that should be considered when a penalty is set. See the discussion in chapter 8 on multiple penalties and chapter 13 on the costs of the investigation.

2317 The ALRC is seeking submissions on the use of guideline sentencing judgments in relation to federal civil penalties: see Question 18–6.

2318 See the discussion in chapter 7 on negotiated penalties.

2319 The effect of state and territory sentencing laws on the recovery of monetary penalties is discussed in chapter 11. See too Question 18–4.

2320 *Trade Practices Commission v CSR Ltd* (1991) 13 ATPR ¶41–076, 52,152–3.

2321 *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.

2322 See *Attorney-General (NSW) v Radio 2UE & Laws* [1998] NSWSC 28; *R v Laws* (2000) 116 ACrimR 70.

Penalties for corporations

18.73 The difficulty in devising appropriate sanctions for corporations has been discussed by numerous commentators [2323] and considered previously by the ALRC.[2324] 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 disparate nature of corporations (which vary enormously in size, purpose and financial viability) as a group.

Monetary penalties

18.74 Corporations do not have a physical body that can be imprisoned. Monetary penalties (fines or civil pecuniary penalties) are therefore the dominant form of sanction imposed for corporate regulatory offences.

18.75 The differential treatment of individuals and corporations in imposing monetary penalties is provided for either in the primary legislation[2325] or, where the primary legislation is silent, by s 4B of the *Crimes Act*, which provides that a court may 'impose a pecuniary penalty 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'.[2326]

18.76 Brent Fisse is critical of the utility of monetary penalties as sanctions for corporations. The shortcomings he identifies include that:

- monetary penalties do not necessarily lead to internal disciplinary action;
- monetary penalties do not mean that internal policies and procedures will be reviewed;
- monetary penalties suggest that there is a 'price' for prohibited conduct;
- monetary penalties may affect innocent third parties such as shareholders, employees and consumers;

2323 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.

2324 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.

2325 That is, the legislation which has been contravened. 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.

2326 *Crimes Act 1914* (Cth), s 4B(3).

- monetary penalties may exceed the ability of a corporation to pay (and have the unintended consequence of making the corporation insolvent);[2327] and

- monetary penalties may be avoided by asset-stripping. [2328]

18.77 Professor Celia Wells is also critical of the heavy reliance on monetary penalties as the only form of corporate sanction, arguing that it is a 'common misconception' indicative of the 'individualist bias in criminal justice discourse'.[2329] She is critical of the way monetary penalties have been imposed:

> With corporate defendants, however, 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.[2330]

18.78 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'.[2331] 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.[2332]

18.79 The difficulty of imposing meaningful monetary penalties on corporations has also been acknowledged by the Chairman of the ACCC, Professor Allan Fels: '[i]n fact the profits from flagrant acts of collusion often far exceed the maximum fines the courts can impose'.[2333] He advocates an extended range of penalties, including the option of imprisonment of executives.

> To deter anti-competitive conduct we need to dramatically increase the potential cost to executives who contemplate cheating other companies and the public. Nothing would be more effective than a prison sentence, even for a short period.[2334]

2327 Known as the 'deterrence or retribution trap': see generally 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.

2328 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.

2329 C Wells, *Corporations and Criminal Responsibility* (2nd ed, 2001) Oxford University Press, Oxford, 31.

2330 Ibid, 32.

2331 Ibid, 33–34.

2332 Ibid, 34.

2333 A Fels, 'Jail Would Hurt More Than Fines', *The Canberra Times*, 5 July 2001, 11.

2334 Ibid.

Tailored penalties

18.80 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 sanctions different from those imposed on individual offenders was considered in detail.[2335] The ALRC was critical of the almost exclusive reliance on monetary penalties as sanctions for corporate offenders.

18.81 In its *Sentencing* inquiry, the ALRC considered a range of non-monetary corporate sanctions and, 15 years later, it is worth reviewing the extent to which those non-monetary penalties have been adopted. The non-monetary penalties considered by the ALRC were:

- dissolution;
- disqualification from government contracts;
- equity fines (stock dilution);
- supervisory orders;
- publicity orders; and
- community service orders.[2336]

Disqualification from government contracts

18.82 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:

2335 Australian Law Reform Commission, *Sentencing: Penalties — Discussion Paper*, DP 30 (1987), Australian Law Reform Commission, Sydney. The issue was considered again by the ALRC in 1994 in relation to corporate sanctions for contraventions of the *Trade Practices Act 1974* (Cth): Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), Australian Law Reform Commission, Sydney.

2336 The last three forms of corporate sanctions were also considered by the ALRC in Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), Australian Law Reform Commission, Sydney: see para 10.5–10.21.

- qualifying to supply to government; and
- receiving designated industry assistance.[2337]

18.83 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' comply with the '*Workplace Relations Act (1996)*(Cth) and relevant Government policy on workplace relations'.[2338]

Equity fines

18.84 Equity fines, which operate through stock dilution, were first proposed by Professor John Coffee in 1981.[2339] 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.

18.85 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.[2340]

2337 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.

2338 Department of Finance & Administration, *Commonwealth Procurement Guidelines*, <www.finance.gov.au/ctc>, 10 January 2002.

2339 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.

2340 Coffee cited in C Kennedy, 'Criminal Sentences for Corporations: Alternative Fining Mechanisms' (1985) 73 *California Law Review* 443.

18.86 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![2341]

18.87 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'.[2342]

18.88 Fisse's point is important. Shareholders ultimately own and control the company and the composition of its board. Moreover, if the shareholders have ultimately benefited by the contraventions, then there is an argument that they should bear the loss caused by the penalty, and this might be a factor in causing the shareholders to insist that management comply with legislation.

18.89 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. The ALRC did not recommend the introduction of equity fines in Australia.[2343]

A modified equity fine approach: turnover fines

18.90 A similar type of fine (directed at the value and profitability of the corporation) is the turnover fine. A turnover fine is a fine determined as a percentage of the offending company's turnover for a particular period. European Union antitrust laws 'allow fines of up to 10% of the offending company's previous year's global turnover'.[2344] In the United Kingdom, financial penalties of up to a maximum of 10% of the turnover of an undertaking in 'the relevant product market and relevant geographic market affected by the infringement in the last financial year' may be

2341 J Braithwaite, 'Penalties for White-Collar Crime' (Paper presented at Complex Commercial Fraud conference, 20 August 1991).

2342 B Fisse, 'Sentencing Options against Corporations' (1990) 1(2) *Criminal Law Forum* 211, 231–232.

2343 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), Australian Law Reform Commission, Sydney, para 10.27.

2344 C Wells, *Corporations and Criminal Responsibility* (2nd ed, 2001) Oxford University Press, Oxford 34: referring to article 14(2) of Regulation (EEC) No 4064/89.

imposed for anti-competitive conduct offences.[2345] In deciding what percentage to impose, the Director General is guided by the 'twin objectives' of imposing 'penalties on infringing undertakings which reflect the seriousness of the infringement and [which] ensure that the threat of penalties will deter undertakings from engaging in anti-competitive practices'.[2346]

18.91 In the United States, the *Federal Sentencing Guidelines* specifically 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'.[2347] For individuals, fines should be from 'one to five per cent of the volume of commerce, but not less than $20,000' and for corporations, the base fine is '20 per cent of the volume of affected commerce'.[2348]

> The purpose of specifying a percent 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.[2349]

18.92 The Chairman of the ACCC, Professor Fels, has expressed support for the introduction of turnover fines in Australia.[2350]

18.93 As discussed above, a modified version of the turnover fine, drawing on the equitable principles of unjust enrichment, was imposed in *Roche Vitamins*. In this case, the ACCC and the parties put agreed penalties to the court for endorsement. Before accepting the agreed penalties, Lindgren J required the parties to make further submissions detailing the benefits received by the offenders as a result of the contraventions, what profit had been received and the extent to which prices had been inflated.

> In my opinion, the levels of penalty jointly proposed by the parties to each proceeding is [sic] not so low compared to any profit made as a result of the contravening conduct of the respondent in question that the penalty would not operate as both a general and a specific deterrent. The suggested penalty either exceeds, or is a significant percent-

2345 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, para 2.3.

2346 Ibid, para 1.8.

2347 US Sentencing Commission, *Federal Sentencing Guideline Manual*, US Sentencing Commission, <www.ussc.gov/2001guid/tabcon01_2.htm>, 12 December 2001, §2R1.1.

2348 Ibid, §2R1.1(c), (d). Statutory maximum fines of $350,000 for individuals and $10 million for corporations apply for each offence.

2349 US Sentencing Commission, *Federal Sentencing Guideline Manual*, US Sentencing Commission, <www.ussc.gov/2001guid/tabcon01_2.htm>, 12 December 2001, §2R1.1, application note 4.

2350 'Prison for Price Fixing is Fair', *The Age* (Melbourne), 11 June 2001, 2, 2; A Fels, 'Jail Would Hurt More Than Fines', *The Canberra Times*, 5 July 2001, 11.

> age of, the estimated profit figure. It is also a significant percentage even of the sales figure.[2351]

18.94 By looking at the level of profit derived from the contravening conduct, Lindgren J was attempting to impose a penalty that would deprive the offenders of the benefit obtained unlawfully.[2352] He also looked at penalties imposed by courts in the USA and Canada in relation to the overseas arrangements in deciding to accept the agreed penalties as appropriate.

18.95 The ALRC seeks submissions on the use of monetary penalties expressed as a percentage of turnover.[2353]

Supervisory or probation orders

18.96 Supervisory or probation orders were considered by the ALRC to have 'advantages in terms of achieving changes in corporate conduct or "rehabilitation"'.[2354] The types of supervisory orders considered by the ALRC were:

- internal discipline orders;
- organisational reform orders; and
- punitive injunctions.

Internal discipline orders

18.97 The use of internal disciplinary mechanisms of the corporation has been strongly advocated by Braithwaite and Fisse. Braithwaite supports enforced self-regulation as a sanction for corporate wrongdoing.[2355] 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 implemented by the corporation. Failure to report would lead to criminal sanctions 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.

2351 *Australian Competition & Consumer Commission v Roche Vitamins Australia Pty Ltd* (2001) ATPR ¶41–809, 42,815.

2352 This approach of looking at the level of profit derived echoes that of the courts in civil cases where an account is taken of profits unlawfully made.

2353 See Question 18–1.

2354 Australian Law Reform Commission, *Sentencing: Penalties — Discussion Paper*, DP 30 (1987), Australian Law Reform Commission, Sydney, para 295.

2355 See J Braithwaite, 'Enforced Self-Regulation; A New Strategy for Corporate Crime Control' (1982) 80 *Michigan Law Review* 1466.

18.98 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

18.99 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'.[2356] This type of sanction is similar to the use of enforceable undertakings that 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.[2357] Enforceable undertakings are also discussed in chapter 3.

Community service orders

18.100 Community service orders were proposed by the ALRC as 'a useful sentencing option for corporate offenders'[2358] in its *Sentencing* inquiry and again in its 1994 report, *Compliance with the Trade Practices Act 1974*.[2359] The ALRC recommended

> that the TPA be amended to provide expressly for corporate community service orders. These orders should be available at the discretion of the court and the project specified in the order should bear a reasonable relationship to the contravention.[2360]

18.101 The ALRC also recommended that corporate probation orders be introduced, noting the advantages of such sanctions as including:

- flexibility — as they can be crafted to suit the particular circumstances;
- promotion of individual accountability;
- incentive for organisational change to avoid a repetition of the offending conduct; and

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2356 Australian Law Reform Commission, *Sentencing: Penalties — Discussion Paper*, DP 30 (1987), Australian Law Reform Commission, Sydney, para 297.

2357 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.

2358 Australian Law Reform Commission, *Sentencing: Penalties — Discussion Paper*, DP 30 (1987), Australian Law Reform Commission, Sydney, para 301.

2359 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), Australian Law Reform Commission, Sydney.

2360 Ibid, para 10.17.

- avoidance of the 'deterrence or retribution' trap.[2361]

18.102 Formal organisational reform orders (probation and community service orders) were introduced as penalties into the *Trade Practices Act* in July 2001 by the *Trade Practices Amendment Act (No 1) 2001* (Cth).[2362] The new s 86C allows the ACCC to apply to the court for a 'community service order' or a 'probation order for a period of no longer than 3 years'.

18.103 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'.[2363]

> Example: The following are examples of community service orders:
>
> (a) an order requiring a person who has made false representations to make available a training video which explains advertising obligations under this Act; and
>
> (b) an order requiring a person who has engaged in misleading or deceptive conduct in relation to a product to carry out a community awareness program to address the needs of consumers when purchasing the product.[2364]

18.104 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'.[2365] Permitted probation orders include:

> (a) an order directing the person to establish a compliance program for employees or other persons involved in the person's business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to the contravening conduct, similar conduct or related conduct; and
>
> (b) an order directing the person to establish an education and training program for employees or other persons involved in the person's business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to the contravening conduct, similar conduct or related conduct; and

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2361 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.

2362 With effect from 26 July 2001. A similar provision (s 12GLA) was introduced into the *ASIC Act* (with effect from 27 September 2001) by the *Financial Services Reform (Consequential Provisions) Act 2001* (Cth). Victoria is proposing to adopt a similar provision in its Crimes (Workplace Deaths and Serious Injuries) Bill 2001 (Vic). Under s 14D the proposed penalties for corporations include the performance of specified acts or the carrying out of a specified project for the public benefit (even if unrelated to the offence). Other proposed penalties under that section include advertising the offence, the effect and the penalties and notifying shareholders by publishing a notice in the annual report.

2363 *Trade Practices Act 1974* (Cth), s 86C(4).

2364 Ibid, s 86C(4).

2365 Ibid, s 86C(4).

> (c) an order directing the person to revise the internal operations of the person's business which lead to the person engaging in the contravening conduct.[2366]

18.105 The Explanatory Memorandum to the Trade Practices Amendment Bill (No. 1) 2000 noted:

> The Trade Practices Act 1974 (the TPA) would be amended to provide the Courts with a discretion to impose probation orders (for example an order that the contravening party establish an advertising approval committee which for the period of the order, would be responsible for vetting all major advertising campaigns undertaken by the corporation), community service orders (for example an order to undertake a community education campaign that would rectify misunderstanding within the community brought about by the contravening conduct), adverse publicity orders and corrective advertising orders, where it has been established that there has been a contravention of the Act. 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.[2367]

18.106 Fisse favours corporate probation as a sanction for 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'.[2368] 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.

18.107 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.[2369]

18.108 A recent example of a community service order 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 communi-

2366 Ibid, s 86C(4).
2367 Explanatory Memorandum to the Trade Practices Amendment Bill (No 1) 2000 , 4–5.
2368 B Fisse, 'Sentencing Options against Corporations' (1990) 1(2) *Criminal Law Forum* 211.
2369 Ibid.

ties. As part of the consent order, Combined agreed to 'provide … funding for the preparation of community education material by ASIC'.[2370]

Adverse publicity

18.109 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'.[2371] The ALRC considered that 'adverse publicity can have a significant impact and deterrent effect on a corporation'.[2372]

18.110 Coffee favours adverse publicity as a corporate sanction because of the public invisibility of much corporate wrongdoing.[2373] 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.'[2374]

18.111 Formal adverse publicity orders may be made under s 86D of the *Trade Practices Act* and s 12GLB of the *Australian Securities and Investments Commission Act 2001* (Cth).[2375] Another formal use of publicity is the ability of a regulator to name non-compliant corporations in reports tabled in Parliament.[2376] Another example is 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*'.[2377] The use of informal publicity by corporate regulators is considered in detail in chapter 3.

2370 Australian Securities & Investments Commission, 'Insurance Selling in Aboriginal Community Leads to Further Court Orders', *ASIC Media Release 01/408*, 20 November 2001.

2371 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.

2372 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), Australian Law Reform Commission, Sydney, para 10.21.

2373 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.

2374 B Fisse, 'Sentencing Options against Corporations' (1990) 1(2) *Criminal Law Forum* 211, 241–2.

2375 This penalty was introduced in September 2001 by the *Financial Services Reform (Consequential Provisions) Act 2001* (Cth).

2376 *Equal Opportunity for Women in the Workplace Act 1999* (Cth), s 19.

2377 At Last, Truth in Advertising', *The Sydney Morning Herald*, 9 July 2001, 31.

Dissolution

18.112 Dissolution or deregistration of the corporation is sometimes referred to as 'corporate capital punishment'.[2378] Whilst there are advantages in having the threat of such a drastic sanction, there would be difficulties in imposing such a penalty. It may seem the ultimate form of condemnation to 'wipe out' a corporation, but there are risks that dissolution may be used as a mechanism to avoid sanctions or payment of restitution or compensation to third parties adversely affected by the corporate wrong and that 'overspill' to 'innocent third parties including shareholders, employees and consumers' would occur.[2379] The potential use of corporate insolvency to avoid payment of monetary penalties is considered in chapter 14. There is also the potential for those involved in the management of the company to start a new company, a so-called 'phoenix company'.

18.113 A variation on dissolution has been used as a penalty in the United States in respect of organisations 'operated primarily for a criminal purpose or primarily by criminal means'. In such cases, 'the fine shall be set at an amount (subject to the statutory maximum) sufficient to divest the organization of all its assets'.[2380] This has the effect of causing the corporation to be liquidated.

The need for an overall corporate penalty scheme

18.114 Since the ALRC's consideration of tailored sanctions for corporations in its *Sentencing* inquiry and the inquiry into *Compliance with the Trade Practices Act 1974*, a number of the ALRC's proposals for tailored corporate sanctions have been adopted, albeit on a piecemeal basis; however, no overall scheme of sanctions has been implemented. In 1987, the ALRC recommended that:

> A sentencing court should have available to it a wide range of sanctions which are sufficiently flexible to cope with relatively minor corporate crime as well as extremely serious corporate offences which have major social impact.[2381]

18.115 This recommendation remains relevant today.

18.116 Dr Gerald Acquaah-Gaisie also supports a more flexible approach to sanctioning corporate offenders.

2378 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.

2379 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), Australian Law Reform Commission, Sydney, para 292.

2380 US Sentencing Commission, *Federal Sentencing Guideline Manual*, US Sentencing Commission, <www.ussc.gov/2001guid/tabcon01_2.htm>, 12 December 2001, §8C1.1.

2381 Australian Law Reform Commission, *Sentencing: Penalties — Discussion Paper*, DP 30 (1987), Australian Law Reform Commission, Sydney, para 307.

> A better sentencing approach would be a combination of sanctions. Along with penalties that affect the decision-makers directly like imprisonment and fines, restitution must be given high priority. … The erring corporation must also suffer some detriment if for no other reasons than deterrence and retribution.[2382]

18.117 It may be time that a general corporate sentencing scheme was introduced to ensure consistency across the vast array of corporate regulatory offences. See Question 18–9 below.

18.118 In the United States, comprehensive guidelines for sentencing corporate defendants have been in use since 1991.[2383] The guidelines apply to the sentencing of organisations convicted of federal criminal offences, including offences relating to environmental pollution, antitrust, and taxation.[2384] The approach taken in the guidelines

> combines the threat of heavy criminal fines for law violators and the likelihood of court-supervised probation (the 'sticks'), with the opportunity for very substantial fine mitigation (and perhaps no probation) (the 'carrots') for those convicted entities who either have instituted an 'effective program to prevent and detect violations of law', or who promptly report their wrongdoing and fully cooperate with law enforcement.[2385]

18.119 The guidelines use the concept of a base fine amount subject to adjustment for aggravating and mitigating factors (the 'culpability' score).[2386] Aggravating factors include:

- managerial involvement in or tolerance of the conduct;
- prior wrongdoing;
- violation of a court order; and
- obstruction of justice.

18.120 Mitigating factors include:

- that the offence occurred despite an effective compliance program; and

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2382 G Acquaah-Gaisie, 'Enhancing Corporate Accountability in Australia' (2000) 11 *Australian Journal of Corporate Law* 146, 228.

2383 US Sentencing Commission, *Federal Sentencing Guideline Manual*, US Sentencing Commission, <www.ussc.gov/2001guid/tabcon01_2.htm>, 12 December 2001, chapter 8. The guidelines also apply to individual defendants. Their use in that context is discussed at para 18.58.

2384 Ibid, chapter 2.

2385 J Steer, 'Changing Organizational Behavior — The Federal Sentencing Guidelines Experiment Begins to Bear Fruit' (Paper presented at Twenty-Ninth Annual Conference on Value Inquiry, Tulsa, 26 April 2001), 2.

2386 US Sentencing Commission, *Federal Sentencing Guideline Manual*, US Sentencing Commission, <www.ussc.gov/2001guid/tabcon01_2.htm>, 12 December 2001, §8C2.5. This approach has been adopted by the ATO for remission of penalties: see chapter 15.

- the level of co-operation and self-reporting of the organisation.

18.121 In addition to increasing the fine payable, organisations 'who did not have an effective compliance program could be sentenced additionally to a term of probation and ordered to develop such a program during their period of court-supervised probation'.[2387] The guidelines describe an effective compliance program as having been

> reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct. Failure to prevent or detect the instant offense, by itself, does not mean that the program was not effective. The hallmark of an effective program to prevent and detect violations of the law is that the organization exercised due diligence in seeking to prevent and detect criminal conduct by its employees and other agents.[2388]

18.122 'Due diligence' is further defined as requiring that the organisation to have taken the following seven steps:[2389]

1. established compliance standards that are reasonably capable of reducing the prospect of criminal conduct;

2. assigned responsibility for compliance with the program to specific high-level personnel;

3. used care not to delegate responsibility to 'high-risk' personnel;

4. communicated the expected standards to all personnel;

5. monitored compliance with the expected standards;

6. enforced compliance through internal disciplinary mechanisms; and

7. after an offence is detected, took reasonable steps to respond to the offence and to prevent its recurrence.

18.123 These steps embody some of the concepts of enforced self-regulation and reactive corporate fault advocated by Braithwaite and Fisse.[2390]

2387 J Steer, 'Changing Organizational Behavior — The Federal Sentencing Guidelines Experiment Begins to Bear Fruit' (Paper presented at Twenty-Ninth Annual Conference on Value Inquiry, Tulsa, 26 April 2001), 6.

2388 US Sentencing Commission, *Federal Sentencing Guideline Manual*, US Sentencing Commission, <www.ussc.gov/2001guid/tabcon01_2.htm>, 12 December 2001, §8A1.2, n 3(k).

2389 Ibid, §8A1.2, n 3(k).

2390 See discussion at para 18.96-97 and in chapter 16.

18.124 In addition to fines and probation orders, the guidelines allow orders for restitution, remediation, and community service to be imposed as corporate sanctions.[2391]

18.125 As at 31 December 1999, the guidelines had been used in 1,089 cases.[2392] Whilst 'slightly more than 50 percent of the organizational defendants [had been] given mitigating credit for post-offense cooperation with authorities', only three defendants had 'been given credit for having an effective compliance program'.[2393] Explanations for this low result concerning compliance programs include that the majority of defendants sentenced were small, closely-held companies who were often unaware of compliance obligations or, having high-level managerial involvement in the offence, were unable to use a compliance program as a mitigating factor. An additional factor is that large companies are often able to negotiate for civil (rather than criminal) enforcement and reach agreement as to penalty with the regulator, in which case the guidelines do not apply.

Proposals and questions

Proposal 18-1. Where contraventions result in an offender obtaining large financial benefits, legislation should allow the court to link the form or quantum of the penalty to the financial gain as one of the alternative approaches to setting the penalty.

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?

Proposal 18-2. Legislation which provides for monetary penalties should provide guidelines or criteria for determining the amount of the penalty, such as those set out in s 76 of the *Trade Practices Act 1974* (Cth), s 481(3) of the *Environment and Biodiversity Conservation Act 1999* (Cth) and the factors outlined by French J in *Trade Practices Commission v CSR Ltd* (1991).

2391 US Sentencing Commission, *Federal Sentencing Guideline Manual*, US Sentencing Commission, <www.ussc.gov/2001guid/tabcon01_2.htm>, 12 December 2001, §8B1.1–1.3.

2392 J Steer, 'Changing Organizational Behavior — The Federal Sentencing Guidelines Experiment Begins to Bear Fruit' (Paper presented at Twenty-Ninth Annual Conference on Value Inquiry, Tulsa, 26 April 2001), 16.

2393 Ibid, 16–17.

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 provisions. Where anomalies are revealed that are not explained by their context, legislation should be amended to achieve greater consistency.

Question 18-2. 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?

Question 18-3. Is there any inconsistency or unfairness in the levels of regulatory penalties imposed? If so, does this relate to:

(a) the relative penalties applied to corporations and individuals?

(b) the level of penalties in one area of legislation relative to another?

(c) the level of penalties for one type of conduct relative to another?

(d) the levels of civil penalties generally (or particular civil penalties) relative to administrative or criminal penalties for comparable conduct?

(e) any other issues?

Question 18-4. Does any inconsistency or unfairness arise from the imposition of federal civil penalties in state and territory courts in different jurisdictions?

Question 18-5. Should a regulatory contraventions code be used to set out a general list of aggravating and mitigating factors? Or should legislation set out the aggravating and mitigating factors applicable to the penalties it imposes, either generally or in relation to specific penalties or sections of the legislation?

Question 18-6. Should the courts deliver guideline sentencing judgments in relation to federal civil penalties? If so, in what areas of law and on what basis should any such judgments be issued?

Question 18-7 Should minimum penalties be set in any circumstances? If so, should principles be established for circumstances in which minimum penalties are appropriate?

Question 18-8. Where a choice of proceedings is possible, should the maximum penalty for the criminal offence 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 non-criminal regulatory contravention where the conduct is the same or substantially the same?

Proposal 18-4. 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.

Question 18-9. Should sentencing guidelines be developed for corporate offenders to ensure that a range of tailored sanctions is generally available? These sanctions might include, but not be limited to:

(a) probation orders;

(b) community service orders; and

(c) adverse publicity orders.