Chapter 3

The investigation and prosecution of white-collar crime and corporate and financial misconduct

3.1 While the focus of this inquiry was the adequacy and consistency of penalties for white-collar crime and misconduct, a number of inquiry participants emphasised that penalties only worked to deter would-be wrongdoers where they feared being caught and held to account.

3.2 This chapter provides a brief overview of some of the challenges associated with investigating and prosecuting white-collar crime and misconduct. These challenges include the high evidentiary standards that typically apply in white-collar cases (including non-criminal proceedings); the relationship between penalties and the likelihood of detection and prosecution in deterring white-collar crime and misconduct; and reforms that might better encourage corporate compliance and cooperation with regulatory and enforcement agencies, and thereby supplement or support the role of penalties in the enforcement framework.

Evidentiary standards and white-collar offences

3.3 One issue considered in this inquiry is the high evidentiary standards which typically apply in proving white-collar offences, including in civil proceedings. Various submitters and witnesses noted that the issue of penalties needed to be considered alongside the challenges for regulatory and enforcement agencies in successfully prosecuting white-collar crime or proving an offence in non-criminal proceedings.

3.4 Professor Fiona Haines noted that one of the things that differentiates white-collar crime from street crime was that defenders often have significant resources at their disposal. These resources can allow defenders to extend litigation and drain the resources of the regulator.[1] Professor Haines submitted that 'superior legal and financial resources can be used to wear down regulatory and prosecutorial agencies and result in a settlement that falls well short of transparent and full accountability for breaches of the law'.[2] However, Professor Haines suggested that steps to lower the standard of evidence or reduce the requirement for criminal intent were problematic, in that this risked creating a body of law seen as 'quasi-criminal'.[3] While not arguing against reform, Professor Haines cautioned that reforms aimed at addressing the

1 Professor Fiona Haines, Private capacity, *Proof Committee Hansard*, 6 December 2016, p. 20.

2 Professor Fiona Haines, *Submission 8*, p. 4.

3 Professor Fiona Haines, *Submission 8*, p. 4.

imbalance of resources and securing easier convictions 'may in turn change perceptions of the law itself as something less than criminal'.[4]

3.5 Several inquiry participants explained that, despite popular misconceptions, civil cases were often as complex, resource intensive and difficult to prove as criminal cases, particularly when they involved white-collar offences. The standard of proof in civil proceedings, of course, differs from that which applies in criminal proceedings. In civil proceedings, the standard of proof imposed is usually on 'the balance of probabilities', while in criminal proceedings it is 'beyond reasonable doubt'.[5] However, as the Attorney-General's Department explained, in determining the balance of probabilities, a court will have regard to three considerations: the seriousness of the allegation; the inherent unlikelihood of its occurrence; and the gravity of its consequences.[6]

3.6 Moreover, while the standard of proof in civil cases does not change, the severity of allegations involved in the kind of civil cases typically brought by regulatory and enforcement agencies—for instance, allegations of fraud and the like—has implications for the strength of the evidence required to satisfy the 'balance of probabilities' test. The ACCC noted that in civil proceedings brought by the ACCC, the *Briginshaw* principle requires that additional rigour apply to the balance of probabilities test. In summary, the principle requires that the greater the severity of the allegation and potential consequences, the higher the standard of proof. As Justice Dixon explained in *Briganshaw v Briganshaw*:

> …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.[7]

3.7 Several submitters noted the high standard this set in pursuing civil cases involving white-collar offences. For example, ASIC noted that, while the standard of proof is lower in civil cases, the *Briginshaw* test:

> …requires that the Court, in civil cases involving serious allegations or significant adverse consequences for the defendant, reach a higher level of

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4 Professor Fiona Haines, *Submission 8*, p. 5.

5 In criminal trials, the prosecution has the burden of proving the guilt of the accused beyond reasonable doubt; in civil proceedings, the person seeking the benefit of the law bears the burden of persuading the court that it should exercise its authority. However, the Attorney-General's Department noted that in criminal cases the burden of proof is sometimes reversed where the offence carries a relatively low penalty or the burden of proof does not relate to an essential element of the offence. In civil cases, there are cases where the respondent will carry the onus of proof, or at least the burden of bringing evidence on a particular issue. Attorney-General's Department, *Submission 52*, pp. 5–6.

6 Attorney-General's Department, *Submission 52*, p. 5.

7 Australian Competition and Consumer Commission, *Submission 40*, p. 3.

> satisfaction commensurate with the seriousness of the allegations. In practice, this means that in relation to civil penalties proceedings the distinction between the 'balance of probabilities' and 'beyond reasonable doubt' standard of proof is reduced.[8]

3.8 Certainly, the evidence received by the committee suggests that a decision by ASIC or another regulatory or enforcement agency to pursue civil rather than criminal proceedings does not reflect a view that civil matters are easier to prove. ASIC explained in its submission that civil penalties were first introduced into the *Corporations Act 1993* in response to a perceived reluctance on the part of the courts to impose criminal sanctions for breaches of directors' duties. In this sense, the introduction of civil penalties provided an additional component of the 'pyramid of enforcement', whereby 'serious misconduct (such as director negligence) could be met with substantial penalties, but without the moral opprobrium of a criminal conviction or a custodial sentence'.[9]

3.9 However, ASIC also stressed that while it undertakes civil penalty proceedings 'where the evidence indicates that the defendants have engaged in serious misconduct, but where there is no evidence of the additional elements (such as dishonesty) necessary to establish a criminal offence' (consistent with the intent of the Parliament), it was wrong to assume that civil proceedings provided a 'more timely and efficient means of dealing with corporate misconduct than criminal prosecutions'. In fact, ASIC submitted that civil cases frequently require even greater time, effort and resources, and were by no means a 'quick and easy' alternative to criminal prosecutions. Civil procedures, ASIC explained, can be as complex as criminal procedures, particularly with regard to the commercially and legally complex cases that ASIC is often involved in.[10] Moreover:

> …due to the common law privilege against exposure to penalties (akin to the privilege against self-incrimination) and the courts' general concern for the rights of defendants in penalty cases, many of the procedural benefits of civil proceedings are not available to us in civil penalties cases where the defendants are natural persons (rather than corporations). For example, natural person defendants are not required to provide discovery of documents in their possession, nor provide details of the defences they propose to run at trial.[11]

3.10 Dr Vicky Comino suggested that ASIC's ability to rely on civil penalties under the Corporations Act had been compromised by the way in which the courts apply due process protections in civil penalty proceedings. This, Dr Comino argued, was despite the fact that the Parliament had mandated that:

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8 Australian Securities and Investments Commission, *Submission 49*, p. 18.

9 Australian Securities and Investments Commission, *Submission 49*, p. 17.

10 Australian Securities and Investments Commission, *Submission 49*, pp. 17–18.

11 Australian Securities and Investments Commission, *Submission 49*, p. 18.

> …the courts must apply the civil rules of evidence and procedure in civil penalty proceedings under *Corporations Act*, s 1317L, and with the benefit of the civil standard of proof (on the balance of probabilities), not the criminal standard (proof beyond a reasonable doubt).[12]

3.11 Dr Comino suggested that a solution to this situation would be provided by the Parliament introducing legislation:

> …to resolve the procedures to be adopted in civil penalty proceedings. This legislation should apply not only to all of ASIC's civil penalty proceedings, but to those of all Australian regulators that have the power to bring such proceedings, such as the ACCC, APRA and ATO.[13]

3.12 The NSW Young Lawyers Business Law Committee (NYLBLC) noted that the *Briginshaw* test meant that the 'balance of probabilities' standard in civil cases 'operates on a spectrum in its meaning and application – that is, essentially on a case-by-case basis'. Moreover, in some proceedings—such as *ASIC v Plymin, Elliott and Harrison*—ASIC has been required to effectively satisfy the standard of 'beyond reasonable doubt' when seeking to impose civil penalty orders because of the gravity of the allegations involved. The NYLBLC therefore submitted that in some civil proceedings there 'can be difficulties in ascertaining whether the standard of proof applied is closer to beyond reasonable doubt than on the balance of probabilities, unless raised by ASIC on appeal'.[14] Additionally, because ASIC is able under the Corporations Act to bring civil proceedings in State courts as well as Federal courts, and because each State court applies their relevant Evidence Act in hearing such cases, this has 'resulted in cases where different State courts have interpreted identical sections of the Corporations Act differently'.[15] The NYLBLC therefore recommended the adoption of a uniform civil code for rules of evidence and procedure in civil proceedings that would apply in State and Federal courts. This, it argued, would 'provide greater clarity, consistency, and certainty on the evidentiary standards required by the law'.[16]

3.13 Dr Overland noted that civil proceedings for insider trading were introduced in 2001 'in order to assist in overcoming perceived difficulties in prosecuting insider trading and to make it easier for ASIC to bring insider trading proceedings'. However, despite the lower standard of proof for civil proceedings, ASIC has brought very few civil proceedings for insider trading. Dr Overland suggested that the 'level of the burden of proof has perhaps not been the major obstacle to the successful prosecution of insider trading cases, but rather the existence of appropriate evidence to prove the

12 Dr Vicky Comino, *Submission 24*, p. 1.

13 Dr Vicky Comino, *Submission 24*, p. 1.

14 NSW Young Lawyers Business Law Committee, *Submission 137*, p. 4.

15 NSW Young Lawyers Business Law Committee, *Submission 137*, p. 5.

16 NSW Young Lawyers Business Law Committee, *Submission 137*, p. 2.

elements of the offence'.[17] Dr Overland noted that some have suggested a reversal of the onus of proof in insider trading cases (criminal and civil), but concluded that it would be inappropriate to do so (and thus undermine the general presumption of innocence) 'merely because particular crimes or civil breaches are difficult to prove'. A better response, Dr Overland suggested, would be an increased focus on and resourcing of insider trading investigations—which, she acknowledges, has occurred in recent years.[18]

Should criminal penalties be preferred in white-collar cases?

3.14 Some submitters argued that ASIC should favour pursuing criminal rather than non-criminal penalties in relation to white-collar crime, or at least have greater scope to pursue both criminal and non-criminal penalties in relation to a matter. For example, the ASA suggested that ASIC was constrained by legal and practical barriers that prevented it pursuing both criminal and civil penalties for the same contravention. It submitted:

> We believe that there should be sufficient scope for ASIC to pursue both criminal and non-criminal penalties in relation to a particular wrongdoing as appropriate. In this regard, we are of the view that the burden of proof for criminal proceedings is potentially too onerous and must play a role in reducing the number of actions brought under the criminal jurisdiction.[19]

3.15 The Australian Shareholders' Association (ASA), pointing to what it regarded as the general inadequacy of penalties imposed on white-collar criminals (as distinct from penalties available), also indicated a preference for criminal prosecutions:

> [O]ur view is that the actual penalties imposed for white collar crime in Australia have been too weak. Criminal penalties are rare and, in many civil cases, negotiated settlements take place which although provide greater certainty regarding the outcome, could lead to lower penalty than would otherwise have been imposed if the penalty was not pre-agreed (of course, it is still up to the court to determine that the settlement is appropriate). This is particularly concerning as the High Court recently confirmed that regulators can negotiate civil penalties and that this should be encouraged in the interests of efficiency and avoiding lengthy and complex litigation. We believe there is a need for more criminal prosecutions rather than civil or negotiated settlements.[20]

3.16 Mr Stephen Mayne (ASA) suggested that directors were relatively untroubled by the prospect of being subject to civil action:

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17 Dr Juliette Overland, *Submission 9*, p. 4.

18 Dr Juliette Overland, *Submission 9*, p. 5.

19 Australian Shareholders' Association, *Submission 34*, p. 2.

20 Australian Shareholders' Association, *Submission 34*, p. 3.

> ASIC is right where the directors want them to be. They are not really troubling them. The directors are sleeping well at night; they are not worried about what ASIC is going to do to them. They know if ASIC comes along, they are going to be able to buy peace or it will be something civil and they will be able to continue.[21]

3.17 Evidence provided by the AFP suggested that ASIC and other agencies already had sufficient flexibility to pursue either civil or criminal penalties. Asked to provide some insight into how authorities determined whether to pursue civil proceedings or criminal charges, and whether or not this decision could be reversed, the AFP advised:

> It is a decision we make at the start, as I have said, where we sit down with agencies like ASIC to say whether it is going to be a civil investigation or a criminal investigation. But if the circumstances change through the investigation on either side there is an opportunity for us to engage. It is effectively looking at the best outcome for the Commonwealth in that space.[22]

3.18 The AFP also advised that it could pursue both criminal prosecutions and civil proceedings in relation to a particular matter, with strict firewalling between the criminal process and civil process:

> We conduct criminal prosecutions under the Crimes Act but also civil proceeds of crime prosecutions at the same time. So, they cannot operate concurrently in relation to that space. And, again, I think in relation to some of the complex bribery investigations you might have a criminal investigation against individuals but an ASIC civil investigation against directors of those companies in terms of the corporate responsibility. So, there is operability between the two different avenues.[23]

3.19 While highlighting the important deterrent effect of criminal penalties in combating serious financial crime, the AFP submitted that the availability of administrative and civil penalties:

> …is equally important to address the serious harm caused by white-collar wrongdoing. Such measures are crucial in circumstances where criminal liability cannot be proven, but the conduct has resulted, or will result, in harm being caused to the community, or a profit or gain being wrongfully obtained.[24]

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21 Mr Stephen David Mayne, Director, Australian Shareholders' Association, *Proof Committee Hansard*, 6 December 2016, p. 38.

22 Mr Ian McCartney, Assistant Commissioner and National Manager, Organised Crime and Cyber, Australian Federal Police, *Proof Committee Hansard*, 6 December 2016, pp. 50–51.

23 Mr Ian McCartney, Assistant Commissioner and National Manager, Organised Crime and Cyber, Australian Federal Police, *Proof Committee Hansard*, 6 December 2016, p. 51.

24 Australian Federal Police, *Submission 54*, p. 4.

Deterrence dependent on prospects of detection and prosecution

3.20 A number of submitters argued that the deterrence effect of stronger penalties for white-collar crime and misconduct (a matter discussed in greater detail in the next chapter) is contingent on would-be wrongdoers believing there is a realistic prospect they will be caught and held to account. In this sense, these submitters argued that steps to strengthen the penalty framework needed to be considered holistically, with thought also given to ensuring regulators and prosecutors had the resources they needed to carry out their responsibilities. For example, Dr Zirnsak told the committee:

> While this inquiry is largely looking at the penalties, in our submission we also raise that for this to be effective it needs to be combined with increased resources for detecting and carrying out enforcement. Penalties alone will not act as a deterrent without greater detection. There is growing criminological research in this space, on these crime types, that is demonstrating that that is the case. We raise the concern that if there is a perception that someone will not be caught then effectively penalties will not be effective.[25]

3.21 Similarly, Professor Haines argued that the likelihood of detection was more important than the severity of the penalty in deterring offending, irrespective of the type of offending involved:

> Translating this to the work of financial regulators means that preventative and proactive forms of detection and monitoring have a greater impact, or a likely to have a greater impact, than a recourse of penalties.[26]

3.22 Professor Haines also emphasised that deterring white-collar criminals not only depended on the existence of 'criminal penalties with significant sanctions across a range of relevant regulatory regimes', but also 'demonstrated cases where prosecution in the case of egregious business practice have led to significant criminal penalties being applied'.[27]

3.23 The CDPP submitted that white-collar criminals were less likely to carefully consider the severity of potential punishments if there was a low perceived risk of detection. Emphasising the often resource-intensive nature of white-collar criminal investigations and prosecutions, the CDPP submitted that:

> …any response to white-collar crime which seeks to bring about changes in sentencing outcomes should address not just the framework for sentencing but also the front-end resources available to the investigative and

25 Dr Mark Zirnsak, Director, Justice and International Mission Unit, Uniting Church in Australia, Synod of Victoria and Tasmania, *Proof Committee Hansard*, 6 December 2016, p. 1. See The Justice and International Mission Unit of the Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission 39*, p. 1.

26 Professor Fiona Haines, Private capacity, *Proof Committee Hansard*, 6 December 2016, p. 19.

27 Professor Fiona Haines, *Submission 8*, p. 3.

> prosecution agencies which are responsible for bringing white-collar offenders before the courts.[28]

3.24 For its part the AFP explained that serious financial crime—a category that the AFP considers encompasses white-collar crime—can be difficult to investigate and prosecute. Serious financial crime, it submitted, is 'often complex, premeditated and carried out by well-educated and resourced perpetrators', who structure their crimes to evade detection and investigation. The AFP added:

> These characteristics of serious financial crime mean that investigators face significant challenges obtaining sufficient evidence to bring prosecutions. A perception that there is a low risk of being detected means that criminals are willing to take risks in committing serious financial crimes. Even if they are detected, offences may not be made out in court due to challenges associated with gathering sufficient evidence.
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> Any assessment of the efficacy of criminal penalties for serious financial crime must take into account the degree to which they are able to be enforced and the availability of effective non-criminal measures. While strong criminal penalties are important to deter and punish wrongdoing, they must be supported by sufficient powers to gather evidence and incentives to encourage whistle-blowers to come forward and companies to voluntarily self-report wrongdoing. Both incentives to encourage voluntary compliance with the law and other mechanisms to reduce the profit motivation of serious financial crime are critical to a holistic strategy to combat such crime.[29]

3.25 Professor Bagaric took the above arguments about the importance of detection and prosecution further and indeed drew a different conclusion altogether, suggesting that it was only the prospect of detection and prosecution, and not penalty settings, that served to deter white-collar crime:

> What we do know is that, when people make a prudential assessment regarding committing a crime, it is a one-step not a two-step process. The step they take is: if I commit this crime—the assault, the theft or the insider trading transaction—will I get caught? If the answer to that is that they think yes then they do not do it. They do not take the next step and think: if I do get caught, what is going to happen? You need to focus on the first step. That is what you need to do. The solution to reducing white-collar offenders is not to put more in jail; the solution is that we need to have greater enforcement and detection.[30]

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28 Commonwealth Director of Public Prosecutions, *Submission 53,* p. 5.

29 Australian Federal Police, *Submission 54*, p. 3.

30 Professor Mirko Bagaric, Professor of Law, Swinburne University of Technology *Proof Committee Hansard*, 6 December 2016, p. 21. Professor Bagaric's rejection of imprisonment as a deterrent for white-collar criminals is discussed in the next chapter.

3.26 Some submitters, such as the ASA, questioned whether ASIC currently has sufficient funding and resources to investigate cases of suspected wrongdoing and respond appropriately.[31] In particular, the ASA suggested that ASIC often seemed reluctant to pursue action through the courts.[32] In this respect, the ASA pointed to the findings of the committee's final report on the performance of ASIC. Summarising those findings, the ASA observed that while the number of completed criminal proceedings, persons convicted and jailed, and civil proceedings had steadily declined over the years, the number of banning orders and enforceable undertakings had increased. The ASA argued that enforceable undertakings often seemed insufficient given the severity of misconduct in question, and failed to hold companies properly to account for that misconduct:

> For example, UBS, BNP Paribas and Royal Bank of Scotland were fined only $1 million in conjunction with their enforceable undertakings when they were found to have influenced the swap index rate in Australia. That penalty is miniscule compared to amounts banks paid overseas in respect of similar conduct. When UBS settled charges regarding Libor, the fine was US$1.5 billion. We believe any possible deterrent effect is also significantly reduced since enforceable undertakings typically allow companies to avoid any admission of liability.[33]

Encouraging corporate cooperation and compliance

3.27 A number of inquiry participants drew a link between the efficacy of the penalty framework and measures that encouraged cooperation with regulatory and enforcement bodies. These views are summarised below.

Corporate whistleblowing framework

3.28 Several inquiry participants, in discussing the need to better detect and punish white-collar crime and misconduct, argued in favour of improving whistleblowing protections, and/or introducing rewards for whistleblowers who disclose misconduct.[34]

3.29 The committee did not consider Australia's corporate whistleblowing framework in any detail in this inquiry, and it might be noted here that the Parliamentary Joint Committee on Corporations and Financial Services (PJCCFS) is

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31 Australian Shareholders' Association, *Submission 34*, p. 5.

32 Australian Shareholders' Association, *Submission 34*, p. 6.

33 Australian Shareholders' Association, *Submission 34*, p. 6.

34 Dr Mark Zirnsak, Director, Justice and International Mission Unit, Uniting Church in Australia, Synod of Victoria and Tasmania, *Proof Committee Hansard*, 6 December 2016, p. 1; The Justice and International Mission Unit of the Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission 39*, p. 4; Australian Competition and Consumer Commission, *Submission 40*, p. 9; HNAB Action Group, *Submission 41*, p. 9; Ms Merilyn Swan, *Submission 50*, p. 9; LF Economics, *Submission 63*, p. 42.

currently undertaking an inquiry into whistleblowing protections.[35] In addition, in December 2016, the Minister for Revenue and Financial Services released a 'Review of tax and corporate whistleblower protections in Australia' paper for public consultation, and indicated that the results of this consultation will be provided to the PJCCFS for consideration as part of its inquiry.[36] The committee also notes that it released its own discussion paper on Australia's corporate whistleblowing framework in 2016.[37]

Deferred prosecution agreements

3.30 Several inquiry participants discussed the possibility of introducing deferred prosecution agreements (DPAs) as a means of encouraging actors in the corporate sector to come forward and disclose misconduct to regulators and enforcement agencies. A DPA, as the Attorney-General's Department has explained, is:

> …a voluntary, negotiated settlement between a prosecutor and a defendant.
>
> Under a DPA scheme, where a company has engaged in a serious corporate crime, prosecutors would have the option to invite the company to negotiate an agreement, in return for which the prosecution would be deferred. The terms of the DPA would typically require the company to cooperate with any investigation, pay a financial penalty and implement a program to improve future compliance.
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> In exchange, the company can have the matter resolved without criminal conviction with any fine imposed reflecting the company's cooperation. Upon fulfilment of the terms of the DPA, the prosecution would be discontinued.[38]

3.31 The Attorney-General's Department advised the committee that both the United States and the United Kingdom have DPA schemes which apply to corporate crime. It submitted that an Australian DPA scheme for serious corporate crime:

> …may improve agencies' ability to detect and pursue crimes committed by companies and help to compensate victims of corporate crime. It may help avoid lengthy and costly investigations and prosecutions, and provide greater certainty for companies seeking to report and resolve corporate

35 Parliamentary Joint Committee on Corporations and Financial Services, webpage, 'Inquiry into whistleblower protections in the corporate, public and not-for-profit sectors', http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections, accessed 16 March 2017.

36 The Hon Kelly O'Dwyer MP, Minister for Revenue and Financial Services, media release, 'Consultation on whistleblower protections', 20 December 2016.

37 Senate Economics References Committee, issues paper, 'Corporate whistleblowing in Australia: ending corporate Australia's cultures of silence', 21 April 2016.

38 Attorney-General's Department, webpage, 'Deferred prosecution agreements – public consultation', https://www.ag.gov.au/Consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx, accessed 16 March 2017.

> misconduct. It would be compatible with the Government's policy to tackle crime and ensure that Australian communities are strong and prosperous.[39]

3.32 The AFP told the committee that it supported the introduction a DPA scheme, as it would encourage actors in the corporate sector to 'come forward at an early juncture to work with agencies such as the AFP to disclose more of the criminality that is actually out there'.[40]

3.33 The AFP highlighted the intrinsic difficulties in obtaining sufficient information and evidence in white-collar crime cases about the commission of an offence. The AFP noted, for example, that an offence may be subject to a 'cover up', particularly 'where it is committed in a corporate context in the absence of a strong compliance culture'. Moreover, external witnesses and evidence may be difficult to obtain, 'especially where persons may have been involved in the commission of an offence or located in other jurisdictions'. The AFP submitted:

> In light of the difficulties involved in prosecuting white-collar criminal offences, jurisdictions such as the United States and United Kingdom have developed the use of deferred prosecution agreements (DPAs) as an additional approach to traditional prosecution. DPAs provide an incentive to corporate offenders to self-report wrongdoing, and as a part of the agreement, to improve their internal compliance systems. Although DPAs may allow offenders to avoid conviction if their terms are met, their terms often include the payment of a financial penalty, as well as requiring the company to incur further costs to improve their compliance systems. Offenders may also be required to make restitution to the victims of the crime.[41]

3.34 The AFP noted that, at present, Australian companies that are willing to cooperate with investigations may still face charges irrespective of their ongoing cooperation—indeed, two companies involved in investigations into foreign bribery were, at the time of the AFP's submission, in exactly this position. The AFP noted that this situation 'limits the incentives for companies to self-report serious financial crime matters and strengthen their compliance systems'.[42] Noting that the AGD had released a public consultation paper on DPAs in Australia, the AFP added:

> The use of deferred prosecution schemes in overseas jurisdictions is an example of how additional measures can bolster the deterrent effect of strong criminal penalties by encouraging corporate compliance and cooperation. At the same time, it is important that individual measures to incentivise compliance are not perceived to be panaceas for combating serious financial crime including white-collar crime. Ultimately, these

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39 Attorney-General's Department, *Submission 52*, pp. 12–13.

40 Mr Ian McCartney, Assistant Commissioner and National Manager, Organised Crime and Cyber, Australian Federal Police, *Proof Committee Hansard*, 6 December 2016, p. 44.

41 Australian Federal Police, *Submission 54*, p. 11.

42 Australian Federal Police, *Submission 54*, p. 11.

> measures target the majority of persons who can be persuaded to voluntarily comply with the law. They complement the criminal investigation and prosecution of offences, which serves to reassure those who choose to comply that they are not disadvantaged because of their compliance and warn those who are inclined not to comply as to the consequences of non-compliance.[43]

3.35 Mr Golding told the committee that the Law Council of Australia supported the introduction of DPAs in Australia, not just with respect to white-collar crime and corporate misconduct, but in the criminal law generally.[44] Mr Golding advised:

> The deferred prosecution system has been used for many years in the United States. The argument is that it reduces the cost of administration of justice by allowing a corporation to enter an effective guilty plea and avoid a prosecution being pursued. Critics of deferred prosecution agreements say that, particularly out of the GFC, large corporations just enter into these sorts of arrangements as a cost of doing business.
>
> That is a valid concern. However, we think that the advantages of allowing that as a route to resolution of a prosecution is in the interests of justice generally. We note that the UK, similarly, undertook a review of deferred prosecution agreements, introduced some two years, and there have now been two deferred prosecution agreements handed in to the UK in the last 12 months, in the area of foreign bribery, and we believe that it has been a very important addition to the regulatory arsenal in the UK.[45]

3.36 The Australian Government is currently actively considering the possibility of introducing a DPA scheme for serious corporate crime. In March 2016, the Minister for Justice released a public consultation paper on the matter.[46] The Attorney-General's Department advised the committee that, as of December 2016, consideration of the matter was still ongoing, but a majority of written submissions received in response to the issues paper had been in favour of a scheme.[47]

3.37 The Attorney-General's Department also advised the committee that a draft Open Government National Action Plan, which the government released for public comment on 31 October 2016, discussed the possibility of a DPA scheme (along with

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43 Australian Federal Police, *Submission 54*, p. 12.

44 Mr Greg Golding, Chair, Foreign Corrupt Practices Working Group, Business Law Section, Law Council of Australia, *Proof Committee Hansard*, 6 December 2016, p. 15.

45 Mr Greg Golding, Chair, Foreign Corrupt Practices Working Group, Business Law Section, Law Council of Australia, *Proof Committee Hansard*, 6 December 2016, p. 15.

46 Ms Kelly Williams, Assistant Secretary, Criminal Law Enforcement Branch, Attorney-General's Department, *Proof Committee Hansard*, 6 December 2016, p. 45. See Attorney-General's Department, webpage, 'Deferred prosecution agreements – public consultation', https://www.ag.gov.au/Consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx, accessed 9 March 2017.

47 Ms Kelly Williams, Assistant Secretary, Criminal Law Enforcement Branch, Attorney-General's Department, *Proof Committee Hansard*, 6 December 2016, p. 46.

other measures relevant to white-collar crime).[48] A February 2017 update on the Open Government National Action Plan noted that the Attorney-General's Department is currently finalising a second consultation paper on a possible DPA scheme, and it is expected this paper will be released in the near future.[49]

Corporate culture and accountability

3.38 Some inquiry participants pointed to the need to foster corporate cultures better focused on compliance, while at the same time holding senior officers within corporations accountable for compliance failures that enabled or facilitated white-collar crime and misconduct.

3.39 Dr Zirnask, appearing on behalf of the Uniting Church (JIMU), explained that there was a strong correlation between a corporation's culture and the incidence of corrupt conduct within that corporation:

> My experience with companies would be that, I think, there is a growing awareness among corporations that the culture they set will often determine the level of criminal activity that might take place within them. I heard a very useful, recent quote, which was: 'A corrupt environment is not one where people carry out corruption, but is one where the majority fear reporting corruption,'—or in this case white-collar crime— 'when they detect it.' That actually creates that enabling environment for people to carry out this. Good companies are increasingly understanding that they need to create environments where individuals cannot carry that out. There is a difference, clearly, between where a corporation has had an employee that has engaged in criminal activity against all the systems that the company has put in place versus a company that, effectively, has given a wink and a nod to the kind of criminal activity the person might be carrying out. I think they are very different cultures and need to be dealt with in very different ways.[50]

3.40 Dr Zirnsak also told the committee that it was important to hold senior officers within a corporation accountable when criminal activity occurred because of a failure to create a culture of compliance. If a corporation, he submitted, had:

> …created an environment in which criminal activity has been able to flourish or people have felt pressure to have to engage in white-collar crime

48 Ms Kelly Williams, Assistant Secretary, Criminal Law Enforcement Branch, Attorney-General's Department, *Proof Committee Hansard*, 6 December 2016, pp. 43–44.

49 Department of the Prime Minister and Cabinet, webpage, 'Update on Public Consultation Activities', http://ogpau.pmc.gov.au/2017/02/22/update-public-consultation-activities, accessed 8 March 2017.

50 Dr Mark Zirnsak, Director, Justice and International Mission Unit, Uniting Church in Australia, Synod of Victoria and Tasmania, *Proof Committee Hansard*, 6 December 2016, p. 3.

> in order to do their jobs, then I think management needs to be held to account for that'.[51]

3.41 The Uniting Church (JIMU) made a similar point in its written submission. It argued that it was important that individuals were held accountable for financial misconduct or white-collar crime, 'and are not able to hide behind corporate entities to escape such accountability'.[52]

3.42 Similarly, the ACCC made the point that 'one of the most effective ways to combat corporate misconduct is to hold the individuals who perpetrated the wrongdoing, either individually or on behalf of the company, responsible and accountable'. The ACCC noted that this view was widely accepted internationally.[53]

3.43 The HNAB-AG submitted that while individuals who engage directly in white-collar crime needed to be held accountable, it was equally the case that:

> …their superiors, as part of the employing entity, are responsible for enabling which collar crime by way of lack of measures to provide simply, informed consent (not hidden in pages of legalese, technicalities and small print) or to implement protocols to ensure these are followed.[54]

3.44 As the AFP explained in its submission, Part 2.5 of the Criminal Code provides that a body corporate may be found guilty of any offence, including one punishable by imprisonment, and that the Code applies to bodies corporate in the same way as it applies to individuals. The AFP further explains that this means 'serious financial crime offences in the Code, such as those relating to bribery, fraud and money laundering, are all equally applicable to bodies corporate as well as individuals'.[55] In this regard, it notes that the Criminal Code includes 'corporate culture' provisions in subsection 12.3(6) of the Criminal Code which appear to allow criminal liability to be attributed to a corporation without a finding of fault in relation to an individual'.[56]

3.45 However, the AFP noted the difficulties in gathering evidence to prove an offence under the 'corporate culture' provisions:

> Notwithstanding the breadth of the definition of 'corporate culture' in subsection 12.3(6) of the Criminal Code, investigators nonetheless face difficulties in gathering evidence to prove a corporate culture that

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51 Dr Mark Zirnsak, Director, Justice and International Mission Unit, Uniting Church in Australia, Synod of Victoria and Tasmania, *Proof Committee Hansard*, 6 December 2016, p. 5.

52 The Justice and International Mission Unit of the Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission 39*, p. 12.

53 Australian Competition and Consumer Commission, *Submission 40*, p. 8.

54 HNAB Action Group, *Submission 41*, p. 5.

55 Australian Federal Police, *Submission 54*, p. 8.

56 Australian Federal Police, *Submission 54*, p. 8.

> authorised or permitted the commission of an offence, or that a body corporate failed to create and maintain a corporate culture that required compliance. This is especially the case where a body corporate has in place formal policies that despite being compliant with the law, are not intended to be taken seriously. Proving a non-compliant corporate culture in such circumstances is often difficult for the same reasons it is difficult to attribute intention, knowledge or ulterior intention to an individual: people take great care to avoid incrimination. Additionally, potential whistle-blowers face a range of challenges and disincentives.
>
> The effectiveness of penalties in deterring serious financial crime, including white-collar crime, is highly dependent on the ability to investigate and prosecute bodies corporate as appropriate. To date, there have not been any successful prosecutions under the corporate criminal responsibility provisions of the Criminal Code, where a body corporate has pleaded not guilty.[57]

3.46 The AFP drew attention to what it regarded as a currently 'inadequate provision for criminal liability' in the Criminal Code for 'ringleaders' in serious and organised crime syndicates:

> Although such persons can be prosecuted on the basis of accessorial liability (aiding, abetting, counselling or procuring the commission of an offence), these forms of liability imply that the offender was not as culpable as the person who committed the main offence. In fact, such persons should be considered more culpable, due to their leadership roles and conduct which is often deliberately calculated to distance themselves from the commission of the main offence.[58]

3.47 The AFP recommended amending the Criminal Code to include 'knowingly concerned' as an additional form of secondary criminal liability would help to facilitate prosecution of serious financial crime offences. It explained:

> The concept of 'knowingly concerned' was included in the Crimes Act 1914 when it was first enacted and thus has a long history in Australian law. As noted by the Commonwealth Director of Public Prosecutions, it required proof that a person had intentionally concerned themselves with the essential elements or facts of a criminal offence; mere knowledge of the offence was insufficient. It more accurately reflects the nature of organised crime, and is simpler to apply than the archaic formulation of 'aid, abet, counsel or procure'.
>
> The Government introduced legislative amendments to amend the Criminal Code to include 'knowingly concerned' as a form of derivative liability through the Crimes Legislation Amendment (Powers, Offences and Other

57 Australian Federal Police, *Submission 54*, p. 8.

58 Australian Federal Police, *Submission 54*, pp. 8–9.

Measures) Bill 2015. However, the schedule of the Bill including these amendments was defeated in the Senate.[59]

Committee view

3.48 The committee notes that some inquiry participants, including the Australian Shareholders' Association, are concerned that ASIC was too quick to pursue civil proceedings rather than criminal prosecutions. The committee is, however, satisfied that ASIC and other enforcement agencies have sufficient flexibility to pursue both criminal and non-criminal actions, and is not convinced that civil proceedings constitute a 'weak' or 'second-best' alternative to criminal prosecution. On the contrary, the committee agrees with the point made by the AFP that the availability of administrative and civil penalties are as important as criminal penalties in combating white-collar wrongdoing, and of particular importance where criminal liability cannot be proven.

3.49 The committee also notes concerns about the difficulty of proving white-collar offences, including in civil penalty proceedings. The committee is inclined to agree with the view that just because particular crimes or civil offences are difficult to prove, this does not mean evidentiary standards should be lowered. However, the committee notes that in some civil proceedings commenced by ASIC and other regulatory authorities there is a lack of clarity as to the standard of proof that must be satisfied—or, more specifically, the meaning and application of the 'balance of probabilities' standard—and the rules of procedure that apply. In this regard, the committee notes that some inquiry participants have recommended reform to clarify the evidentiary standards and procedures that apply in civil penalty proceedings.

3.50 Evidence received in this inquiry underlines the need to reform Australia's corporate whistleblowing framework, and also points to the potential value of the introduction of a DPA scheme in tackling serious corporate crime and misconduct. The committee notes and welcomes the fact that both matters are being pursued in other forums.

3.51 The committee notes the AFP's concerns regarding the inadequate provision for criminal liability in the Criminal Code for 'ringleaders' in serious and organised crime syndicates, including syndicates engaged in serious financial crime. While this matter was not considered at any length in this inquiry, the committee would encourage the government to engage with the AFP in considering steps to strengthen these provisions for criminal liability in such cases.

Recommendation 1

3.52 The committee recommends that the government consider reforms to provide greater clarity regarding the evidentiary standards and rules of procedure that apply in civil penalty proceedings involving white-collar offences.

59 Australian Federal Police, *Submission 54*, p. 9.