12.31 The ALRC accepts that the decision to issue an infringement notice is not a decision to impose a penalty, as it is not a final or operative determination of substantive rights. For this reason, the ALRC concludes that the exclusion of external merits review of the decision to issue an infringement notice is acceptable:[73] see Recommendation 22–2.

Corporations Act continuous disclosure infringement notice scheme

12.32 In the recently announced CLERP 9 proposals,[74] an infringement notice scheme has been suggested for contraventions comprising inadequate disclosure of materially price sensitive information by listed entities.[75] The proposed infringement notice scheme 'would enable an entity to bring the process to an end after its administrative phase by paying ASIC a financial penalty fixed by statute'.[76] The features of the proposed scheme include that:

- A hearing would be held by ASIC in order for ASIC to form a view as to whether there had been a breach of the continuous disclosure requirements in the *Corporations Act*. The entity would have the right to make submissions to ASIC at the hearing;
- If ASIC formed the view that there had been a breach, ASIC could issue an infringement notice specifying 'that the breach may be addressed through payment of a fixed financial penalty set out by statute';[77]
- Payment of the amount specified in the infringement notice would act as a bar to proceedings being instituted by ASIC, but would not be treated as an admission of liability;
- If the amount specified in the infringement notice is not paid, ASIC would be able to commence proceedings to enforce the alleged contravention; and
- In the court proceedings, if the court determined that a contravention had occurred, it 'would be permitted to impose a financial penalty not less than the penalty set out in the ASIC infringement notice'.[78] The court would not be able to make a pecuniary penalty order; if a contravention were found, its only option would be to accept the penalty specified in the infringement notice and order its payment.

Customs Depot Licensing Charges Amendment Bill 2000 (2001), Commonwealth of Australia, para 1.40–1.41.

73 See further discussion of this point in ch 22.

74 Treasury, *CLERP 9: Corporate Disclosure – Strengthening the financial reporting framework*, <www.treasury.gov.au/contentitem.asp?pageId=&ContentID=403>, 18 September 2002.

75 Members of the Advisory Committee expressed the view that the scheme was unnecessary as existing powers to seek injunctions allowed sufficient flexibility: Advisory Committee members, *Advisory Committee meeting*, 17 October 2002.

76 Treasury, *CLERP 9: Corporate Disclosure – Strengthening the financial reporting framework*, <www.treasury.gov.au/contentitem.asp?pageId=&ContentID=403>, 18 September 2002, 147.

77 Ibid, 148.

78 Ibid, 149.

12.33 The scheme proposed is not wholly consistent with other infringement notice schemes. In other schemes, no hearing is held prior to the issue of an infringement notice, but a notice may be issued if the regulator has 'reasonable grounds to believe' that the alleged offence has been committed. In no other infringement notice scheme is the court's discretion as to penalty (if the alleged offence is prosecuted) limited in the manner proposed in the CLERP 9 scheme.[79]

12.34 In support of the proposal it is stated that:

> This process would supplement existing criminal and civil court procedures. It would remedy a significant gap in the current enforcement framework by facilitating the imposition of a financial penalty in relation to relatively minor contraventions of the regime that would not otherwise be pursued through the courts and in relation to which ASIC considers a relatively small financial penalty would be justified. The capacity to issue an infringement notice would also allow ASIC to signal its views concerning appropriate disclosure practices to listed entities more effectively than through court action alone.[80]

12.35 The ALRC considers that the proposed infringement notice scheme has several problems and does not recommend that it be used as a model for other infringement notice schemes. In particular, the ALRC is concerned at the proposed restriction on the court's discretion to fix the quantum of penalty if a finding of contravention is made. Asking the court to confirm an amount set by a regulator would appear to raise Chapter III issues.[81] The ALRC's preferred model is that the infringement notice be used as an administrative mechanism to deal with a matter, but if the amount specified in the infringement notice is not paid by the person to whom the notice has been issued, then the matter be treated in the same way as any other alleged offence or contravention, that is, proceedings may be instituted by the regulator to enforce the contravention in the normal way and those proceedings would follow the usual court procedure. The ALRC is also not convinced that alleged contraventions of continuous disclosure provisions are appropriate contraventions to be dealt with by way of an infringement notice as they involve subjective judgments as to the materiality of information and are, therefore, contraventions involving a 'state of mind' element.

12.36 An additional difficulty with the scheme is the stated proposed size of the penalty. CLERP 9 proposes raising the maximum penalty for a corporation in breach of the continuous disclosure requirements to $1 million. An amount under an infringement notice scheme must be a fixed sum; typically, it is not more than one-fifth of the maximum penalty which can be imposed by a court for the breach, and the ALRC endorses this approach. In the proposed scheme, this would entail an amount specified as payable in the infringement notice of up to $200,000, potentially more than a court would impose if the matter proceeded to a hearing. The CLERP 9 proposal said in relation to the penalty:

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79 See for example *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth), reg 14.14 and *Fisheries Management Regulations 1992* (Cth), reg 45 which specifically negate this proposition.

80 Treasury, *CLERP 9: Corporate Disclosure — Strengthening the financial reporting framework*, <www.treasury.gov.au/contentitem.asp?pageId=&ContentID=403>, 18 September 2002, 149.

81 On this point see Recommendation 12–8(o).

> It would remedy a significant gap in the current enforcement framework by facilitating the imposition of a financial penalty in relation to relatively minor contraventions of the regime that would not otherwise be pursued through the courts and in relation to which ASIC considers a relatively small financial penalty would be justified.[82]

12.37 In a consultation with the ALRC, officers of ASIC indicated that the likely penalty might be 'tens of thousands of dollars'.[83] See discussion of the amount that might be specified as payable in an infringement notice at para 12.43.

12.38 ASIC officers also indicated they would use publicity in conjunction with infringement notices.[84] This raises additional issues because it is generally regarded that payment of an infringement notice is not an admission of liability. This point is discussed at para 12.75 to 12.78.

Use of private contractors

12.39 The Terms of Reference for this Inquiry require the ALRC to consider what limitations, if any, should exist on the use of persons other than officers or members of government departments and agencies (for example, employees of private contractors) to issue infringement notices or other process for the payment of administrative penalties. The use of private contractors, and the issues it raises for the accountability of penalty decision-making, has been considered in detail in the context of quasi-penalties in chapter 22. The ALRC is not aware of the use of private contractors to serve infringement notices in any federal schemes (although it does note that in some schemes notices may be served on behalf of the Commonwealth by authorised State or Territory officers).[85] Under State and Territory schemes, notices may generally be served by 'authorised officers' which might include persons other than government employees, for example council parking inspectors. It is known that some councils in New South Wales have 'outsourced' parking meter and patrol services to private contractors.

12.40 The ALRC sees no legal impediment to the use of private contractors to issue infringement notices provided that the safeguards outlined in Recommendation 22–3 to 22–6 are followed.

Offences and contraventions suitable for infringement notice schemes

12.41 As noted above, infringement notices are routinely used at both State and Territory and federal level to deal with minor criminal offences. One example often referred to is a parking offence. The features of the offences for which an infringement notice may be issued most commonly are that the offences:

- Are low-level offences attracting relatively low monetary penalties which means that the amount specified as payable in an infringement notice (if calculated as a

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82 Treasury, *CLERP 9: Corporate Disclosure – Strengthening the financial reporting framework*, <www.treasury.gov.au/contentitem.asp?pageId=&ContentID=403>, 18 September 2002, para 8.5.5.

83 Australian Securities & Investments Commission, *Consultation*, Sydney, 5 September 2002.

84 Ibid.

85 See for example, *Fisheries Management Act 1991* (Cth), s 83 (definition of 'officer'); *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 393 (definition of 'ranger').

percentage of the maximum penalty that a court could impose for the offence) will not be a substantial amount;[86]

- Are high-volume offences meaning that they occur frequently and if enforced through the courts would add considerably to the court's workload and involve significant resources of the regulator to investigate and prepare cases, resources which might be better used encouraging compliance by the regulated community rather than enforcing numerous small instances of non-compliance. The high volume and low amount payable might be said to justify foregoing some of the procedural safeguards inherent in the criminal process in the interests of efficiency;

- Do not involve any significant forensic enquiry or subjective elements such as state of mind or fault. The offence is usually based on the occurrence of an event or the existence of a set of circumstances as a matter of fact; for example, camping in an unauthorised area.[87]

12.42 In the ALRC's opinion, in the criminal sphere, infringement notice schemes are only suitable to deal with high-volume, low penalty criminal offences of strict or absolute liability. On this point the ALRC notes with approval the recommendation made by the Senate Standing Committee for the Scrutiny of Bills in its report on the *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* that 'infringement notices should used only for strict liability offences'.[88] The ALRC also notes with approval the recommendation that 'strict liability offences should be applied only where the penalty does not include imprisonment and where there is a cap on monetary penalties; the general Commonwealth criteria of 60 penalty units ($6600 for an individual and $33,000 for a body corporate) appears to be a reasonable maximum'.[89]

12.43 One method to discourage the use of infringement notices for matters which are serious enough as to warrant court action, either because of the need to secure a high penalty as deterrence, or the need to provide greater procedural protections for the alleged offender, would be to cap the maximum amount that could be specified as payable in an infringement notice. This would appear to be particularly suited to infringement notices applying to non-criminal contraventions where the maximum penalty specified in the legislation may be substantial and the conduct which might constitute a contravention range from low-level, one-off and isolated occurrences to high-level, organised, systematic and ongoing non-compliance. In this circumstance it is difficult to propose a maximum amount payable in an infringement notice by reference to the maximum penalty that a court could impose, as the result might be that the amount

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86 The highest amount identified by the ALRC in a federal infringement notice scheme is $5000 for a body corporate under s 299 and 310 of the *Migration Act*.

87 *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth), reg 12.28.

88 Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002), AGPS, 285.

89 Ibid, 284.

specified as payable in the infringement notice far exceeds the likely penalty that a court would impose.

12.44 Courts take into consideration a range of factors when setting penalties. Infringement notice schemes adopt a 'one size fits all' approach that is only acceptable when the result is that the amount payable is less than the expected penalty that a court would impose. Regulators should not be in a position to use an infringement notice to attempt to secure a higher penalty than would likely be imposed by a court if successful action were taken. There must be some trade-off for relieving the regulator of the burden of proving its allegations in court; a lesser penalty appears to be an appropriate trade-off. Equally there needs to be some disincentive to the inappropriate use of infringement notices for matters which are serious enough as to warrant being dealt with by a court, rather than an administrative process.

12.45 The type of non-criminal contraventions that the ALRC considers might appropriately be dealt with by way of an infringement notice schemes include requirements to provide information to the regulator within a specified period or in a specified form.[90] The ALRC notes in this regard the comments of the Australian Broadcasting Authority that infringement notice schemes might be appropriate in the context where there is a failure to provide notification or information to the regulator and this failure 'potentially reduces the [regulator's] effectiveness in performing its regulatory functions'.[91] The ALRC would qualify this view, however, to exclude any provision of information that required a subjective assessment to be made, for example, as to the materiality of the information. Infringement notices would only be appropriate where the information required to be provided was purely factual and was within the knowledge of the person required to provide it.

12.46 The ALRC acknowledges that specifying the amount payable in an infringement notice by reference to the maximum penalty that a court could impose is only useful where that amount is not substantial and where there is some certainty as to the amount that a court would likely impose. Whilst these two conditions appear to be satisfied in relation to low-level criminal offences, the same cannot be said for non-criminal contraventions. The ALRC's research has shown that maximum penalties for non-criminal contraventions are generally significantly higher than for comparable criminal offences and there is substantial jurisprudence, particularly in relation to market offences, that shows that courts rarely, if ever, impose the maximum penalty. For these reasons, the ALRC considers that the amount specified as payable in an infringement notice should not be more than 12 penalty units for both infringement notices issued in response to alleged criminal offences and for those issued in response to alleged non-criminal contraventions. See the discussion below at para 12.61.

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90 See for example *Financial Sector (Collection of Data) Act 2001* (Cth), s 9(6) and 13(9).

91 Australian Broadcasting Authority, *Submission CAP 23*, 14 October 2002, 10.