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.
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> 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.