The Senate

Economics References Committee

‘Lifting the fear and suppressing the greed’: Penalties for white-collar crime and corporate and financial misconduct in Australia

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Senate Economics References Committee

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The committee recommends that the Australian Securities and Investments Commission consider ways in which the accessibility and usability of the banned and disqualified register might be enhanced, in order to create greater transparency regarding banning and disqualification orders.

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The committee recommends that the government consider making infringement notices available to the Australian Securities and Investments Commission to respond to breaches of the financial services and managed investments provisions of the Corporations Act.

Recommendation 4 **paragraph 6.55**

The committee recommends that the government amend the Corporations Act 2001 to increase the current level of civil penalties, both for individuals and bodies corporate, and that in doing so it should have regard to non-criminal penalty settings for similar offences in other jurisdictions.

Recommendation 5 **paragraph 6.56**

The committee recommends that the government provide for civil penalties in respect of white-collar offences to be set as a multiple of the benefit gained or loss avoided.

Recommendation 6 **paragraph 6.57**

The committee recommends that the government introduce disgorgement powers for the Australian Securities and Investments Commission in relation to non-criminal matters.

Chapter 1

Introduction and Overview

1.1 On 25 November 2015, the Senate referred the matter of inconsistencies and inadequacies of current criminal, civil and administrative penalties for corporate and financial misconduct or white-collar crime to the Economics References Committee for inquiry and report.[1]

1.2 The terms of reference are as follows:

(a) evidentiary standards across various acts and instruments;

(b) the use and duration of custodial sentences;

(c) the use and duration of banning orders;

(d) the value of fine and other monetary penalties, particularly in proportion to the amount of wrongful gains;

(e) the availability and use of mechanisms to recover wrongful gains;

(f) penalties used in other countries, particularly members of the Organisation for Economic Co-operation and Development [OECD]; and

(g) any other relevant matters.

1.3 This chapter provides an overview of the policy context of the inquiry, including a summary of recent inquiries and reports that address the issue of penalties for white-collar crime and corporate and financial misconduct.[2]

Submissions and public hearings

1.4 The committee received 139 submissions, including 5 confidential submissions.

1.5 The committee held a public hearing in Melbourne on 6 December 2016.

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1 At the dissolution of the Senate and the House of Representatives on 9 May 2016 for a general election on 2 July 2016, the parliamentary committees of the 44th Parliament ceased to exist, and ongoing inquiries automatically lapsed. On 11 October 2016, the Senate agreed to the committee's recommendation that this inquiry be re-adopted in the 45th Parliament.

2 For the most part, this report uses the phrase 'white-collar crime and misconduct'. It might be noted that the financial and corporate misconduct captured by this phrase is not always criminal in nature. Where the report is referring specifically to criminal offences or non-criminal offences this is made clear.

Defining 'white-collar crime' and 'corporate and financial misconduct'

1.6 A number of submissions addressed or sought to clarify the meaning of the terms 'white-collar crime' and 'corporate and financial misconduct'.

1.7 As the Institute of Public Affairs (IPA) noted in its submission, when the term 'white-collar crime' first entered usage in the mid-twentieth century it generally referred to crimes committed by persons of high social status in the course of their employment. More recently, however, the term has evolved to encompass the specific nature of those crimes, rather than focussing on the social status or position of the offender.[3]

1.8 In their joint submission, Professor Michael Adams, Dr Tom Hickie and Mr Ian Lloyd QC, suggested that while the meaning of the term 'white-collar crime' is debated, in simple terms it captures offences such as:

> …fraud, bribery, tax evasion, and multiple regulatory offences involving corporate entities. Inevitably, these offences are non-violent and, in the main, committed by educated and/or [those] who can be described as 'well off' individuals or corporations.
>
> Similarly, the motive for the commission of these crimes is to obtain money or property or avoiding the payment of money or debts. Thus, generally, the aim is to obtain some form of financial advantage.[4]

1.9 While social status is no longer the main criterion for determining whether an offence can rightly be categorised as 'white-collar crime', the individual's relationship to the victim remains a defining feature of the white-collar criminal. That is, a white-collar criminal is generally acting from a position of trust and authority, and from inside a business or organisation. For example, the Attorney-General's Department advised that it understood the terms 'corporate and financial misconduct' and 'white-collar crime' to:

> …encompass illegal or unethical acts that violate fiduciary responsibility or public trust. These acts may be committed by an individual or organisation and are usually committed during the course of legitimate occupational activity for personal or organisational gain.[5]

1.10 The Australian Federal Police (AFP) defined 'white-collar crime' as a form of serious financial crime (while noting that the AFP does not itself distinguish 'white-collar crime' from financial crime generally). It explained:

> The term 'white-collar crime' generally refers to financially-motivated, non-violent crime and can cover a broad range of criminal conduct. Criminal conduct may occur in the course of the perpetrator's business or profession.

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3 Institute of Public Affairs, *Submission 33*, p. 2.

4 Professor Michael Adams, Dr Tom Hickie and Mr Ian Lloyd QC, *Submission 5*, p. 1.

5 Attorney-General's Department, *Submission 52*, p. 1.

> In some cases, perpetrators exploit their social status or that of the business or profession with which they are associated, for example, corporate fraud or corruption. Other offences involve criminal conduct benefitting a business directly, for example bribery of a foreign official to obtain a business advantage, or indirectly, by profiting from the proceeds of crime, such as through money laundering.[6]

1.11 Some inquiry participants objected to the idea of treating white-collar criminals as a distinct class of criminal. For example, the IPA voiced broad concerns about the concept of 'white-collar crime', and the related instinct to treat white-collar criminals as distinct from other non-violent criminals. To do so, the IPA argued, tended to undermine the concept of equality before the law 'by singling out a special class of offenders for different treatment'.[7] Asked whether it was right to group white-collar crime together with social security fraud (particularly given the latter type of offence was often undertaken by people in relatively desperate situations), the IPA advised:

> I think the problem here is that defining a white-collar crime is actually really difficult. And that probably goes back to the origin of the term, which is rooted in a very particular political view point. The man who invented the term was a guy named Edwin Sutherland, who was a criminologist. It was his contention that rich people, if you like, committed crime at the same rate as anyone else but they were able to avoid conviction. So this idea of greed versus need is already conflated in this topic, because there is no clear [way] to delineate what a white-collar crime is. We are actually happy to talk about social security fraud and white-collar crime and other kinds of things as fraud, as theft, in their general categories, rather than trying to ring-fence them as white-collar crime and imply that that requires some sort of special attention.[8]

1.12 While the term 'white-collar crime' remains contested,[9] a useful definition is financially motivated non-violent crimes committed by businesses or individuals acting from a position of trust and authority. This basic definition is used in this report. Common examples of white-collar crime include fraud, bribery, insider trading, embezzlement, money laundering, forgery, cybercrime, identity theft and Ponzi schemes (although these offences do not always fit neatly into the 'white-collar crime' category).

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6 Australian Federal Police, *Submission 54*, p. 6.

7 Mr Andrew Bushnell, Research Fellow, Institute of Public Affairs, *Proof Committee Hansard*, 6 December 2016, p. 8.

8 Mr Andrew Bushnell, Research Fellow, Institute of Public Affairs, *Proof Committee Hansard*, 6 December 2016, p. 11.

9 Gilbert Geis, 'White-collar crime: what is it?' *Current Issues in Criminal Justice* 3 (1991), p. 10.

Is Australia a 'paradise' for white-collar crime?

1.13 The apparent prevalence of white-collar crime and misconduct in Australia, and a series of high-profile scandals in recent years in the corporate sector, has increased attention on the adequacy and consistency of the relevant criminal, civil and administrative penalties.

1.14 The Attorney-General's Department provided the following information on the incidence of white-collar crime in Australia:

> According to PwC's 2014 Global Economic Crime Survey, 57 per cent of surveyed Australian organisations had experienced white collar crime in the past two years, with more than a third of organisations losing more than $1 million.
>
> There has also been over $1.2 billion in reported fraud against the Commonwealth from 2010–14 stemming from 391,831 incidents. The actual cost of fraud, however, is likely to be much greater as this figure does not include undetected, unquantified or unreported incidents.[10]

1.15 The Attorney-General's Department further noted that as at 30 June 2015, the AFP had 114 fraud-related matters on hand with an estimated total value of $1.6 billion.[11] The AFP, meanwhile, advised the committee that serious and organised crime costs the Australian economy $36 billion per year, of which organised fraud comprises $6.3 billion.[12]

1.16 Dr Mark Zirnsak, the Director of the Uniting Church's Justice and International Mission Unit (hereafter 'Uniting Church (JIMU)'), advised that the levels of misconduct in the corporate world were likely higher than was publicly reported. Dr Zirnsak explained that many firms preferred to address instances of fraud or other misconduct internally, thus avoiding reputational damage:

> We would be concerned about the levels that are there, and in private conversation with corporate firms that investigate fraud they seem to indicate there are very high levels of fraud that take place in Australia, most of which goes unreported. So, often, companies are embarrassed by frauds and therefore do not take action against them. That is of concern because it would add to that broader perception that you will not get detected and you will not get caught, and it helps exacerbate crime.[13]

1.17 However, Dr Zirnsak also acknowledged that it was difficult to gauge if the incidence of white-collar crime was on the increase:

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10 Attorney-General's Department, *Submission 52*, p. 1.

11 Attorney-General's Department, *Submission 52*, p. 1.

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

13 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. 2.

> Often with criminal activity, it is very hard because you cannot go out and survey people, 'How many frauds did you commit this year?' You cannot get accurate statistics. Often, greater reporting does not necessarily mean that there is more; it simply means more has been detected. That is always the challenge about knowing what was the base level of white-collar crime that was taking place before this.[14]

1.18 While quantifying the costs of white-collar crime and misconduct is difficult, various regulators and other experts have voiced concern about its prevalence in Australia. For example, Australian Securities and Investments Commission (ASIC) Chairman, Mr Greg Medcraft, gave voice to concerns about the prevalence of white-collar crime and the adequacy of current penalties when, in an October 2014 'Q&A' with a business audience, he seemed to suggest Australia was a 'paradise' for white-collar criminals. Mr Medcraft further observed the need to 'lift the fear and supress the greed' in order to deter white-collar criminals, and suggested the threat of going to jail could help achieve this (a subject discussed in detail in chapter 4). Mr Medcraft also highlighted what he viewed as insufficient civil penalties for white-collar offences:

> The penalties, particularly civil penalties, in Australia for white-collar offences are basically not strong enough, not tough enough. All you're doing is giving them a slap on the wrist [and] that is not deterring people.[15]

1.19 In a subsequent appearance at Senate Estimates, Mr Medcraft sought to clarify his apparent characterisation of Australia as a paradise for white-collar crime, while reiterating his broader point about the need for stronger penalties:

> [T]he point I was making was not that we are a paradise, but we need to be careful that we are not seen as a haven and, therefore, regarding the issue we have raised previously about corporate penalties and which the Senate inquiry[16] has actually recommended, we need to make sure that our penalties are consistent with the rest of the world. That is the point I have made on a number of occasions about making sure that we are consistent in terms of our penalty regime.[17]

1.20 Mr Medcraft has made similar points about the inadequacy of current penalties on other occasions and in various forums. For example, appearing before the Senate Economics References Committee during its inquiry into the performance of ASIC, Mr Medcraft advised that the 'inadequacy of penalties' constituted a barrier to ASIC taking strong action against wrongdoers and thereby sending a message that

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14 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.

15 Sue Mitchell, 'Australia "paradise" for white-collar criminals, says ASIC chairman Greg Medcraft', *Sydney Morning Herald*, 21 October 2014.

16 Mr Medcraft was referring the Senate Economics References Committee's 2013–14 inquiry into the performance of ASIC, which is discussed later in this chapter.

17 Mr Greg Medcraft, Chairman, Australian Securities and Investments Commission, *Senate Economics Legislation Committee Estimates Hansard*, 22 October 2014, p. 69.

might shape future behaviour. Mr Medcraft submitted that the inadequacies of the current penalty regime included:

> …the fact that some comparable criminal offences attract inconsistent penalties and that civil penalties are currently set too low and they are not available for a sufficiently wide range of offences.[18]

1.21 ASIC's views on the overall adequacy of current penalties for white-collar crime and misconduct, and the views of other participants in the inquiry in this respect, are discussed in the next chapter.

Impacts of white-collar crime and corporate and financial misconduct

1.22 A clear message to the committee from inquiry participants was that white-collar crime and misconduct can cause serious harms, both at the individual level and in the community as a whole.

1.23 The committee received a large number of submissions from individuals relaying their own experiences with white-collar crime and misconduct. These submissions primarily related to 'predatory' or irresponsible lending, Loan Application Form fraud, and other disputes with banks and financial institutions regarding lending practices. Other submissions related to inappropriate or fraudulent financial advice or similar matters. A unifying theme in these submissions was that white-collar crime and misconduct can have a profound, and in some cases devastating, impact on the lives of individuals.

1.24 The HNAB Action Group (a group formed by clients who received financial advice from Mr Peter Holt or his associates) submitted that the victims of white-collar crime not only suffer financially, but also experience immeasurable damage to their well-being, health, family and social life and careers.[19] It submitted:

> Innocent people have been forced to sell their home, had their life-savings and/or superannuation effectively stolen, retirement rendered impossible or the quality of it radically reduced including ending up in poverty. People have been forced into bankruptcy or insolvency arrangements.
>
> Beyond the devastating financial ramifications, from which many will never recover, the personal life-altering toll is inestimable and deeply traumatic. The toxic tentacles extend to marriages / relationships, children, elderly parents, friendships, social-life, work and career and include severe physical, emotional and mental health impacts extending to suicidality.
>
> The protracted nature over many years of trying to extract from the ordeal, on top of next to no accountability required of the culprits, far less avenues

18 Mr Greg Medcraft, Chairman, Australian Securities and Investments Commission, *Committee Hansard,* 19 February 2014, p. 2.

19 HNAB Action Group, *Submission 41*, p. 15.

> for justice and restitution, exacerbate the intense and profound trauma experienced by the victims.[20]

1.25 The AFP also emphasised the costs of white-collar crime on both individual victims and on society as a whole:

> Serious financial crimes including white-collar crimes are not, contrary to some perceptions, 'victimless' crimes. They have a real and significant impact on individuals and society as a whole even when there are no complainants coming forward to report their losses or harm suffered. Such crimes can facilitate or hide the commission of other serious criminal activity, including organised crime and terrorism, deprive people and communities of valuable resources and assets, and distort the legitimate economy.[21]

1.26 Some inquiry participants, such as Professor Fiona Haines, also noted the damage white-collar crime and misconduct can cause in terms of market integrity. For instance, with regard to insider trading, people may choose not to invest because they believe that only insiders are in a position to benefit.[22]

Recent inquiries and reports regarding the penalties issue

The committee's inquiry into the performance of ASIC

1.27 The committee's inquiry into the performance of ASIC, which commenced in June 2013 and reported in June 2014, included a consideration of the adequacy of existing penalties for financial or corporate misconduct. In particular, the report considered potential inadequacies in the penalties currently available for contraventions of the legislation ASIC administers.

1.28 In its final report, the committee emphasised the importance of appropriate penalties in supporting ASIC's work, and concluded that there was a need for a review in this regard. The committee expressed the view that it is:

> …important that the penalties contained in legislation provide both an effective deterrent to misconduct as well as an adequate punishment, particularly if the misconduct can result in widespread harm. Insufficient penalties undermine the regulator's ability to do its job: inadequately low penalties do not encourage compliance and they do not make regulated entities take threats of enforcement action seriously. The committee considers that a compelling case has been made for the penalties currently available for contraventions of the legislation ASIC administers to be

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20 HNAB Action Group, *Submission 41*, p. 6.

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

22 Professor Fiona Haines, Private capacity, *Proof Committee Hansard*, 6 December 2016, p. 28. A contrary view, questioning the impact of white-collar crime on market integrity, was offered by Professor Bagaric. Professor Mirko Bagaric, Professor of Law, Swinburne University of Technology *Proof Committee Hansard*, 6 December 2016, p. 27.

> reviewed to ensure they are set at appropriate levels. In addition, consideration should be given to designing more responsive monetary penalties, such as multiple of gain penalties or penalties combined with disgorgement.[23]

1.29 Recommendation 41 of the report also called for the government to commission an inquiry into the 'current criminal and civil penalties available across the legislation ASIC administers'.[24] The committee recommended that this inquiry should consider:

- the consistency of criminal penalties, and whether some comparable offences currently attract inconsistent penalties;
- the range of civil penalty provisions available in the legislation ASIC administers and whether they are consistent with other civil penalties for corporations; and
- the level of civil penalty amounts, and whether the legislation should provide for the removal of any financial benefit.[25]

1.30 The government response to the committee's report was tabled in October 2014. The government noted recommendation 41 and indicated that the issue would be considered more fully in conjunction with its response to the Financial System Inquiry (FSI).[26]

ASIC's Report 387 on penalties

1.31 In preparing its submission to the FSI (discussed further below), ASIC prepared and in March 2014 released a report on penalties, *Report 387: Penalties for corporate wrongdoing*. The report considered whether penalties in Australia are proportionate and consistent, and compared penalties available to ASIC with:

- those in other countries;
- those of other Australian regulators; and

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23 Senate Economics References Committee, *Performance of the Australian Securities and Investments Commission* (June 2014), pp. 367–368. 'Disgorgement', as ASIC explained in its submission, is 'the removal of financial benefit (such as profits illegally obtained or losses avoided) that arises from wrongdoing, or the act of paying these monies, on demand or by legal compulsion. For example, any profit made by wrongdoing is "disgorged" from those involved in the wrongdoing in addition any penalties that are imposed.' Australian Securities and Investments Commission, *Submission 49*, p. 10.

24 Senate Economics References Committee, *Performance of the Australian Securities and Investments Commission* (June 2014), p. 368.

25 Senate Economics References Committee, *Performance of the Australian Securities and Investments Commission* (June 2014), p. 368.

26 Australian Government, *Response to the Senate Economics References Committee Report: Performance of the Australian Securities and Investments Commission* (October 2014), p. 21.

- across ASIC's regime.[27]

1.32 The key findings of *Report 387* were that:

- on the international comparison —
    - while our maximum criminal penalties—jail and fines—are broadly consistent with those available in other countries, there are significantly higher prison terms in the [United States], and higher fines in some overseas countries for certain offences;
    - there is a broader range of civil and administrative penalties in other countries, they are higher, and they include the ability to remove financial benefit from wrongdoing (i.e. disgorgement);
- on the comparison with other Australian regulators—
    - the maximum civil penalties available to ASIC are lower than those available to other regulators and are fixed amounts, not multiples of the financial benefits obtained from wrongdoing; and
- on the comparison across ASIC's regime—
    - there are differences between the types and size of penalties for similar wrongdoing. For example, providing credit without a licence can attract a civil penalty up to ten times greater than the criminal fine for those who provide financial services without a licence.[28]

1.33 *Report 387* informed ASIC's subsequent submission to the FSI inquiry (discussed further below).[29]

Financial System Inquiry (FSI)

1.34 The FSI (commonly known as the 'Murray Review') was the most significant inquiry into the financial industry since the Wallis inquiry in 1996–97. Announced in December 2013, the overall aim of the FSI was to 'examine how the financial system could be positioned to best meet Australia's evolving needs and support Australia's economic growth'.[30] As part of its work, the inquiry considered various issues related to penalties for misconduct in the financial system, as summarised below.

1.35 The FSI Interim Report, released in July 2014, noted (as ASIC's own submission to the FSI had) that criminal penalties in Australia in relation to market

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27 ASIC, media release, 'ASIC reports on penalties for corporate wrongdoing', 20 March 2014, http://asic.gov.au/about-asic/media-centre/find-a-media-release/2014-releases/14-055mr-asic-reports-on-penalties-for-corporate-wrongdoing/ (accessed 2 December 2012).

28 ASIC, media release, 'ASIC reports on penalties for corporate wrongdoing'.

29 ASIC, media release, 'ASIC reports on penalties for corporate wrongdoing'.

30 Financial System Inquiry, 'The inquiry's terms of reference', http://fsi.gov.au/terms-of-reference/ (accessed 20 June 2016).

conduct and disclosure are broadly consistent with those available in major foreign jurisdictions, but civil and administrative penalties are comparatively low. The FSI Interim Report further observed:

> ASIC's mandate also has important gaps when compared to major domestic and international jurisdictions. For non-criminal proceedings, ASIC does not have the power of disgorgement available in Canada, Hong Kong, the United Kingdom and the United States. ASIC cannot impose fines on [Australian Financial Services Licence] holders, although it can suspend or revoke their licence. Penalties available to the [Australian Competition and Consumer Commission] are higher than those available to ASIC.[31]

1.36 The FSI Final Report, released in December 2014, included a number of findings and recommendations relevant to ASIC's enforcement powers and other matters relevant to this inquiry. In particular, the FSI Final Report found that:

> …the maximum penalties in Australia for contravening laws governing financial sector conduct are low by international standards. For example, ASIC cannot seek disgorgement of profits in relation to civil contraventions. As such, current penalties are unlikely to act as a credible deterrent against misconduct by large firms.[32]

1.37 The FSI Final Report recommended strengthening the Australian Credit Licence and Australian Financial Services Licence (AFSL) regimes 'so ASIC can deal more effectively with poor behaviour and misconduct'. The Final Report also stated:

> The maximum civil and criminal penalties for contravening ASIC legislation should be substantially increased to act as a credible deterrent for large firms. ASIC should also be able to seek disgorgement of profits earned as a result of contravening conduct.[33]

1.38 However, while the FSI Final Report recommended substantially higher penalties, it qualified this recommendation by noting that Australia should not:

> …introduce the extremely high penalties for financial firms recently seen in some overseas jurisdictions. This practice risks creating inappropriate incentives for government and regulators unless revenue is separated and used for social or public purposes.[34]

1.39 The government released its response to the FSI Final Report in October 2015. It indicated, among other things, that by the end of 2016 the government would:

- develop legislation to give ASIC the power to ban individuals from managing financial firms;

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31 Financial System Inquiry, *Interim Report* (July 2014), p. 3-125.

32 Financial System Inquiry, *Interim Report* (July 2014), p. 252.

33 Financial System Inquiry, *Final Report* (December 2014), p. 250.

34 Financial System Inquiry, *Final Report* (December 2014), p. 252.

- consult on strengthening ASIC's enforcement tools in relation to the financial services and credit licensing regimes.[35]

1.40 The government response also noted that it had already commenced an ASIC Capability Review, and would 'review ASIC's enforcement regime to ensure it provides a credible deterrent for poor behaviour and breaches of financial services laws'.[36]

ASIC Capability Review

1.41 The government announced the ASIC Capability Review in July 2015 as part of its response to the FSI. The review was completed in December 2015.

1.42 The Capability Review was led by an Expert Panel and considered ASIC's regulatory and enforcement toolkit. However, the final report did not address the adequacy or consistency of penalties available to ASIC.[37] In its response to the review, ASIC noted that the final report was silent on the 'significant inconsistencies in ASIC's penalty regime'.[38]

ASIC Enforcement Review Taskforce

1.43 On 19 October 2016, the Minister for Revenue and Financial Services, the Hon Kelly O'Dwyer MP, announced the terms of reference for an ASIC Enforcement Review Taskforce. Ms O'Dwyer indicated that the terms of reference 'allow for a thorough but targeted examination of the adequacy of ASIC's enforcement regime, including in relation to industry Codes of Conduct, to deter misconduct and foster consumer confidence in the financial system'.[39]

1.44 The Taskforce is led by a core panel chaired by Treasury, and includes senior representatives from ASIC, the Attorney-General's Department, and the office of the Commonwealth Director of Public Prosecutions (CDPP). An Expert Panel drawn from

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35 Australian Government, *Improving Australia's financial system: Government response to the Financial System Inquiry* (October 2015), p. 8.

36 Australian Government, *Improving Australia's financial system: Government response to the Financial System Inquiry* (October 2015), p. 8.

37 The Capability Review terms of reference indicated that the review could 'provide observations, but not make recommendations on ASIC's regulatory framework and powers'. Australian Government, *Fit for the future: A capability review of the Australian Securities and Investments Commission* (December 2015) [hereafter 'ASIC Capability Review'], p. 1.

38 *ASIC Capability Review*, Appendix E: ASIC's Response to the Panel's Report to Government, p. 181.

39 The Hon Kelly O'Dwyer MP, Minister for Revenue and Financial Services, media release, 'ASIC Enforcement Review Taskforce', 19 October 2016, http://kmo.ministers.treasury.gov.au/media-release/095-2016/.

peak industry bodies, consumer groups and academia is supporting the Taskforce. The Taskforce is due to report to the government in March 2017.[40]

1.45 The terms of reference for the Taskforce include an examination of legislation dealing with corporations, financial services, credit and insurance as to:

> The adequacy of civil and criminal penalties for serious contraventions relating to the financial system (including corporate fraud);
>
> The need for alternative enforcement mechanisms, including the use of infringement notices in relation to less serious contraventions, and the possibility of utilising peer disciplinary review panels (akin to the existing Markets Disciplinary Panel) in relation to financial services and credit businesses generally;
>
> The adequacy of existing penalties for serious contraventions, including disgorgement of profits;
>
> The adequacy of enforcement related financial services and credit licensing powers;
>
> The adequacy of ASIC's power to ban offenders from occupying company offices following the commission of, or involvement in, serious contraventions where appropriate; …[41]

1.46 The terms of reference also provide for an examination into legislation as it relates to other matters directly or indirectly relevant to this inquiry, including: ASIC's information gathering powers; the adequacy of ASIC's powers in relation to licensing of financial services and credit providers, including its coercive powers in this regard; the adequacy of frameworks for notifying ASIC of breaches of the law; and any other matters that arise during the course of the inquiry and which appear necessary to address any deficiencies in ASIC's regulatory toolkit.[42]

Structure of this report

1.47 This report considers the adequacy and consistency of existing penalties for white-collar crime and misconduct across six chapters, including this introductory chapter. Of the remaining chapters:

- chapter 2 provides an overview of the current penalty framework, including the division of regulatory and enforcement responsibilities, and considers evidence received on the general adequacy and consistency of that framework;
- chapter 3 explores some of the challenges involved in investigating and prosecuting white-collar crime and misconduct, and questions related to proving civil and criminal offences. Chapter three also considers certain

40 Ms O'Dwyer, 'ASIC Enforcement Review Taskforce'.

41 Ms O'Dwyer, 'ASIC Enforcement Review Taskforce'.

42 Ms O'Dwyer, 'ASIC Enforcement Review Taskforce'.

recommendations made during the inquiry for improving corporate cooperation and compliance;

- chapter 4 examines the underlying purpose of penalties for white-collar crime and misconduct, and considers the role of custodial penalties in relation to white-collar crime;
- chapter 5 discusses the role of banning and disqualification orders in relation to white-collar crime and misconduct, along with ASIC's use of infringement notices;
- chapter 6 considers the adequacy and consistency of monetary penalties for white-collar crime and misconduct, and considers recommendations for introducing disgorgement powers in relation to civil offences.

Chapter 2

Overview of the current penalty framework

2.1 This chapter provides an overview of the current penalty framework as it applies to white collar crime and misconduct in Australia.

2.2 First, this chapter provides a brief summary of the three categories of penalty that apply in relation to white collar crime and misconduct, as captured in the inquiry terms of reference—that is, criminal, civil and administrative penalties. In turn, this chapter offers an overview of the regulatory and enforcement activities of various agencies.

2.3 Finally, this chapter considers evidence received in relation to the overall adequacy and consistency of the penalty framework.

Categories of penalties for white-collar crime and financial misconduct

2.4 This part of the chapter provides an overview of criminal, civil and administrative penalties for white collar crime and misconduct.

2.5 The main criminal penalties used in Australian legislation are fines and imprisonment.[1] However, criminal penalties can also take a number of other forms. For example, instead of imprisonment, a court may impose a community service order (a common outcome in white-collar crime cases). In many cases, a recorded criminal conviction cannot be expunged from a person's record and can prevent the convicted person from performing certain roles, such as becoming a company director.

2.6 Civil penalties are imposed by courts applying civil rather than criminal court processes. Civil penalties typically take the form of a monetary fine, although they may also take the form of injunctions, banning orders, licence revocations and orders for reparation and compensation; they do not include penalties of imprisonment.[2] Perhaps the most important distinction between criminal and civil penalty proceedings is the variable standard of proof at or above the 'balance of probabilities'—as opposed to the higher 'beyond reasonable doubt' burden of proof for criminal prosecutions—along with the loss of procedural protections for the accused, such as the privilege against self-incrimination.[3] As Michael Gillooly and Nii Lante Wallace-Bruce have put it:

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1 Australian Law Reform Commission [ALRC] Reports, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (2002) [hereafter '*Principled Regulation*'], p. 27 (available at http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC95.pdf).

2 ALRC, 'Principled Regulation', pp. 73–74.

3 ALRC, 'Principled Regulation', p. 81.

> [C]ivil 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. However, the process by which these penalties are imposed is decidedly non-criminal, lacking many of the procedural safeguards built into the criminal process to protect the citizen from arbitrary use of State power.[4]

2.7 As the ALRC has explained, 'administrative penalties' in Australian federal law 'are broadly understood as being sanctions imposed by the regulator, or by the regulator's enforcement of legislation, without intervention by a court or tribunal'.[5] As set out in the next section of this report, regulators with the ability to impose administrative penalties in relation to financial or corporate misconduct include ASIC and the ATO. Typical administrative penalties include monetary fines and banning orders.

2.8 According to the ALRC, there are three broad categories of regulatory activity that are described as 'administrative penalties' in Australian federal regulation: infringement (or penalty) notices; 'quasi-penalties' or 'pseudo-penalties', such as the revocation or variation of a licence to which the regulated party would otherwise be entitled; and automatic, non-discretionary monetary administrative penalties.[6]

Responsibilities for enforcement and the application of penalties

1.52 A number of agencies have regulatory or other responsibilities in relation to preventing, investigating and punishing white-collar crime and misconduct, including recommending or applying various penalties. The next part of this chapter provides an overview of the responsibilities of key agencies in this regard, and how these responsibilities relate to the current regime of criminal, civil and administrative penalties.

Australian Securities and Investments Commission (ASIC)

2.9 The Australian Securities and Investments Commission (ASIC) has responsibility for the regulation of corporations, managed investment schemes, participants in the financial services industry and people engaged in credit activities

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4 Michael Gillooly and Nii Lante Wallace-Bruce, 'Civil Penalties in Australian Legislation', *University of Tasmania Law Review* 13 (1994), p. 269.

5 ALRC, 'Principled Regulation', pp. 78–79.

6 The ALRC does not consider infringement notices or 'quasi/pseudo-penalties' to be true 'administrative penalties', but rather administrative devices. ALRC, 'Principled Regulation', pp. 78–79. Submitters to this inquiry have generally taken 'administrative penalties' to include infringement notices and what the ALRC calls 'quasi/pseudo-penalties'; this report also employs the broader, common definition of 'administrative penalties', even allowing that it may not be technically precise to do so.

under a range of Commonwealth laws.[7] Suffice to note here, many of the activities that can be characterised as 'white-collar crime' or 'corporate and financial misconduct' occur in organisations and sectors for which ASIC has regulatory responsibility.

2.10 ASIC relies on a range of regulatory approaches to deter financial and corporate misconduct, including alternatives to enforcement action such as engagement with industry and stakeholders, surveillance, guidance, education and policy advice.[8] However, enforcement action remains a critical regulatory tool for ASIC, and ASIC's submission emphasised the importance of effective enforcement to its strategic priorities of 'promoting investor and financial consumer trust and confidence and ensuring fair, orderly and transparent financial markets'.[9]

2.11 Sanctions and remedies available to ASIC in undertaking enforcement action include 'punitive, protective, preservative, corrective or compensatory actions, or otherwise resolving matters through negotiation or issuing infringement notices'.[10] Table 1 provides a summary of the types of action available to ASIC, as set out in its *Report 387* in March 2014.

Table 1: Types of action available to ASIC, from *Report 387: Penalties for corporate wrongdoing*

Type of action	Description
Punitive	We can pursue action in the courts to punish a person or entity in response to the misconduct. Actions include: • criminal penalties (e.g. terms of imprisonment; fines; community service orders)—matters giving rise to criminal penalties are prosecuted by the Commonwealth Director of Public Prosecutions, with the exception of a number of minor regulatory offences, which are prosecuted by ASIC; and • civil monetary penalties. All monetary penalties in these types of actions are payable to the Commonwealth.
Protective	We can take administrative action decided by an ASIC delegate designed to protect consumers and financial investors. Actions include: • disqualification from managing a corporation;

7 ASIC, *Information sheet 151: ASIC's approach to enforcement* (September 2013), http://download.asic.gov.au/media/1339118/INFO_151_ASIC_approach_to_enforcement_20130916.pdf.

8 ASIC, *Information sheet 151: ASIC's approach to enforcement* (September 2013), p. 4.

9 Australian Securities and Investments Commission, *Submission 49*, p. 4.

10 Australian Securities and Investments Commission, *Submission 49*, p. 4. ASIC has set out its approach to enforcement in Information Sheet 151, including guidance on how and why it determines the most appropriate remedy to apply in response to misconduct. ASIC, *Information sheet 151: ASIC's approach to enforcement* (September 2013).

Type of action	Description
	• a ban on providing financial services or engaging in credit activities; • revocation, suspension or variation of conditions of a licence; and • public warning notices. We can also apply to the court for a disqualification order.
Preservative	We can take court action to protect assets or compel someone to comply with the law (e.g. through an injunction or freezing order).
Corrective	We can seek a court order for corrective disclosure.
Compensatory	We can begin a representative action in the courts to recover damages or property for those who have suffered loss (e.g. ASIC Act, s50; Corporations Act, s1317J).
Negotiated or agreed outcome	We can use negotiated alternatives to remedies where these can achieve an effective regulatory outcome. These include: • enforceable undertakings; and • payment of infringement notices.

Source: ASIC, *Report 387: Penalties for corporate wrongdoing* (March 2014), pp. 9–10.

Legislation administered by ASIC

2.12 There is a range of legislation administered by ASIC which provides the regulator with the capacity to impose or seek penalties for white-collar crime. This includes:

- the *Corporations Act 2001*;
- the *Australian Securities and Investments Commission Act 2001* (ASIC Act);
- the *National Consumer Credit Protection Act 2009* (NCCP Act); and
- the *Superannuation Industry (Supervision) Act 1993* (SIS Act).[11]

2.13 ASIC is also able to charge wrongdoers with fraud offences under state and territory criminal legislation, as well as under ASIC-administered legislation.[12]

2.14 ASIC can also brief the AFP and the CDPP to bring an action to confiscate the proceeds of crime in criminal matters under the *Proceeds of Crime Act 2002* (POC Act). However, ASIC does not have any equivalent disgorgement provisions in ASIC-administered legislation for civil penalty proceedings.[13] The possibility of introducing disgorgement powers for non-criminal matters is considered in chapter 6.

11 ASIC, *Report 387: Penalties for corporate wrongdoing* (March 2014) [hereafter *Report 387*], p. 7.

12 ASIC, *Report 387*, p. 56.

13 ASIC, *Report 387*, p. 20.

Australian Taxation Office (ATO)

2.15 The ATO has the responsibility of imposing and collecting financial penalties relating to offences within the taxation and superannuation systems. In its submission, the ATO noted that it administers over 80 different types of penalties across the tax and superannuation systems. These penalties fall into four different categories: administrative penalties, civil penalties, penalties relating to taxation offences (summary offences), and criminal penalties for serious tax crime prosecution.[14]

Australian Federal Police (AFP)

2.16 The AFP investigates a range of Commonwealth criminal offences that can be categorised as white-collar crime (which, as previously noted, the AFP considers a subset of serious financial crime). These offences include fraud, money laundering, and corruption, including the bribery of Commonwealth and foreign public officials.[15]

2.17 In addition to investigating criminal matters, the AFP noted that it works closely with partner agencies to ensure other measures, such as civil and administrative penalties, are considered and deployed to address the harm caused by white-collar crime and misconduct:

> 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.[16]

2.18 The AFP further advised that in addition to appropriate penalties, law enforcement and partner agencies also draw on a range of other powers to detect, investigate, prevent and deter serious financial crime. These powers include the non-conviction based confiscation regime provided for under the Proceeds of Crime Act, recently strengthened through reforms introduced by the *Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Act 2016*.[17]

2.19 The AFP works alongside government agencies such as ASIC, AUSTRAC and the ATO to investigate and prosecute white-collar criminals.

Commonwealth Director of Public Prosecutions (CDPP)

2.20 The Commonwealth Director of Public Prosecutions (CDPP) plays an important role in the Commonwealth's efforts to combat white-collar crime. A range of Commonwealth investigative agencies refer matters relating to white-collar crime to the CDPP, including the AFP, Australian Competition and Consumer Commission

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14 Australian Taxation Office, *Submission 29*, p. 4. An explanation of each of these penalty types is provided in the ATO's submission, pp. 4–6.

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

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

17 Australian Federal Police, *Submission 54*, pp. 4–5.

(ACCC), Australian Criminal Intelligence Commission (established by the merger in 2016 of the Australian Crime Commission and CrimTrac), ASIC, the ATO and the Department of Human Services.[18] The CDPP further informed the committee that through 'the provision of expert pre-legal advice and prosecution services, the CDPP actively contributes to whole-of-government efforts to combat white-collar crime'.[19]

Australian Competition and Consumer Commission (ACCC)

2.21 The ACCC is Australia's national competition and consumer protection enforcement agency.

2.22 As the ACCC explained in its submission, it does not have the power to decide whether there has been a breach of the *Competition and Consumer Act 2010* or to impose penalties. However, it plays an important role in investigating potential breaches of the law, and making applications to the Court for the imposition of remedies and penalties.[20] The ACCC can also refer a brief of evidence to the CDPP if it considers the conduct may warrant a criminal penalty. The Competition and Consumer Act also provides the ACCC with a range of non-Court based enforcement remedies, which the ACCC suggested provides it with 'the flexibility to respond to conduct proportionate to the potential harm'. These non-Court remedies include administrative resolution, court enforceable undertakings, and the issuance of infringement notices.

Australian Financial Security Authority (AFSA)

2.23 The Australian Financial Security Authority (AFSA) is an executive agency in the Attorney-General's portfolio, responsible for the application of bankruptcy and personal property security laws, and the regulation of personal insolvency practitioners and trustee services. ASFA does not impose penalties itself, but has an investigatory function, and refers prosecution briefs to the CDPP.[21]

Attorney-General's Department

2.24 The Attorney-General's Department administers offences within the *Criminal Code Act 1995* (the Criminal Code), including fraud affecting the Commonwealth government, domestic bribery, foreign bribery, money laundering, forgery and false accounting offences.[22] The Attorney-General's Department summarised the penalties available for these offences in its submission to the inquiry.[23] It also noted that the

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18 Commonwealth Director of Public Prosecutions, *Submission 53*, p. 1.

19 Commonwealth Director of Public Prosecutions, *Submission 53*, p. 1.

20 Australian Competition and Consumer Commission, *Submission 40*, p. 2.

21 Australian Financial Security Authority, *Submission 25*, pp. 1–2.

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

23 Attorney-General's Department, *Submission 52*, pp. 6–10.

AFP is responsible for investigating Commonwealth offences and the CDPP has primary responsibility for the prosecution of these crimes, while ASIC, the ATO, the ACC and the ACCC also have enforcement and prosecutorial functions in relation to white-collar crime.[24]

2.25 The Attorney-General's Department summarised its policy role in relation to combating white-collar crime in its submission as follows:

> The department is responsible for a number of policy areas related to white collar crime, including national anti-money laundering and counter-terrorism financing (AML/CTF), Commonwealth fraud, proceeds of crime, anti-corruption and foreign bribery. The department administers a range of Acts used to combat white collar crime, including the *Proceeds of Crime Act 2002* and the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act). The department also fulfils a legislative scrutiny role, assessing Commonwealth legislation against the principles outlined in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.
>
> The department works closely with law enforcement agencies such as the Australian Federal Police (AFP), the Australian Crime Commission (ACC), CrimTrac, AUSTRAC, and the Commonwealth Director of Public Prosecutions (CDPP) and provides legal and policy advice to government on criminal justice issues, including issues surrounding white collar crime.[25]

Interagency and international initiatives

2.26 There are various forums and bodies through which different agencies and jurisdictions work together to combat white-collar crime and cooperate and financial misconduct.

2.27 For example, in 2015 the government established a multi-agency Serious Financial Crime Taskforce (SFCT), designed to deter and disrupt serious and complex financial crime. The SFCT builds upon and broadens the partnerships established by Project Wickenby, a cross-agency taskforce established in 2006 to better combat tax fraud. As the Attorney-General's Department explained:

> The SFCT brings together the knowledge, resources and experience of law enforcement and regulatory agencies, including the AFP, Australian Tax Office (ATO), ACC, the Attorney General's Department (AGD), AUSTRAC, Australian Securities and Investments Commission (ASIC), CDPP and Australian Border Force (ABF).[26]

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24 Attorney-General's Department, *Submission 52*, p. 10.

25 Attorney-General's Department, *Submission 52*, p. 2.

26 Attorney-General's Department, *Submission 52*, p. 3.

2.28 The SFCT targets activities in Australia and abroad, including phoenix fraud, trust fraud and international tax evasion. In doing so, it works with international partner agencies, governments and organisations around the world, including those countries subject to Australia's bilateral tax treaties and Tax Information Exchange Agreements.[27]

2.29 The SFCT is part of the AFP-led, multi-agency Fraud and Anti-Corruption (FAC) Centre, which was created in 2014 to improve existing fraud and anti-corruption efforts.[28] The AFP advised the committee that 11 agencies were working side by side in the FAC Centre to prevent and combat serious financial crime.[29]

Views on the adequacy and consistency of the current penalty framework

2.30 A number of submitters highlighted the importance of having a penalty framework that was consistent and fit for purpose. For example, ASIC noted that appropriate penalty settings, and the availability of a range of penalties for particular breaches of the law, are central to its enforcement role. An appropriately set penalty framework, it submitted, helps deter contraventions of the law, promote greater compliance and encourage cooperation with the regulator, thus 'resulting in a more resilient financial system'.[30] Conversely, ASIC explained that where there are gaps in its enforcement toolkit:

> …this presents a barrier to us taking an optimal enforcement response, because the appropriate remedy is not available to us. This can risk undermining confidence in the financial regulatory system.[31]

2.31 ASIC noted that the penalties in legislation that it administers have not been subject to review since they were introduced[32] (although, as noted in the previous chapter, these penalties are now being considered by the ASIC Enforcement Review Taskforce). ASIC submitted that this had led to:

> … shortcomings in the consistency or size of penalties, which creates gaps between community expectations of the appropriate regulatory response to a particular instance of misconduct and what we can do in practice.[33]

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27 Attorney-General's Department, *Submission 52*, p. 3; Australian Federal Police, factsheet, 'Serious Financial Crime Taskforce', https://www.afp.gov.au/sites/default/files/PDF/serious-financial-crime-taskforce-factsheet.pdf (accessed 16 March 2017).

28 Attorney-General's Department, *Submission 52*, p. 3.

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

30 Australian Securities and Investments Commission, *Submission 49*, p. 4.

31 Australian Securities and Investments Commission, *Submission 49*, p. 12.

32 Australian Securities and Investments Commission, *Submission 49*, p. 12.

33 Australian Securities and Investments Commission, *Submission 49*, p. 12.

2.32 Other inquiry participants highlighted a broad range of apparent inconsistencies and inadequacies in the current penalty framework. The next part of this chapter provides an overview of some of the perceived inadequacies and inconsistencies in the penalty framework, noting that these concerns are addressed in greater detail in subsequent chapters.

Views on the general adequacy of the penalty framework

2.33 Several submitters argued that the penalty framework for white-collar crime and misconduct was, on the whole, failing to properly deter or adequately punish offenders. For example, the Australian Shareholders' Association (ASA) submitted that penalties imposed for white-collar offences in Australia in recent years 'have generally been inadequate'. It submitted:

> The civil and administrative penalties which are currently available and actually imposed are not strong enough to deter offenders and criminal convictions, where available, are pursued only in limited cases. ASA believes that there is a need for more criminal prosecutions and increased civil and administrative penalties for white-collar crime.[34]

2.34 The Uniting Church (JIMU) argued that the penalties imposed on white-collar criminals were often too lenient, particularly relative to the penalties handed down to people convicted of social security fraud. This was despite the fact, the United Church (JIMU) submitted, that the sums involved in white-collar crime were typically higher, and white-collar criminals were more likely to be acting out of greed than financial hardship.[35] The Uniting Church (JIMU) submitted that:

> …due to the inconsistencies in legislation the outcome for white-collar criminals who are convicted can be much less detrimental than for those who are convicted of other types of fraud such as welfare or identity fraud. Penalties for social security fraud in Australia can include steep fines and up to ten years in prison, even though the amounts defrauded are generally much smaller, and the people committing the fraud are often people who are already suffering extreme financial hardship.[36]

2.35 Other submitters suggested that penalty settings in Australia, at least in relation to those penalties within their area of concern, are generally adequate. For example, the ATO submitted that existing penalty settings in relation to tax crime are broadly consistent with comparable countries. Moreover, the ATO submitted that overall the current penalty framework as it applied to tax crime:

> …is considered to be 'fit for purpose' in terms of its structure, the variety of penalty options it affords to treat white-collar crime, and the maximum

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34 Australian Shareholders' Association, *Submission 34*, p. 1.

35 The Justice and International Mission Unit of the Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission 39*, p. 11.

36 The Justice and International Mission Unit of the Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission 39*, p. 11.

> levels of penalties and criminal sanctions. In addition, the ATO has a range of powers which support our ability to collect the financial penalties that we impose. The laws include the ability to garnishee bank accounts and prevent taxpayers with a taxation liability from leaving the country. Generally we believe that these laws are effective in supporting the collection of penalties levied.[37]

2.36 Similarly, the ACCC submitted that the penalties for breaches of Australian competition law are 'broadly appropriate and in line with international trends'.[38] However, while indicating that the maximum penalty settings for breaches of competition law in Australia were generally appropriate, the ACCC also suggested that 'there remains a challenge for the regulator and the Courts to bring down penalties in proportion to the wrongdoing occurring'.[39]

2.37 In contrast to its characterisation of the penalties available for breaches of competition law, the ACCC submitted that the penalties for breaches of the Australian Consumer Law (ACL) in Australia are currently inadequate, and 'ought to be more comparable to competition law penalties that also operate across the economy'.[40] The ACCC advised that it:

> …considers that the current maximum penalties available under the ACL are too low to provide a powerful deterrent effect. This is particularly the case for breaches by large corporate players that are unlikely to be deterred by a maximum penalty of [$1.1 million] per contravention. There appears to be no strong policy reason for the maximum penalties under the ACL being considerably lower than those available for breaches of competition laws. We do not consider that consumer harm resulting from ACL breaches is necessarily less significant than that arising in competition cases.[41]

37 Australian Taxation Office, *Submission 29*, p. 3.

38 Australian Competition and Consumer Commission, *Submission 40*, p. 1.

39 Australian Competition and Consumer Commission, *Submission 40*, p. 1. The ACCC acknowledged that this might be due, in part, to the fact that cases in Australia using higher penalties that were introduced in 2007 are only now coming before court. Australian Competition and Consumer Commission, *Submission 40*, p. 5.

40 Australian Competition and Consumer Commission, *Submission 40*, p. 1.

41 Australian Competition and Consumer Commission, *Submission 40*, p. 10.

2.38 At the same time, the ACCC noted that the ACL Review currently underway (and due to report in March 2017) will consider whether the penalties provided for in the ACL remain appropriate.[42]

2.39 One apparent deficiency in the current penalty framework highlighted by a range of inquiry participations was the level of civil penalties available in the Corporations Act. These inquiry participants noted, for instance, that the current maximum civil penalties of $200,000 for individuals and $1 million for corporations have not been changed since they were introduced more than 10 years ago, and are too low given the severity of the offences involved. ASIC also submitted that a 'broader range' of non-criminal monetary penalties are available in other jurisdictions, including:

- greater flexibility to impose higher non-criminal penalties (e.g. penalties that are a multiple of the financial benefit obtained by the wrongdoer) and scope to use non-criminal penalties when punishing a wider range of wrongdoing; and
- the ability to require disgorgement (i.e. to require the profits gained or losses avoided to be removed from the wrongdoer).[43]

2.40 Calls for increasing the range and level of civil penalties in the Corporations Act, the possibility of imposing penalties as multiples of the benefit gained, and the introduction of a disgorgement regime are discussed in chapter 6.

2.41 Similarly, there was a robust debate between inquiry participants regarding the adequacy of criminal penalties for white-collar crime, and in particular maximum prison terms available and the extent to which white-collar criminals are currently receiving custodial sentences. These views are discussed in chapter 4.

Views on the general consistency of the penalty framework

2.42 A number of submitters pointed to what they regarded as inconsistencies in the penalty regime. For example, referring specifically to criminal penalties for white-

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42 Australian Competition and Consumer Commission, *Submission 40*, p. 10. Consumer Affairs Australia and New Zealand (CAANZ) commenced a review of the ACL in 2015. See Australian Consumer Law, webpage, 'About the review', http://consumerlaw.gov.au/review-of-the-australian-consumer-law/about-the-review/ (accessed 2 February 2017). In parallel with the CAANZ review, the Productivity Commission is undertaking a review of the enforcement and administration arrangements underpinning the ACL, and is due to report in March 2017. The Productivity Commission released a draft report in December 2016, which includes consideration of the adequacy of penalties in the ACL. The draft report highlights several aspects of the ACL enforcement regime that could be strengthened, including, for example, increasing maximum financial penalties for breaches of the ACL, and aligning penalties for breaches of the ACL with penalties for breaches of competition provisions in the Competition and Consumer Act. Productivity Commission, draft report, *Consumer Law Enforcement and Administration* (December 2016), pp. 10, 18, http://www.pc.gov.au/inquiries/current/consumer-law/draft/consumer-law-draft.pdf.

43 Australian Securities and Investments Commission, *Submission 49*, p. 7.

collar offences, Mr Greg Golding, representing the Law Council of Australia, told the committee that:

> … there is a need to review Australia's penalty regime to ensure that there is conformity and appropriate similarity across criminal penalties. We believe that there is a disparity that has crept into the law over the years that needs to be reviewed for consistency purposes.[44]

2.43 The CDPP pointed to one such inconsistency in the treatment of the offence of general dishonesty in chapter 7 of the Criminal Code. For historical reasons set out by the CDPP, the offence carries a maximum penalty of five years, as opposed to 10 years for various other fraud offences. At the same time, similar offences, such as conspiracy to dishonestly obtain a gain or cause a loss to the Commonwealth and, under the Corporations Act, engaging in dishonest conduct in relation to a financial product or financial service, carry a maximum 10 year sentence.[45]

2.44 ASIC pointed out in its submission that some penalties have increased in recent times. However, ASIC described penalty changes in recent years as 'piecemeal', with some introducing inconsistencies into the penalty regime.[46] For example, referring to its own legislation, ASIC highlighted inconsistencies in the penalties available for similar types of offence, depending on where they are located in the relevant legislation:

> For example, in 2010, the maximum penalties available for offences including market manipulation, insider trading and dishonest conduct in the course of carrying on a financial services business were increased, with the maximum imprisonment term doubling to ten years and pecuniary penalties being significantly raised. However, the maximum penalties for offences including the dishonest use of position by a director and the intentional failure of an officer of a managed investment scheme to act honestly remained at five years imprisonment.[47]

2.45 The introduction of new legislative instruments has, in some cases, introduced an additional level of inconsistency into the penalty framework, with penalties in more recent legislation being considerably higher than the penalties available for similar types of conduct in older legislation. ASIC explained that some of the newer legislation it administers (for instance, the National Consumer Protection Act 2009) actually applies higher civil penalties than the criminal pecuniary penalties available for the same type of conduct under the Corporations Act:

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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 Shane Kirne, Practice Group Leader, Commercial Financial and Corruption, Commonwealth Director of Public Prosecutions, *Proof Committee Hansard*, 6 December 2016, pp. 53–54.

46 Australian Securities and Investments Commission, *Submission 49*, p. 13.

47 Australian Securities and Investments Commission, *Submission 49*, p. 13.

> An individual prosecuted for the criminal offence of providing unlicensed financial services under the Corporations Act faces a maximum fine of $36,000. In contrast, an individual subject to civil proceedings for engaging in unlicensed credit activity under the National Credit Act faces a civil penalty of up to $360,000.[48]

2.46 ASIC also noted that some offences in the Corporations Act attract criminal penalties but not civil penalties, whereas similar offences under the National Credit Act and the ASIC Act do attract civil penalties:

> For example, providing unlicensed financial services attracts a significantly lower maximum penalty than does providing unlicensed credit services. Providing unlicensed financial services is a criminal offence with a maximum penalty of $180,000 for a corporation and/or two years imprisonment. As it is a criminal offence only, the unlicensed provision of financial services by a corporation will require proof, beyond reasonable doubt, of the fault elements imposed under the Criminal Code Act 1995. In the event that a company is convicted, the maximum penalty available is $180,000. In contrast, the comparable provision in the National Credit Act relating to unlicensed credit services is both a criminal offence and a civil penalty offence attracting a penalty of $1.8 million for a corporation.[49]

Committee view

2.47 Providing an overall assessment of the adequacy and consistency of current penalties for white-collar crime and misconduct is not straightforward. Just as the types of wrongdoing that might be considered white-collar crime and misconduct are extremely varied, so too are the penalties available in relation to that wrongdoing. However, the committee agrees that, broadly speaking, there appear to be serious inadequacies and inconsistencies in the current penalty framework. These inadequacies and inconsistencies are drawn out in subsequent chapters, as are steps that might be taken to address them.

48 Australian Securities and Investments Commission, *Submission 49*, p. 14.

49 Australian Securities and Investments Commission, *Submission 49*, pp. 13–14.

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.
>
> 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.
>
> 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.

Chapter 4

Sentencing, deterrence and custodial sentences

4.1 In part, the varying views expressed by inquiry participants regarding the adequacy of penalties for white-collar crime and misconduct reflected equally divergent views as to the purpose of penalties within the broader compliance and enforcement framework. Some inquiry participants, including regulatory and enforcement agencies, argued that the primary purpose of penalties for white-collar crime and misconduct was one of deterrence, at both the individual level and the wider community level. However, others suggested that it was important not to overstate the relationship between penalty settings and deterrence, and cautioned that doing so risked setting and imposing penalties that were disproportionate to the wrongdoing, ineffective in deterring wrongdoing, or both.

4.2 These competing perspectives were apparent in the different views expressed by inquiry participants regarding the effectiveness and appropriateness of custodial sentences for white-collar criminals. Some submitters argued that imprisonment is the strongest deterrent available for white-collar criminals and would-be criminals. Others, however, countered that imprisonment is rarely justified in cases of non-violent crime—including white-collar crime—and is, at any rate, ineffective in deterring offenders.

4.3 This chapter outlines and considers the different views expressed by inquiry participants on the above matters.

Purposes of penalties and sentencing

4.4 Penalties for white-collar crime, as is the case for penalties in the criminal justice system more broadly, serve multiple purposes. A number of inquiry participants pointed to these multiple purposes. For example, the Uniting Church (JIMU) noted that a penalty regime in the criminal justice system should serve three purposes: protecting the community from further harm; rehabilitating the offender; and deterring both the offender and others from criminal activity.[1]

4.5 Just as penalties may be set with multiple purposes in mind, in sentencing criminal offenders courts will have regard to a range of considerations and purposes. A number of jurisdictions have set out in legislation the multiple purposes of sentencing and other matters to which a court should have regard in passing sentence. For example, in Victoria the *Sentencing Act 1991*, as Victoria's Sentencing Advisory Council has explained, summarises the purposes of sentencing as potentially including:

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1 The Justice and International Mission Unit of the Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission 39*, p. 10.

- just punishment – to punish the offender to an extent and in a way that is just in all the circumstances
- deterrence – to deter the offender (specific deterrence) or other people (general deterrence) from committing offences of the same or a similar character
- rehabilitation – to establish conditions that the court considers will enable the offender's rehabilitation
- denunciation – to denounce, condemn, or censure the type of conduct engaged in by the offender
- community protection – to protect the community from the offender
- a combination of two or more of these purposes.[2]

4.6 The Victorian Sentencing Advisory Council also points to a range of factors that must be taken into account when sentencing an adult, including (but not limited to) the maximum penalty for the offence, the nature and gravity of the offence, the offender's culpability and motivation, the harm caused by the offence, and so on.[3] Similarly, section 16A of the *Crimes Act 1914* (Commonwealth) outlines the matters to which a court should have regard when passing sentences in section 16A.

4.7 While legislation may guide courts on the matters they should have regard to in sentencing, the CDPP explained that in sentencing judges are ultimately required to 'instinctively synthesise' a broad range of factors in order to:

> …arrive at a sentence 'that is of a severity appropriate in all the circumstances to the offence'. They do so within the parameters of the maximum penalty prescribed by statute for the offence(s) and through the application of relevant common law sentencing principles.[4]

4.8 Indeed, as Professor Michael Adams, Dr Tom Hickie and Mr Ian Lloyd QC noted in their joint submission, it is trite law that in setting an appropriate sentence, a judicial officer must have regard to the multiple purposes of sentencing.[5]

4.9 Some submitters pointed to the multiple purposes of penalties for white-collar crime specifically, both in terms of the maximum level of those penalties and the extent to which courts impose them. For example, Professor Haines, while noting the importance of setting penalties with a view to deterrence, also pointed to the

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2 Sentencing Advisory Council, webpage, 'Sentencing principles, purposes, factors', https://www.sentencingcouncil.vic.gov.au/about-sentencing/sentencing-process/sentencing-principles-purposes-factors, accessed 1 February 2017. In New South Wales, section 3A of the *Crimes (Sentencing Procedure) Act 1999* sets out a similar range of 'purposes of sentence'.

3 Sentencing Advisory Council, webpage, 'Sentencing principles, purposes, factors', https://www.sentencingcouncil.vic.gov.au/about-sentencing/sentencing-process/sentencing-principles-purposes-factors, accessed 1 February 2017.

4 Commonwealth Director of Public Prosecutions, *Submission 53*, p. 2.

5 Professor Michael Adams, Dr Tom Hickie and Mr Ian Lloyd QC, *Submission 5*, p. 1.

importance of setting penalties to a standard that was consistent with public expectations:

> So, in this regard, if there is a significant loss, where somebody has taken illegal financial advice and they are living a life of poverty—they may have lost their house and so on—they look at this and say, 'I have lost $500,000' or $100,000 or whatever it is, 'but this person who stole $20 shoplifting has gone to jail'—whatever the comparison is. There does need to be some kind of parity in terms of possible penalties between the two, otherwise there is an issue of public legitimacy in what is going on here.[6]

4.10 Other submitters, and in particular submissions provided by individuals who had suffered as a result of white-collar crime or misconduct, emphasised the importance of using the penalty system to provide 'justice' for victims.

4.11 More than any other factor, however, the evidence received suggested that, first and foremost, penalties should be designed and imposed with a view to deterring offenders and would-be offenders. The next part of this chapter considers the relationship between penalties for white-collar crime and misconduct and deterrence.

Penalties and deterrence

4.12 The relationship between penalty settings and deterrence was, as noted above, a major focus of this inquiry. A range of submitters, including regulatory and enforcement authorities, emphasised that strong maximum penalties and tough sentencing were critical in deterring further misconduct by a specific offender—that is, 'specific deterrence'—and deterring would-be offenders in the wider community from committing offences—that is, 'general deterrence'.

4.13 Regulatory and enforcement agencies were as one in arguing the importance of penalties in deterring white-collar crime and misconduct. For example, the ACCC submitted that both specific and general deterrence relied on penalty settings, and this in turn was critical in encouraging compliance with the Competition and Consumer Act. It added:

> To prevent infringing behaviour both the theoretical maximum penalty and the penalties obtained must have a strong deterrent effect. To be effective, the prohibitions must be able to be efficiently enforced by the ACCC and private litigants, and the penalties achieved must outweigh the gains that businesses obtain from anti-competitive or unfair conduct.[7]

4.14 The CDPP advised that 'general deterrence' was, in fact, the primary sentencing objective in cases of white-collar crime, and explained that this was particularly true given the nature of offending and offenders in white-collar cases. It submitted that there is:

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6 Professor Fiona Haines, Private capacity, *Proof Committee Hansard*, 6 December 2016, p. 28.

7 Australian Competition and Consumer Commission, *Submission 40*, p. 9.

> …a very considerable body of appellate level case law which underscores the seriousness of white-collar crime and its impacts on the community. That case law also entrenches the principle that 'general deterrence' is the primary sentencing objective. This is very important because white-collar offenders typically come before sentencing courts with evidence of impressive character and no prior criminal convictions. In different circumstances, 'prior good character' may operate to significantly mitigate an offender's sentence. However, courts recognise that it is often this factor which enabled the offence by allowing white-collar offenders to obtain and exploit a position of trust. Accordingly, sentencing courts give little weight to prior good character when sentencing white-collar offences.[8]

4.15 As such, the CDPP explained, many individuals convicted of serious white-collar crime offences are routinely sentenced to significant terms of imprisonment.[9] (The deterrent effect of imprisonment is discussed in the next part of this chapter.)

4.16 One of the arguments put to the committee during the inquiry was that because white-collar crime and misconduct is difficult to detect and prove, there is a particularly pressing need to set penalties at a level that will deter misconduct. For example, in making the case for introducing stronger civil penalties in relation to insider trading, Dr Overland highlighted the difficulties in detecting and proving such cases:

> Accordingly, those who might be tempted to engage in insider trading, on the assumption that they are unlikely to be caught or convicted, or severely punished if they are, need to be deterred from considering such activity. If those who are convicted or found liable in civil penalty proceedings are seen to be subject to serious and significant penalties, the deterrent effect will be much greater.[10]

4.17 In contrast, Professor Bagaric dismissed the theory of general deterrence as an 'absolute myth'. He argued that while it might seem counterintuitive, the severity of penalties had little effect on the thinking of offenders, unlike the risk of detection (a matter covered in the previous chapter):

> Ninety-three per cent of criminologists around the world know that there is no correlation between the severity of the penalty and a reduction in crime. Common sense tells us that there is. We all think that people act rationally and prudently when they are considering what actions to do next. We make the assumption that when people are about to commit a crime, whether it is an assault or a white-collar crime, that they sit back and reflect, 'If I do this, what is going to happen to me?' and that if the consequence is really bad—it could be jail for 10 years—they will not do it. It does not work. The empirical evidence shows that it does not work.

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8 Commonwealth Director of Public Prosecutions, *Submission 53*, p. 3.

9 Commonwealth Director of Public Prosecutions, *Submission 53*, p. 3.

10 Dr Juliette Overland, *Submission 9*, p. 11.

> We could escalate white-collar sentences to a mandatory 30 years imprisonment for every white-collar crime. Do you know how much crime that would reduce? Zero. The only thing that will reduce white-collar crime is to increase the perception in people's minds that if they do something wrong they will get caught.[11]

4.18 Clarifying his argument, Professor Bagaric suggested that deterrence worked in an absolute sense, but not in a marginal sense. Absolute deterrence, he explained:

> …contends that, in order for the risk of detection to be effective, people need to understand that if they are caught there needs to be a hardship and unpleasantness that is going to be associated with that. But the unpleasantness does not have to be something that is going to damage the taxpayer even more by five years imprisonment. The unpleasantness can be a community-based order. That would be sufficient. The unpleasantness can be stripping of their assets. That would be sufficient. The unpleasantness just needs to be something that the person would seek to avoid. It does not have to be grotesquely over the top compared to the level of harm of their crime. Deterrence does work in an absolute sense but not in a marginal sense.[12]

4.19 The IPA was also critical of the concept of 'general deterrence'.[13] The IPA suggested that it was widely accepted that 'general deterrence is a weak justification for increasing penalties because it effectively punishes someone for the potential crimes of others'.[14]

Custodial sentences for white-collar offences

4.20 Differences between submitters about the purpose of penalties and their relationship to deterrence found their clearest expression in evidence concerning the use of custodial sentences in white-collar crime cases. Some submitters argued that imprisonment was a critical part of the criminal penalty framework, particularly because of its strong deterrent effect. The committee also received a large number of submissions from individuals who had suffered a loss due to white-collar crime or

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11 Professor Mirko Bagaric, Professor of Law, Swinburne University of Technology *Proof Committee Hansard*, 6 December 2016, p. 21.

12 Professor Mirko Bagaric, Professor of Law, Swinburne University of Technology, *Proof Committee Hansard*, 6 December 2016, p. 21.

13 'General deterrence' is distinct from 'specific deterrence', which is 'aimed at reducing crime by applying a criminal sanction to a specific offender, in order to dissuade him or her from reoffending'. Donald Ritchie, 'Sentencing Matters: Does Imprisonment Deter? A Review of the Evidence', Sentencing Advisory Council (April 2011), https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Does%20Imprisonment%20Deter%20A%20Review%20of%20the%20Evidence.pdf, p. 1.

14 Mr Andrew Bushnell, Research Fellow, Institute of Public Affairs, *Proof Committee Hansard*, 6 December 2016, p. 8.

misconduct, and many of these individuals emphasised what they regarded as a need for stronger custodial penalties. In contrast, some witnesses argued that prison was rarely an appropriate or proportionate response to white-collar crime, and some also argued that it was not an effective deterrent.

4.21 This part of the chapter examines these various views, starting with a consideration of the availability and use of custodial sentences for white-collar crime in Australia.

Availability and use of custodial sentences for white-collar crime

4.22 In its submission, the CDPP noted that in considering whether or not penalties for white-collar crime are adequate, there are two main issues:

> …first, whether courts are discharging their existing sentencing discretion appropriately; and second, whether the statutory maximum penalty for the offence is appropriate.[15]

4.23 On the whole, the evidence received by the committee would suggest that the maximum terms of imprisonment available for white-collar crime are broadly consistent with settings in foreign jurisdictions. In this sense at least, the maximum penalties would appear adequate, although some submitters, and in particular victims of white-collar crime and their advocates, nonetheless argued that higher maximum terms of imprisonment should be introduced. However, for the most part, inquiry participants suggested that, to the extent sufficiently strong custodial sentences are not being handed down to white-collar criminals, this might be attributed to a reluctance on the part of enforcement agencies and prosecutors to seek custodial sentences or a failure by the courts to impose adequate custodial sentences.

4.24 According to ASIC, maximum terms of imprisonment available in Australia are broadly consistent with settings in comparable foreign jurisdictions. The exception, it noted, was the United States, which has significantly higher maximum prison terms compared to other jurisdictions.[16] ASIC provided a table comparing maximum prison terms across various jurisdictions for a range of white-collar offences demonstrating this point (reproduced as Table 4.1 below).

Table 4.1: Comparison of prison terms (years)

Country	Insider trading	Market manipulation	Disclosure	False statements	Unlicensed conduct	Fraud
Australia	10	10	5	10	2	10
Canada	10	10	5	5	5	14
Hong Kong	10	10	–	10	7	10
New Zealand	5	5	–	5	–	7
Singapore	7	7	7	7	3	Life*

15 Commonwealth Director of Public Prosecutions, *Submission 53,* p. 2.

16 Australian Securities and Investments Commission, *Submission 49*, p. 7.

United Kingdom	7	7	–	7	2	10
United States	20	20	20	20	20	20**

* Under s409 of the *Singapore Penal Code*, criminal breach of trust by a public servant, or by a banker, merchant or agent, attracts imprisonment for life, or imprisonment for up to 20 years. Like the fraud provisions in a number of other jurisdictions, this offence is not specific to the provision of financial services.

** Fraud offences that amount to 'securities and commodities fraud' attract a maximum prison term of 25 years under the *Sarbanes-Oxley Act 2002* (US): see 18 U.S.C. § 1348.

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

4.25 Dr Overland, addressing penalties for insider trading specifically, noted that maximum custodial sentences for insider were consistent with other jurisdictions (with the exception of the United States).[17] However, Dr Overland noted that the terms of imprisonment imposed in even the most serious cases of insider trading had not approached the maximum penalty. For example, Mr Luke Kamay, an NAB banker who had conspired with an Australian Bureau of Statistics employee to access and trade on embargoed data, was sentenced to seven years and three months' imprisonment, for what the judge called the 'worst case' of insider trading he had seen in Australia. Dr Overland submitted that if 'offenders who engage in the "worst" and "most serious" cases of insider trading do not receive the maximum available sentence, it is hard to argue that the criminal penalties need to be increased'.[18]

4.26 The Australian Shareholders' Association (ASA) allowed that current maximum terms of imprisonment and fines in Australia for white-collar crime were 'broadly consistent' with those available in foreign jurisdictions. However, the ASA suggested that there:

> …appears to be a reluctance to pursue and/or impose custodial sentences other than in very exceptional cases. In some cases, even where a custodial sentence is imposed, it is wholly or partially suspended. What we have seen is a penchant for weak punishments such as good behaviour bonds or community service orders even when the admitted wrongdoing has been serious, deliberate and systematic (for example, fraud). There is also a lack of clear consistency in the sentencing of offenders.
>
> Thus, whilst there is a framework in Australia that might be considered comparable to overseas jurisdictions in terms of criminal penalties, the fact that the actual penalties imposed are towards the lower end of the spectrum produces an outcome that is both inadequate to deter offenders and encourage proper compliance by individuals. It also attacks public confidence and the integrity of markets and the financial system as a whole.[19]

17 Dr Overland notes, in this regard, that the maximum term of imprisonment was increased in Australia was increased from five years to 10 years in 2010.

18 Dr Juliette Overland, *Submission 9*, p. 6.

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

4.27 Mr Stephen Mayne, representing the ASA, suggested that ASIC was reluctant to pursue the 'big players' in policing white-collar crime, instead preferring to focus on the 'small fish'. Mr Mayne further argued that fewer and fewer white-collar criminals were going to jail as a result of an ASIC-led prosecution. Instead, he argued, ASIC tended 'to settle and go the civil route and do the infringement penalties and do the enforceable undertakings and not actually take the hard yards'.[20]

4.28 The evidence received from the ASA appeared to reinforce claims made elsewhere about the number of people being sent to prison as a result of action taken by ASIC. For example, as the United Church (JIMU) reported in its submission, an analysis of ASIC and court records undertaken by a journalist indicated that in the two financial years ending July 2015, 58 individuals had been convicted and sentenced for corporate crime. Of these, 46 per cent received a custodial sentence, although the majority of those individuals received suspended sentences, good behaviour bonds or intensive correction orders. Those imprisoned served an average of 20 months before become eligible for parole.[21]

4.29 However, the IPA challenged the notion that white-collar criminals are currently being treated leniently by the courts, suggesting the 'evidence for such leniency is unclear, and has a number of complexities'.[22]

Will 'doing time' deter white-collar crime?

4.30 A range of submitters argued that there was no stronger deterrent for white-collar criminals than the risk of receiving a custodial sentence. For example, the CDPP submitted:

> Arguably, nothing deters would-be white collar criminals more than a realistic prospect of imprisonment. Whereas a fine can be factored into the 'cost of business' and potentially offset by profits from the offence, imprisonment impacts at a very direct and personal level.[23]

4.31 Noting the high costs of financial crime in Australia, and the harm such crime can have on individuals and society as a whole, the AFP submitted that criminal penalties, including imprisonment for individuals, are a 'proportionate and dissuasive measure to combat serious financial crime'.[24] The AFP expressed support for the CDPP's submission in relation to the deterrent effect of jail terms:

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20 Mr Stephen David Mayne, Director, Australian Shareholders' Association, *Proof Committee Hansard*, 6 December 2016, p. 37.

21 Rebecca Urban, 'Corporate criminals escaping jail time', *The Australian*, 8 December 2015, as cited in The Justice and International Mission Unit of the Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission 39*, p. 7.

22 Institute of Public Affairs, *Submission 33*, p. 3.

23 Commonwealth Director of Public Prosecutions, *Submission 53*, p. 3.

24 Australian Federal Police, *Submission 54*, p. 4. The AFP also noted that civil and administrative penalties are 'equally important' in addressing white-collar wrongdoing.

> Fines can be factored into the cost of business. I think a realistic prospect of imprisonment is a more effective deterrent in relation to this sort of criminality. We are talking about very serious criminality in the Commonwealth space, where taxpayers and the government are being defrauded of many millions of dollars. The point I make again is this: our focus is on those professional facilitators and organisers and our strong view is jail is a very effective deterrent in that space.[25]

4.32 ASIC also suggested that 'imprisonment is a significant deterrent' for white-collar criminals.[26] Mr Rowan Davis, Special Counsel at ASIC, told the committee that in his 22 years of experience investigating and prosecuting white-collar crime, he had found that the prospect of imprisonment provides a powerful deterrent to white-collar criminals. In making this point, Mr Davis explained that white-collar offending often involves significant and sophisticated pre-planning over a period of time, and in this context the threat of imprisonment:

> …rings loud and clear. I say that in terms of my experience, in part from seeing contemporaneous evidence of people in the process of committing crimes—including telephone intercepts, emails et cetera—where the fear of imprisonment will actually be spoken about it. Unfortunately, that has not necessarily had the effect of causing them to desist, but it is a real factor. In my view, the fact that we still have white-collar crime does not speak to those who are actually deterred as a result.[27]

4.33 Mr Davis also suggested that, aside from arguments regarding general deterrence, imprisonment played a role in registering the community's disapprobation for white-collar crime.[28]

4.34 While some witnesses argued that imprisonment was rarely the most appropriate or proportionate response to white-collar crime (as discussed further below), Dr Overland noted that jail, fines and restitution were not mutually exclusive. She noted, in particular, that in criminal proceedings, 'for the majority of white-collar crimes, there are fines that can be imposed in addition to the imposition of a jail term, and sometimes there is an emphasis on one over another'.[29]

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25 Mr Ian McCartney, Assistant Commissioner and National Manager, Organised Crime and Cyber, Australian Federal Police, *Proof Committee Hansard*, 6 December 2016, p. 49.

26 Mr Tim Mullaly, Senior Executive Leader, Australian Securities and Investments Commission, *Proof Committee Hansard*, 6 December 2016, p. 62; Mr Chris Savundra, Senior Executive Leader, Australian Securities and Investments Commission, *Proof Committee Hansard*, 6 December 2016, p. 63.

27 Mr Rowan Davis, Special Counsel, Chief Legal Office, Australian Securities and Investments Commission, *Proof Committee Hansard*, 6 December 2016, pp. 62–63.

28 Mr Rowan Davis, Special Counsel, Chief Legal Office, Australian Securities and Investments Commission, *Proof Committee Hansard*, 6 December 2016, p. 63.

29 Dr Juliette Overland, Private capacity, *Proof Committee Hansard*, 6 December 2016, pp. 26–27.

Victims of white-collar crime on imprisonment

4.35 The committee received a large number of submissions from victims of white-collar crime and advocates writing on behalf of victims. The overwhelming view expressed in these submissions was that maximum terms of imprisonment should be higher, and more white-collar criminals should be receiving prison sentences.

4.36 The Banking & Finance Consumers Support Association (BFCSA) pointed to the Icelandic example of prosecuting and, in many cases, imprisoning executive officers of banks and financial institutions in the aftermath of the global financial crisis (GFC). According to the BFCSA, the use of custodial sentences in Iceland has served as a powerful deterrent to would-be white-collar criminals in the Icelandic banking sector. The BFCSA submitted that a similar 'zero tolerance' approach, and the use of 'tough penalties' (along with improved enforcement and a better understanding of predatory lending, mortgage fraud and other 'control frauds'), should apply in Australia.[30] The BFCSA argued, on behalf of its members, for:

> …heavy custodial sentences as strong deterrents for the future. We collectively seek the most appropriate penalties to match the magnitude of damage to people's lives, the homelessness, and the stress of financial loss. It is time to get serious for the sake of future generations in terms of housing and general financial stability.[31]

4.37 More specifically, and addressing what it suggested was criminal activity on the part of lenders and other participants in the banking and financial sector, the BFCSA submitted:

> In the public interest and with the clear intention to stop these activities, we believe 25 years with a non-parole period is a fair sentence and a significant deterrent. Given the magnitude of the criminal intent, the Cartel activity and, the staggering loss of homes, which will continue well into the future, after the last Low Doc Mortgage is sold and signed up, no lesser sentence is adequate.
>
> BFCSA Members also recommend 20 years with a non-parole period for regulatory executives found guilty of criminal neglect.[32]

4.38 Ms Merilyn Swan noted that, as of January 2016, 29 bankers in Iceland had been sentenced to prison for their roles in Iceland's banking crisis during the GFC. Ms Swan, while emphasising the central importance of a strong corporate regulator, submitted:

> Iceland's approach to breaches of fiduciary duties by CEOs and senior bank management would be welcomed by many in Australia who feel CEOs

30 Banking and Finance Consumers Support Association, *Submission 23*, p. 6.

31 Banking and Finance Consumers Support Association, *Submission 23*, p. 11.

32 Banking and Finance Consumers Support Association, *Submission 23*, p. 12.

> expressing their apologies for widespread financial misconduct within their organisations is simply not good enough.[33]

4.39 The HNAB-Action Group argued that white-collar criminals should face prison time 'for at least as long as it takes all the offender's victims to receive restitution and compensation'.[34]

4.40 A large number of submissions received by individuals relaying their own experiences with alleged predatory lending and mortgage fraud, also called for increasing the incidence and duration of custodial sentences for white-collar criminals in banks and other financial institutions.

Is imprisonment a proportionate and effective response to white-collar crime?

4.41 Not all inquiry participants agreed that sending a larger number of white-collar criminals to prison for longer periods of time would be effective or proportionate. Some questioned why white-collar criminals should be subject to different treatment than other non-violent offenders, questioned whether imprisonment was a proportionate or cost-effective response to the offending in most instances, and challenged the idea that stronger custodial penalties would have a meaningful deterrent effect. These views are summarised below.

4.42 Some submitters stressed that custodial sentences should always be considered a punishment of last resort. For example, Dr Zirnsak explained that the Uniting Church (JIMU) regarded imprisonment as an appropriate penalty only in 'extreme cases' where there was a need to protect the community or 'send a signal about deterrence in some cases for really egregious crimes being committed'.[35] Dr Zirnsak suggested that deterrence could be provided through other sanctions:

> In these kinds of crimes, if there is transparency, the potential for that public disclosure does in itself add a penalty, in addition to what we think should be adequate civil penalties, to ensure that there is no profit out of the crime. Other sanctions might be being banned from certain roles, certain industries, not being able to be a director, depending on the type of crime. There are a range of sanctions that could be applied, in the case of white-collar crime.[36]

4.43 Dr Zirnsak told the committee that criminological research appeared to suggest that when it came to deterrence, the likelihood of detection (a matter discussed in chapter 3) was more important than the threat of imprisonment:

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33 Ms Merilyn Swan, *Submission 50*, p. 8.

34 HNAB Action Group, *Submission 41*, p. 9.

35 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. 4.

36 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. 2.

> If you had the choice between having a handful of high profile, very strong imprisonment sentences versus lots of detection with more middle level sanctions, then our understanding would be the system where you have more detection and more middle level sanctions is probably a much greater deterrent and far more effective than simply: 'I'll take my chances. It's about one chance in a 100 I get caught, but if I get caught I'm going to go to prison for a long time.' Our understanding is that the research increasingly suggests that is not as effective as the other one.[37]

4.44 The Queensland Law Society acknowledged that white-collar crime can and has 'damaged whole industries and devalued entire markets, and in such circumstances the enormity of the crime, the harm caused and the informed intent behind the wrongdoing will justify custodial sentences of significant length'.[38] Nonetheless, the Queensland Law Society maintained that in many instances white-collar crime arises through ignorance, performance pressure or poor decision-making, and in such circumstances, and unless there is a physical threat to the community, imprisonment is unlikely to achieve the objectives of sentencing. Alternative, non-custodial sentences, including community service orders, are likely to be more appropriate, and far less costly to the taxpayer. The Queensland Law Society added that non-custodial sentences can also be used in conjunction with fines and compensation orders to enhance deterrence.[39]

4.45 The IPA argued that that the imprisonment of non-violent criminals, including 'white-collar criminals'—a categorisation it suggested was problematic and risked undermining equality before the law[40]—was rarely rational or appropriate. The IPA pointed to evidence that suggesting that increasing sentence severity, including incarceration, has no effect on levels of criminal activity.[41] The issue, the IPA suggested, was not whether to punish non-violent criminals, but rather whether the punishment was proportionate to the offence. In this sense, it made the case for penalising white-collar crime in a way that was consistent with the treatment of other non-violent crimes:

> Violent offenders need to be incarcerated, but prison is expensive and strongly correlated with repeat and escalating offending. For this reason, non-violent offenders are increasingly given alternative punishments. This recognises that the costs of imprisonment for people whom we are merely mad at, as opposed to afraid of, are not justified by the benefits that you get from that punishment. This is the context for the central contention of our submission: white-collar crime is not special and white-collar criminals

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37 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. 4.

38 Queensland Law Society, *Submission 31*, p. 2.

39 Queensland Law Society, *Submission 31*, p. 2.

40 Mr Andrew Bushnell, Research Fellow, Institute of Public Affairs, *Proof Committee Hansard*, 6 December 2016, p. 8.

41 Institute of Public Affairs, *Submission 33*, p. 4.

> should not be singled out for special treatment. The principles that apply to the punishment of non-violent offending also apply to white-collar crime.[42]

4.46 The IPA also argued that in cases of non-violent crime, imprisonment should be seen as a last resort and reserved for 'recidivists or people who have otherwise indicated through their behaviour that they simply will not respond to alternative punishments'.[43] In most cases, it argued, alternative punishments for white-collar criminals would be more effective and proportionate:

> Home detention and community service can be sufficiently punitive to deliver retribution for the victim and society. Professional disqualification is an effective specific deterrent that reduces the criminal's chance of reoffending. Restitution orders and fines can be used to make the victim whole, and this should be at the heart of the criminal justice system, especially in relation to crimes that involve money.[44]

4.47 As noted previously, the IPA was critical of the concept of 'general deterrence'. With regard to imprisonment as a form of general deterrence, the IPA submitted:

> Imprisonment as a penalty has a very specific purpose in sentencing—that is, to separate people from the public to protect the public. That is the unique feature of prison itself. General deterrence in any other circumstance is not an acceptable justification on its own. What we need is to achieve the other objectives with sentencing in punishing the criminal. Prison has not worked well to achieve the other objective of sentencing. It has not worked well to prevent recidivism. It does not provide any restitution to the victims of crime. There is a reason to believe that prison is also a poor mechanism for rehabilitation. On its own, prison would only be used as an idea of general deterrence, and we believe that is weak in and of itself.[45]

4.48 Some inquiry participants questioned whether the benefits to the community of imprisoning white-collar criminals justified the cost. For example, in their joint submission, Professor Adams, Dr Hickie and Mr Lloyd QC highlighted the high cost of incarceration, and emphasised the need for a 'careful balancing act between the

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42 Mr Andrew Bushnell, Research Fellow, Institute of Public Affairs, *Proof Committee Hansard*, 6 December 2016, p. 8. The IPA also submitted a copy of an IPA research essay, 'The use of prisons in Australia: Reform directions', which argues that Australia is over-incarcerating non-violent, low-risk offenders, in a manner that is disproportionate to the crimes committed, costly to the taxpayer, and ineffective in terms of deterring crime, rehabilitating offenders and providing restitution to victims. Institute of Public Affairs, *Submission 139*.

43 Mr Andrew Bushnell, Research Fellow, Institute of Public Affairs, *Proof Committee Hansard*, 6 December 2016, p. 10.

44 Mr Andrew Bushnell, Research Fellow, Institute of Public Affairs, *Proof Committee Hansard*, 6 December 2016, p. 8.

45 Mr Darcy Allen, Research Fellow, Institute of Public Affairs, *Proof Committee Hansard*, 6 December 2016, p. 9.

sentencing of white-collar criminals and the costs associated for the state'.[46] They submitted:

> The argument has been made for many years that an affluent white collar criminal should not be treated more favourably than the traditional perpetrator of street crimes which perpetrator [sic] would in the main come from a less affluent socio-economic background. Whilst this proposition is perhaps self-evidently correct, it ignores the cost to society of housing the white collar criminal and the fact the white collar criminal poses no real threat to the physical well-being of the citizen in the street.[47]

4.49 Professor Adams, Dr Hickie and Mr Lloyd QC also submitted that there was little evidence to suggest that imprisonment of offenders was effective in reducing the rates of recidivism of offenders. They argued that:

> …if one of the aims of imposing a custodial sentence on an offender is rehabilitation of that offender, then current sentencing practices arguably fall woefully short of achieving that aim. This then begs the question of how and why a custodial sentence should apply to a white collar criminal.[48]

4.50 Professor Adams, Dr Hickie and Mr Lloyd QC argued that hitting the 'hip-pocket nerve' of offenders and retrieving ill-gotten gains would, along with the stigma of a conviction, were the major deterrent factors for white-collar criminals, and the threat of imprisonment was less relevant in this regard:

> The effects of a conviction on a white collar criminal are undoubtedly at the core of punishment and deterrence because they impact upon the offender's ability to carry on their business. Such effects may include travel visa denials and the inability to engage upon their licensed profession (disbarment for lawyers and licensing for traders and other business professionals) and the ability for such offenders to earn money and raise funds in the future. These effects flowing from a conviction [simply] do not normally apply to the usual non-white collar crime offender. It can be argued, save and except for financial punishment, the imposition of a prison term in reality does little to deter a white collar criminal for re-offending.[49]

4.51 Professor Bagaric argued that prison should be reserved for criminals who pose a physical risk to the community.[50] He added:

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46 Professor Michael Adams, Dr Tom Hickie and Mr Ian Lloyd QC, *Submission 5*, p. 2.

47 Professor Michael Adams, Dr Tom Hickie and Mr Ian Lloyd QC, *Submission 5*, p. 3.

48 Professor Michael Adams, Dr Tom Hickie and Mr Ian Lloyd QC, *Submission 5*, p. 3.

49 Professor Michael Adams, Dr Tom Hickie and Mr Ian Lloyd QC, *Submission 5*, pp. 3–4. The important of monetary penalties is covered in chapter six.

50 Professor Mirko Bagaric, Professor of Law, Swinburne University of Technology, *Proof Committee Hansard*, 6 December 2016, p. 20.

> When it comes to sentencing white-collar offenders, in most situations, we should not put them in prison. We need to implement other more cost-effective sanctions in order to deal with them.[51]

4.52 Professor Bagaric also emphasised the need to have regard to the principle of proportionately in sentencing. He suggested that a custodial sentence was in most instances not a proportionate response to the harms caused by white-collar criminals:

> Imprisonment is a profoundly damaging sanction. People that go to prison not only suffer the hardship of deprivation of liberty while they are there, the chances of them being subject to a significant violent crime go up tenfold. When they get out, their life expectancy is reduced. When they get out, their lifetime earning is reduced by about 40 per cent. Imprisonment for any case of institutional types of insider or white-collar crime is almost always a grossly disproportionate penalty hardship for what they have done.[52]

4.53 In discussing the importance of the principle of proportionately, Professor Bagaric argued that a bifurcated response to white-collar crime was needed in which the focus was on harms caused:

> There are only two forms of basic white-collar crime. One is where mums and dads, and individuals get hurt and lose their life savings and their houses, and causes significant damage to people. In rare instances, the only appropriate response to that may be a jail term. But, for the institutional type of white-collar crime, in nearly no cases should any of those people come anywhere near a prison. There are other forms of sanctions that are proportionate to the harm that they do.[53]

4.54 Some witnesses and submitters suggested that calls for harsher prison sentences for white-collar offenders were based less on evidence and more, as the IPA put it, on 'anti-market populism'.[54] Similarly, Professor Bagaric told the committee that penalties should be based on evidence, rather than what 'feels right'. The starting point in a discussion about penalties, he argued, should be that:

> …the harshest penalties in our criminal justice system need to be reserved for the people we are scared of—not the people we are angry at.
>
> We and the community are angry at white-collar offenders. Why? Because they are greedy and quite often they are lazy. That does not justify us, in a logical and empirical manner, imposing the harshest penalties in our system—being imprisonment—on these people. The impact of imprisoning

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51 Professor Mirko Bagaric, Professor of Law, Swinburne University of Technology, *Proof Committee Hansard*, 6 December 2016, p. 21.

52 Professor Mirko Bagaric, Professor of Law, Swinburne University of Technology, *Proof Committee Hansard*, 6 December 2016, p. 27.

53 Professor Mirko Bagaric, Professor of Law, Swinburne University of Technology, *Proof Committee Hansard*, 6 December 2016, p. 30.

54 Institute of Public Affairs, *Submission 33*, p. 2.

> many white-collar offenders is that we, paradoxically, punish the taxpayer and ourselves even more.[55]

4.55 Some inquiry participants took issue with the notion that imprisonment was not a proportionate response to the harms caused by white-collar crime (and, as noted in the first chapter, many witnesses were keen to emphasise the extent of these harms). Making the case for imprisonment as a condign punishment in cases of white-collar crime, Mr Davis, ASIC Special Counsel, was critical of the underlying assumption in Professor Bagaric's suggestion that imprisonment should be saved for the worst type of offender, suggesting:

> …there is a risk there of perhaps underestimating the impact that financial crime can have on the victims of financial crime. In my experience, that can be devastating.[56]

4.56 Asked about the point made by some witnesses that imprisonment should always be a last resort, Mr Davis also indicated that it was already the case that prison sentences were only handed down when no other penalty was deemed appropriate:

> I might indicate that legislative guidance does exist in the Commonwealth Crimes Act in relation to imposing a sentence in prison: the court has to be satisfied that no other sentence is appropriate. So in a sense the court is required to go through that stepped reasoning process, as it were, of 'No, this is not appropriate; this is not appropriate,' and we end up at a sentence of imprisonment.[57]

Mandatory sentencing

4.57 As summarised below, there was some discussion during the inquiry about whether mandatory minimum sentences might provide one way of better deterring white-collar offending, particularly in light of the difficulties involved in successfully prosecuting offenders.

4.58 Dr Overland suggested that, rather than increasing the maximum custodial sentence for insider trading, consideration should be given to a mandatory minimum sentence of six months imprisonment for all offenders convicted of insider trading, 'other than in the most extenuating circumstances'.[58] This, she submitted, would have a positive impact on general deterrence:

> While the availability of increasingly severe penalties may appear to have a general deterrent effect, it is the actual penalties imposed on those

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55 Professor Mirko Bagaric, Professor of Law, Swinburne University of Technology, *Proof Committee Hansard*, 6 December 2016, p. 20.

56 Mr Rowan Davis, Special Counsel, Chief Legal Office, Australian Securities and Investments Commission, *Proof Committee Hansard*, 6 December 2016, pp. 62–63.

57 Mr Rowan Davis, Special Counsel, Chief Legal Office, Australian Securities and Investments Commission, *Proof Committee Hansard*, 6 December 2016, p. 63.

58 Dr Juliette Overland, *Submission 9*, p. 2.

> convicted of insider trading which are most likely to have an impact. Potential insider traders are unlikely to be deterred from engaging in insider trading just because a greater maximum sentence is possible, if they regularly see that those who are convicted of insider trading are not given a severe sentence. Thus, when the penalties imposed, even for the cases considered to be in the "worst category", do not approach the existing maximums, an arbitrary increase of maximum penalties is unlikely to have a significant impact on deterrence.
>
> While judicial discretion must be preserved in matters of sentencing, consideration should be given as to whether it is appropriate to legislate for a minimum sentence of six months' imprisonment, other than in the most extenuating circumstances, for those convicted of white collar crimes such as insider trading. This ensures that all potential offenders are aware that imprisonment is a certainty for those identified and convicted of insider trading, thus increasing the deterrent effect of the penalty.[59]

4.59 On the whole, witnesses appearing before the committee expressed caution or opposition to the concept of mandatory sentencing. The Queensland Law Society indicated that, in addition to viewing imprisonment as a last-resort punishment, mandatory sentencing restricts 'a court's ability to address issues specific to the offender and can result in harsh and unjustifiable sentences, as well as decreasing the likelihood of guilty pleas being entered'.[60]

4.60 Referring to Dr Overland's suggestion that consideration be given to a mandatory minimum sentence for insider trading, the CDPP also expressed concern about the impact this might have on encouraging offenders to plead guilty:

> One issue about that is that it can have an impact on whether persons plead or not, and that is certainly what happened in the people-smuggling space, where, once defendants realised that, no matter how good their mitigating circumstances, they were going to jail for X period—bearing in mind that was a minimum of three years—that did significantly impact on the plea rate. From the community's perspective, that means a lot more expensive trials have to be conducted. If there were to be a mandatory minimum, my personal view would be that there would need to be a get-out clause to cater for the special circumstances or the exceptional case, because there is always a case that comes along where one might feel that it is not appropriate that this individual go to jail.[61]

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59 Dr Juliette Overland, *Submission 9*, p. 7. Also see Dr Juliette Overland, Private capacity, *Proof Committee Hansard*, 6 December 2016, p. 25.

60 Queensland Law Society, *Submission 31*, p. 1.

61 Mr Shane Kirne, Practice Group Leader, Commercial Financial and Corruption, Commonwealth Director of Public Prosecutions, *Proof Committee Hansard*, 6 December 2016, pp. 56–57.

4.61 For its part, the IPA argued that mandatory sentencing not only removes the judiciary's ability to properly consider the facts of a case in sentencing, but also leads to overincarceration which the taxpayer has to pay for.[62]

4.62 Mr Theo Alexander also sounded a note of caution in regard to mandatory sentencing, advising the committee that there was no evidence that mandatory sentencing was effective as a deterrent.[63]

4.63 Taking a different approach on the question of mandatory penalties, Dr Zirnsak suggested that consideration should be given to:

> …a mandatory limit to wipe out the profit that was made from the criminal activity, and the penalty should be higher than that, because clearly if all you do is lose what you gained, that is still not necessarily a significant enough deterrent. I do think that is the case. Also, those kinds of penalties are only going to be on what the detected benefit was as well, so there is some risk that a person may have gained a greater benefit that goes undetected. This is not unknown in Australian law. I know, for example, that in the antibribery section of the Criminal Code there already is this ability to level a penalty that is a multiple of the benefit gained through the bribe if that can be determined by the court.[64]

Committee view

4.64 The committee acknowledges the concerns of some inquiry participants, and in particular of victims of white-collar crime and their advocates, that maximum prison terms for white-collar offences should be increased. However, the committee is satisfied that the maximum prison terms available in Australia are comparable to those available in similar foreign jurisdictions. While the committee does not preclude the possibility that maximum terms of imprisonment for certain offences should be increased, broadly speaking the committee considers current maximum terms of imprisonment for white-collar crime to be appropriate.

4.65 The committee considers that custodial sentences have an important role to play in deterring and punishing white-collar crime. Indeed, the committee is inclined to agree with the suggestion that arguably nothing deters a white-collar criminal more than the realistic prospect of imprisonment. Moreover, this inquiry has helped underline the harms caused by white-collar crime, both at the individual level and in the community more broadly, and agrees that imprisonment is often an appropriate and proportionate response to white-collar crime. Equally, the committee notes the

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62 Mr Andrew Bushnell, Research Fellow, Institute of Public Affairs, *Proof Committee Hansard*, 6 December 2016, p. 10.

63 Mr Theo Alexander, Lecturer, Deakin University, *Proof Committee Hansard*, 6 December 2016, *Proof Committee Hansard*, 6 December 2016, p. 26.

64 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. 7.

severity of imprisonment as a punishment, and agrees that the courts should only impose a term of imprisonment as a 'last resort' punishment. However, the committee has seen no evidence to suggest that the courts currently regard it otherwise.

4.66 The committee would have strong reservations in relation to any steps to introduce mandatory sentencing in relation to white-collar offences. While deterring, detecting and prosecuting white-collar crime and misconduct is often very challenging, this in itself would not justify steps that would remove the discretion of the courts in sentencing. Mandatory sentencing might also reduce the prospects of guilty pleas or cooperation in white-collar crime cases.

Chapter 5

Banning orders and infringement notices

5.1 A number of inquiry participants raised with the committee the use and duration of banning orders and disqualification orders in relation to white-collar crime and misconduct.

5.2 While inquiry participants broadly agreed on the value of banning orders as part of wider penalty framework, some participants suggested reforms that would enhance their effectiveness in combating white-collar crime and misconduct. This chapter summarises the views expressed by inquiry participants in this regard.

5.3 This chapter also considers the current arrangements for the use of infringement notices, and whether ASIC is effectively and appropriately employing this particular part of the enforcement toolkit to combat financial and corporate misconduct.

Importance of banning and disqualification orders

5.4 ASIC is responsible for regulating persons who carry on a financial services business in Australia, including licensing those persons and monitoring their ongoing compliance with licence and other legal obligations.[1] As noted in chapter 2 (Table 1), ASIC can take administrative action to protect consumers and financial investors, including: disqualifying a person from managing a corporation; banning a person from providing financial services or engaging in credit activities; or revoking, suspending or varying the conditions of a licence (with or without a hearing).[2] This part of the report summarises those powers, and considers whether they are appropriate and adequate in combating white-collar crime and misconduct.

Banning orders

5.5 ASIC's power to make a banning order is contained in s920A of the Corporations Act. As ASIC explains in *Regulatory Guide 98: Licensing: Administrative action against financial service providers*, a banning order is:

> …a written order by us that prohibits the banned person from providing financial services, whether as an AFS licensee or as a representative of such a licensee. We can make an order that either prevents a person from providing all financial services, or from providing specified financial

1 ASIC, *Regulatory Guide 98 – Licensing: Administrative action against financial services providers* [hereafter 'RG98'] (July 2013), p. 4. It might be noted here that AFS licensees may be a natural person, a partnership, a body corporate or a trustee. ASIC, RG98, p. 7.

2 For more detail on ASIC's administrative powers, see ASIC, RG98, pp. 7–11.

> services, in specified circumstances. A banning order may be permanent or for a specified period.[3]

5.6 On the whole, inquiry participants were agreed as to the importance of banning orders as part of the enforcement toolkit.

5.7 HNAB-AG suggested that banning orders issued on a zero tolerance basis for offenders in a given industry would help prevent illegal phoenix activity and 'avert people [offenders] being moved around within an institution or onto another'.[4]

5.8 The LCA told the committee that the use of banning orders had been effective in the approximately 20 years they had been in use:

> We believe that when you look at the sorts of banning orders courts have imposed in the area of white-collar crime generally you see a range from zero to 20 years, depending on the nature of the offence. We believe that that has worked well and does not require any tinkering.[5]

5.9 The LCA also noted that the imposition of a banning order could have serious reputational consequences in Australia, which added to their efficacy.[6]

Disqualification orders

5.10 ASIC also has a power to disqualify a person for managing a corporation for up to 5 years under s206F of the Corporations Act. On application by ASIC, a court may also disqualify a person from managing corporations for a period under s206C of the Act. A person is automatically disqualified from managing corporations they are convicted of certain offences, are an undischarged bankrupt, or in certain other situations set out in s206B of the Act, although ASIC or a court can allow the person to manage a company under s203B of the Act. As noted below, disqualification orders can also be issued under other legislative instruments, including under competition law.

5.11 Several inquiry participants highlighted the importance of disqualification orders. Noting that disqualification orders can be issued by a court for breaches of the Competition and Consumer Act or the Australian Consumer Law, the ACCC submitted:

> The ACCC considers the imposition of a disqualification order to be an important remedy, as it restricts a person from managing a company and

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3 ASIC, RG98, p. 9.

4 HNAB Action Group, *Submission 41*, p. 9.

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

6 Mr Greg Golding, Chair, Foreign Corrupt Practices Working Group, Business Law Section, Law Council of Australia, *Proof Committee Hansard*, 6 December 2016, p. 16.

> sends a strong message to other potential offenders that there are consequences for misconduct.[7]

5.12 Appearing before the committee, Mr Bezzi from the ACCC emphasised the power disqualification orders could have:

> We have also had disqualification orders in competition cases. They are quite common. And I can tell you that they are a very powerful sanction. I have sat across the table from people who have said to me: 'I'll pay more fine. I'll give you another $100,000. Just reduce the disqualification period.' I think they work very well.[8]

5.13 ARITA argued that non-monetary penalties should be given greater prominence in insolvency cases. For instance, directors would be more likely to meet their obligations to a liquidator when confronted with the possibility of an order that prevented them for acting as a director of another company, as opposed to paying a relatively small monetary penalty.[9]

5.14 ARITA noted that a streamlined director disqualification regime had been proposed in the exposure draft of the Insolvency Law Reform Bill 2013. According to ARITA, this streamlined approach would have applied in instances where directors failed to comply with demands by external administrators to deliver the company's books and records and to provide a report as to affair (RATA). ASIC would have been able to use this new process as either an alternative to, or addition to, criminal prosecution. ARITA explained:

> ASIC would provide a warning and then formally demand compliance by the director. If the director did not comply and did not provide a reasonable excuse, the director would automatically become disqualified from managing corporations until one of a range of factors occurred, including compliance with the notice.[10]

5.15 However, as ARITA notes, this reform was subsequently removed from subsequent drafts of the bill.[11]

5.16 A different matter was raised by Dr Overland, who expressed concern about the practice of courts granting leave from automatic disqualification orders. Referring to persons convicted of insider trading in criminal proceedings, Dr Overland noted

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7 Australian Competition and Consumer Commission, *Submission 40*, p. 4.

8 Mr Marcus Bezzi, Executive General Manager, Competition Enforcement, Australian Competition and Consumer Commission, p. 68.

9 Australian Restructuring Insolvency and Turnaround Association (ARITA), *Submission 32*, p. 8.

10 Australian Restructuring Insolvency and Turnaround Association (ARITA), *Submission 32*, p. 9.

11 Australian Restructuring Insolvency and Turnaround Association (ARITA), *Submission 32*, p. 9.

that such persons are subject to an automatic disqualification from managing a corporation. However, a court can grant leave to allow the person to manage a corporation. For example, despite his conviction for insider trading, former director and chairman of Gunns Limited, Mr John Gay, was granted leave to manage two family companies, despite ASIC opposing his application to do so.[12] In order to prevent this happening, Dr Overland recommended legislative reform so that 'a court may only grant such leave if satisfied that the offender is otherwise subject to a penalty of appropriate personal and general deterrence'.[13]

5.17 Appearing before the committee, Dr Overland reiterated her concerns in this regard:

> In addition to that, the issue of disqualification, particularly automatic disqualifications that apply when a person is convicted of a crime that has a maximum sentence under the Corporations Act of more than 12 months, I do find it concerning that leave can be granted and people committed to manage corporations when they would otherwise be automatically disqualified and that particular consideration should be given as to whether limitations should be imposed on that.[14]

5.18 Dr Overland also noted that there is currently no automatic disqualification from managing corporations for persons found liable for insider trading in civil proceedings. Dr Overland recommended that the same form of disqualification apply where a person is found liable for insider trading in civil penalty proceedings as applied when they were convicted of insider trading in criminal proceedings—that is, that they be subject to automatic disqualification.[15]

ASIC's banned and disqualified register

5.19 ASIC maintains a register of people and organisations who have been subject to banning orders or disqualification orders, using information drawn from a number of other registers. It includes information on persons who have been:

- disqualified from involvement in the management of a corporation;
- disqualified from auditing self-managed superannuation funds (SMSFs); or
- banned from practicing in the financial services or credit industry.[16]

12 Dr Juliette Overland, *Submission 9*, p. 8.

13 Dr Juliette Overland, *Submission 9*, pp. 2.

14 Dr Juliette Overland, Private capacity, *Proof Committee Hansard*, 6 December 2016, p. 19.

15 Dr Juliette Overland, *Submission 9*, p. 8.

16 ASIC, webpage, 'Banned and disqualified', http://asic.gov.au/online-services/search-asics-registers/banned-and-disqualified/#whatinformation, accessed 10 March 2017.

5.20 Some of the information on the register can be viewed for free—for instance, the name of the person, type of banning or disqualification, date of commencement and (if temporary) cessation. Further information from the register can be purchased.[17]

5.21 The Centre for Corporate Law and Securities Regulation (CCLSR) suggested that while banning orders constituted one of ASIC's most coercive powers, there was little public information available regarding their use or duration. The CCLSR noted, for example, that while the ASIC website does allow the user to search for banned and disqualified persons (that is, via the register), they can only do so if they already know the name of the individual for whom they are searching. As such, the CCLSR recommended that ASIC:

> …should establish an online and free-of-charge public register of banning orders imposed by ASIC that can be both browsed and searched using key terms, similar to ASIC's enforceable undertakings register'.[18]

5.22 According to the CCLSR, the establishment of a register of this sort would help improve fairness and accountability in relation to ASIC's use of its power. Moreover, it would help promote general deterrence by sending 'a stronger signal to the market that ASIC is taking administrative enforcement action seriously, both in terms of [the] frequency and magnitude of bans'.[19]

Committee view

5.23 The committee notes the issues raised by CCLSR in relation to the banned and disqualified register maintained by ASIC. While the committee did not consider the matter at any length in the inquiry, it considers that there would be merit in further considering enhancing the access to and usability of the register. This would likely help improve transparency regarding the use of disqualification and banning orders in Australia, and also better enable consumers and other interested parties to access information about people and organisations that have engaged in misconduct serious enough to warrant a banning or disqualification order.

Recommendation 2

5.24 The committee recommends that the Australian Securities and Investments Commission consider ways in which the accessibility and usability of the banned and disqualified register might be enhanced, in order to create greater transparency regarding banning and disqualification orders.

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17 ASIC, webpage, https://connectonline.asic.gov.au/HLP/SearchRegisters/sch-using-this-service/sch-whatyoucansearch/banned-and-disqualified/index.htm, accessed 10 March 2017.

18 Dr George Gilligan, *Submission 35*, pp. 2–3.

19 Dr George Gilligan, *Submission 35*, p. 3.

Infringement notices

5.25 Another administrative action that ASIC can take against financial service providers is the issuance of an infringement notice.

5.26 Infringement notices, as explained in *Information Sheet 151: ASIC's approach to enforcement*, are administrative actions administered by ASIC or, with ASIC's authority, the Markets Disciplinary Panel.[20] There are a number of different infringement notice regimes with differing levels of potential penalty, as set out below in Table 5.1.

Table 5.1: Types of infringement notice

For contraventions of:	Features	Issued by
ASIC Act (unconscionable conduct and consumer protection provisions)	These notices are intended to facilitate payment of relatively small financial penalties in relation to relatively minor contraventions.	ASIC
National Credit Act		ASIC
Market integrity rules	These notices can impose higher financial penalties, reflecting the potentially greater impact on the market of the conduct involved. They can only be issued after a formal opportunity to present their case is offered to the recipient. Notices for breaches of the market integrity rules can extend to compliance and conduct direction.	MDD
Corporations Act (continuous disclosure obligations)		ASIC

Source: Australian Securities and Investments Commission, *Information Sheet 151: ASIC's approach to enforcement*, p. 7.

5.27 Where an infringement notice is complied with (for example, where the penalty is paid) no further regulatory action can be taken in relation to the breach. However, if the infringement notice is not complied with, ASIC is able to bring a civil penalty action against the notice recipient.[21]

5.28 In its submission, ASIC notes that infringement notices provide 'a prompt and proportionate means of enforcing the law', particularly when the more serious action for suspending or cancelling an AFS license appears disproportionate to the breach in question.[22]

5.29 However, ASIC also advised that while infringement notices are part of ASIC's enforcement toolkit in relation to breaches of the market integrity rules and

20 Australian Securities and Investments Commission, *Information Sheet 151: ASIC's approach to enforcement* [hereafter *Information Sheet 151*], p. 7.

21 Australian Securities and Investments Commission, *Information Sheet 151*, p. 7.

22 Australian Securities and Investments Commission, *Submission 49*, pp. 15–16.

continuous disclosure obligations, 'they are not currently available to us for breaches of the financial services and managed investments provisions of the Corporations Act, among others'.[23] ASIC suggested that introducing a broader infringement notice regime alongside existing remedies would provide a useful enforcement tool to respond to misconduct at the lower end of the scale where:

a) a higher volume of cases is expected, relative to instances of more serious misconduct;

b) an assessment of whether misconduct has occurred depends on relatively straightforward and objective criteria; and

c) a penalty must be imposed as soon as possible in order to be effective.[24]

5.30 ASIC explained that in many cases, when an AFS licensee does not comply with its obligations, the only enforcement remedy available to ASIC is to suspend or cancel on AFS licence, even though an infringement notice would be a more proportionate and appropriate response. Banning orders, ASIC explained:

> …is not appropriate for the vast majority of cases where misconduct is of low to medium severity, and where suspending or cancelling a licence would have significant adverse consequences for the licensee, its clients, employees and other representatives, and would be disproportionate with the nature of the breach. This means that we do not have the means to respond effectively and in a timely manner to less serious misconduct, which could escalate into more serious breaches.[25]

5.31 In contrast to ASIC's arguments regarding the value and utility of infringement notices, the LCA told the committee that it did not support the use of infringement notices in relation to white-collar crime, and noted that its concerns were shared in this regard by the Australian Law Reform Commission:

> Infringement notices in the area of white-collar crime have been a contentious issue. We as a body have always opposed the use of infringement notices. We believe it is lazy regulation. It does not involve a finding of culpability. It does not provide guidance to the community as to what conduct should be proscribed or not. We note that the Australian Law Reform Commission does not support infringement notices in areas such as this, and we would continue our opposition to infringement notices and our opposition to a broadening of the application of infringement notices in the corporations context.[26]

23 Australian Securities and Investments Commission, *Submission 49*, pp. 15–16.

24 Australian Securities and Investments Commission, *Submission 49*, p. 16.

25 Australian Securities and Investments Commission, *Submission 49*, p. 15.

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

Committee view

5.32 While noting the Law Council of Australia's views regarding infringement notices, the committee agrees with ASIC that infringement notices provide a valuable enforcement tool for responding to less serious instances of corporate and financial misconduct.

5.33 The committee agrees with ASIC that there may be value in making infringement notices available for breaches of the financial services and managed investments provisions of the Corporations Act.

Recommendation 3

5.34 The committee recommends that the government consider making infringement notices available to the Australian Securities and Investments Commission to respond to breaches of the financial services and managed investments provisions of the Corporations Act.

Chapter 6

Monetary penalties and disgorgement

6.1 A large number of inquiry participants expressed the view that current monetary penalties for white-collar crime and misconduct are currently inadequate, particularly in respect of non-criminal matters. This chapter considers arguments made in relation to the current settings of monetary penalties.

6.2 This chapter also considers arguments for multiple of gain penalties—that is, allowing monetary penalties to be set as a multiple of the benefit gained or loss avoided from the misconduct in question—and the possibility of introducing a mechanism for disgorgement alongside other penalties.

Adequacy of current maximum monetary penalties

Civil penalties

6.3 Inquiry participants generally agreed that maximum monetary penalties in non-criminal cases are currently inadequate.

6.4 ASIC highlighted the relatively low level of maximum penalties for non-criminal matters in the Corporations Act. For individuals, the maximum penalty of $200,000 for individuals was introduced in 2001; for body corporates, the maximum penalty of $1 million was introduced in 2004. Neither of these maximum penalties has been increased since their introduction. ASIC made the obvious point that these penalty levels 'have not kept pace with inflation', and added they 'are proportionately low given the seriousness and impact of civil penalty matters'.[1]

6.5 In its submission, ASIC provided a comparison of civil and administrative monetary penalties for individuals across various jurisdictions (Canada, Hong Kong, New Zealand, Singapore, the United Kingdom and the United States). Australian penalties for various white-collar offences are very much at the lower end of the scale, and indeed in most instances the lowest among the jurisdictions compared.[2]

6.6 ASIC also compared the civil penalties in the Corporations Act with the maximum penalties available for similar offences in the ASIC Act and National Credit Act. Maximum penalties under those pieces of legislation are set at a maximum $360,000 for individuals and $1.8 million for body corporate.[3]

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1 Australian Securities and Investments Commission, *Submission 49*, p. 14.

2 Australian Securities and Investments Commission, *Submission 49*, pp. 9–10.

3 Australian Securities and Investments Commission, *Submission 49*, p. 14.

6.7 ASIC noted that one of the factors it considers in determining its enforcement approach in a particular matter is the market impact of an investigation and an enforcement outcome. In cases where only low civil penalties were available (or low criminal penalties in criminal matters), ASIC advised that this might weigh against it pursuing a particular course of enforcement action.[4]

6.8 ASIC explained that increasing the maximum civil penalties available would better enable the courts to impose penalties proportionate to the severity of the offence and in line with community expectations, even in cases where the maximum penalty was not imposed:

> Historically, the courts have tended to apply civil penalties well below the maximum possible, reducing their impact and creating gaps between the levels of sanction the community expects should be handed down and what is given in practice. The reasons for this are complex and vary from one case to another (in itself reducing consistency), but often discounts are applied or the seriousness of the matter is not considered as warranting the maximum penalty (although it is unclear what level of seriousness would warrant the maximum penalty). Legislated maximum penalties should be set so as to take into account the worst cases, thus allowing reasonable penalties to be imposed in other cases.[5]

6.9 ASIC advised the committee that, while it considered maximum civil penalties of $200,000 for individuals and $1 million for corporations too low, it was not advocating an increase to a specific level:

> We certainly have advocated in this submission for increased penalties in the civil penalty regime, without being specific. I think it is a matter that is probably best left to the task force [ASIC Enforcement Review Taskforce] to do, which will assess those penalties both domestically and internationally to see whether they are consistent.[6]

6.10 Other inquiry participants also pointed to the apparent inadequacy of existing monetary penalties for non-criminal matters in the Corporations Act, and were prepared to make a submission on what an appropriate level of penalty might be. For example, Mr Golding from the Law Council of Australia suggested that Australia should not move to the level of penalties imposed by the United States, but that Australia's maximum penalties 'are low in international terms and should be reviewed upwards'.[7] Mr Golding told the committee that while it considered the civil penalty regime 'extremely effective and a very useful addition to the regulatory enforcement pyramid', it supported:

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4 Australian Securities and Investments Commission, *Submission 49*, p. 15.

5 Australian Securities and Investments Commission, *Submission 49*, p. 15.

6 Mr Chris Savundra, Senior Executive Leader, Australian Securities and Investments Commission, *Proof Committee Hansard*, 6 December 2016, p. 59.

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

> …an increase in the maximum penalties that can be imposed for a civil penalty prosecution. Currently it is $200,000 for individuals and $1 million for corporations. It has been at that level since the introduction of the civil penalties regime in 1994. It has not kept pace with inflation and it certainly has not kept pace with community expectations around that area. So we would support, particularly in the area of corporate penalties, an increase to that $1 million threshold.[8]

6.11 Mr Stephen Mayne, Director of the ASA, also argued that civil penalties were too low, suggesting that instead of the current maximum penalties of $200,000 for individuals and $1 million for corporations, penalties of $1 million for individuals and $5 million for corporations would be appropriate.[9]

6.12 The ASA explained that existing civil penalties were particularly low when considered in relation to the levels of remuneration directors within the corporate sector typically receive. It noted that the maximum civil penalty for directors and officers who breach their directors' duties is $200,000, which it suggested was low given the amounts CEOs and non-executive directors were typically paid:

> We believe that unless the $200,000 penalty is increased to reflect the potential gravity of the offence, courts will continue to be reluctant to impose anything more than a normal penalty (if any) on directors breaching their duties, even though shareholders may have suffered severely as a result.[10]

6.13 Dr Overland also told the committee that she supported ASIC's call of increased maximum civil penalties in the Corporations, suggesting that the penalties were 'very low'.[11]

Setting civil penalties as multiples of the benefit gained

6.14 In addition to being low, ASIC noted that civil penalties in Australia cannot currently be set as multiples of the benefit gained, as is the case in some other jurisdictions.[12]

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

9 Mr Stephen Mayne, Director, Australian Shareholders' Association, *Proof Committee Hansard*, 6 December 2016, p. 37

10 Australian Shareholders' Association, *Submission 34*, pp. 4–5.

11 Dr Juliette Overland, Private capacity, *Proof Committee Hansard*, 6 December 2016, p. 19.

12 Australian Securities and Investments Commission, *Submission 49*, p. 7. For some criminal offences under the Criminal Code Act 1995 (the Criminal Code), corporate bodies face a maximum penalty that is set as a multiple of the benefit gained or, where the benefit cannot be determined, as a certain percentage of the annual turnover of the body corporate in the period the offending occurred. Attorney-General's Department, *Submission 52*, p. 10.

6.15 While ASIC did not suggest a specific multiple that should apply to civil penalties, a number of witnesses (as noted below) discussed the possibility of introducing a multiple of three times the benefit made or loss avoided. As ASIC noted, provision for setting civil penalties at three times the benefit gained would be consistent with penalty settings in several other jurisdictions. Moreover, similar provisions already for certain criminal offences in the Corporations Act (specifically, certain market misconduct offences) and in other Australian legislation.[13]

6.16 Several witnesses expressed support setting civil penalties as a multiple of the benefit gained. For example, Dr Zirnsak, JIMU, told the committee that he supported the idea of setting penalties at three-times the value of ill-gotten gains.[14] In its submission, the Uniting Church (JIMU) recommended that civil penalties for white-collar crime should be increased where necessary to ensure that persons committing the crime are not able to financially profit from the crime.[15] The Uniting Church (JIMU) submitted:

> Currently civil penalties for white collar crime can be less than the proceeds of the crime which means that white collar criminals still end up ahead financially, unlike other countries where the penalties can include the sum of the gain plus a penalty of triple the amount of damages. Such a large penalty may prevent potential white collar criminals from committing an offence.[16]

6.17 Noting that civil penalties for insider trading were low by international standards, Dr Overland recommended increasing these penalties 'to a maximum of $765,000 or three times the profit made or loss avoided, whichever is greater'. The increase, she suggested, would be consistent with monetary penalties available for criminal convictions of insider trading (which also carries a maximum penalty of 10 years imprisonment), and reasonably consistent with fines available in foreign jurisdictions. Dr Overland further recommended that the ability to impose fines at multiples of the profit earned or loss avoided, as currently applied in criminal proceedings, should also apply to civil proceedings.[17]

6.18 The ASA also argued in support of penalties set as multiples of the wrongful gain. It submitted:

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13 Mr Tim Mullaly, Senior Executive Leader, Australian Securities and Investments Commission, *Proof Committee Hansard*, 6 December 2016, p. 59; Mr Chris Savundra, Senior Executive Leader, Australian Securities and Investments Commission, *Proof Committee Hansard*, 6 December 2016, p. 59.

14 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. 6.

15 The Justice and International Mission Unit of the Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission 39*, p. 6.

16 The Justice and International Mission Unit of the Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission 39*, p. 11.

17 Dr Juliette Overland, *Submission 9*, pp. 3, 9, 10.

> In our view, these penalties should at a minimum be at least the amount of the wrongful gain, and have the potential to be proportionately higher (for example, up to 10 times the financial benefit). Where there is no clear quantifiable wrongful gain, ASIC should have the power to order that the wrongdoer pay a penalty, for example up to $5 million for a body corporate and $1 million for an individual.[18]

6.19 The NSW Young Lawyers Business Law Committee also explained that having fixed civil penalties made it harder to prevent offenders from profiting from their conduct:

> The lower degree of flexibility in the non-criminal regime [in Australia, as compared to other jurisdictions] means that it may not always be possible to ensure a wrongdoer does not profit from their conduct, since the maximum fine that may be imposed may be substantially lower than the financial benefit obtained as part of the conduct.[19]

6.20 Although not addressing civil penalties specifically, the Tasmanian Small Business Council referred to alleged incidences of financial misconduct by Australian banks, and submitted that monetary penalties must be 'proportionate to the amount of wrongful gains by banks and bankers that have acted deceitfully and dishonestly'.[20]

Monetary penalties for criminal offences

6.21 Some inquiry participants also suggested that the maximum monetary penalties available in criminal matters involving white-collar crime were inadequate.

6.22 In its submission, ASIC argued that while criminal penalties in Australia for white-collar crime were broadly consistent with those available in comparable foreign jurisdictions (including the maximum fines available), Australia had 'significantly lower fines available' to punish particular contraventions, including those related to continuous disclosure obligations and unlicensed conduct.[21]

6.23 Professor Adams, Dr Hickie and Mr Lloyd QC, who as noted in chapter four registered doubts regarding the efficacy of imprisonment for white-collar criminals, suggested that penalties needed to focus on the 'hip-pocket' of offenders:

> By definition the motive of a white collar criminal is financial gain. The 'hip-pocket' argument as a major goal of sentencing of a white collar criminal must be correct. The integrity of business institutions and probity in individual and corporate enterprises can only be enhanced by sentencing

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

19 NSW Young Lawyers Business Law Committee, Submission 137, p. 7.

20 Tasmanian Small Business Council, *Submission 42*, p. 7.

21 Australian Securities and Investments Commission, *Submission 49*, pp. 7–8.

> options which include the imposition of large and effective fines together with retrieving the proceeds of crime from a white collar offender.[22]

6.24 Professor Adams, Dr Hickie and Mr Lloyd QC noted that while the level of fines in Australia for white-collar offending had increased (particular in relation to cartels) they did not allow for the imposition of the level of fines that apply in the United States, which can run into the tens of millions of dollars. They submitted that:

> …the most effective sentence to be imposed upon a white collar criminal would be, if appropriate, the imposition of a short custodial term of imprisonment together with the imposition of a higher level of fine and a thorough application of proceeds of crime legislation. In this way, the purposes of sentencing, in particular personal and general deterrence, would be achieved. Consideration should also be given to extended parole periods and conditions of parole aimed at limiting the offender's ability to re-offend and aimed at the offender 'giving back' to the community such as the imposition of an intensive correction order and/or some form of community service when released on parole.[23]

6.25 The BFCSA, which as noted in chapter 4 argued that white-collar criminals should be exposed to higher custodial sentences, suggested that fines and other monetary penalties represented 'pocket money' to the wealthy, and thus were inadequate as a deterrent 'for the determined and serious white-collar criminal'. Moreover, the fines typically issued were 'not in line with the tragic loss and damage we see every day in the mortgage scams and associated bank scandals'.[24] It might be noted, however, that the BFCSA was not arguing for higher monetary penalties for criminal offences per se, but rather a shift from the use of monetary penalties to stronger custodial sentences for white-collar offenders.

Multiples of benefit penalties for criminal offences

6.26 While some submitters expressed concern about the level and type of monetary penalties that can be imposed in criminal matters, it is worth noting here that the committee also received evidence highlighting the value of multiple of benefit penalties that currently apply in relation to certain criminal offences.

6.27 For corporate bodies, certain criminal offences in the Criminal Code, such as domestic bribery offences, foreign bribery offences and false accounting offences, can be punished through the application of a monetary penalty set as a multiple of the benefit gained or, where the benefit cannot be determined, as a percentage of the annual turnover of the corporate body in the period the offending occurred. This approach, the Attorney-General's Department argued:

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22 Professor Michael Adams, Dr Tom Hickie and Mr Ian Lloyd QC, *Submission 5*, pp. 4–5.

23 Professor Michael Adams, Dr Tom Hickie and Mr Ian Lloyd QC, *Submission 5*, p. 5.

24 Banking and Finance Consumers Support Association, *Submission 23*, p. 15.

> …allows for flexibility in determining penalties for white-collar crime, ensuring that the penalty imposed on corporations is proportional to the wrongful gain obtained by this corporate body. This means of calculating the maximum penalty for a corporation helps to ensure that the penalty imposed is sufficiently high to deter and punish financial crime and promote good governance, the rule of law and confidence in corporate practices.[25]

Limitations of monetary penalties in cases involving bankruptcy

6.28 The Australian Financial Security Authority (AFSA), which has responsibility (inter alia) for administering and investigating offences under the *Bankruptcy Act 1966*, submitted that it had:

> …received feedback from personal insolvency practitioners to the effect that the penalties imposed by the courts for offences under the Bankruptcy Act do not effectively deter bankrupts and others from committing offences under the Act.[26]

6.29 AFSA noted, in this regard, that fines were regularly being imposed upon offenders under the Bankruptcy Act who:

> …in the majority of cases, are or have been in financial difficulty and have sought relief through the bankruptcy process. The imposition of a fine in such circumstances presents practical difficulties in ensuring the penalty is complied with in a timely manner, as a person who is an undischarged bankrupt is likely to face difficulties in raising funds to pay a fine.[27]

6.30 AFSA therefore submitted that alternative penalties, such as Community Service Orders/Community Protection Orders, 'may provide a more appropriate sentence outcome for bankrupts who are prosecuted for offences under the Bankruptcy Act than the imposition of fines'.[28] AFSA noted that such a sentence is currently available under the *Crimes Act 1914*.

Disgorgement powers

6.31 A central theme of the evidence received by the committee was that efforts to tackle white-collar crime must take the profit out of the crime. While the *Proceeds of Crime Act 2002* (POC Act) provides a mechanism for recouping a wrongful gain in a criminal case, there is currently no comparable power to force the forfeiture of gains when someone has committed a civil offence. A number of submitters recommended introducing a disgorgement power that would apply in non-criminal matters.

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25 Attorney-General's Department, *Submission 52*, pp. 10–11.

26 Australian Financial Security Authority, *Submission 25*, p. 2.

27 Australian Financial Security Authority, *Submission 25*, p. 3.

28 Australian Financial Security Authority, *Submission 25*, p. 3.

6.32 Disgorgement, as ASIC explained, refers to:

> …the removal of financial benefit (such as profits illegally obtained or losses avoided) that arises from wrongdoing, or the act of paying these monies, on demand or by legal compulsion. For example, any profit made by wrongdoing is 'disgorged' from those involved in the wrongdoing in addition any penalties that are imposed.[29]

6.33 ASIC further explained that disgorgement provides a:

> …vehicle for preventing unjust enrichment. This means that disgorgement orders can offer significant deterrent value by reducing the likelihood that wrongdoers can consider penalties to be merely a business cost.[30]

6.34 This section of the report briefly summarises the powers that currently exist to recoup the gains of white-collar crime and misconduct—including under the POC Act—and in turn considers arguments in relation to the introduction of a disgorgement power.

6.35 The related question of compensation for victims of white-collar crime and misconduct is not addressed in any detail in this chapter, or elsewhere in this report. However, the committee notes that this matter will be considered as part of the committee's current inquiry into consumer protection in the banking, insurance and financial services sector.

Proceeds of Crime Act 2002 (POC Act)

6.36 The Attorney-General's Department explained that, where an individual retains a wrongful gain after the imposition of a fine under offences within Criminal Code (set out in the *Criminal Code Act 1995*), it is open to the CDPP and AFP to recoup this wrongful gain by bringing a forfeiture order under the POC Act.[31] The POC Act provides 'a comprehensive scheme to trace, investigate, restrain and confiscate proceeds generated from Commonwealth indictable offences, foreign indictable offences and certain offences against State and Territory law'. POC Act proceedings are civil proceedings, and do no impose a criminal conviction.[32]

6.37 Significantly, the POC Act, in addition to allowing for proceedings where a conviction has been secured ('conviction based forfeiture'), also allows for proceedings independent of the prosecution process or even where there has been no criminal conviction. The Attorney-General's Department explained that this system enables Australian authorities to better target the assets of individuals suspected of white-collar crime, particularly those at the top of criminal organisations. These

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29 Australian Securities and Investments Commission, *Submission 49*, p. 10.

30 Australian Securities and Investments Commission, *Submission 49*, p. 10.

31 Attorney-General's Department, *Submission 52*, p. 10.

32 Attorney-General's Department, *Submission 52*, p. 11.

individuals, the Attorney-General's Department further explained, had the resources to distance themselves from individual criminal acts, 'thereby evading conviction and placing their profits beyond the reach of conviction-based laws', and that:

> Generally, before assets can be seized under the non-conviction scheme in the POC Act, it must be established that the asset is the proceeds or an instrument of crime and that the asset was under the effective control of a person. The POC Act also contains a range of restraining orders and freezing orders which are designed to prevent an individual from disposing of an asset before a forfeiture application is resolved.[33]

6.38 A number of inquiry participants highlighted the importance of mechanisms to remove the proceeds of crime from white-collar criminals. The AFP, for instance, submitted that the confiscation of criminal assets 'is a vital tool in taking the profit out of crime and preventing the reinvestment of criminal profits into further criminal activity'.[34] The AFP advised that it can pursue asset confiscation, including in cases involving 'white-collar' offending such as insider trading and fraud, through the joint Criminal Assets Confiscation Taskforce (CACT), which combines the expertise and resources of the AFP, ACC and ATO.[35]

6.39 ASIC noted that in criminal matters it can brief the AFP and the CDPP to bring an action to confiscate the proceeds of crime under the POC Act. [36] However, ASIC also told the committee that, because it did not have access to disgorgement powers itself, and because it was required to go to the AFP or CDPP to seek action under the POC Act, this sometimes made recovery actions more difficult. Such actions needed to align with the AFP's or CDPP's priorities, and while those agencies have generally been 'very supportive' of ASIC's requests to take POC Act actions, there may be cases where ASIC sees 'a pressing need for disgorgement [but] other agencies may not'.[37]

6.40 ASIC placed more emphasis still on the fact that it does not have any equivalent disgorgement powers for civil penalty proceedings.[38] The issue of a disgorgement regime that would apply in non-criminal matters is discussed below.

Arguments for a disgorgement regime for non-criminal matters

6.41 Whereas monetary penalties, as ASIC explained, might sometimes be considered a 'cost of business'—particularly when those penalties are not set in

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33 Attorney-General's Department, *Submission 52*, p. 11.

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

35 Australian Federal Police, *Submission 54*, p. 10.

36 Australian Securities and Investments Commission, *Submission 49*, p. 16.

37 Mr Chris Savundra, Senior Executive Leader, Australian Securities and Investments Commission, *Proof Committee Hansard*, 6 December 2016, p. 60.

38 Australian Securities and Investments Commission, *Submission 49*, p. 16.

reference to any benefit gained or loss avoided—disgorgement provides a means of removing the financial incentive to engage in misconduct.[39]

6.42 ASIC compared the disgorgement powers available in Australia in non-criminal cases—or, more precisely, the lack of such powers—with those available in comparable economies in *Report 387* (as referred to in chapter 2). ASIC noted that in all the other jurisdictions it considered, regulators or the courts have the ability to remove the financial benefit obtained from corporate wrongdoing in non-criminal settings. The mechanism for disgorgement, ASIC further explained, varied among jurisdictions. However, the 'fundamental feature of disgorgement in all jurisdictions is that the illegal profits gained or losses avoided are removed from the wrongdoer'. This is achieved, ASIC noted, by:

> (a) having legislated maximum penalties that are a multiple of the financial benefit obtained from the wrongdoing (New Zealand, Singapore and the United States);
>
> (b) taking into account the financial benefit obtained from the wrongdoing when determining the quantum of penalty that should be imposed (Hong Kong and the United Kingdom); or
>
> (c) having a disgorgement power that is distinct from the ability to impose non-criminal penalties (Canada, Hong Kong, the United Kingdom and the United States).[40]

6.43 In contrast to other jurisdictions, in Australia maximum non-criminal penalties for corporate wrongdoing are fixed amounts, meaning that it 'may not be possible for ASIC or courts to remove the financial benefit obtained from corporate wrongdoing in non-criminal settings even if the maximum penalty is imposed'.[41]

6.44 ASIC produced a table in its submission comparing the availability of disgorgement powers across jurisdictions in relation to non-criminal proceedings:

Table 6.1: Availability of disgorgement in non-criminal proceedings

Country	Insider trading	Market manipulation	Disclosure	False statements	Unlicensed conduct	Inappropriate advice
Australia	No	No	No	No	No	No
Canada	Yes	Yes	No	Yes	Yes	Yes
Hong Kong	Yes	Yes	No	Yes	No	No
New Zealand	No	No	No	No	No	No

39 Australian Securities and Investments Commission, *Submission 49*, p. 10.

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

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

Singapore	No	No	No	No	No	No
United Kingdom	Yes	Yes	Yes	Yes	No	Yes
United States	Yes	Yes	Yes	Yes	Yes	Yes

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

6.45 ASIC has raised the need for disgorgement powers in relation to non-criminal matters on a number of occasions, including in *Report 387*.[42] In its submission to this inquiry, ASIC argued:

> Having access to disgorgement increases the flexibility regulators have to address wrongdoing efficiently and effectively. Disgorgement orders can offer significant deterrent value by removing the benefits gained from the wrongdoing and reducing the likelihood that wrongdoers can consider penalties to be merely a business cost.[43]

6.46 ASIC's call for the creation of a disgorgement power in non-criminal cases was supported by a number of inquiry participants. For example, Dr Zirnsak, JIMU, suggested ASIC's lack of disgorgement powers was a 'gap' in the system that should be rectified. In this connection, Dr Zirnsak emphasised that taking the profit out of crime 'acts as a massive deterrent' to criminal activity.[44]

6.47 Dr Overland, referring specifically to penalties for insider trading, also suggested the lack of a disgorgement power in relation to civil penalties was out of step with other jurisdictions, including Canada, Hong Kong, New Zealand, the United Kingdom and the United States. Dr Overland also noted the deterrent effect of the confiscation of profit made or losses avoided for those who might engage in insider trading.[45]

6.48 The Law Council of Australia also expressed support for disgorgement remedies 'as an additional penalty that can be imposed in a civil penalty context'. Australia, it observed, was 'quite out of step by international comparison' in this regard. [46]

6.49 The ASA submitted that in cases of white-collar crime, 'where a financial benefit is gained by the wrongdoer, including in non-criminal proceedings, and profits

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42 ASIC, *Report 387*, p. 19.

43 Australian Securities and Investments Commission, *Submission 49*, p. 16.

44 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. 6.

45 Dr Juliette Overland, *Submission 9*, p. 10. Also see Dr Juliette Overland, Private capacity, *Proof Committee Hansard*, 6 December 2016, p. 19.

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

made or losses avoided should at a minimum be disgorged'.[47] Mr Stephen Mayne, appearing on behalf of the ASA, told the committee that disgorgement powers was one of the more obvious reforms that would assist ASIC better fulfil its enforcement role.[48]

6.50 NSW Young Lawyers submitted that an examination of the disgorgement arrangements in comparable jurisdictions revealed that the:

> …utility, flexibility, effectiveness, and overall appeal of disgorgement in relation to white collar crime offences not only has a remedial function but also an important deterrent function.[49]

6.51 It is worth noting here that in addition to arguments put in favour of disgorgement powers for ASIC in non-criminal matters, the Attorney-General's Department advised the committee that the matter is being considered by the ASIC enforcement review taskforce.[50] Significantly, no inquiry participant made a case against allowing for disgorgement in non-criminal matters.

Committee view

6.52 The committee considers there is overwhelming evidence and support for increasing the current levels of civil penalties for white-collar offences in the Corporations Act. The committee is reluctant to specify a particular penalty amount, and notes that the ASIC Enforcement Taskforce may be better placed to comment on this matter. Nonetheless, the committee suggests that the government should have regard to the level of non-criminal penalties in other jurisdictions for similar offences, and in this connection notes that the fivefold increase (or greater) suggested by some witnesses would not be inconsistent with penalty settings in foreign jurisdictions.

6.53 The committee notes the importance of multiples of benefit penalties in ensuring that white-collar offenders are not able to profit from their crimes and misconduct. In this respect, the committee considers there is a need to introduce multiple of benefit penalties in relation to non-criminal offences.

6.54 The committee agrees that the lack of disgorgement powers in non-criminal matters represents a significant gap in ASIC's enforcement toolkit. Noting that this is a matter that the ASIC Enforcement Taskforce is likely to address, the committee nonetheless considers that the government should move to address this gap and introduce disgorgement powers in relation to non-criminal matters.

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

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

49 NSW Young Lawyers Business Law Committee, *Submission 137*, p. 3.

50 Ms Kelly Williams, Assistant Secretary, Criminal Law Enforcement Branch, Attorney-General's Department, *Proof Committee Hansard*, 6 December 2016, p. 45.

Recommendation 4

6.55 The committee recommends that the government amend the *Corporations Act 2001* to increase the current level of civil penalties, both for individuals and bodies corporate, and that in doing so it should have regard to non-criminal penalty settings for similar offences in other jurisdictions.

Recommendation 5

6.56 The committee recommends that the government provide for civil penalties in respect of white-collar offences to be set as a multiple of the benefit gained or loss avoided.

Recommendation 6

6.57 The committee recommends that the government introduce disgorgement powers for the Australian Securities and Investments Commission in relation to non-criminal matters.

Senator Chris Ketter
Chair

Additional comments from the Australian Greens

1.1 The Australian financial sector has been riddled with scandals in recent years. This, along with other instances of bribery and corruption that have been uncovered in business, would indicate that the current approach to white-collar crime is not sufficient to deter bad behaviour. Many companies seem to be factoring in relatively small fines to the cost of doing business. Many more simply get away with it. This must be rectified. The financial system depends on trust, and the economy works best when the playing field is level and the rules reward fair play.

Detection and deterrence: Fear is the key

1.2 The committee heard strong evidence that the thing most likely to stop people committing white-collar crime is the fear of getting caught. The level of this fear is, obviously, linked to the perceived likelihood that regulators can and will catch them. Creating a climate of fear requires properly empowered and properly resourced regulators—strong cops on the beat.

1.3 The Australian Greens support regulators being given more power to tackle white-collar crime. In response to the evidence heard by this inquiry, the Australian Greens support greater 'equalisation' of the standard of proof required for regulators to bring about successful civil proceedings—a weakening of the so-called Briginshaw test. Regulators should not be required to meet a standard of evidence in civil cases equivalent to that required for criminal prosecutions. Civil proceedings do not carry the magnitude of penalties or the level of dishonour that criminal proceedings do. The standard of proof required in civil proceedings should reflect this difference, irrespective of the magnitude of allegations.

Recommendation 1

1.4 That the government provide greater clarity regarding the evidentiary standards and rules of procedure that apply in civil proceedings involving white-collar offences with an emphasis on lowering the standard of proof.

1.5 Whilst beyond the terms of reference of this inquiry, the adequate resourcing of regulators and the protections available to whistle-blowers is also critical to the detection and deterrence of white-collar crime.

1.6 In response to the threat of a Royal Commission, the government has restored funding to the Australian Securities and Investments Commission (ASIC) and instituted an industry levy. However the Australian Taxation Office (ATO) remains critically underfunded. This is ridiculous given the level of tax evasion that goes undetected. Increasing funding to the ATO would be revenue positive.

1.7 The government also needs to act on providing the same protections to corporate whistle-blowers that are provided to public service whistle-blowers. In doing so, the government should also facilitate compensation for whistle-blowers in recognition of the impact their actions can have on their financial security, job security and mental health. Where whistle-blowers expose misconduct that enables regulators to reclaim money they should receive a portion of this reclaimed money as a reward.

Targeting those responsible

1.8 The committee heard strong evidence in favour of targeting the individuals responsible for white-collar crime, including those in positions of leadership who facilitate wrongdoing.

1.9 Corporate leaders set the culture of a workplace. Where this culture is bad, this can lead to wrongdoing. In some cases, this goes further. The committee heard evidence that some corporate leaders, who may not be directly committing offences themselves, tacitly endorse the activity of employees who are committing offences. This needs to be stamped out. The Australian Greens agree with the recommendation of the Australian Federal Police (AFP) that the law be amended to allow for the prosecution of 'ringleaders' who aid and abet those committing white-collar crime.

Recommendation 2

1.10 That the Criminal Code be amended to include 'knowingly concerned' as an additional form of secondary criminal liability.

Strong and consistent penalties: Make the time fit the crime

1.11 The committee heard multiple cases of inconsistency in the penalties available for white collar crime, including in both criminal and civil proceedings, and for monetary and custodial penalties. Some of these inconsistencies are historical anomalies. Others extend from the complicated and ever-evolving nature of wrongdoing that is considered to be white-collar crime.

1.12 Accordingly, the Australian Greens believe that an overarching principle should be adopted to standardise penalties for white-collar crime. Penalties should not be able to be gamed because of anomalies in the statute.

1.13 The default position in respect of the scope and level of criminal, civil and administrative penalties should be that they are the same; including for misconduct in the banking and financial services sector, for tax evasion, for breaches of competition and consumer law, and for bribery, fraud or anything else within the broad gamut of white-collar crime. Allowance should be made for variation for particular offences, but this should be the exception rather than the rule.

1.14 Monetary penalties should be available as an absolute amount or as a multiple of the wrongful gain in all cases.

Recommendation 3

1.15 That the default maximum custodial sentence for criminal wrong-doing be ten years imprisonment.

Recommendation 4

1.16 That the default maximum monetary penalty for criminal wrongdoing be the greater of $5 million or three times the benefit gained.

Recommendation 5

1.17 That the default maximum monetary penalty for civil and administrative penalties be the greater of $1 million or three times the benefit gained.

1.18 The Australian Greens strongly endorse the recommendation in the Chair's report that disgorgement powers be made available to ASIC so as to enable the recovery of ill-gotten gains. The absence of disgorgement powers is a gaping hole in the current regulatory framework that should be remedied as soon as practicable.

1.19 The Australian Greens also support the request by ASIC for the scope of civil offences to be reviewed with a view to making them more widely available, or at least consistently available. ASIC provided examples where, for no good reason, civil penalties are available to them for particular offences, but are not available for other similar offences. Again, the Australian Greens believe the underlying principle of standardisation should apply. However, the Australian Greens accept that this should not be done without due consideration of the particular nature of existing civil offences.

Recommendation 6

1.20 That the government conduct a review of the availability of penalties for civil offences with a view to making them more widely and consistently available to regulators.

Public reporting: name and shame

1.21 An important adjunct to the penalties imposed on those committing white-collar crime is the way in which information relating to this misconduct is made available to the public. Dr Mark Zirnsak noted in his submission that:

> …transparency is of itself a penalty for the person who committed the crime (being publicly exposed) and acts as a deterrent against further criminal activity, eroding the sense of security those contemplating such criminal activity may have that they will get away with it.[1]

1.22 ASIC has established an enforceable undertakings register, and a banned and disqualified register that makes information available to the public about certain white-collar criminals. However, this only represents part of the enforcement action undertaken by one regulator. Even then, the data in the banned and disqualified register is not presented in a fully open and navigable form.

1.23 Except for cases in which public disclosure would prejudice on-going legal action, regulators should make public, in full, the details of banning and disqualification orders, as well as the outcomes of court actions in which they have been successful. This is not an approach that the Australian Greens would endorse for most, if not all, other instances of wrongdoing. But white-collar crime is different. White-collar crime is seldom an act of impulse or necessity. It is most often well-planned, systemic, and fuelled by greed. The victims of white-collar crime are sometimes discrete, but often the breach of confidence and trust has far wider implications. White-collar crime is a threat to the financial system and to the economy, and the approach of government should take account of this.

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1 The Justice and International Mission Unit of the Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission 39*, p. 9.

1.24 The Australian Greens believe that a single 'register of corporate criminals' should be established to enable the public to see who has committed serious white-collar crime, what they have done, and what the penalty they received was. The register should cover white-collar crime in which regulators have successfully bought criminal or civil action to the courts. The register should also include the details of any individual or any company currently subject to a banning or prohibition order in relation to their business activity. Those who have committed wrongdoing would 'drop off' the register after a period of time has passed, or once a ban or prohibition has lapsed. However, the time spent on the register should be proportionate to the offence committed: the more serious the wrongdoing, the longer the 'naming and shaming' should go on.

1.25 This register will help inform those looking to engage in business with any individuals or businesses who they might either have cause to be wary of or steer away from altogether.

Recommendation 7

1.26 That the government establish a single 'register of corporate criminals' that provides, in full, data on individuals and corporations guilty of serious criminal or civil offences, or who are subject to banning or prohibition orders.

Senator Peter Whish-Wilson
Senator for Tasmania

Appendix 1
Submissions received

Submissions received in the 44th Parliament

No	Submitter
1	Ms Otelta Verein
2	Mr Phillip Sweeney
3	Name Withheld
4	Mr Peter Leech
5	Professor Michael Adams, Dr Tom Hickie and Mr Ian Lloyd QC
6	DI McMahon
7	Mr Jeffrey Knapp
8	Professor Fiona Haines
9	Dr Juliette Overland
10	Name Withheld
11	Mr Kerrie Hanrahan
12	Name Withheld
13	Ms Gwynneth Field
14	Mr Domenic Olimpio
15	Ms Maxine Olimpio
16	Monash Business School
17	Mr Med Hilsen
18	Nemesis Project
19	Mr Matt Monk
20	Mr John McAvoy
21	Ms Natasha Keys, NMK Solutions Pty Ltd
22	Mr Peter Bates
23	Banking and Finance Consumers Support Association
24	Dr Vicky Comino
25	Australian Financial Security Authority
26	Mr Gary White

27	Ms Kaye Downer
28	Mr and Mrs Dwayne and Jenny Cox
29	Australian Taxation Office
30	Financial Planning Association of Australia
31	Queensland Law Society
32	Australian Restructuring Insolvency and Turnaround Association (ARITA)
33	Institute of Public Affairs
34	Australian Shareholders' Association
35	Dr George Gilligan
36	Name Withheld
37	Professor Mirko Bagaric, Mr Theo Alexander and Ms Jenny Awad
38	Mr Tony Webb
39	The Justice and International Mission Unit of the Synod of Victoria and Tasmania, Uniting Church in Australia
40	Australian Competition and Consumer Commission
41	HNAB Action Group
42	Tasmanian Small Business Council
43	Ms Gail Hester
44	Ms Debra Ross
45	Mr Ong Hii
46	Ms Margaret Menzel
47	Ms Kerry Budworth
48	Corporations Committee, Business Law Section, Law Council of Australia
49	Australian Securities and Investments Commission
50	Ms Merilyn Swan
51	Ms Linda O'Sullivan
52	Attorney-General's Department
53	Commonwealth Director of Public Prosecutions
54	Australian Federal Police
55	Confidential
56	Confidential

57	Confidential
58	Confidential
59	Confidential
60	Mr Garry Corfield
61	Mr and Mrs Guy and Desley Greenhill
62	Ms Muriel Duncan
63	LF Economics
64	Ms Sandy Phillips
65	Mr Lynton Freeman
66	Bank Reform Now
67	Name Withheld
68	Mr Frank Colosimo
69	Name Withheld
70	Mr Peter Maxwell
71	Name Withheld
72	Lady Rosie Cornell
73	Dr Evan Jones
74	Mr Robert Novak
75	Ms Michelle Matheson
76	Ms Julia Robertson
77	Mr Lendl Turner
78	Ms Narelle Dean
79	Mr Neil Toplis
80	Ms Beatriz Rojas
81	Mr Martin Hetebry
82	Mr Tony Rigg
83	Mr Rasik Sinha
84	Mrs Marjory Waters
85	Mr Graham Filmer
86	Ms Rosalyn Sinha
87	Mr Andrew Forbes Smith
88	Mr Stan Frydenberg
89	Ms Debra Raca

90	Mr Gregory Wignall
91	Mr Steve Lloyd
92	Mr Robbie Stimpson
93	Ms Mary Green
94	Mr Peter Dunell
95	Ms Deirde Kempson
96	Mr & Mrs Peter and Anne Harwood
97	Ms Rebecca Reid
98	Mr Brett Montgomery
99	Mr Jack Jiang
100	Ms Lisa Yu
101	Name Withheld
102	Ms Alana Smith
103	Ms Susan Rayner
104	Mr & Mrs Brian and Sharon Harris
105	Shareholders Foundation
106	Mr Paul Herman
107	Mrs Billie Jacobsen
108	Mr Russell Cousins, Counter Corruption Analysis
109	Maverick Ministries
110	Mr Kevin Jacobsen OAM
111	Name Withheld
112	Name Withheld
113	Name Withheld
114	Name Withheld
115	Name Withheld
116	Name Withheld
117	Name Withheld
118	Name Withheld
119	Name Withheld
120	Name Withheld
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122	Name Withheld

123	Name Withheld
124	Name Withheld
125	Name Withheld
126	Name Withheld
127	Name Withheld
128	Name Withheld
129	Name Withheld
130	Ms Mary Wishart & Mr Anthony Webster
131	Ms Katie Shafar
132	Mr Murray Spencer
133	Name Withheld
134	Mr Philip Brown

Submissions received in the 45th Parliament

No	**Submitter**
135	Takeovers Panel
136	Errol Opie & Ann Marie Delamere
137	NSW Young Lawyers Business Law Committee
138	Mr & Mrs Gilbert & Sylvia De Michiel
139	Institute of Public Affairs
140	Attorney-General's Department

Appendix 2

Additional information, tabled documents and answers to questions on notice received

Additional information

1 Additional information received from Professor Ian Ramsay on 14 April 2016

2 Additional information received from Mr Peter Kennan on 30 March 2016

Tabled documents

1 Australian Financial Security Authority: Extracts from the New Zealand Sentencing Act 2002 (public hearing, Melbourne, 6 December 2016)

2 Commonwealth Director of Public Prosecutions: Opening statement by Mr Shane Kirne (public hearing, Melbourne, 6 December 2016)

Answers to questions on notice

1 Commonwealth Director of Public Prosecutions: Answers to questions taken on notice from a public hearing 6 December 2016, received 13 December 2016

2 Australian Securities and Investments Commission: Answers to questions taken on notice from a public hearing 6 December 2016, received 21 December 2016

3 Australian Competition and Consumer Commission: Answers to questions taken on notice from a public hearing 6 December 2016, received 22 December 2016

4 Attorney-General's Department: Answers to questions taken on notice from a public hearing 6 December 2016, received 22 December 2016

5 Australian Federal Police: Answers to questions taken on notice from a public hearing 6 December 2016, received 10 January 2017

Appendix 3
Public hearings and witnesses

Tuesday, 6 December 2016 – Melbourne

ALEXANDER, Mr Theo, Lecturer, Deakin University

ALLEN, Mr Darcy, Research Fellow, Institute of Public Affairs

ARGITIS Ms Vicky, Acting Assistant Director, Legal Business Improvement, Commonwealth Director of Public Prosecutions

AWAD, Ms Jenny, Academic, Deakin University

BAGARIC, Professor Mirko, Professor of Law, Swinburne University of Technology

BEZZI, Mr Marcus, Executive General Manager, Competition Enforcement, Australian Competition and Consumer Commission

BUSHNELL, Mr Andrew, Research Fellow, Institute of Public Affairs

DAVIS, Mr Rowan, Special Counsel, Chief Legal Office, Australian Securities and Investments Commission

GOLDING, Mr Greg, Chair, Foreign Corrupt Practices Working Group, Business Law Section, Law Council of Australia

HAINES, Professor Fiona Sally, Private capacity

HEYS, Mr Nicholas, Director, Enforcement Coordination, Australian Competition and Consumer Commission

KIRNE Mr Shane, Practice Group Leader, Commercial Financial and Corruption, Commonwealth Director of Public Prosecutions

LAWRENCE, Mr Ian, Acting General Manager, Strategy, Intelligence and International Advocacy Branch, Australian Competition and Consumer Commission

MAYNE, Mr Stephen David, Director, Australian Shareholders' Association

McCARTNEY, Mr Ian, Assistant Commissioner and National Manager, Organised Crime and Cyber, Australian Federal Police

MULLALY, Mr Tim, Senior Executive Leader, Australian Securities and Investments Commission

OVERLAND, Dr Juliette, Private capacity

SAVUNDRA, Mr Chris, Senior Executive Leader, Australian Securities and Investments Commission

SELLARS, Mr Andrew Newell, General Counsel, Australian Financial Security Authority

SHARP, Mr Tom, Acting Director, Criminal Law Reform Section, Attorney-General's Department

SHAW, Mr Paul Richard, National Manager, Regulation and Enforcement, Australian Financial Security Authority

THOMPSON Ms Fiona, Practice Group Co-ordinator, Commercial Financial and Corruption, Commonwealth Director of Public Prosecutions

WILLIAMS, Ms Kelly, Assistant Secretary, Criminal Law Enforcement Branch, Attorney-General's Department

ZIRNSAK, Dr Mark, Director, Justice and International Mission Unit, Uniting Church in Australia, Synod of Victoria and Tasmania