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TITLE PAGE

A PROPOSAL FOR A UNIFORM AUSTRALIAN REGULATORY MODEL

Thesis submitted by

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**Submitted on 19 June 2007 for the degree of Doctor of Philosophy in the School of
Law James Cook University**

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A PROPOSAL FOR A UNIFORM AUSTRALIAN REGULATORY MODEL

Abstract

The problem

The Australian Commonwealth regulators, including the Australian Securities and Investments Commission (ASIC), the Australian Prudential Regulation Authority (APRA), the Australian Competition and Consumer Commission (ACCC) and the Australian Taxation Office (ATO), are each governed by their own legislation. That legislation provides each of them with their own investigative and enforcement powers and processes. While those powers and processes are directed to assisting them to resolve similar regulatory issues or problems, they are not uniform across the various regulatory laws. Those inconsistencies are partly the product of successive federal governments' "ad hoc" and reactive approach to the development of the regulatory laws. Further, as problems with a particular regulator's powers or processes are identified, usually as the result of costly litigation, they are rectified by legislative amendments, but those amendments are not made uniformly or consistently across all regulatory legislation, even though the problems may be universal. This approach has meant that some regulators have superior investigative and enforcement powers in comparison to others. In some cases, the problems are not rectified by express provisions and the matter is governed by common law or equitable principles. Those general law principles do not always provide a clear resolution to the problem either. Those inconsistencies and ambiguities adversely impact on the effectiveness and efficiency of the Australian regulatory framework taken as a whole and therefore impact on the effectiveness and efficiency with which governments, businesses and individuals in the economy can operate.

Thesis statement and objectives

It is argued in this thesis that there is an unwarranted inconsistency between the regulatory powers and processes applicable to Australia's four principal federal regulatory bodies, ASIC, APRA, the ACCC and the ATO, and that this inconsistency impacts negatively on the effectiveness and efficiency with which those bodies can discharge their regulatory functions. It is argued and demonstrated that their effectiveness and efficiency can be improved by standardising the relevant powers and processes through reform of their governing regulatory laws. Such reforms are both desirable and achievable by amending the existing regulatory frameworks and by benchmarking the reforms against best practice as observed both within the existing Australian regulatory frameworks and in comparable foreign regulatory frameworks.

The specific objectives of this thesis are to:

- (a) identify the areas in which the powers and processes of ASIC, APRA, the ACCC and the ATO differ and can be improved through alignment or standardisation;
- (b) investigate and suggest better approaches to regulatory reform;

- (c) identify the ideal reforms that should be incorporated in the Australian statutory regulatory regime; and
- (d) propose a mechanism for the implementation of the identified reforms.

The general overarching objective of this thesis is to demonstrate the desirability of adopting a uniform statutory regulatory model, and to suggest the reforms that should be incorporated into such a model (to balance competing public and private interests) that are suitable for adoption by ASIC, APRA, the ACCC and the ATO. Those reforms will give those regulators, the regulated and the judiciary clear guidance as to the applicable rules and procedures in all regulatory matters, and would promote more timely and cost-effective regulatory outcomes and more effective regulation of the Australian economy.

Methodology

The problems inherent in the relevant Australian regulatory laws are identified, defined and analysed by comparing the existing Australian regulatory frameworks and the relevant regulatory frameworks in the United States and the United Kingdom. Each of those frameworks will be analysed according to the competing (and sometimes overlapping) public and private interests that underpin them.

The existing regulatory frameworks are also analysed using universal theoretical and practical principles (derived from regulatory theory and judicial and academic writings) including the need to:

- (a) promote more effective regulation;
- (b) promote greater certainty and clarity in the law;
- (c) ensure greater government accountability;
- (d) promote better decision-making;
- (e) save time and costs in regulatory actions; and
- (f) observe the principles of fairness, including the need to treat like cases alike.

The purpose of the comparative analysis is to identify the “benchmarks” of effective regulation, or “best practice” in, or the advantageous features of, each regulatory framework, as well as to identify the weaknesses and inconsistencies in those frameworks to provide an informed basis for suggested law reform.

Findings

The analysis indicates there is a lack of clarity, consistency and uniformity in the Australian regulatory laws. As a consequence, the Australian regulators, the regulated and the judiciary do not have clear guidance in relation to a range of common regulatory issues which, in turn, has resulted in collateral litigation concerning evidential and procedural issues that are unrelated to the substantive merits of the case. The lack of clarity in the law has not promoted better decision-making in regulatory matters because similar regulatory issues have not been resolved on a consistent basis in the context of the

different regulators and like cases have not been treated alike. This has negatively impacted on what should be the primary goal of achieving effective regulation because compliance is not being achieved in a timely, cost-effective and efficient manner. Those problems may, in turn, have an adverse impact on Australia's economic growth and on the prosperity of all Australians.

Recommendations

The thesis concludes by recommending that the federal government should adopt a more consistent, informed, principled and proactive approach to the formulation of the Australian regulatory laws. The laws governing the core investigative and enforcement powers of ASIC, APRA, the ACCC and the ATO should be made more consistent or, where practicable, uniform. The suggested reforms can be readily and cost-effectively implemented because they only require the enactment of a small number of uniform Commonwealth laws and the amendment of a small number of existing laws. Many of the suggested reforms could be achieved by enacting the proposed *Investigation and Enforcement Powers Act* (Cth) and the proposed *Administrative Powers and Proceedings Act* (Cth) to govern the investigative, enforcement and administrative functions of ASIC, APRA, the ACCC and the ATO and to afford uniform protections to the regulated. This legislation would, at least substantially, eliminate the present confusion and ambiguity in the law and lead to more consistent and effective regulatory outcomes, because the regulators, the judiciary and the regulated would be governed by one set of standards that would be applied consistently to common regulatory problems across all Australian business and financial sectors and regulatory jurisdictions.

The suggested reforms retain the advantages of the current Australian multiple regulator model, including the view that regulators, like ASIC, APRA, the ACCC and the ATO, being bodies that are formed for separate purposes, will function best with their own distinct cultures. The suggested reforms also avoid the potential problems associated with adopting the United Kingdom's approach of merging some regulators into one "super regulator", such as producing inefficiencies and exposing the Australian regulatory system to further substantial disruption and cost. The suggested reforms are also consistent with the views expressed in the United States that "where governmental involvement is needed, its aim should be to support and enforce a predictable, minimalist, consistent and simple legal environment for commerce."

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A PROPOSAL FOR A UNIFORM AUSTRALIAN REGULATORY MODEL

CHAPTER 1

INTRODUCTION, OBJECTIVES, METHODOLOGY AND OUTLINE

By Tom Middleton

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CHAPTER 1

INTRODUCTION, OBJECTIVES, METHODOLOGY AND OUTLINE

[1.1] Introduction

The Australian Securities and Investments Commission (ASIC), the Australian Prudential Regulation Authority (APRA), the Australian Competition and Consumer Commission (ACCC) and the Australian Taxation Office (ATO), all strive to achieve effective regulation (see [1.5.1.1]) thereby promoting a range of public and private interest objectives (see [1.5.2]). The laws governing those regulators should facilitate effective regulation and the proper functioning of the Australian economy by providing certainty, predictability and enforceability of the rights and obligations of those who participate in that economy. However, the comparative analysis conducted in this thesis demonstrates that the Australian regulatory regime is flawed and is not effectively achieving those objectives. For example, the analysis indicates that while those regulators have common investigative powers including powers to conduct oral examinations, to issue notices to produce books and to obtain search warrants, those common powers are governed by inconsistent and, in some cases, unclear statutory provisions. The analysis also indicates that while those regulators share common regulatory problems or concerns¹ (in relation to detecting contraventions² and administering and enforcing the regulatory laws), there is no clear and uniform legislative response to those common problems or concerns. For example, there is no uniform statutory regime governing the commencement and conduct of the regulators' administrative, civil, civil penalty or criminal proceedings or governing review of the regulators' decisions.

¹ See generally *Rich v ASIC* (2004) 220 CLR 129; (2004) 78 ALJR 1354; 209 ALR 271; [2004] HCA 42 at [119] per Kirby J.

² In *ASIC v Vizard* (2005) 54 ACSR 394; [2005] FCA 1037 at [37] Finkelstein J indicated that criminal contraventions of the regulatory legislation or "white collar crimes" are the result of deliberate and calculated conduct, are diffuse in their impact, are easily concealed in legitimate transactions and are therefore difficult to detect, control and punish.

In recent years there has been an increase in the number of cases where the investigative and enforcement actions of ASIC, APRA, the ACCC and the ATO, have been frustrated or delayed by collateral litigation (that is, litigation that is unrelated to the substantive merits of the case). This collateral litigation often involves arguments relating to which evidential or procedural issues apply in the matter; or claims that the regulator lacks a particular power, or has abused a power; or claims that the regulated have an implied right or an implied protection under the relevant regulatory law. The analysis indicates that the majority of this collateral litigation and the consequent investigative and enforcement problems have arisen because of regulatory weaknesses, that is, a lack of express provisions in some Australian regulatory laws (despite the fact that there are express provisions governing the same matter in other Australian regulatory laws), a lack of clear legislative intent in some express provisions, and inconsistent express provisions in some overlapping regulatory statutes (see [1.5.7]). Those problems have meant that the regulators, the regulated and the judiciary do not have any clear guidance in relation to a range of common and important regulatory issues which, in turn, encourages collateral litigation. The lack of guidance is reflected in the fact that the courts have not resolved similar regulatory issues on a consistent basis in the context of the different regulators (see [1.5.4], [1.5.5], [4.10.2] and [4.10.3]).

Some of the collateral litigation is based on legitimate claims by persons who are genuinely aggrieved by the regulator's action, but there is also evidence that, in some cases, individuals with "deep pockets" are prepared to exploit the weaknesses of the existing regulatory frameworks for tactical purposes, such as achieving delay (see [1.5.1.2] and [11.5.2]). Braithwaite has indicated that the wealthy perceive an advantage in uncertain laws and deploy legal entrepreneurship to exploit this uncertainty to advance their interests against the public interest.³

³ Braithwaite J, "Markets in Vice, Markets in Virtue," The Federation Press, Leichhardt, 2005 at p 147; and Braithwaite J, "Restorative Justice and Responsive Regulation," Oxford University Press, Oxford, 2002, at pp 239-240. This problem is exemplified by the explosion of aggressive tax avoidance schemes in the 1970s and 1990s: see Evans C, "Avoiding the issue: countering the termites in the Australian tax

Some of the regulatory weaknesses have contributed to regulatory failures and to corporate collapses in which the public have suffered large losses. There is evidence, for example, that the losses caused by the HIH collapse were exacerbated by APRA's failure to detect, in a timely manner, HIH's solvency problems. Those problems may have been detected earlier if there were mechanisms in place to encourage informants to voluntarily provide information, as discussed at [3.9.4]. APRA and ASIC also have inadequate statutory powers to recover compensation for victims of such a collapse. A range of reforms are suggested in this thesis to improve the regulators' powers to recover compensation for victims (see [8.7.2]).

There are suggestions that some regulatory failures are a product of a lack of prosecutorial will on the part of some regulators. It could be argued that it does not matter what law reforms are introduced because regulators lack the will to enforce the laws. For example, Evans⁴ described the ATO as a "timid revenue authority" in the context of the tax avoidance schemes in the 1970s. However, other commentators now regard the ATO as an aggressive and inflexible regulator.⁵ It has been suggested that the number of contraventions enforced by ASIC is far outweighed by the number of contraventions that are not enforced or that go undetected.⁶ One commentator has stated that ASIC "is not willing to take the hard cases" and that it is implementing the

system," Australian Review of Public Affairs, 12 September 2006, at <http://www.australianreview.net/digest/2005/09/evans.html>, viewed on 25 October 2006, citing Grabosky P and Braithwaite J, "Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies," Oxford University Press, Melbourne, 1986 at p 153. They estimate that some 7000 companies and over 30,000 taxpayers participated in Australia tax avoidance schemes in the 1970s.

⁴ Evans C, *ibid*.

⁵ See Senate Economics References Committee *Inquiry into the Operation of the Australian Taxation Office* March 2000, Ch 2-3 and Commonwealth Ombudsman *Annual Report 1999-2000*, 26-37 cited in ALRC Background Paper 7 – Review of Civil and Administrative Penalties In Federal Jurisdiction, Item 4, and fn 178 at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/alrc/publications/bp/7/bp7.html>, viewed on 23 April 2007.

⁶ ABC Online, inside business, "Sykes retires," Kohler A interview with Sykes T (Australian Financial Review) at <http://www.abc.net.au/insidebusiness/content/2005/s1523148.htm>, viewed on 5 December 2005.

federal government's "light touch regime."⁷ However, the analysis indicates that in many cases the problem of a lack of "prosecutorial will" can be ascribed to uncertainties and inconsistencies in the Australian regulatory framework. For example, as discussed in Chapter 9, the lack of clarity in the laws relating to regulatory offences has meant that the regulators tend not to favour commencing criminal prosecutions. A range reforms are suggested in Chapter 9 to make criminal prosecutions an effective option of last resort (in terms of Braithwaite's⁸ enforcement pyramid) for all Australian regulators.

In some cases, the lack of "prosecutorial will" is the product of limited funding which can be attributed to a lack of political will. The regulators do not have sufficient funding to investigate every complaint or to enforce every contravention. As a consequence, they must prioritise their investigative and enforcement responses. Reforms are suggested at [3.6] to provide greater clarity in the law and accountability in relation to the regulators' decisions on whether to investigate a matter. Criticisms regarding the regulators' poor enforcement response are also partly based on a misconception of the nature of the Australian regulatory framework. In many cases that framework preserves private litigation as an enforcement option.⁹ The federal government's policy under some regulatory laws is to encourage the enforcement of those laws by private litigants thereby saving public funds by shifting the costs of litigation to the private plaintiff. A range of reforms are suggested throughout this thesis to improve the regulators' powers to assist private litigation (see [7.5.5]).

It is argued that the current lack of uniformity in the various regulators' investigative and enforcement powers, and lack of uniformity in the protections

⁷ Robinson T (ALP Victoria), ABC Online, inside business, "Creditors' meeting brings bad news for Fincorp investors," at <http://www.abc.net.au/insidebusiness/content/2007/s1886710.htm>, viewed on 20 April 2007.

⁸ Ayres I and Braithwaite J, "Responsive Regulation: Transcending the Deregulation Debate," Oxford University Press, New York, 1992 at p 35 cited in ALRC, "The Purposes of Monetary Penalties – The Enforcement Pyramid," at [12], at <http://www.austlii.edu.au>, viewed on 15 March 2005.

available to the regulated, are partly the result of the historical processes by which those regulators were established (including the different time periods in which they were formed and therefore the different business, legal, political and social environments which existed when each regulator was established). The lack of uniformity is also partly a product of successive federal governments' "ad hoc" and reactive approach to the development of the Australian regulatory laws. It is suggested that isolated ad hoc amendments to the regulatory laws are insufficient on their own to "flip markets in vice to markets in virtue."¹⁰ According to Baxt,¹¹ the Australian regulatory frameworks are inadequate for Australia's current economic climate. Baxt has indicated that rather than simply incrementally amend the regulatory frameworks (some of which, such as the corporations legislation, are based on 19th century laws), the federal government should reassess those frameworks and adopt a new approach to reforming those frameworks. This is consistent with the conclusions and recommendations of this thesis.

It is argued that there is a better approach to dealing with the above regulatory problems. It is suggested, and demonstrated, in this thesis that the better approach, is to conduct a comprehensive review and analysis of the existing Australian and foreign regulatory frameworks (to identify the strengths, weaknesses and inconsistencies in each of those frameworks) before considering what reforms should be introduced. As the result of the analysis in this thesis, it is suggested that the preferred approach to regulatory reform, and to resolving the problems identified, is to group all of the relevant regulatory laws together into one set of uniform laws that will govern the regulatory activities of ASIC, APRA, the ACCC, and the ATO. The suggested reforms should quickly resolve the problems identified by immediately eliminating, or at least reducing, the existing regulatory weaknesses from all relevant

⁹ See, for example, ss 179, 185 and 230 of the *Corporations Act*.

¹⁰ Argued by analogy from Braithwaite J, "Markets in Vice, Markets in Virtue," *op cit* n 3, at p 205.

¹¹ Baxt R, "Thinking about Regulatory Mix – Companies and Securities, Tax and Trade Practices," p 117 at 119 in Grabosky P and Braithwaite J (Editors), "Business Regulation and Australia's Future," Australia Institute of Criminology, Canberra 1993.

regulatory sectors and by uniformly applying the identified regulatory strengths across all those sectors. A significant advantage of adopting one set of uniform regulatory laws is that the regulators, the judiciary and the regulated would be governed by one set of standards or investigative and enforcement laws that would be applied consistently to common regulatory problems across all Australian business and financial sectors and regulatory jurisdictions.¹² This approach to reform would assist to “weave a fabric” in the regulatory framework “that effectively restrains vice.”¹³ The reforms suggested in this thesis have the support of a number of scholars. For example, Grabosky has indicated that there is a need for greater regulatory harmonisation across the Australian federal system and that Australia’s goal should be to achieve regulatory outcomes which are economically efficient.¹⁴

[1.1.1] *Historical background - ad hoc development of regulatory laws and the emergence of a national economy*

At Federation in 1901, Australia was in effect six colonies. It is in that environment that the Australian legal system developed. As a result of this historical background, corporations were originally regulated at a State level by a Corporate Affairs Commission which was controlled and funded by each State. This system was eventually replaced by a more uniform and federally controlled system governed by the National Companies and Securities Commission in 1979, the Australian Securities Commission in 1989, and ASIC in 1998.

The States originally administered their own separate taxation systems. The federal government did not attempt to levy income tax until 1915 and it was not until

¹² Tunstall I, “International Securities Regulation,” Lawbook Co, Sydney, 2005 at p 206.

¹³ Argued by analogy from Braithwaite J, “Markets in Vice, Markets in Virtue,” op cit n 3, at p 205.

¹⁴ Grabosky P, “Australian Regulatory Enforcement in Comparative Perspective,” p 9 at 21 in Grabosky P and Braithwaite J, op cit n 11.

1942, as the result of the *Uniform Tax* cases,¹⁵ that a federal taxation system became effectively operational in Australia.

The States (except Tasmania) originally enacted laws dealing with restrictive trade practices.¹⁶ The State legislation did not deal effectively with trade practices' matters and was not enforced rigorously because each State competed with the others to attract industry and investment.¹⁷ The first Commonwealth legislation in relation to trade practices was the *Industries Preservation Act 1906* (Cth) which was replaced by the *Trade Practices Act 1965* (Cth). That Act was, in turn, replaced by the *Trade Practices Act 1974* (Cth). It was the economic developments of the 1950s and 1960s, plus the fact that restrictive trade practices was an Australia-wide problem that crossed State borders, that led to political acceptance, at a State level, that trade practices matters should be controlled at a federal level.¹⁸

The limited trend towards uniform Commonwealth legislation described above was also partly the product of the provisions of the *Commonwealth of Australia Constitution Act 1901* (UK) (the Constitution). Commonwealth legislation may be valid even though it in effect weakens or destroys a State law. This is evident from s 109 of the Constitution which provides that where there is an inconsistency between valid Commonwealth and State laws, the State law is invalid to the extent of the inconsistency. As a result of s 109, Commonwealth laws have put an end to State

¹⁵ *South Australia v The Commonwealth* (1942) 65 CLR 373; and *State of Victoria v The Commonwealth* (1957) 99 CLR 575 at 614, 625-626 and 661-662. See also Woellner R, *Australian Taxation Law*, 8th ed, CCH, 1998, Sydney, at [1.600].

¹⁶ See, for example, the *Consumer Protection Act 1969* (NSW); *Monopolies Act 1923* (NSW); *Profiteering Prevention Act 1948* (Qld); *Trade Associations Registration Act 1959* (WA); *Collusive Practices Act 1965* (Vic); *Fair Prices Act 1924* (SA) and the *Prices Act 1963* (SA) cited in Taperell, Vermeesch and Harland "Trade Practices and Consumer Protection," Butterworths, 1983, Sydney, at p 17.

¹⁷ Taperell, Vermeesch and Harland, *ibid*.

¹⁸ See the views expressed in Taperell, Vermeesch and Harland, *op cit* n 16, at p 19. See also the *Consumer Protection Act 1969* (NSW); *Monopolies Act 1923* (NSW); *Profiteering Prevention Act 1948* (Qld); *Trade Associations Registration Act 1959* (WA); *Collusive Practices Act 1965* (Vic); *Fair Prices Act 1924* (SA) and the *Prices Act 1963* (SA).

Courts of Bankruptcy and to State Patent, Trade Mark and Copyright Departments.¹⁹

Despite the trend towards more uniform Commonwealth regulatory laws in relation to the corporate, trade practices and taxation areas described above, there is a lack of uniformity between each of those regulatory frameworks in relation to the regulators' investigation and enforcement powers. This is partly because the legislation governing each regulator was enacted in different time periods and has been amended over time on an ad hoc basis to cure defects revealed by various judgments or Parliamentary reviews. This ad hoc approach continues today. Baxt²⁰ has indicated that amendments to the corporations, taxation and trade practices laws "merely reflect knee-jerk reactions to particular pressures, some of which are highly artificial." Pearson has described the development of the Australian financial laws as the product of a "piecemeal" approach.²¹ Knott has indicated that Australian regulatory problems have been dealt with on an ad hoc basis.²²

While the statutory frameworks governing the Australian regulators have been established on an ad hoc basis, those frameworks have also been shaped by the principle of "continuous improvement" (sometimes referred to as "disjointed incrementalism"). Braithwaite and Drahos²³ describe "continuous improvement" as the prescription of doing better every year than the previous year in terms of a regulatory objective. The problem is that the principle of "continuous improvement" has not been applied holistically or consistently across all Australian regulatory systems. The current approach of making "continuous improvements" to a particular

¹⁹ *South Australia v The Commonwealth* (1942) 65 CLR 373 at 423-424.

²⁰ Baxt R, "Thinking about Regulatory Mix – Companies and Securities, Tax and Trade Practices," p 117 at 119 in Grabosky P and Braithwaite J op cit n 11.

²¹ Pearson G, "Risk and the Consumer in Australian Financial Services Reform," 2006 SydLRev, at 7, at <http://www.austlii.edu.au>, viewed on 23 September 2006.

²² Knott D, (former Chairman of ASIC), "The regulatory perspective – The case for International Accounting standards," International Accounting Standards World Standard Setter's Conference, Hong Kong, 18 November 2002, <http://www.asic.gov.au/nsf>, viewed on 26 February 2004.

²³ Braithwaite J and Drahos P, "Global Business Regulation," Cambridge University Press, New York, 2000, at pp 77, 130-131, 167, 208, 518 and 527.

regulatory framework without making similar improvements to the other frameworks could be described as involving a “myopic” and “tunnel-visioned” approach.²⁴

According to Grabosky, the Australian regulatory environment is characterised by parochialism, fragmentation, duplication or regulatory overlap, inconsistent standards and enforcement policies. Grabosky indicates that those features have profound detrimental consequences for industries or businesses that operate Australia-wide such as producing inefficiencies in the mobility of labour and capital which is essential to microeconomic reform and to improving Australia’s wealth and position in the international economy.²⁵ Wilkins²⁶ has indicated that there is a need to create and maintain an Australian national market for goods, services (including financial services) and capital. Accordingly, there is a need to adopt uniform standards and regulatory regimens in relation to those areas.

John Howard stated that “We are now a single national economy and that cries aloud for a single national industrial relations system. That’s not revolutionary, it’s commonsense.”²⁷ It is suggested that John Howard’s approach should apply more broadly to Australia’s regulatory laws. ASIC and the ATO have also recently emphasised the importance of adopting a “whole of government approach” to dealing with regulatory issues.²⁸

Given that Australians now live in a national economy, it is argued that there should be a more holistic approach to reforming the legislative frameworks that

²⁴ See generally Braithwaite J, “Responsive Regulation for Australia,” at p 81 in Grabosky P and Braithwaite J, op cit n 11.

²⁵ Grabosky P, “Australian Regulatory Enforcement in Comparative Perspective,” p 9 at 13 in Grabosky P and Braithwaite J, op cit n 11.

²⁶ Wilkins R, “Duplication and Inconsistency of Regulation in a Federal System,” p 181 at 185 in Grabosky P and Braithwaite J, op cit n 11.

²⁷ O’Brien K, 7.30 Report, “PM discusses terrorism, IR” at <http://www.abc.net.au/7.30/content/2005/s1430603.htm>, viewed 12 august 2005.

²⁸ “ASIC and Tax Office sign new MoU,” 11 May 2007 at <http://www.asic.gov.au/asic/asic.nsf/byheadline/07-127+ASIC+and+Tax+Office+sign+new+MOU?openDocument>.

regulate that economy so as to produce greater uniformity thereby creating efficiencies that will promote more effective regulation.

[1.2] Thesis statement and objectives of the thesis

This thesis argues that there is an unwarranted inconsistency between the regulatory powers and processes applicable to Australia's four principal federal regulatory bodies, ASIC, APRA, the ACCC and the ATO. It is also argued that this inconsistency impacts negatively on the effectiveness and efficiency of how those bodies can discharge their regulatory functions. Those regulators face common forms of mischief and therefore need common powers and processes to deal with those matters. It is suggested that the regulators' effectiveness and efficiency can be improved by standardising the relevant powers and processes through reform of their governing regulatory laws. Such reforms are both desirable and achievable by amending the existing regulatory frameworks and by benchmarking the reforms against best practice²⁹ as observed both within the existing Australian regulatory frameworks and in comparable foreign regulatory frameworks.

The specific objectives of this thesis are to:

- (i) investigate and suggest better approaches to regulatory reform (in comparison to the federal government's current ad hoc approach, see [1.1.1]);
- (ii) identify the areas in which the powers and processes of selected federal regulators, ASIC, APRA, the ACCC and the ATO differ and can be improved through alignment or standardisation;
- (iii) identify the ideal reforms that should be made to the Australian statutory regulatory regime (including reforms that eliminate areas of regulatory weakness, that reduce the risk of regulatory failures, that improve the capacity of the regulators to respond to contraventions of the regulatory laws

²⁹ Braithwaite J and Drahos P, op cit n 23, at pp 77, 130-131, 167, 208, 518 and 527.

and to impose appropriate sanctions thereby promoting public and private interests and that promote public confidence in the effectiveness and integrity of the Australian regulatory system); and

- (iv) propose a mechanism for the implementation of the identified reforms.

The general overarching objective of this thesis is to demonstrate the desirability of adopting a uniform statutory regulatory model that is suitable for adoption by ASIC, APRA, the ACCC and the ATO,³⁰ and to suggest the reforms that should be incorporated into such a model. The suggested reforms are designed to give the regulators, the regulated and the judiciary clear guidance as to the applicable rules and procedures in all regulatory matters thereby promoting more timely and cost-effective regulatory outcomes and more effective regulation of the Australian economy (see [1.5.1.2]). Such reforms would enhance the prosperity of the Australian community.³¹

[1.3] Approaches to regulatory reform

There are a number of approaches that may be adopted in analysing regulatory frameworks and that provide the foundations for adopting particular regulatory reforms. They include “regulatory formalism”, the “command and control” approach, “responsive regulation” and a “principles and actors” approach. Each of those approaches has advantages and disadvantages. The technique adopted in this thesis is to select the advantageous features of each approach and incorporate those features in the suggested reforms, rather than strictly adhere to one particular approach.

³⁰ It is recognised in subsequent chapters that, in the cases of some Australian regulators, there may be circumstances which justify departures from the universal regulatory model. See, for example, at [8.7.1].

³¹ Pearson G, op cit n 21, at 4.

[1.3.1] *Regulatory formalism*

Throughout this thesis a range of regulatory problems (that are common to the Australian regulators) are identified and “black letter” law reforms are suggested to deal with those problems. This approach reflects what Braithwaite describes as “regulatory formalism.” According to Braithwaite, the formalists “define in advance which problems require which response and write rules to mandate those responses.”³²

[1.3.2] *Command and control*

The approach adopted in this thesis also reflects what Baldwin and Cave³³ describe as the “command and control” approach to regulation. Under this approach, regulation is conducted by imposing standards of behaviour that are backed by sanctions. Baldwin and Cave³⁴ indicate that the advantage of the “command and control” approach (in comparison to self-regulation) is that because the standards are backed by law, those standards can be immediately enforced. According to Baldwin and Cave,³⁵ this approach promotes public confidence in the regulatory system because it permits the regulator to take a “clear stand” by designating some forms of behaviour as unacceptable, by excluding persons from participating in relevant industries and by imposing penalties against those who engage in contravening conduct.³⁶

The command and control approach has been criticised on the grounds that it may lead to over-regulation, excessive legalism and the development of unnecessarily

³² Braithwaite J, “Restorative Justice and Responsive Regulation,” op cit n 3, at p 29.

³³ Baldwin R and Cave M, “Understanding Regulation Theory Strategy, and Practice,” Oxford University Press, Oxford, 1999 at p 35.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Braithwaite indicates that the ATO adopted a “command and control” approach in the 1970s and 1980s but has now adopted a “responsive regulation” approach (see below): see Braithwaite J, “Markets in Vice, Markets in Virtue,” op cit n 3, at p 68.

complex and inflexible rules with an overemphasis on the rule of law at the expense of discretionary decision-making that, in turn, may cause delay and expense in enforcement. This approach may also lead to a significant intrusion on managerial freedom.³⁷ In contrast to those criticisms, the reforms suggested in this thesis (whilst partly based on a command and control philosophy) are designed to achieve certainty and simplicity in the Australian regulatory laws by introducing greater uniformity in the regulators' investigative and enforcement powers and in the protections that are afforded to the regulated.

[1.3.3] *Responsive regulation*

“Responsive regulation” involves a regulatory model that utilises persuasion and, in some cases, punishment to achieve compliance. It requires governments to be “responsive to the conduct of those they seek to regulate in deciding whether a more or less interventionist response is needed.”³⁸ According to Braithwaite, regulators should be responsive to how effectively the regulated can regulate themselves before deciding whether to escalate intervention.³⁹ Braithwaite indicates that responsive regulation also involves sending a clear message to the public through “concrete enforcement actions” that the regulator is willing to escalate its response so as to create a culture where the public are encouraged to implement systemic preventative solutions. Responsive regulation also requires the regulators to develop a good relationship with the regulated so that the regulated will voluntarily do most of the compliance work.⁴⁰ Pearson indicates that the widespread influence of Braithwaite’s approach has led the ACCC and the ATO to gain new powers with which to bargain with non-compliers⁴¹ to encourage co-operation and to reduce resistance and evasion. Some of the reforms suggested in this thesis (such as giving all Australian regulators powers to release information to the various professional disciplinary bodies (see

³⁷ Baldwin R and Cave M, op cit n 33, at p 37.

³⁸ Braithwaite J, “Restorative Justice and Responsive Regulation,” op cit n 3, at p 29.

³⁹ Braithwaite J, “Restorative Justice and Responsive Regulation,” op cit n 3, at p 29.

⁴⁰ Braithwaite J, “Markets in Vice, Markets in Virtue”, op cit n 3, at p 178.

⁴¹ Pearson G, op cit n 21, at 19.

[7.5.6]), to accept enforceable undertakings from the regulated (see [10.4.2.2]) and to disqualify persons from acting in the relevant industry (see [8.8.3] and [10.9.1])), reflect the “responsive regulation” approach as they allow the regulators to adopt a less interventionist approach at first as an alternative to immediately escalating their enforcement response.

Yeung is critical of Braithwaite’s “responsive regulation” approach on the grounds that it places too much reliance on the discretion of the regulators and too much emphasis on pursuing policy goals inherent in regulation without sufficient concern for fundamental values such as obedience to the law, certainty, accountability, transparency and rationality in the administration of the law.⁴² Silbey suggests that responsive regulation fails to apply the law uniformly and favours the interests of the regulated (particularly powerful corporations), rather than the interests of consumers or the public.⁴³ The reforms suggested in this thesis attempt to address such concerns by adopting a balanced approach to competing public and private interests (see [1.5.2]).

[1.3.4] *Principles, rules, actors and mechanisms*

A number of scholars consider the role that certain “principles, rules, actors and mechanisms” play in shaping and reforming regulatory systems. The methodology and analytical principles adopted in this thesis have some parallels to those adopted by Braithwaite and Drahos.⁴⁴ They indicate that regulatory regimes are the core of governance structures. They analyse global regulatory frameworks and governance structures by reference to principles, actors, rules and mechanisms. They indicate that principles underpin the establishment and reform of regulatory regimes and that principles also underpin the creation, application and reform of the rules

⁴² Yeung K, “Securing Compliance: A Principled Approach” (2004) at 5-8 cited in Pearson G, op cit n 21, at 3.

⁴³ Silbey S, “The Consequences of Responsive Regulation” in Hawkins & Thomas “Enforcing Regulation” (1984) cited in Pearson G, op cit n 21, at 19.

⁴⁴ Braithwaite J and Drahos P, op cit n 23, at p 507.

contained in those regimes. They note that principles have less specificity than rules. Braithwaite and Drahos emphasise that principles may be legal and juristic in character (such as national treatment and sovereignty) and they may also include non-legal matters such as transparency, reciprocity and agreed standards of conduct such as world's best practice. They state that rules can be legal or non-legal and may include specific regulatory laws that prescribe or prohibit specific conduct. "Actors" refer to those who participate in the regulatory regimes and include governments, the regulators and the regulated. "Mechanisms" refer to the processes by which the principles and rules are implemented⁴⁵ and may include the regulators' investigative and enforcement powers and the rules of evidence and procedure that govern the courts. This thesis focuses on the investigative and enforcement rules and mechanisms that are embedded in the Australian regulatory regimes.⁴⁶

Braithwaite and Drahos consider the role that certain actors (including policy makers, public regulatory authorities and powerful private interest groups) and certain principles have had in shaping those regulatory systems. They indicate that "actors articulate and ally themselves with certain principles" because certain principles assist to achieve objectives and goals that are important to the particular actor in question. Actors, through principles, seek to incorporate into regulatory systems social practices and changes that are consistent with their general values. Braithwaite and Drahos indicate that "principles" have played an important role in shaping global business regulation. They found that in every regulatory domain some "actors" supported some principles and opposed others when developing regulatory regimes.⁴⁷

Similarly, Black adopts an all-embracing approach to regulation and considers the role of the rule-makers and the role of various actors in shaping regulatory

⁴⁵ Braithwaite J and Drahos P, *op cit* n 23, at pp 18-19.

⁴⁶ Different interest groups and different regulatory theories place different emphasis on these four factors. For example, public policy makers and legal analysts may be more concerned with the principles and mechanisms. Conventional lawyers are more concerned with the implementation of the rules. Criminologists place more emphasis on the actors, such as white collar criminals.

⁴⁷ Braithwaite J and Drahos P, *op cit* n 23, at pp 19, 27, 157 and 507.

systems. Black indicates that regulation is concerned with shared collective goals and is of the view that the greater the shared understanding and acceptance of regulation, the greater the compliance. According to Black, an understanding of how a regulatory system works can only be obtained by looking at the various actors in that system and to the conversations between the various actors about the rules of the system and the process of rule formation.⁴⁸ Pearson indicates that the predominant conversations in Australia have focused on compliance by, and the risks faced by, the regulated, rather than on the risks faced by consumers.⁴⁹ Whilst it is recognised that a range of actors play a role in developing regulatory regimes, and that those actors have different goals and values that may impact upon the shape of regulatory systems, it is argued throughout this thesis that an effective regulatory regime must contain a clear and balanced expression of the collective goals and values of the various actors.

Braithwaite also emphasises the role that certain individuals (which he describes as “moral and fiscal termites”) have had in shaping taxation regulatory systems. Braithwaite indicates that market forces can drive the production of social “bads” as well as driving the production of social “goods.”⁵⁰ Braithwaite indicates that the competition in the New York market for financial advice and for aggressive tax planning schemes has meant that the Internal Revenue Service (IRS) has developed a more sophisticated regulatory strategy in comparison to the ATO. According to Braithwaite, this “competition in vice...can flip markets in vice to markets in virtue” because the regulators’ response to vice is to “ratchet up” their regulatory activities and engage in “smart regulation.”⁵¹ The methodology adopted in this thesis involves introducing reforms that will produce “smart regulation” or what

⁴⁸ Black J, “Talking About Regulation [1998] *Public Law 77*; and Black J, “Mapping the Contours of Contemporary Financial Services Regulation,” Discussion Paper No 17, (2003), Black J, “Constitutionalising Self-Regulation” (1996) 59 Mod LR 24 cited in Pearson G, op cit n 21, at 7 and 19.

⁴⁹ Pearson G, op cit n 21, at 8.

⁵⁰ Evans C, op cit n 3.

⁵¹ Braithwaite J, “Markets in Vice, Markets in Virtue”, op cit n 3, at 14 citing Gunningham N and Grabosky P, “Smart Regulation: Designing Environmental Policy,” Clarendon Press, Oxford, 1998.

Baldwin and Cave⁵² describe as “good regulation” or “effective regulation” (see [1.4] and [1.5.1.2]) including innovative laws to improve the Australian regulators’ capacity to gather information in a timely manner and to give them more effective enforcement options.

Some scholars view individuals and corporations as “rational actors” who carefully assess opportunities and risks and who breach the law if the anticipated profits greatly exceed the anticipated fine and probability of being caught. Consequently, they argue that regulatory models should be designed to produce a deterrent effect and should contain harsh penalties.⁵³ By contrast, some scholars view individuals and corporations as “social actors” who comply with the law partly because they believe in the rule of law and partly because they see compliance to be in their long-term self-interest. Consequently, they argue that regulatory models should be designed to achieve compliance outcomes through co-operation rather than through deterrence or coercion.⁵⁴

Braithwaite argues that a person can be a “rational actor” today but a “social actor” tomorrow. Consequently, he suggests that the regulatory model should be designed to deal with both types of actors. Braithwaite attempts to achieve this through his “responsive regulation” model⁵⁵ and his “enforcement pyramid”, as discussed at [1.3.3] and [1.5.4].

Longo⁵⁶ and Mayer⁵⁷ emphasise the importance of considering principles that promote public and private interest objectives when analysing regulatory systems.

⁵² Baldwin R and Cave M, op cit n 33, at p 76.

⁵³ Attorney-General’s Department, Commonwealth Treasury, “Review of Sanctions in Corporate Law”, at [1.11], 2007 at http://www.treasury.gov.au/documents/1182/PDF/Review_of_Sanctions.pdf, viewed 19 March 2007.

⁵⁴ Attorney-General’s Department, ibid, at [1.13].

⁵⁵ Attorney-General’s Department, ibid, at [1.17]-[1.18].

⁵⁶ Longo JP, “The Powers of Investigation of the Australian Securities Commission: Balancing the Interests of Persons and Companies under Investigation with the Interests of the State” p 43 at 47 in Grabosky P and Braithwaite J, op cit n 11.

The judiciary have also emphasised the importance of considering the competing public and private interests when interpreting regulatory laws.⁵⁸

Baldwin and Cave⁵⁹ indicate that certain changes in regulatory regimes are driven by the “force of ideas,” rather than by pressure from private interests. “Ideas” refer to intellectual conceptions which express how and why the government should control businesses and the economy. They indicate that despite the fact that ideas may be distorted by political considerations when laws are enacted, those ideas still provide the essential basis for the explanation and justification of particular regulatory policies. However, Braithwaite indicates that the complexity in current tax law is because law reform has been driven by exceptions rather than principles and he has called for a more “principle-driven” approach to formulating tax law. According to Braithwaite, a law that is “based on principles that people understand and accept is less likely to be eroded by moral termites.”⁶⁰ Such a law is also more likely to be voluntarily complied with.

Mayer,⁶¹ Schoer⁶² and Braithwaite⁶³ have indicated that procedural clarity, cost-effectiveness and timeliness are important considerations if regulation is to achieve social political and economic objectives. Those principles are frequently used in this thesis to analyse the regulatory frameworks and to provide a basis for suggested reforms.

⁵⁷ Mayer, E, “The Role of Regulatory Enforcement in the Australian Economy,” at pp 97-98 in Grabosky P and Braithwaite J, op cit n 11.

⁵⁸ See, for example, *Spedley Securities Ltd (in liq) v Bond Brewing Investments Pty Ltd* (1991) 4 ACSR 229 at 247 per Cole J.

⁵⁹ Baldwin R and Cave M, op cit n 33, at p 26.

⁶⁰ Braithwaite J, “Markets in Vice, Markets in Virtue”, op cit n 3, at pp 63 and 144.

⁶¹ Mayer, E, “The Role of Regulatory Enforcement in the Australian Economy,” at p 97 in Grabosky P and Braithwaite J, op cit n 11.

⁶² Schoer R, “Self-Regulation and the Australian Stock Exchange,” at pp 108-109 in Grabosky P and Braithwaite J, op cit n 11.

⁶³ Braithwaite J, “Markets in Vice, Markets in Virtue”, op cit n 3, at pp 160 and 184.

Braithwaite and Drahos identify also “world’s best practice”⁶⁴ as one of the principles that is useful in analysing global business regulatory regimes. Braithwaite and Drahos suggest that in the context of global taxation systems, businesses will locate in “low cost” jurisdictions and that factor is more dominant, than world’s best practice, in influencing decisions regarding the location of businesses in a global environment. By contrast, they indicate that in the context of global financial markets and capital raising, businesses will locate in jurisdictions that have adopted “world’s best practice.” They suggest that businesses have a competitive advantage if they list on the New York Stock Exchange because such a listing instills confidence in the investing public. In the context of the Australian regulators’ investigative and enforcement powers, it will be demonstrated in this thesis that the adoption of “world’s best practice” in the Australian regulatory regime will produce lower costs for the regulators and the regulated.⁶⁵ The adoption of best practice by the regulators also sends a more effective compliance message to the regulated and, in turn, encourages the regulated to adopt their own best practices thereby flipping the markets in vice to markets in virtue. That is, the regulated become aware that adopting a level of best practice in their industry is “their only way out of deep trouble with the government.”⁶⁶

Costello has also emphasised the importance of adopting “best practice” in regulatory structure, standards of prudence and consumer protection. He has indicated that the purpose of regulatory reform is to transform the performance of the economy by creating a “world class regulatory structure for the development and growth of the whole Australian economy.”⁶⁷ Wallis suggests that the Australian economy can obtain a comparative advantage in global markets if it adopts the “best

⁶⁴ Braithwaite J and Drahos P, op cit n 23, at pp 77, 130-131, 167, 208, 518 and 527.

⁶⁵ See generally Braithwaite J and Drahos P, op cit n 23, at pp 130-131.

⁶⁶ Braithwaite J, “Markets in Vice, Markets in Virtue”, op cit n 3, at p 199.

⁶⁷ Costello P, Commonwealth, House of Representatives, Parliamentary Debates (Hansard), 2 September 1997, at 7516; Costello P, Treasurer, “Reform of the Australian Financial System: Press Release No 102”, (2 September 1997) cited in Pearson G, op cit n 21, at 4 and 6.

regulatory system.”⁶⁸

The reforms suggested in each of the subsequent chapters represent world’s best practice.

[1.4] Methodology

Selected Australian and foreign regulatory frameworks will be compared and analysed by reference to the theoretical approaches described above at [1.3]-[1.3.4]. Those frameworks will also be analysed according to the competing (and sometimes overlapping) public and private interests that underpin those frameworks. Those competing interests are outlined at the beginning of each chapter. The selected regulatory frameworks are also analysed using other theoretical and practical principles (derived from regulatory theory and judicial and academic writings) as discussed above at [1.3.4] including the need to:

- (a) promote more effective regulation (see [1.5.1.2]);
- (b) promote transparency (see [1.5.3]);
- (c) promote greater certainty and clarity in the law (see [1.5.4]);
- (d) ensure greater government accountability;
- (e) promote better decision-making;
- (f) save time and costs in regulatory actions (see [1.5.4]); and
- (g) observe the principles of fairness, including the need to treat like cases alike (see [1.5.5]).

Those factors are used in each chapter to identify the existing areas of the relevant Australian regulatory laws that either promote, or that do not promote, effective regulation. This involves identifying the existing areas of strength and weakness in those laws.

The comparative analysis is also based on a detailed examination of the

⁶⁸ Wallis S, “Financial System Inquiry: Final Report,” (1997), Treasury, at 177 cited in Pearson G, *op cit* n 21, at 6.

relevant Australian and foreign statute and case law, and other primary and secondary materials. Comparisons are made with the United States' regulatory laws including the laws governing the Securities and Exchange Commission (SEC), the Antitrust Division of the Department of Justice (ATD) and the IRS. Comparisons are also made with the United Kingdom's regulatory laws including the laws governing the Department of Trade and Industry (DTI), the Financial Services Authority (FSA), the Competition Commission (CC), and Her Majesty's Revenue and Customs (HMRC).

The purpose of the comparative analysis is to identify the "benchmarks" of effective regulation, or what Braithwaite and Drahos describe as "world's best practice"⁶⁹ in, or the advantageous features of, each regulatory framework, as well as to identify the weaknesses and inconsistencies in those frameworks to provide an informed basis for suggested law reform.

The comparative analysis is conducted in relation to the regulators' powers to:

- (a) commence investigations (Chapter 3);
- (b) conduct oral examinations (Chapter 4);
- (c) require the production of books (Chapter 5);
- (d) enforce their investigative requirements (Chapter 6);
- (e) release investigative information (Chapter 7);
- (f) commence and conduct civil and civil penalty proceedings (Chapter 8);
- (g) commence and conduct criminal proceedings (Chapter 9); and
- (h) commence and conduct administrative proceedings (Chapter 10).

The comparative analysis is also conducted in relation to affected persons' rights to seek internal and external review of the regulators' decisions (Chapter 11).

The concluding chapter (Chapter 12) outlines how the reforms (the proposed uniform Australian regulatory framework) could be implemented.

⁶⁹ Braithwaite J and Drahos P, *op cit* n 23, at pp 77, 130-131, 167, 208, 518 and 527.

Consideration is given to whether Australia should retain its current “multiple regulator model” or adopt a “single or super regulator model” or some form of “hybrid regulator model.”

[1.5] Reasons for the reforms suggested by the thesis

It is argued in this section that common public and private interest factors (see [1.5.2]), coupled with a range of principled theoretical and practical reasons (see [1.5.1]-[1.5.8]), support the objectives of this thesis (see [1.2]) and indicate that the Australian regulators, the courts and the regulated should operate within a more uniform regulatory regime than exists at present.

[1.5.1] *Promote effective regulation*

[1.5.1.1] *Meaning of regulation*

The term “regulation” has been narrowly described as involving the promulgation of a binding set of rules or a specific set of commands to be applied by a body devoted to this purpose.⁷⁰ Regulation has also been described more broadly as “an identifiable mode of governmental activity,” or a “sustained and focused control exercised by a public agency over activities that are valued by the community” or “deliberate State influence” covering “all State actions designed to influence industrial or social behaviour.”⁷¹ In its broadest sense, regulation includes “all forms of social control or influence - where all mechanisms affecting behaviour – whether these be State-derived or from other sources (eg markets) – are deemed

⁷⁰ These definitions are quoted from Baldwin R and Cave M, op cit n 33, at pp 1-2. See also Jordana J and Levi-Faur D, “The politics of regulation in the age of governance,” at p 3 in Jordana J and Levi-Faur D (Eds), “The Politics of Regulation – Institutions and Regulatory Reforms for the Age of Governance, ” Edward Elgar Publishing, Northampton, 2004.

⁷¹ See Baldwin R and Cave M, op cit n 33, at pp 1-2. See also Jordana J and Levi-Faur D, *ibid*.

regulatory.”⁷² The primary concern in this thesis is with regulation in the first sense described above.

[1.5.1.2] *Effective regulation*

One core economic policy of the Australian federal government is to encourage savings and investment in Australia.⁷³ Savings and investment are needed if Australia is to improve its domestic economy and its status in the international market. Some members of Parliament have indicated that Australian and overseas investors are only willing to invest in the Australian business, capital and financial markets if they perceive the Australian process of business regulation and law enforcement to be efficient and effective.⁷⁴

According to Baldwin and Cave,⁷⁵ to determine whether a regulatory regime is producing “good regulation” or “effective regulation,” it is necessary to identify the benchmarks that are relevant to such an evaluation. They indicate that a good or effective regulatory regime is one that is supported by statutory powers; that produces cost-effective regulatory outcomes; that is accountable; that has fair, accessible and open procedures; and that is supervised by a regulator with sufficient expertise.⁷⁶

The ALRC has indicated that “effective regulation” involves encouraging a culture of compliance by the target population with the regulatory rules and the achievement of the regulatory objective (whether investor or consumer protection, a competitive market or efficient revenue collection) in a timely and cost-effective

⁷² See Baldwin R and Cave M, op cit n 33. See also Jordana J and Levi-Faur D, *ibid.*

⁷³ World Trade Organisation, Trade Policy Reviews, Australia June 1998, at http://www.wto.org/English/tratop_e/tpr_e/tp76_e.htm, viewed on 23 June 2006. See also Mr Moore (Member for Ryan) and Mr McArthur (Member for Corangamite), Australia, House of Representatives 1992, Debates vol. HR 4, at 1378 and 1384.

⁷⁴ Mr Moore and Mr McArthur, *Ibid.*

⁷⁵ Baldwin R and Cave M, op cit n 33, at p 76.

⁷⁶ Baldwin R and Cave M, op cit n 33, at p 77.

manner.⁷⁷ Pearson has also emphasised the importance of achieving cost-effectiveness in regulatory reform.⁷⁸ Mann has indicated that effective or successful regulation requires clear regulatory laws that are enforced in a predictable and consistent manner.⁷⁹

It is argued that an effective regulatory regime is one that sends a uniform compliance message to the regulated. Schoer⁸⁰ indicates that the current complex and inconsistent regulatory laws create “signposts” that guide those who want to circumvent a particular law. It is suggested that the current Australian regulatory framework, which gives some regulators superior investigative and enforcement powers, and which creates “signposts,” does not send a uniform compliance message to the public, encourages unscrupulous individuals to deploy legal entrepreneurship to exploit weaknesses in the regulatory laws, increases the potential for members of the public to be harmed by the activities of such individuals and undermines public confidence in the integrity and effectiveness of those laws. An inconsistent regulatory framework could send the message to the public that if you are going to commit a contravention, you are “better off” committing that contravention within the regulatory domain of the regulator with the weaker investigative and enforcement powers. It could be argued that it is unlikely that the majority of potential contravenors would take this matter into account when they are considering whether to deliberately contravene the regulatory laws. However, there are indications from the *Westpoint* case⁸¹ that the defendants deliberately structured their transactions to avoid being within ASIC’s regulatory jurisdiction.

A further consequence of a lack of uniformity is that where a particular regulatory framework has superior investigative and enforcement powers, the

⁷⁷ ALRC, op cit n 5, at Item 2, “What is Effective Regulation?”

⁷⁸ Pearson G, op cit n 21, at 6.

⁷⁹ Mann M, (Director of the SEC) cited in ALRC, Background Paper 7, op cit n 5, at Item 1 and fn 56.

⁸⁰ Schoer R, “Self-Regulation and the Australian Stock Exchange,” p 107 at 108 in Grabosky P and Braithwaite J, op cit n 11.

⁸¹ *ASIC v Emu Brewery Mezzanine Ltd* [2004] WASC 241.

regulators may use artificial methods to invoke those superior powers, as discussed at [1.5.7]. This strategy may not promote effective regulation, or produce the outcome desired by the regulators, as there may be a delay in the investigative and enforcement process as the result of the defendant challenging the regulator's action on grounds such as abuse of power or lack of power.⁸²

The suggested reforms would avoid the problems and confusion caused by inconsistent decisions such as those in *Corporate Affairs Commission (NSW) v Yuill*,⁸³ which indicates that the client's legal professional privilege has been impliedly abrogated in ASIC's investigations, and *Daniels v ACCC*,⁸⁴ which indicates that legal professional privilege may be claimed in the ACCC's investigations. At present, the costly and protracted litigation in cases like *Daniels v ACCC*, which resolves a question for the ACCC, does not resolve the same question for the other regulators (given the textual differences between the various regulatory statutes). Such an approach does not promote effective or successful regulation.

Contraventions of the regulatory laws can impose extremely high costs on the Australian public as evidenced by a series of high profile corporate collapses including the collapse of the Pyramid Group, the Connell and Bond Groups, Quintex, HIH, One.Tel and Fincorp.⁸⁵ Additional costs have been incurred in the above cases, particularly in the HIH and One.Tel matters, as the result of collateral litigation concerning the applicable regulatory procedures and rules. For example, in the case of the One.Tel collapse, a search of the "Austlii" website reveals over 40 interlocutory applications involving "*ASIC v Rich*" in the New South Wales Supreme Court between 2003 and 2005. Many of those applications involved collateral attacks

⁸² Such a challenge has recently occurred, in the context of ASIC's oral examination powers, in *Muldoon v ASIC* [2005] FCA 1432 at [22]-[23], as discussed at [4.10.2].

⁸³ (1991) 172 CLR 319. The approach in the case has been confirmed, in the context of James Hardie investigations, by the *James Hardie (Investigations and Proceedings) Act 2004* (Cth), as discussed at [4.10.3.1].

⁸⁴ (2002) 213 CLR 593.

⁸⁵ See the comments in *ASIC v Vizard* (2005) 54 ACSR 394; [2005] FCA 1037 at [25]. See generally Robinson T (ALP Victoria), op cit n 7.

regarding the applicable evidential and procedural rules and issues that were not related to the substantive merits of the case.⁸⁶ It could be argued that some of this litigation had no other purpose than to obtain the tactical objective of impeding or frustrating the regulators' enforcement action (see further at [11.5.2]).

It is argued that a uniform regulatory system, with clear express powers and protections, would reduce the type of collateral litigation described above and would promote a more efficient approach to regulation as the regulators and the regulated will need to spend less time and money in ascertaining the applicable rules that govern them. Such efficiencies would assist to improve Australia's economic performance and productivity domestically and internationally so as to achieve greater economic wealth for all Australians.

[1.5.1.3] *Necessity for regulation*

According to Justice Owen, "There is no doubt that regulation is necessary: peace order and good government could not be achieved without it."⁸⁷ Shearing also indicates that "there is no escape from the necessity of regulation."⁸⁸

The establishment of APRA, ASIC, the ACCC and the ATO reflects the federal government's philosophy that regulation of the Australian financial and business markets is necessary and is best achieved by independent specialist bodies. Other options could be to adopt a regulatory model based on self-regulation or a model based on no regulation at all (*laissez faire*). Baldwin and Cave⁸⁹ indicate that

⁸⁶ Compare the findings of the Administrative Review Council, "The Scope of Judicial Review, Discussion Paper," 2003, at pp 3 and 18 and at fn 42.

⁸⁷ Justice Neville Owen, HIH Royal Commission, Final Report, The Failure of HIH Insurance, Volume 1, "A corporate collapse and its lessons, The failure of HIH: a critical assessment, The Royal Commission: a personal perspective," at xiii, April 2003, cited in Australian Institute of Company Directors, Module 1, The Practice of Directorship, 2004 at p 30.

⁸⁸ Shearing CD, "A Constitutive Conception of Regulation" at p 72 in Grabosky P and Braithwaite J, op cit n 11.

⁸⁹ Baldwin R and Cave M, op cit n 33, at p 9.

regulation is necessary because an uncontrolled market place will fail to produce behaviour or results that are consistent with the public interest (see [1.5.2]). Some commentators have indicated that recent collapses have led to a massive crisis of public confidence in the financial markets and in self-regulation.⁹⁰ The federal government is of the view that public confidence can only effectively be restored and maintained by government regulation.⁹¹

Regulation is necessary because it promotes appropriate disclosures by market participants and assists to perfect the market system for the purchase and sale of goods, securities, other property and services (see [1.5.3]). Regulation assists to ensure fair, honest and transparent markets and therefore facilitates the efficient functioning of the economy. The regulation of business transactions assists to protect the government's taxation or revenue collection power (within the regulatory domain of the ATO) and protects and makes more effective the Australian banking and credit systems which are used to finance business and private activities and protects the public's investment in superannuation and retirement funds (within the regulatory domains of APRA, ASIC and the ATO). Regulation also assists to promote more competitive and, therefore, more effective Australian and overseas trade and commerce (within the regulatory domains of ASIC and the ACCC).⁹²

The need for government regulation is highlighted by what may occur where there is either a deliberate policy of no regulation or where a regulator fails to properly regulate. A failure to properly regulate the economy would be likely to lead to a significant increase in the number of cases of non-disclosure, misleading disclosure, market manipulation and inaccurate market prices. Inaccurate market prices (caused by inaccurate information) could lead to unreasonable fluctuations in market prices caused by the speculative activities of fraudsters and others. This

⁹⁰ Baldwin R and Cave M, op cit n 33, at p 9.

⁹¹ See, for example, the comments in the Explanatory Memorandum to *James Hardie (Investigations and Proceedings) Bill 2004* (Cth) at [4.24].

⁹² Argued by analogy from s 2 of the *Securities Exchange Act 1934* (US); and 15 USC, s 78b.

could, in turn, cause loss to the victims of fraud, unreasonable expansion or contraction of relevant industries and affect the value of collateral required, or already provided, for financing business activities thereby threatening the viability of the banking and financial systems. An unregulated or poorly regulated market could also prejudice the accurate collection of taxes. This could then prejudice the government's ability to properly fund the regulators, to provide future infrastructure for business and personal activities and weaken the government's ability to provide relief to individuals by way of welfare payments. Unregulated markets and market manipulation could also create a national crisis including a loss of public confidence in the integrity of the markets, a collapse of trade and commerce, and widespread unemployment affecting the welfare of all citizens.⁹³ The case law also indicates that serious contraventions of the regulatory laws may affect the economy as a whole.⁹⁴

In some cases, the failure to properly regulate may be attributed to a failure by the federal government to adopt a uniform approach to the development of the Australian regulators' investigative and enforcement powers. This may produce weaknesses in a particular regulator's investigative and enforcement powers that are not shared by some of the other Australian regulators. Those weaknesses could produce some of the adverse consequences discussed above. For example, APRA has recently been subject to much criticism over its perceived failure to perform its regulatory functions in relation to the HIH Collapse and the National Australia Bank's currency trading problems.⁹⁵ The HIH collapse, in particular, highlighted the need for proper regulation and the weaknesses in some of APRA's regulatory powers.⁹⁶

⁹³ Argued by analogy from s 2 of the *Securities Exchange Act 1934* (US); and 15 USC, s 78b.

⁹⁴ *ASIC v Vizard* (2005) 219 ALR 714 at 723 at [33] cited in *ASIC v Beekink* [2006] FCA 388 at [23].

⁹⁵ For example, it was claimed that APRA failed to adequately address risk management issues at the National Australia Bank in relation to the \$360 million currency trading losses incurred by the bank as the result of unauthorised trading by its staff. APRA was criticised for not informing the market in a more timely manner of its concerns regarding the bank's risk management practices. The suggestion is that APRA has not learned its lesson after the HIH debacle: see Letts S, Lateline,

Given that regulation is necessary, it is argued that it must be carried out effectively. More effective regulation can be achieved by the Australian regulators, like APRA, if the federal government adopted a more comprehensive and uniform approach to improving Australia's regulatory laws. For example, if the federal government had improved APRA's powers at the same time that it improved ASIC's powers under the *Corporations Act* and *ASIC Act*, APRA may have had a better capacity to respond to the HIH collapse (see further at [2.6] and [9.5.1]). The recent review of APRA's powers had as its objective, improving consistency across the banking, insurance and superannuation sectors. This review may mean that APRA will be granted a uniform set of powers which are grouped together in the *Australian Prudential Regulation Authority Act 1998* (Cth), rather than the present situation which involves outdated laws and inconsistent powers in industry specific legislation.⁹⁷ There is also currently a review being conducted of the civil and criminal sanctions in Australian corporate law.⁹⁸ One objective of this review is to identify areas of inconsistency and to suggest reforms to introduce greater uniformity in corporate criminal offences and defences. Those reviews could produce results that are consistent with the objectives of this thesis. However, they also provide a further example of the federal government's ad hoc approach to the reform of the Australian regulatory laws.

"Watchdog knew about NAB trade risk" <http://www.abc.net.au/lateline>, viewed on 20 February 2004.

⁹⁶ APRA publicly decried its lack of regulatory power in relation to certain matters: see generally, The HIH Royal Commission, Final Report, op cit n 87, "Regulation of General Insurance," at [8.5].

⁹⁷ HIH Royal Commission, Final Report, op cit n 87, at [8.5.3] and Recommendation 20. See also APRA, "Prudential Supervision of General Insurance – Stage 2 Reforms" at http://www.apra.gov.au/RePEc/RePEcDocs/Archive/discussion_papers/dp0012.pdf, viewed on 20 April 2007.

⁹⁸ Attorney-General's Department, Commonwealth Treasury, "Review of Sanctions in Corporate Law," at, http://www.treasury.gov.au/documents/1182/PDF/Review_of_Sanctions.pdf, viewed on 16 April 2007.

[1.5.2] *Public and private interests*

Public and private interest factors make it necessary for governments to regulate and control business markets and business transactions. It is argued throughout this thesis that public and private interests dictate that there should be greater uniformity in the Australian regulators' investigative and enforcement powers.

It is recognised that there are difficulties that arise when attempting to classify particular principles, rights or protections as falling within generic descriptors such as "public interest" or "private interest." In some cases the distinction is not mutually exclusive and some of those principles, rights or protections may promote both public and private interests.⁹⁹ Whilst there may be other definitions of "public interest" or "private interest," for the purpose of this thesis, these terms are defined in a particular way in this section and in subsequent chapters.

The phrase "public interest" is not defined for the purposes of the Australian regulatory legislation. It is difficult to define with precision. ASIC is of the view that "public interest" has an extremely wide meaning.¹⁰⁰ The word "public" may include the Australian taxpayers who fund ASIC's operations.¹⁰¹ In the context of the ACCC and its role in relation to the *Trade Practices Act 1974* (Cth), "public benefit" has been defined broadly as anything of value to the community generally including the economic goals of efficiency and progress.¹⁰² The public interest includes a consideration of factors such as the standards of human conduct and the functioning of government for the good order of society and the well-being of its members. The public interest is the

⁹⁹ See below at footnotes 119, 120 and 121.

¹⁰⁰ Thompson P, "Section 50 of the ASC Law - The Power and its Application" (1993) 3 ASC Digest SPCH 75 at 77 cited in Richardson D, "Section 50 of the Australian Securities Commission Act 1989: White Knight or White Elephant?" (1994) 12 C&SLJ 418 at p 419.

¹⁰¹ Richardson D, *ibid*, at p 429.

¹⁰² *Re Queensland Co-operative Milling Association Ltd* (1976) 25 FLR 169; and *Re Travel Industries Automated Systems Ltd* (1993) ATPR (Com) 50-131.

interest of the public as distinct from the private interest of the individual.¹⁰³

Braithwaite and Drahos¹⁰⁴ indicate that some powerful public and private interest lobby groups or “actors” have shaped global regulatory systems. They cite the dominant role of the SEC, in the United States, in shaping global financial regulatory systems. By contrast, some of the Australian regulators have had “mixed results” in shaping the Australian domestic regulatory system.¹⁰⁵

Baldwin and Cave¹⁰⁶ indicate that “public interest theories” are based on the idea that those seeking to institute or develop regulatory regimes do so in pursuit of public interest related objectives, rather than group, sector or individual self-interests. They indicate that the regulatory legislation’s purpose is to achieve a range of publicly desired results in circumstances where an uncontrolled market would fail to achieve such results. Yeung indicates that the purpose of regulation, and of those designing statutory regulatory frameworks, is to implement particular collective goals to promote what is regarded as best for the community or what is in the “public interest.” Yeung indicates that “public interest” values are inherent in the rule of law and liberal democracy.¹⁰⁷ By contrast, Ogus indicates that it is naïve to expect that legislation is always made in the public interest.¹⁰⁸

¹⁰³ *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 at 480 per Barwick CJ.

¹⁰⁴ Braithwaite J and Drahos P, op cit n 23, at pp 3-4 and 157. They also give the example of the Motorola corporation’s key role in setting telecommunication standards through its chairmanship of various committees.

¹⁰⁵ For example, ASIC has successfully lobbied the federal government and obtained reforms in relation to the operation of the privilege against self-incrimination at its oral examinations (see [4.10.2]) whereas the ACCC has had no success in seeking a “cease and desist power” (see [10.9.2]).

¹⁰⁶ Baldwin R and Cave M, op cit n 33, at pp 19-20.

¹⁰⁷ Yeung K, “Securing Compliance: A Principled Approach” (2004) at pp 5-8 cited in Pearson G, op cit n 21, at 3.

¹⁰⁸ Ogus A, “Whither the economic theory of regulation? What economic theory of regulation?,” at p 35 in Jordana J and Levi-Faur D, op cit n 70.

Baldwin and Cave¹⁰⁹ indicate that public interest theories emphasise the “trustworthiness and disinterestedness of expert regulators in whose public-spiritedness and efficiency the public can have confidence.” However, they note that public interest theories have been criticised on the ground that it is difficult to identify an agreed conception of the “public interest”, as discussed above. This could be remedied in part by ensuring that the Australian regulators have a clear statutory statement of regulatory objectives, as discussed in Chapter 2. According to Baldwin and Cave, public interest theories have also been criticised on the ground that some “regulators may succumb to venality and be corrupted by opportunities for personal profit so that regulation” ends up being “biased by the pursuit of personal interests.”¹¹⁰ There is no evidence that this is a major problem in the cases of ASIC, APRA, the ACCC and the ATO. However, there have been recent isolated cases where this has occurred.¹¹¹ Baldwin and Cave¹¹² indicate that public interest theory is also criticised on the basis that, in some cases, “regulatory capture” occurs whereby the regulators and their policies become “subject to the influence of powerful regulated parties, politicians or sectors of consumers so that regulation serves the interests of those parties or sectors, rather than those of the wider public.” Grabosky and Braithwaite¹¹³ indicate that the closer the regulator is to the regulated sector in terms of experience and outlook, and the greater the frequency of contact between the regulator and the regulated, the more likely that “regulatory capture” will result. It is argued that the potential for “regulatory capture” could be reduced by the reforms suggested throughout this thesis that are designed to introduce greater certainty,

¹⁰⁹ Baldwin R and Cave M, op cit n 33, at pp 19-20.

¹¹⁰ Baldwin R and Cave M, op cit n 33, at pp 19-20.

¹¹¹ For example, in the case of the ATO, Nick Petroulias (a former ATO officer) was prosecuted for taking bribes in exchange for giving taxpayers favourable rulings on certain tax schemes: see Braithwaite J, “Markets in Vice, Markets in Virtue,” op cit n 3, at pp 41, 52, 61, 73, 78 and 167. See generally *Petroulias v Commissioner of Taxation* [2006] FCA 1821; and *Petroulias v Commissioner of Taxation* [2006] AATA 333.

¹¹² Baldwin R and Cave M, op cit n 33, at pp 19-20.

¹¹³ Grabosky P and Braithwaite J, “Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies,” op cit n 3, at p 29.

transparency and accountability in the Australian regulatory regimes.¹¹⁴

The term “public interest,” as subsequently used throughout this thesis, refers to a range of publicly desired results including the need to:

- (a) promote the objectives underpinning the regulators’ investigative and enforcement powers (including promoting a culture of compliance with the regulatory laws);
- (b) protect and promote the confidence of the regulated through clear and transparent laws that impose a high level of government accountability;
- (c) promote fairness and uniformity in the treatment of the regulated (so that like cases are treated alike);
- (d) achieve timely and cost-effective investigative and enforcement responses; and
- (e) maintain, facilitate and improve the performance of the Australian economy and the business entities within that economy (by reducing business compliance costs and improving the efficiency of regulation).

Yeung indicates that private interest factors are also important in shaping regulatory frameworks and notes that regulation often benefits particular groups within society including groups who were not ostensibly intended to benefit.¹¹⁵ Baldwin and Cave¹¹⁶ indicate that “private interest theories” are based on the idea that regulatory regimes are the products of the relationships between different powerful private interest groups and the State.¹¹⁷ Private interest theories have also

¹¹⁴ See also Baldwin R and Cave M, *op cit* n 33, at p 20.

¹¹⁵ Yeung K, “Securing Compliance: A Principled Approach” (2004) at 5-8 cited in Pearson G, *op cit* n 21, at p 20 and fn 6.

¹¹⁶ Baldwin R and Cave M, *op cit* n 33, at p 22.

¹¹⁷ They indicate that the early forms of regulation in the United States were the product of pressure exerted by business groups who sought governmental assistance to maximise their profits and to stabilise markets.

been criticised on the basis that politicians and bureaucrats are not always driven by self-seeking motives and ideology and altruism also help shape regulatory reforms.¹¹⁸

The term “private interest,” as subsequently used throughout this thesis, refers to a range of factors that promote the interests of the individual including the need to protect:

- (i) the individual’s common law rights including the right to silence (see [4.6.3]), the privilege against self-incrimination¹¹⁹ and the penalty privilege (see [4.10.2]), the right to a lawyer (see [4.7.1]), the right to claim legal professional privilege¹²⁰ (see [4.10.3]), the rights afforded by

¹¹⁸ Ogus A, *op cit* n 108.

¹¹⁹ The privilege against self-incrimination is a substantive rule of law (see *Reid v Howard* (1995) 184 CLR 1 at 11) serving both public and private interests. It serves the public interest by assisting to preserve a fair balance between the State and individuals and ensures that the onus is on the prosecution to prove its case thereby maintaining the integrity of the accusatorial system of criminal justice: see *Caltex Refining Co Pty Ltd v State Pollution Control Commission* (1991) 25 NSWLR 118 at 127-128. In the context of some Australian regulatory laws, it is also a private right in that it can only be claimed by the individual examinee. It cannot be claimed by a lawyer or other person on that examinee's behalf (see, for example, s 68(2) of the *ASIC Act*; *ASIC v Kinglsey Brown Properties Pty Ltd* [2005] VSC 506 at [20]-[21]; and *ASIC v Pappas* [2006] FCA 1785 at [38]) even though the public interest may dictate that it should be asserted, as discussed at [4.10.2]. Legal professional privilege and the privilege against self-incrimination also promote the private interest because where they are claimed, some Australian regulatory laws afford examinees statutory “use evidential immunity” in particular subsequent proceedings which means that their direct oral answers, given at the oral examination, cannot be used by the regulator in those proceedings even though the public interest would otherwise dictate that those answers be admissible, as discussed at [4.10.2] and [4.10.3].

¹²⁰ Legal professional privilege can be equated with a private interest in that it is partly based on the duty of confidentiality, which is a private law obligation or right: see *Parry-Jones v Law Society* [1969] 1 Ch 1 at 9; *Baker v Campbell* (1983) 153 CLR 52 at 89; *Attorney-General v Maurice* (1986) 161 CLR 475 at 487 and 490; *New Cap Reinsurance Corporation Ltd (In Liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258 at [22] and [26]; and *Z v New South Wales Crime Commission* [2007] HCA 7 at [12], [17] and [43]. See also ALRC, “Issues Paper 33 Client Legal Privilege and Federal Investigatory Bodies,” at [1.41], [1.47] and [1.77] and fn 104, 2 April 2007, at <http://www.austlii.edu.au/au/other/alrc/publications/issues/33/>, viewed on 23 April

the rules of natural justice in the context of investigations,¹²¹ administrative and judicial proceedings (see [4.7.3], [10.6.2] and [11.5.6]), and the right of the affected person to have access to administrative or judicial review of the regulators' decisions (see Chapter 11);

- (ii) the informant's identity or to protect informants from retaliation, detrimental employment consequences, or liability for disclosing the information (see [3.9]-[3.9.4.3]);
- (iii) the individual's personal and business reputation and personal and business confidences (see [4.6.2]);¹²² and
- (iv) the individual's privacy from arbitrary and unlawful interference (see [6.7.2]).

The private interests of the affected person are likely to be the same regardless of the identity of the affected person or which regulator is involved. It is argued therefore that there should also be uniform rules applicable to all of the regulators that protect the private interests of the individuals who are affected by the regulators' activities.

In the context of the regulators' investigative and enforcement powers, there is

2007. It is also a private right because it can only be claimed by the client: see *Baker v Campbell* (1983) 153 CLR 52; 49 ALR 385 at 408). It cannot be claimed the lawyer or by any one else who may think that, in the public interest, it should be asserted. However, legal professional privilege also promotes the public interest in the proper administration of justice by encouraging parties to seek a lawyer, rather than represent themselves. It is a public right in that it is recognised as a substantive rule of law that applies in administrative, quasi-judicial and judicial proceedings: see *Baker v Campbell* (1983) 153 CLR 52 at 88, 116-117 and 127-128; 49 ALR 385 at 393, 415, 432-433 and 444; and *Grant v Downs* (1976) 1335 CLR 674 at 685.

¹²¹ The rules of natural justice (the bias rule and the hearing rules) serve the public interest by facilitating the proper functioning of judicial proceedings, but they also may impede the public interest in the effective conduct of investigations, as discussed at [4.7.3]. Some regulators have issued policy statements that equate the protections afforded by natural justice with the private interests of the individual: see ASIC Releases, Policy Statement 103: Confidentiality and release of information, [31] at 40,901.

¹²² See generally ASIC Releases, *ibid*, [31] at 40,901.

a tension between the public interest which underpins the necessity for regulation and the private interests of the regulated.¹²³ The Commonwealth Treasury¹²⁴ and Longo¹²⁵ have emphasised the importance of maintaining a balanced approach to those competing interests when developing regulatory regimes. Whether the appropriate balance between the public interest promoted by government regulation and the private interests of the individual is achieved under the various legislative schemes is discussed throughout this thesis. There is not always a clear answer to the conflict between the competing interests.¹²⁶ The issues are often complex and there are often strong arguments favouring the public interest or the private interest, as the case may be. There will be disagreement as to what approach strikes the necessary balance between the competing public and private interests. But it is argued that whatever the agreed “balanced approach” is, that approach should apply equally or uniformly to all Australian regulatory regimes.

[1.5.3] *Promoting proper disclosure and greater transparency*

Baldwin and Cave¹²⁷ indicate that markets can only function properly if the participants are sufficiently well informed to make their particular decisions. They indicate that an unregulated market may fail to ensure adequate disclosure of the relevant information. Government regulation of the Australian economy promotes proper disclosure by the participants in that economy. One reason why successive federal governments have established ASIC, APRA, the ACCC and the ATO is that those regulators serve a common public interest and private interest function of facilitating proper or full and accurate disclosure of information (such as investor information relating to business ventures and associated risks, financial product

¹²³ See, for example, *ASIC v Mount Warren Park (Nominees) Pty Ltd* [2005] QSC 326 at [31].

¹²⁴ *Op cit* n 98, at [5.1].

¹²⁵ Longo JP, “The Powers of Investigation of the Australian Securities Commission: Balancing the Interests of Persons and Companies under Investigation with the Interests of the State” p 43 at 47 in Grabosky P and Braithwaite J, *op cit* n 11.

¹²⁶ See, for example, the comments of Kirby P in *ASC v Ampolex Ltd* (1996) 14 ACLC 80 at 89 and 90.

information or product safety information or information necessary for taxation assessment) by individuals to the public, or to the regulators, as the case may be. The public needs full and accurate disclosure so that it can make informed business or private decisions, including decisions relating to investments and the purchase and sale of goods, other property or services. The regulators' powers to compel proper disclosure assists them to achieve a range of public and private interest regulatory objectives including maintaining the credibility and integrity of, and promoting public confidence in, Australia's various business, capital and financial markets and in Australia's regulatory and general legal systems. Such powers assist to ensure fair play in business, create a level playing field and enhance Australia's business reputation abroad, thereby protecting the interests of businesses, creditors, investors and the public.¹²⁸ Business, creditor, investor and public confidence in the credibility of the Australian business, capital and financial markets is largely dependent on the participants having the knowledge that the risks they take for a given financial return are not exaggerated or distorted by civil or criminal contraventions of the regulatory laws,¹²⁹ that they are making decisions on the basis of accurate information and that they will be assisted by the regulator (if required) when contraventions of the regulatory laws occur (see [8.7]-[8.7.3.]).

It has been said that improved disclosure, openness or transparency "contributes to the more efficient allocation of resources by: ensuring market participants have sufficient information to identify risks; informing market expectations; contributing to the effectiveness of announced policies; and ultimately enhancing the stability of financial markets by assisting in the prevention of a build up of financial and economic imbalances."¹³⁰ The transparency promoted by the Australian regulatory

¹²⁷ Baldwin R and Cave M, op cit n 33, at p 12.

¹²⁸ See generally Australian Society of Certified Practising Accountants, "Corporations Law and Post Wallis Update", 1998 Regional Accounting Forum, Townsville, 24 March 1998, at 7. See also the Explanatory Memorandum to *James Hardie (Investigations and Proceedings) Bill 2004* (Cth) at [4.24]; and ASC, Annual Report, 1996/1997 at 3.

¹²⁹ Robinson WJ, (Statutory Member, ASC), "Why Not A Level Playing Field?," Australian Securities Commission Releases, October 1991, CCH, at [80-824].

¹³⁰ Commonwealth Treasury, "Making Transparency Transparent: an Australian

system improves the efficiency of the Australian economy which, in turn, improves the capacity of Australian businesses to compete in the global economy¹³¹ (see further at [1.5.8]). Braithwaite and Drahos¹³² indicate that “transparency” is one of the key principles that has shaped the development of global financial regulatory systems.

There is a range of provisions in the Australian and foreign legislation that indicate that one of the main purposes of that legislation is to promote proper disclosure.¹³³ Baldwin and Cave¹³⁴ describe those provisions as examples of

Assessment (AGPS, Canberra, March 1999) cited in Jacobs A, “Time is money: Insider trading from a globalisation perspective” (2005) 23 C&SLJ 231 at 241 at fn 42.

¹³¹ See generally Jacobs A, *ibid*, at 240.

¹³² Braithwaite J and Drahos P, *op cit n 23*, at pp 19, 27, 157 and 507.

¹³³ These include provisions that: encourage voluntary informants (Part 9.4AAA of the *Corporations Act 2001* (Cth); and s 806 of the *Sarbanes-Oxley Act 2000* (US)); impose duties of good faith and remedies for non-disclosure (ss 13,14, 21 and 22 of the *Insurance Contracts Act 1984* (Cth); and s 181 of the *Corporations Act 2001* (Cth)); impose duties to act honestly or in good faith (ss 181-183 of the *Corporations Act 2001* (Cth)); require the annual financial reports to give a true and fair view of the financial position of the corporation (s 295(4) of the *Corporations Act 2001* (Cth)); require listed entities to make continuous disclosure (ss 674(2) and 675(2) and Part 9.4AA of the *Corporations Act 2001* (Cth)); impose disclosure rules in relation to fundraising (Chapter 6D of the *Corporations Act 2001* (Cth); and 17 Code of Federal Regulations, s 200.1 (US)); require auditors to be independent (Division 3 of the *Corporations Act 2001* (Cth)); prohibit misleading and deceptive conduct and false statements (s 12DA of the *ASIC Act*; ss 1308 and 1309 of the *Corporations Act 2001* (Cth)); ss 52 and 53 of the *Trade Practices Act 1974* (Cth); s 8K of the *Taxation Administration Act 1953* (Cth); 18 USC, ss 1001 and 1621; s 7206 of the *Internal Revenue Code* (US); s 451 of the *Companies Act 1985* (UK); ss 41 and 85(2) of the *Companies Act 1989* (UK); ss 177(4) and 397 of the *Financial Services and Markets Act 2000* (UK); and s 44 of the *Competition Act 1998* (UK)); impose penalties for a failure to provide information (s 63 of the *ASIC Act*, s 285 of the *Superannuation Industry (Supervision) Act 1993* (Cth); s 115 of the *Retirement Savings Accounts Act 1997* (Cth); s 155(5) of the *Trade Practices Act 1974* (Cth); ss 8C and 8D of the *Taxation Administration Act 1953* (Cth); and s 7203 of the *Internal Revenue Code* (US)); and impose penalties for incorrect statements and incorrect records (s 1307 of the *Corporations Act 2001* (Cth); Part 26 of the *Superannuation Industry (Supervision) Act 1993* (Cth); Part 12 of the *Retirement Savings Accounts Act 1997* (Cth); s 8L of the *Taxation Administration Act 1953* (Cth); and s 7207 of the *Internal Revenue Code* (US)).

“disclosure regulation.” Baldwin and Cave indicate that “disclosure regulation” assists to redistribute wealth or to transfer funds to victims of contraventions of the disclosure requirements contained in the regulatory laws.¹³⁵ Parker and Pearson indicate that the disclosure rules and the enforcement of compliance with those rules facilitate risk management and assist to create a more moral society.¹³⁶

Baldwin and Cave¹³⁷ indicate that the main problems with “disclosure regulation” are that “consumers or other citizens may make mistakes; they may fail to use the information properly; fail to understand the implications of the data given; misassess risks; neglect to collect the full range of relevant information; lack resources to research issues fully; and so may come to harm.” Pearson indicates that the Australian regulatory system may have placed too much emphasis on compliance and the observance of best practice by the regulated whilst overlooking the fact that the disclosure rules have imposed high costs on the regulated and have not assisted the users of such information because the majority of those users are unable to comprehend and make use of the elaborate information that is disclosed to them.¹³⁸ Those criticisms have merit and highlight the importance of, and the difficulties in, achieving an effective balance between the competing goals, values and requirements of the various actors in the regulatory system.

The federal government’s regulatory philosophy (of promoting full disclosure) also requires that individuals make full disclosure to the regulators so that those regulators can quickly determine the “truth” about whether there has been a

¹³⁴ Baldwin R and Cave M, op cit n 33, at p 49.

¹³⁵ Baldwin R and Cave M, op cit n 33, at p 14. They indicate that “disclosure regulation” does not involve a “heavily interventionist” approach to regulation as it does not regulate the production process, the level of output allowed or the allocation of products.

¹³⁶ Parker C, “Compliance Professionalism and Regulatory Community: The Australian Trade Practices Regime” (1996) 26(2) *Journal of Law and Society*, 215 at 219; and Pearson G, op cit n 21, at 20.

¹³⁷ Baldwin R and Cave M, op cit n 33, at p 49.

¹³⁸ Pearson G, op cit n 21, at 2.

contravention of the relevant legislation.¹³⁹

It is suggested that an effective regulatory regime is one that has clear statutory mechanisms in place to ensure that the public have accurate and meaningful information on which to make their decisions, and the relevant information is provided at minimal cost. Given that one common purpose of the Australian regulatory legislation is to promote proper disclosure, and given that the regulators share the common problem of detecting, investigating and enforcing breaches of the disclosure laws, it is argued that there should be greater uniformity in relation to their powers to encourage disclosure (see further at [3.9]-[3.9.5]), to investigate suspected contraventions of the disclosure rules (see Chapter 4 and Chapter 5), to compel persons to comply with the disclosure requirements and to punish those who do not comply (see Chapter 6, Chapter 8 and Chapter 9).

[1.5.4] *Greater legal certainty and better and more cost-effective decision-making*

Wilkins¹⁴⁰ indicates that one problem with the Australian regulatory regime is that it does not ensure the consistent application of common standards across the relevant State and Federal jurisdictions. According to Wilkins, the lack of certainty and consistency in the regulatory laws makes it difficult for businesses to operate in the Australian market and makes it difficult for the regulators to perform their functions. Similarly, Schoer¹⁴¹ indicates that complex and inconsistent regulatory laws “confound and confuse those who have to investigate and enforce the law, including the courts.” According to Schoer,¹⁴² something must be done to break the

¹³⁹ See generally Parliamentary Joint Committee on Corporations and Financial Services, “Report on CLERP (Audit Reform and Corporate Disclosure) Bill 2003,” June 2004, at [2.60], [2.63] and Recommendation 4 at [2.64], http://www.aph.gov.au/senate/committee/corporations_ctte/clerp9/clerp9p1.pdf, viewed on 8 June 2004.

¹⁴⁰ Wilkins R, “Duplication and Inconsistency of Regulation in a Federal System,” at pp 181-182 in Grabosky P and Braithwaite J, op cit n 11.

¹⁴¹ Schoer R, “Self-Regulation and the Australian Stock Exchange,” p 107 at 108 in Grabosky P and Braithwaite J, op cit n 11.

¹⁴² Schoer R, “Self-Regulation and the Australian Stock Exchange,” p 107 at 108 in Grabosky P and Braithwaite J, op cit n 11.

cycle of ever increasing complex and unnecessary legislation or there is a risk of legislating certain industries out of business.

It is argued that the introduction of express and uniform regulatory laws would assist to ensure that the regulators' powers, and a person's rights and obligations, are clearly apparent on the face of the regulatory legislation. This reform would also assist to ensure that, as a general rule, those powers and rights remain the same regardless of which regulator had jurisdiction in the matter. Uniform express powers governing the regulators' investigative and enforcement functions, and the rights of the regulated, would create a clearer decision-making framework and therefore produce better decision-making and more timely and cost-effective regulatory outcomes than a regime that relies on the vagaries of implied powers. Clear rules would reduce the risk of poor quality primary decision-making and reduce the volume of administrative or judicial review applications.¹⁴³

The approach described above is consistent with the practice of drafting legislation in plain English, assists to ensure greater transparency in the regulatory framework and promotes greater government accountability. Those reforms are also consistent with the views expressed in the United States. For example, a report to the Clinton administration suggested that "where governmental involvement is needed, its aim should be to support and enforce a predictable, minimalist, consistent and simple legal environment for commerce."¹⁴⁴

If the courts were given a uniform evidential and procedural framework within which to make their decisions in regulatory matters, they could devote more of their time and resources to providing judicial oversight in relation to the substantive

¹⁴³ Administrative Review Council, "The Scope of Judicial Review Discussion Paper," (2003), at pp 4 and 83.

¹⁴⁴ Information Infrastructure Task Force, *A Framework for Global Electronic Commerce*, July 1997 cited in Scollay M, "Information privacy in Australia - A national scheme for fair information practices in the private sector", fn 7 at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/journals/PLPR/1997/36.html?query=%22telstra%22+and+%22accc%22+and+%22public%22+and+%22interest%22+and+%22immunity%22>, viewed on 11

elements of the case between the regulator and the regulated, rather than being required to spend a considerable amount of time and resources resolving collateral issues, such as the applicable evidential and procedural rules and implied rights or protections (see [8.6]-[8.6.8]).

The problem with relying on implied powers or rights is that they are uncertain and are subject to confirmation by the court. There is also the possibility that a particular court's decision on an implied power or right is simply "wrong" or that an established decision concerning an implied power or right is overruled by a subsequent decision.¹⁴⁵ Braithwaite¹⁴⁶ and Mayer¹⁴⁷ have indicated that a further problem with resorting to litigation to determine whether certain implied powers or rights exist is that high litigation costs mean that access to the courts to determine those issues is largely illusory for ordinary citizens. Woellner indicates that the need to resort to litigation could be reduced by clear and uniform legislative drafting.¹⁴⁸

Ayres and Braithwaite have attempted to introduce some certainty in the law by asserting that the regulators' enforcement action and litigation can be described as an "enforcement pyramid" whereby contraventions of increasing seriousness are dealt with by sanctions of increasing severity. They indicate that most regulatory action takes place at the base of the pyramid and consists of attempts by the regulators to encourage voluntary compliance through persuasion. The next phase of enforcement escalation involves the regulator issuing a warning letter. If this fails, then the

December 2005.

¹⁴⁵ See generally Woellner R, "Section 263 powers of access – why settle for second best?" (2005) 20 Australian Tax Forum at pp 365 and 369. For example, in *Daniels v ACCC* (2002) 213 CLR 593 at [88]-[90] Kirby J suggests that the decision in *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 is probably wrong. However, the approach in the latter case has been adopted in the *James Hardie (Investigations and Proceedings) Act 2004* (Cth), as discussed at [4.10.3.1].

¹⁴⁶ Braithwaite J, "Restorative Justice and Responsive Regulation," op cit n 3, at pp 239-240.

¹⁴⁷ Mayer, E, "The Role of Regulatory Enforcement in the Australian Economy," at pp 97-98 in Grabosky P and Braithwaite J, op cit n 11.

¹⁴⁸ See generally Woellner R, op cit n 145.

regulators may commence civil penalty proceedings (see Chapter 8). As a last resort, the regulators may also commence criminal proceedings (see Chapter 9).¹⁴⁹

One problem with the enforcement pyramid model is that it does not necessarily reflect the regulators' enforcement response. In many cases, the regulators' initial enforcement response will not involve encouraging voluntary compliance or a warning letter. Rather, they will take immediate interlocutory civil action to freeze assets and to preserve the status quo until the suspected contraventions can be fully investigated, as discussed at [8.7.3]. A further problem with the enforcement pyramid model is that it appears to assume that there are clear distinctions between civil penalty and criminal proceedings. In some cases, the Australian laws do not clearly differentiate between civil and criminal contraventions of those laws and therefore they do not clearly indicate when the regulators may commence civil penalty or criminal proceedings, as discussed at [8.5] and [9.5]. Braithwaite¹⁵⁰ indicates that "where imprisonment is at stake, people are entitled to know with some precision, and in advance, what puts them at risk of losing their liberty." However, the enforcement pyramid model does not clearly deal with those issues. Reforms are suggested in Chapter 8 and Chapter 9 to address this problem and to introduce greater certainty in the law. In addition, the enforcement pyramid model does not clearly deal with the plethora of issues and problems that arise from the fact that, in some cases, the regulators may commence multiple proceedings (administrative, civil, civil penalty and criminal proceedings) in respect of the same contravention. Reforms are suggested in Chapter 9 to address the problems (for example, the risk of double punishment) associated with multiple proceedings in respect of the same contravention.

[1.5.5] *Like cases should be treated alike*

¹⁴⁹ Ayres I and Braithwaite J, op cit n 8. The increasing severity of the enforcement action is matched by increasing procedural complexity and costs of that action. The enforcement pyramid is now encapsulated in the ATO's Compliance Model: see Evans C, op cit n 3.

¹⁵⁰ Braithwaite J, "Markets in Vice, Markets in Virtue", op cit n 3, at pp 63 and 151.

As noted at [1.5.1.2], Baldwin and Cave¹⁵¹ indicate that one of the benchmarks of good or effective regulation is that the regulatory regime has procedures that are fair, accessible and open. Thus effective regulation requires equality, fairness and consistency in treatment of the regulated. The Administrative Review Council has also emphasised the need for greater consistency in decision-making.¹⁵² According to Baldwin and Cave,¹⁵³ the underlying rationale for such an approach is that democratic processes protect against the possibility of abuse of power or over regulation by the regulators and such an approach gives greater legitimacy to government regulation. Martin indicates that one of the main concerns of the regulated includes abuse of enforcement powers by the regulators.¹⁵⁴

It is argued that where individuals are the subjects of investigations and subsequent enforcement actions, they should have the same express statutory rights and protections in those processes irrespective of which regulator they are dealing with. Such an approach is consistent with the benchmarks of effective regulation.

From the perspectives of certainty in the law and consistency in decision-making, and the general principle of fairness, it is undesirable that the common regulatory issues or problems are dealt with on a case-by-case basis because there is no guarantee that essentially similar questions will be answered by the courts in the same way in the different legislative contexts.

It could be argued that the doctrine of precedent would assist to achieve greater uniformity in the interpretation and enforcement of the Australian regulatory laws particularly in cases involving the same types of questions. However, civil and criminal proceedings in respect of regulatory matters can be conducted in the different States' courts, which have their own different rules of evidence and

¹⁵¹ Baldwin R and Cave M, op cit n 33, at p 77.

¹⁵² Op cit n 143, at pp 3 and 73.

¹⁵³ Baldwin R and Cave M, op cit n 33, at pp 79 and 314.

¹⁵⁴ Martin J, "Making the Giant Competitive rather than Crushing – Industry Perspectives on Regulation Enforcement," p 169 at 173 in Grabosky P and

procedure (see [8.6.2] and [9.10.1]). In addition, a decision of a particular State court is not binding on the court of a different State.¹⁵⁵ The regulators can also commence civil proceedings in the Federal Court and some regulators can commence criminal proceedings in the Federal Court. Accordingly, there is the additional problem of possible inconsistent decisions arising between the Federal Court and the States' courts (see [8.6.1] and [9.10.1]). Those problems exacerbate the lack of certainty in the law, and the potential for like cases to be treated differently. The High Court has indicated that consistency in the interpretation of the laws is a fundamental element of a rational and fair legal system.¹⁵⁶ However, given the special leave requirements and the High Court's workload, it is unlikely that there would ever be a sufficient number of High Court decisions to promote national consistency in the interpretation and enforcement of all regulatory laws.¹⁵⁷

By contrast, if the regulators and the courts make their decisions within a uniform statutory framework that applies Australia-wide, this would reduce the problems described above, reduce the risk of arbitrary decisions, promote greater consistency in regulatory decisions and thereby promote greater fairness in the treatment of the regulated.¹⁵⁸ The reforms suggested in this thesis would mean that the common or universal regulatory problems outlined above would be resolved in the same way, and "once and for all," for all concerned thereby negating the need to engage in repeated litigation concerning essentially the same problems under different

Braithwaite J, *op cit* n 11.

¹⁵⁵ See the inconsistent decisions in *ASC v Ampolex Ltd* (1996) 38 NSWLR 504 (New South Wales Court of Appeal) and *Green v FP Special Assets Limited* (1990) 3 ACSR 731 (Queensland Court of Appeal) concerning whether the implied undertaking to the court not to use discovered documents for collateral purposes may be claimed as a ground for refusing to comply with ASIC's notice to produce books.

¹⁵⁶ *Lowe v The Queen* (1984) 154 CLR 606 at 610-611 cited in ALRC, DP 70, "Sentencing of Federal Offenders, Equality in the Treatment of Federal Offenders," at [3.29], <http://www.austlii.edu.au/au/other/alrc/publications/dp/70/>, viewed on 5 December 2005.

¹⁵⁷ See generally ALRC, DP 70, *ibid* at [3.29].

¹⁵⁸ See generally *Norris v Norris* (1986) 161 CLR 513 at 519 cited in *Perry v Comcare* [2006] FCA 33 at [84].

regulatory regimes.¹⁵⁹ The reforms would ensure that the regulated are treated similarly and, therefore fairly, irrespective of which regulator they deal with. Baldwin and Cave¹⁶⁰ support such an approach and have stated that “regulators’ actions would be rendered more consistent, and would be seen as more consistent, if common approaches to fundamental regulatory issues were developed.”

Grabosky has indicated that inconsistencies in standards and in their enforcement can produce social and economic costs whereas standardised rules and enforcement policies will ensure that officials do not favour certain individuals.¹⁶¹ Fisse and Braithwaite have emphasised the importance of ensuring that equal wrongs are treated equally and of ensuring the equal application of the law to all contravenors.¹⁶² ASIC and the ATO have emphasised the importance of national consistency in regulating and enforcing Commonwealth regulatory laws within the various States and Territories and the importance of fairness and affording equality of treatment of defendants irrespective of the jurisdiction in which the proceedings are commenced.¹⁶³ The Law Society of South Australia has indicated that it is illogical that sentences imposed on offenders in relation to the same Commonwealth offences in similar circumstances may differ depending upon the geographical location of the trial.¹⁶⁴

However, Braithwaite¹⁶⁵ has also indicated that “precise rules fail to deliver

¹⁵⁹ See, for example, the repeated litigation discussed at [4.7.1] concerning whether ASIC and the ATO have an implied right to a lawyer at their oral examinations.

¹⁶⁰ Baldwin R and Cave M, *op cit* n 33, at p 327.

¹⁶¹ Grabosky P, “Australian Regulatory Enforcement in Comparative Perspective,” at 13-14 in Grabosky P and Braithwaite J, *op cit* n 11.

¹⁶² Fisse B, and Braithwaite J, “Corporations, Crime and Accountability,” Cambridge University Press, New York 1993 at p 182.

¹⁶³ ASIC, *Submission SFO 39*, 28 April 2005, ATO *Submission SFO 18*, 8 April 2005 cited in ALRC, DP 70, *op cit* n 156, at [3.18]. See also Lucy J (former Chairman of ASIC), speaking to Kohler A, “ASIC defends actions over Westpoint,” Inside Business, at <http://www.abc.net.au/insidebusiness>, viewed on 19 February 2006.

¹⁶⁴ Law Society of South Australia, *Submission SFO 37*, 22 April 2005 cited in ALRC, DP 70, *op cit* n 156, at [3.18].

¹⁶⁵ Braithwaite J, “Markets in Vice, Markets in Virtue”, *op cit* n 3, at pp 146-147.

consistency on their own.” According to Braithwaite,¹⁶⁶ wealthy individuals simply see a set of rules as “sign-posts” that they have to “steer around to defeat the purposes of the law and they “deploy legal entrepreneurship to make the law uncertain in practice.” No matter how “perfect” the regulatory laws are, there will always be individuals who are determined to manipulate the system. However, it is argued that a regulatory regime that relies on implied powers is more open to abuse by the wealthy individuals identified by Braithwaite in comparison to the regulatory model suggested in this thesis that is based on clearly drafted express powers.

It is recognised that one should not argue for greater uniformity or consistency in the Australian regulatory laws simply for the sake of uniformity or consistency. Sometimes, a too rigid application of the rules to achieve consistency in decision-making can produce unfairness. The suggested reforms are not designed to require the regulators or the courts to always rigidly or mechanistically impose identical sanctions in relation to similar contravening conduct. The particular regulator’s or court’s decision will turn on the facts of each case and on the submissions made by the affected person or the defendant to the regulator or to the court. The suggested reforms are designed to ensure that similar contravening conduct is not treated differently under different Australian regulatory laws, or that the regulator’s or the court’s decisions are not frustrated under some regulatory laws, because of some weakness, such as an omission from, or a defect in, the particular regulatory law, which does not exist under other regulatory laws. That is, unique defects, problems, or weaknesses in a particular regulatory law should not determine, or impact upon, the regulator’s or the court’s capacity to deliver a fair or just and appropriate decision.

Greater uniformity in the regulatory laws may not always ensure that like cases are treated alike in view of the practical difficulties in proving the particular contravention and other practical considerations such as the need for the regulators to obtain a timely and cost-effective enforcement outcome. The judiciary have indicated that they will accept a practical enforcement outcome, such as an agreed pecuniary

¹⁶⁶ Braithwaite J, “Markets in Vice, Markets in Virtue”, op cit n 3, at pp 146-147.

penalty or disqualification order, “unless it is clearly out of bounds.”¹⁶⁷ As evidenced by the decision in *ASIC v Vizard*,¹⁶⁸ the problem with the regulators or the courts accepting a practical enforcement outcome is that it may create a public perception of selective enforcement and lenient treatment of wealthy contravenors thereby undermining public confidence in the integrity of the regulatory system. Braithwaite indicates that there is a concern about arbitrariness or prejudice in the selection of enforcement targets and that there should be an independent basis for enforcement decisions.¹⁶⁹ According to Martin, one of the main concerns of the regulated includes the problem of selective enforcement by the regulators.¹⁷⁰ The problem of selective enforcement could be reduced if all of the Australian legislation contained clear and uniform principles governing the decisions to commence civil, civil penalty and criminal proceedings (see [8.5] and [9.5.1]-[9.5.2] and [9.9.2]).

[1.5.6] *Interdependent relationship of the Australian regulators*

The individual regulatory activities of ASIC, APRA, the ACCC and the ATO facilitate the regulatory activities of each other regulator. They have an interdependent relationship that relies on mutual cooperation. For example, the activities of ASIC and APRA that promote proper financial disclosure in corporate transactions and financial accounts, in turn, assists the ATO to perform its revenue collecting function.¹⁷¹ In the United States, the legislation expressly recognises that the regulatory functions of the SEC assist the IRS to perform its revenue collecting function.¹⁷² The ATO’s regulatory activities, which ensure that taxpayers furnish accurate taxation information, also assists them to produce accurate financial information (such as balance sheets and profit and loss statements) which are relied

¹⁶⁷ *ASIC v Vizard* (2005) 54 ACSR 394; [2005] FCA 1037 at [42] and [45].

¹⁶⁸ (2005) 54 ACSR 394; [2005] FCA 1037 at [42].

¹⁶⁹ Braithwaite J, “Restorative Justice and Responsive Regulation,” op cit n 3, at 37.

¹⁷⁰ Martin J, op cit n 154.

¹⁷¹ Argued by analogy from the “Necessity for Regulation” contained in s 2 of the *Securities Exchange Act 1934* (US).

¹⁷² See s 2 of the *Securities Exchange Act 1934* (US).

upon by other regulatory agencies such as ASIC and APRA (in performing their functions) and the public (including investors and creditors).¹⁷³

The prices of goods, securities, other property and services that are set by a regulated market provide an accurate basis upon which purchase, sale or investment decisions are made by the Australian public. The regulatory activities of ASIC and the ACCC, in particular, assist to ensure the accuracy and competitiveness of market prices. The prices at which those items are traded on the market, in turn, affect the amount of taxes collected by the ATO and affects the value of collateral required for finance. The accuracy of those values impacts upon the risks assumed by the financial institutions that are regulated by APRA. Those prices may also affect the value of superannuation funds regulated by ASIC, APRA and the ATO and the value of retirement savings funds regulated by ASIC and APRA.¹⁷⁴

The relationship of interdependence between the Australian regulators has also been recognised by Braithwaite and he supports the view that they should have a closer working relationship.¹⁷⁵

The environment of interdependence described above means that weaknesses in APRA's regulatory powers impact not only on APRA's ability to perform its regulatory functions, but also upon ASIC's and the ATO's ability to perform their functions, particularly where those functions overlap or where transactions have impacts across two or more regulatory domains. For example, a weakness in APRA's investigative and enforcement powers, which contributes to a corporation's collapse, impacts on ASIC's ability to protect investors and impacts on the ATO's ability to collect revenue (for example, where the failed corporation owes considerable taxation debts). The collapse of a major corporation, like HIH, will also impact on the

¹⁷³ It is recognised that the Australian tax accounting requirements may differ from the accounting standards' requirements.

¹⁷⁴ Argued by analogy from s 2 of the *Securities Exchange Act 1934* (US); and 15 USC, s 78b.

¹⁷⁵ Braithwaite J, "Markets in Vice, Markets in Virtue," op cit n 3, at pp 183-185.

competitiveness of particular industry sectors and drive prices upwards thereby impacting upon the ACCC's ability to perform its functions.

It is argued that the interdependent nature of the relationship between the Australian regulators, and the interdependent nature of the Australian economy, means that the Australian regulators should operate within a more uniform regulatory framework.

[1.5.7] *Regulatory overlap*

Not only do the Australian regulators have an interdependent relationship, they often investigate cases of mutual interest or concern. There are many examples of “regulatory overlap” where a number of Australian regulators investigate and enforce contraventions based on common conduct or common transactions.¹⁷⁶ This is partly caused by the fact that they have broad and, therefore, sometimes overlapping investigative and enforcement powers. Regulatory overlap is also caused by the fact that there are some complex legislative arrangements for the sharing of investigative and enforcement functions between ASIC, APRA, and the ATO under the *Superannuation Industry (Supervision) Act 1993* (Cth) and between ASIC and APRA under the *Retirement Savings Accounts Act 1997* (Cth) (see [3.8.2]).

The present regulatory overlap creates a paradox because where ASIC, APRA or the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth); or ASIC and APRA are acting under the *Retirement Savings Accounts Act 1997* (Cth), they do have substantially uniform investigative and enforcement powers, whereas outside those Acts, they do not. Given the common purposes of the regulator's core investigative and enforcement powers (see Chapter 4, Chapter 5 and Chapter 6), there

¹⁷⁶ This is recognised in the Memorandum of Understanding Between ASIC and the ACCC, at [7.1] and [9.1] signed 15 December 2004, at <http://www.asic.gov.au>, viewed 4 February 2006; and Memorandum of Understanding Between ASIC and the APRA, at [7.1] signed 30 June 2004, at <http://www.asic.gov.au>, viewed 4 February 2006.

is no principled reason why they should not have the same core investigative and enforcement powers in relation to all of their regulatory work, that is, in all other work outside the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Retirement Savings Accounts Act 1997* (Cth).

Where there is overlapping legislation, the regulator may elect to use the superior investigative or enforcement powers of one particular statute, rather than the inferior powers contained in the other statute. For example, the regulator may elect to use a particular statute because, unlike another overlapping statute, it authorises the seizure of material protected by legal professional privilege and it affords fewer protections to the suspect in the oral examination, as discussed at [4.10.3] and [6.7.5]-[6.7.5.4]. However, there are also cases where there is no overlapping regulatory legislation and the regulator has no option but to rely on an inferior investigative or enforcement power.

In some cases, the regulator or the Commonwealth DPP (in the case of indictable offences) may seek to commence enforcement proceedings under particular legislation, such as the *Corporations Act*, where the elements of the civil or criminal contravention, as the case may be, are easier to prove (in comparison to the position under the *Superannuation Industry (Supervision) Act 1993* (Cth)), as discussed at [9.5.1]-[9.5.2]. The regulators should not have to resort to circuitous and more time-consuming methods to invoke a particular law to obtain a successful litigation outcome.

Where the contravening conduct and transactions fall within the regulatory domains of two or more of the Australian regulators, it is incongruous that those regulators currently do not have the same investigative and enforcement powers in relation to the same conduct and transactions.

[1.5.8] Globalisation

Given the trend towards globalisation¹⁷⁷ of business activity, the Australian regulators must increasingly operate in an international environment. The problem is that the Australian laws (in the absence of a treaty) do not have extra-territorial operation. The Australian regulators' powers are limited to the Australian jurisdiction, yet some of the businesses they regulate operate in the global environment.

The ability of the Australian regulators to protect the Australian public and private interests is diminished if their powers are overridden by the laws of foreign jurisdictions.¹⁷⁸ This problem could be reduced if there was greater uniformity in the Australian and foreign regulators' investigative and enforcement powers.

The recent adoption of uniform accounting standards, and the proposed model laws on "Cross-border insolvency," indicate that the Australian and foreign governments are attempting to achieve greater internationalisation or harmonisation

¹⁷⁷ Globalisation has been defined as: "the increasing freedom and ability of individuals and firms to undertake voluntary economic transactions with residents of other countries, a process entailing a growing contestability of national markets by foreign suppliers": see Brahmabhatt M, "Measuring Global /Economic Integration: A Review of the Literature and Recent Evidence" (The World Bank, Incomplete Draft, November 1998 at <http://www1.worldbank.org/economicpolicy/globalization/documents/measuring.pdf>, viewed 9 March 2005, cited in Jacobs A, op cit n 130 at 239 at fn 33. Globalisation has also been defined as the trend where "The driving elements of economic activity – capital markets, technical innovation, corporate organisation and trends in consumer demand – are increasingly crossing national boundaries as governments, societies, firms and individuals strive to maximise the advantages presented to them by economic integration": see the Report "International Financial Markets – Friends or Foes?", (House of Representatives Standing Committee on Economics, Finance and Public Administration, Canberra, March 2001 at [3.2] cited in Jacobs A, op cit n 130, at p 240 at fn 34. See also Held D, McGrew A, Goldblatt D, and Perraton J, "Global Transformations," Polity Press, Cambridge, 2001, at 2.

¹⁷⁸ *ASC v Bank Leumi Le-Israel* (1996) 69 FCR 531. The decision in *Re Westinghouse Uranium Contract* [1978] AC 547 at 615-617, 630-632 and 639-640 indicates that Australian investigative laws would not operate in the United Kingdom on the ground of the need to preserve the jurisdiction and sovereignty of the United Kingdom. By contrast, the decision in *ASC v Bank Leumi Le-Israel* (1996) 14 ACLC 1576 at 1588 per Lehane J indicates that Swiss law did not prevail over Australian investigatory laws.

in relation to some of the regulatory rules.¹⁷⁹ However, those reforms have been made on an ad hoc basis and there are still many areas in the various Australian regulatory frameworks (such as in relation to the Australian regulators' powers to share investigative information with each other and with their foreign counterparts) which lack uniformity or parity with the foreign regulatory frameworks. There is a vast range of practical and political impediments to achieving uniform global business rules and it is not intended in this thesis to suggest or to develop uniform global rules.

Rather, it is suggested in Chapter 7, that the most practical, and readily achievable, solution to the problems of regulating Australian businesses in a global environment is to improve the Australian regulators' powers to share investigative information with each other, and with their foreign counterparts. Braithwaite and Drahos¹⁸⁰ identify the principle of "reciprocity" as important in relation to the development and regulation of global financial markets and the reforms suggested in Chapter 7 are consistent with this principle.

Efficiency is considered to be the critical factor to enable Australian businesses to compete in a globalised economy. The protection of Australian investors and the success of Australian businesses are best achieved if Australia is as efficient as possible

¹⁷⁹ Knott D, (former Chairman of ASIC), op cit n 22. Australia is currently considering further harmonisation with the international regulatory rules through the possible adoption of a model law on "Cross-border insolvency" developed by the United Nations Commission on International Trade Law. Cross border insolvency refers to an insolvency where a debtor has assets/creditors in more than one country. See Corporate Law Economic Reform Programme: Paper No. 8 (CLERP 8) "Cross Border Insolvency - Promoting international cooperation and coordination," at the Foreword by Senator Ian Campbell (Parliamentary Secretary to the Treasurer) and at pp 1 and 7.

¹⁸⁰ Braithwaite J and Drahos P, op cit n 23, at pp 21 and 126. They define "reciprocity" at p 21-22 as the "contingent exchange of actions between two actors" or the "exchange and recognition of rights and obligations between two sovereigns." They emphasise that the "expectation of repayment of action lies at the heart of reciprocity."

so as to put Australia in a position where it can be competitive in the global economy.¹⁸¹ It is argued that greater efficiency in regulation can be achieved if the Australian laws relating to the sharing of investigative information are consistent and uniform not only from the internal Australian perspective, but externally, by ensuring that there is greater harmony between Australian and foreign information sharing laws. Such a reform would enhance the operation of domestic and global markets and promote international cooperation and coordination, and public and private interests.

By contrast, a lack of uniformity in the Australian and foreign information sharing powers will lead to additional difficulties in the investigation and enforcement of transactions that cross international boundaries particularly in view of the fact that suspects or defendants are prepared to exploit uncertainties or gaps in the regulatory laws by making a range of procedural challenges to the regulators' attempts to share investigative information (see [11.5.2]). Such challenges can cause delay in the enforcement of the regulatory laws which will exacerbate financial loss and undermine public confidence in the regulatory system which, in turn, provides a disincentive to invest and detrimentally impacts on domestic and global economic development.

[1.6] Conclusion

A range of principled reasons have been suggested in this chapter to support the objective of this thesis of demonstrating the desirability of adopting a more uniform statutory regime to govern the regulatory activities of ASIC, APRA, the ACCC and the ATO. In subsequent chapters a comparative analysis is conducted using the methodology discussed at [1.4]. This analysis will demonstrate that there is an unwarranted inconsistency between the regulatory powers and processes applicable to ASIC, APRA, the ACCC and the ATO and that this inconsistency impacts negatively on the effectiveness and efficiency of how those bodies can discharge their regulatory functions. As the result of this analysis, reforms are

¹⁸¹ Jacobs A, op cit n 130, at pp 240 and 241.

suggested in each chapter aimed at achieving greater uniformity and consistency in the Australian regulatory laws. Those suggested reforms, if implemented, should achieve a balance between competing public and private interests as well as addressing and promoting the underlying principles discussed in this chapter.

CHAPTER 2

REASONS FOR SELECTING PARTICULAR AUSTRALIAN AND FOREIGN REGULATORY REGIMES – AND REGULATORS’ FUNCTIONS AND OBJECTIVES

by Tom Middleton

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CHAPTER 2

REASONS FOR SELECTING PARTICULAR AUSTRALIAN AND FOREIGN REGULATORY REGIMES – AND REGULATORS’ FUNCTIONS AND OBJECTIVES

[2.1] Introduction

The reasons for comparing the Australian regulatory laws with those of the United States and the United Kingdom and the reasons for selecting the particular Australian, United States’ and United Kingdom’s regulators for the purpose of the comparative analysis are discussed in this chapter. The regulatory functions and objectives of the selected Australian regulators are also discussed.

It is argued in this chapter that there should be a uniform approach to the formulation of regulatory objectives for the Australian regulators. That is, each Australian regulator should have its own statutory statement of regulatory objectives because such objectives promote a range of public and private interests, as discussed at [2.4.1] and [2.4.2].

[2.2] Why compare the Australian regulatory laws with those in the United States and the United Kingdom?

The United States and the United Kingdom have much in common with Australia in that they all share similar sophisticated economic, financial and market systems and they share similar legal traditions and accounting principles.¹ The United States and the United Kingdom are also important trading partners for Australia and many Australian businesses operate in those countries. Some Australian corporations also have a United States or

¹ See generally Brown P and Tarca A, “Achieving High Quality, Comparable Financial Reporting: A comparison of Independent Enforcement Bodies in Australia and the United Kingdom, March 2005, at 4, at http://papers.ssrn.com/so13/papers.cfm?abstract_id=691702, viewed on 22 February 2006.

United Kingdom listing² and they are therefore subject to the regulatory regimes of those countries. There are number of examples, discussed at [4.10.2] and [7.5.4.2] of current or recent investigations involving corporations such as Multiplex Ltd, One.Tel and HIH that relate to the activities of those corporations in Australia, the United Kingdom and the United States. In view of the above commonalities, and from the perspective of international trade, and the effective regulation of Australian businesses in a global business environment, comparing the regulatory systems of Australia with those of the United States and the United Kingdom is both relevant and instructive.

[2.2.1] *The approach of the High Court*

The approach adopted in this thesis of comparing the United States' and the United Kingdom's regulatory laws is consistent with the approach of the Australian High Court. For example, when deciding whether a corporation had the capacity to claim the privilege against self-incrimination at common law, the High Court in *Environment Protection Authority v Caltex*,³ compared the positions in the United Kingdom, the United States, New Zealand and under various international covenants before reaching a decision. Similar comparisons were made in *Daniels v ACCC*⁴ in determining whether the recipient of the ACCC's notice to produce books could refuse to comply with that notice on the ground of legal professional privilege. In *Rich v ASIC*⁵ Kirby J indicated that the judicial resolution of legal questions relating to the Australian corporate regulatory laws should involve a consideration of the Australian and global social and economic problems that those laws are designed to address and the approach adopted in foreign countries (such as the United Kingdom) to resolving common corporate regulatory problems.

² Baxt B and Heeley C, "Whistleblowing: Get It Right and Everyone Wins," June 2003, Findlaw, viewed 22 February 2004.

³ (1993) 178 CLR 477.

⁴ (2002) 213 CLR 593; [2002] HCA 49. See also *Z v New South Wales Crime Commission* [2007] HCA 7 at [12] and [42].

⁵ *Rich v ASIC* (2004) 220 CLR 129; (2004) 78 ALJR 1354; 209 ALR 271; [2004] HCA 42 at [116]-[119].

The High Court has also indicated that comparisons with overseas jurisdictions are particularly useful where the laws of the foreign country are considered to be not disharmonious with Australian legal traditions.⁶

[2.2.2] *United States*

The commonality between the Australian and United States' legal systems is evidenced by the fact that a range of Australian legislation, including the restrictive trade practices legislation⁷ and the freedom of information legislation⁸ (see [7.4.3] and [7.7.2]), was influenced by, or is substantially similar to, or adopted the policy approach of, the equivalent United States' laws. However, as noted by Grabosky, because of its size and diversity, one should be cautious when generalising about the United States.⁹

It is also recognised that the utility and relevance of United States' law for the purpose of comparative analysis is qualified by the absence in Australia of a Bill of Rights (which assists to protect and promote the private interests of the individual in the United States' legal system). The Bill of Rights in the United States is contained in various amendments to the United States Constitution. Those rights can impact upon the

⁶ *Attorney-General (Cth) v Breckler* [1999] HCA 28 at [106]. The High Court has found comparisons with the United States, the United Kingdom, Canada and New Zealand useful in other areas of law including immigration law: *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* [2004] HCA 49 at [110]-[113], [166] and [179]. In *ASIC v Rich* [2005] NSWSC 62 at [304] Austin J considered the approach in the United States in relation to interpreting legislation governing the issue and execution of search warrants. The High Court has indicated that overseas comparisons may not be appropriate on matters concerning the interpretation of Chapter III of the *Commonwealth of Australia Constitution Act 1900* (UK): see *Forge v ASIC* [2006] HCA 44 at [80], [189] and [250].

⁷ See, for example, the *Australian Industries Preservation Act 1906* (Cth) which was based on the *Sherman Act 1870* (US); and *News Ltd v Australian Rugby Football League Ltd and New South Wales Rugby League Ltd* (1996) 58 FCR 447 at [90] per Burchett J.

⁸ The exemptions contained in 36(1) of the *Freedom of Information Act 1982* (Cth) are based on the fifth exemption (b)(5) of the *Freedom of Information Act 1966* (US): see *Harris v ABC* (1983) 50 ALR 551 at 560 and 563 per Beaumont J.

⁹ Grabosky P, "Australian Regulatory Enforcement in Comparative Perspective," p 9 at 14 in Grabosky P and Braithwaite J (Editors), "Business Regulation and Australia's Future," Australia Institute of Criminology, Canberra 1993.

United States’ regulators’ investigative powers. The Fourth Amendment protects an individual from unreasonable search and seizure. The Fifth Amendment recognises the individual’s privilege against self-incrimination.¹⁰ The effect of the Fifth Amendment on the United States’ regulators’ powers to compel a person to answer incriminating questions, to produce incriminating documents, or to seize incriminating evidence by a search warrant is discussed at [4.10.2], [5.12.1], and [6.7.6] respectively. Despite the impact of the Bill of Rights, Austin J (speaking extra-judicially) has indicated that the developments in corporate and business law in the United States are likely to continue to be relevant in Australia and are useful for comparative purposes.¹¹

[2.2.3] *United Kingdom*

The commonality between the Australian and United Kingdom’s legal systems is based on the fact that Australia acquired all of the statute and common law in force in the United Kingdom in 1828, as was appropriate to the circumstances of Australia as at that date.¹² The High Court has described Australian law as “not only the historical successor of, but an organic development from, the law of England.”¹³ The United Kingdom Parliament’s power to bind the Commonwealth was terminated by the enactment of the *Statute of Westminster 1931 (Imp)* which was adopted in Australia in 1942. The last formal binding legal ties between Australia and the United Kingdom were severed by the passing of the *Australia Act 1986 (Cth)* which terminated the power of the United Kingdom Parliament to legislate for the States.

The United Kingdom’s criminal law has had a significant impact on the development of the *Criminal Code Act 1995 (Cth)*. This Act may apply to Australian regulatory offences (see [9.5.1]). For example, the definition of the “fault elements” of a

¹⁰ See “Bill of Rights in other countries,” at [2.16]-[2.19] found at <http://www.jcs.act.gov.au/prd/rights/documents>, viewed 18 November 2004.

¹¹ Justice RP Austin, “Academics, Practitioners and Judges,” An Address to the 50th Anniversary Sydney Law Review Dinner, Sydney, 21 November, 2003.

¹² 9 Geo IV, c 83; and the *Colonial Laws Validity Act 1865 (UK)*.

¹³ *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1 at 29.

criminal offence of “intention” and “knowledge” in the *Criminal Code Act 1995* (Cth) were derived from the *Theft Act 1967* (UK). Those fault elements, and suggested reforms, are discussed at [8.5], [9.5.1] and [9.5.2]. The *Theft Act 1967* (UK) provided the legislative model for the dishonesty, theft and allied offences contained in the *Criminal Code Act 1995* (Cth).¹⁴ The United Kingdom’s company law has had a significant impact on the development of company law in Australia. The Australian companies legislation was originally based on the *Companies Act 1862* (UK). The Australian companies legislation has adopted many of the United Kingdom’s corporate law reforms since that time.¹⁵

However, it is also recognised that the utility and relevance of the United Kingdom’s law, for the purpose of comparative analysis, is qualified by the United Kingdom’s entry into the European community in 1972 and the increasing influence of European Union law. For example, the *Human Rights Act 1998* (UK) which came into operation in October 2000 was enacted to enforce the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (Rome, November 4, 1950) (the Convention). The *Human Rights Act 1998* (UK) incorporates into the domestic United Kingdom legislation the major rights and freedoms set out in the Convention. The *Human Rights Act 1998* (UK) empowers the European Court of Human Rights to declare that the United Kingdom’s domestic legislation is incompatible with the rights recognised by the Convention.¹⁶ Article 6(1) of the Convention provides that it is unlawful to

¹⁴ Leader-Elliott I, *The Commonwealth Criminal Code – A Guide for Practitioners*, Commonwealth Attorney-General’s Department, March 2002, at pp 51 and 69.

¹⁵ For a recent judicial recognition of these matters: see *ASIC v Vines* [2005] NSWSC 1349 at [10]-[18] where Austin J indicates that the court’s power to grant relief from liability under s 1318 of the *Corporations Act 2001* (Cth) was derived from s 32 of the *Companies Act 1907* (UK).

¹⁶ It is then up to the United Kingdom Parliament to amend the United Kingdom legislation or to explain why the legislation should be incompatible with the Convention: see “Bill of Rights in other countries,” op cit n 10, at [2.20]-[2.25]. See also generally: The Advice on Individual Rights in Europe (AIRE) Centre, “Advice on the European Convention on Human Rights as it affects your rights,” at <http://www.airecentre.org/rights-comm.html>, viewed on 21 November 2004.

demand the production of self-incriminating documents.¹⁷ This Article has the potential to affect the United Kingdom's regulators' powers to compel a person to answer incriminating questions (see [4.10.2]), to compel a person to produce incriminating documents (see [5.12.1]), or to seize incriminating evidence by a search warrant (see [6.7.6]). Article 8 of the Convention also requires that there be respect for an individual's privacy and this article could restrict the United Kingdom's regulators' powers to search private property, as discussed at [6.7.5.3].

Austin J (speaking extra-judicially) has also indicated that the developments in corporate and business law in the United Kingdom are relevant in Australia and are useful for comparative purposes.¹⁸

[2.3] Reasons for selecting particular regulators

ASIC, APRA, the ACCC and the ATO were specifically selected for the comparative analysis in this thesis because they are the major agencies regulating Australia's business, capital and financial markets, and most of the regulatory problems referred to in Chapter 1 have occurred within the context of the regulatory regimes of those regulators. They were also selected because contraventions of the legislation governed by them have the potential to impact on the efficiency and development of the Australian economy and those contraventions may have wider repercussions throughout the Australian community,¹⁹ as occurred in the HIH collapse. Therefore from a strategic perspective, if public resources are to be committed to improving the regulatory laws, they are the regulatory regimes that must be improved first. The suggested improvements to those regulatory regimes may have a wide impact by promoting the efficiency and

¹⁷ See also *Funke v Funke* [1993] 16 EHRR 297; and *Cremieux v France* [1993] 16 EHRR 357 cited in Fisher J, Bewsey J, Waters M, and Ovey E, "The Law of Investor Protection," Sweet & Maxwell, London, 2003 at pp 590 and 596-597.

¹⁸ Justice RP Austin, op cit n 11.

¹⁹ Attorney-General's Department, Commonwealth Treasury, "Review of Sanctions in Corporate Law", at "Executive Summary", 2007 at http://www.treasury.gov.au/documents/1182/PDF/Review_of_Sanctions.pdf, viewed on 19 March 2007.

competitiveness of the Australian economy thereby enhancing the prosperity of all Australians.

At the international level, the foreign regulators were chosen because they share certain fundamental common characteristics with their Australian counterparts. For example, ASIC²⁰ and APRA²¹ (Australia), the SEC²² (United States) and the DTI²³ and the FSA²⁴ (United Kingdom) are all concerned with corporate and/or financial regulation

²⁰ ASIC's functions and objectives are discussed at [2.5].

²¹ APRA's functions and objectives are discussed at [2.6].

²² The SEC was established as a result of the enactment of the *Securities Act 1933* (US) and the *Securities Exchange Act 1934* (US). This legislation was enacted in response to the stock market crash of October 1929 and was designed to restore investor confidence in the securities markets by requiring public companies to disclose the truth about their businesses and associated risks and by regulating those involved in the securities industry (brokers, dealers and exchanges) and requiring those persons to treat investors fairly and honestly. See further the "Necessity for Regulation" contained in s 2 of the *Securities Exchange Act 1934* (US). The SEC was established under s 4 of the *Securities Exchange Act 1934* (US) to provide government oversight of the securities industry and to ensure that the objectives of protecting investors, ensuring fairness and honesty in, and maintaining the integrity of, the United States' capital and securities markets were met: see United States Securities and Exchange Commission at <http://www.sec.gov/about/whatwedo.shtml>, viewed on 25 November 2003. See also *SEC v Fastow* (US District Court for the District of Columbia, December 2001), at <http://www.sec.gov/litigation/complaints/comp2lr17270.htm>, viewed on 31 May 2004.

²³ The DTI has various functions in relation to administering the *Companies Act 1985* (UK), the *Companies Act 1989* (UK), the *Insolvency Act 1986* (UK) and the *Financial Services and Markets Act 2000* (UK). See generally s 87(4) of the *Companies Act 1989* (UK).

²⁴ The FSA administers the *Financial Services and Markets Act 2000* (UK). A major purpose of this Act is to provide a single legal framework to replace the several different frameworks that previously existed and which were administered by several different predecessor organisations. The FSA is an example of the "single" or "super" regulator model discussed at [12.4.1]. The FSA has a number of functions including prudential regulation, supervising and regulating banks, building societies, credit unions, investment businesses (including stockbrokers), insurance businesses, the financial markets and exchanges in the United Kingdom. The FSA is also the listing authority for the United Kingdom: See Financial Services Authority, "The Protection of Regulatory Information under English Law," p 1, at <http://www.fsa.gov.uk/pubs/mou/equivalence/protection.pdf>. The FSA is also responsible for investigating and enforcing civil and criminal contraventions of the financial laws: see ss 2 and 6 of the *Financial Services and Markets Act 2000* (UK); and Tunstall I, "International Securities Regulation," Lawbook Co, Sydney, 2005, at pp 194-197.

and they all have similar regulatory responsibilities or functions. Consequently, it is logical to compare their investigative and enforcement regimes.

In establishing ASIC and its predecessors, the federal government followed the model of the SEC.²⁵ Braithwaite and Drahos²⁶ emphasise the key role played by the SEC in shaping global regulatory systems and describe it as a “regulatory success story.” They also state that the SEC has a depth of expertise in terms of legal, economic and market experience that is unmatched by any other regulator. Tunstall has indicated that the SEC has been a major contributor to developing international securities markets regulation.²⁷ Those factors have also influenced the selection of the SEC for the purpose of the comparative analysis.

The ACCC²⁸ (Australia) and the ATD²⁹ (United States) and the CC³⁰ and DTI³¹ (United Kingdom) were established to administer and enforce the competition and

²⁵ Brown P and Tarca A, op cit n 1, at 9.

²⁶ Braithwaite J and Drahos P, “Global Business Regulation,” Cambridge University Press, New York, 2000 at p 157.

²⁷ Tunstall I, op cit n 24, at p 282.

²⁸ The ACCC’s functions and objectives are discussed at [2.7].

²⁹ The ATD enforces the United States’ antitrust laws. Those laws apply to all businesses in the United States and prohibit anti-competitive practices such as restraint of trade agreements, price fixing agreements, anti-competitive corporate mergers and predatory acts designed to achieve monopoly power: see United States Department of Justice Antitrust Division website, <http://www.usdoj.gov/atr/overview.html>, viewed on 15 December 2006. “Antitrust” is the description given to restrictive trade practices law in the United States and the term derived from the use of the trust structure in the late 19th century as a means of effecting restrictive business enterprises: see Taperell, Vermeesch and Harland “Trade Practices and Consumer Protection,” Butterworths, 1983, Sydney, at p 22.

³⁰ The CC was established by the *Competition Act 1998* (UK) to conduct inquiries into mergers, markets and the regulation of major industry sectors such as telecommunications, utilities (such as water, gas and electricity) and newspapers. The DTI has broad responsibility for setting the overall policy and legal framework for competition and consumer issues in the United Kingdom and for negotiating with the European Union. The DTI funds the CC so that it can perform the specific functions described above: see “The Roles of the Competition Commission and the Department of Trade and Industry in Promoting Competition,” at http://www.competition-commission.org.uk/our_role/roles_cc_dti/index.htm, viewed on 23 December 2005.

consumer protection laws. Accordingly, it is appropriate to compare their respective investigative and enforcement regimes.

The ATO³² (Australia), the IRS³³ (United States) and HMRC³⁴ (United Kingdom) have similar regulatory responsibilities and functions under the various taxation laws. Given those similarities, it is also appropriate to compare their respective investigative and enforcement regimes.

However, even where the Australian and foreign regulators share similar responsibilities or functions, it is also clear from the discussion in this thesis that there are significant differences in some of their investigative and enforcement powers, differences that may contain some lessons for Australia's regulatory system.

A further reason for selecting the particular Australian and foreign regulators described above is that while some of those regulators have different regulatory objectives and, in the case of the Australian regulators, regulate different (although sometimes overlapping) sections of the Australian business community, they were all established to perform a range of common public interest functions, including detecting and enforcing contraventions of the regulatory laws, thereby facilitating the proper functioning of the economy (see [1.5.1.2]). Consequently, it might have been expected

³¹ The DTI also has a role in promoting competition in the United Kingdom's economy: see "The Roles of the Competition Commission and the Department of Trade and Industry in Promoting Competition," *ibid.*

³² The ATO's functions and objectives are discussed at [2.8].

³³ Section 7801 of the *Internal Revenue Code* (US) provides that the Secretary of the Treasury has the authority to administer and enforce the internal revenue laws and it gave the Secretary the power to establish the IRS. See also s 7803 of the *Internal Revenue Code* (US); and Internal Revenue Service, United States Department of Treasury, "The Agency, its Mission and Statutory Authority," at <http://www.irs.gov/irs/article0..id=98141.00.html>, viewed on 13 February 2006.

³⁴ HMRC was established on 18 April 2005 as the result of the merger of the Inland Revenue Commission and the Customs and Excise Department. HMRC administers and enforces the legislation relating to direct taxes (including income tax, corporate tax and capital gains tax) and indirect taxes (including excise duties, stamp duty, land tax and VAT): see HM Revenue and Customs, at <http://www.hmrc.gov.uk/menus/aboutmenu.htm>, viewed on 27 December 2005.

that their powers and processes would be similar, and yet, as demonstrated throughout this thesis, that is not always the case.

The Australian and foreign regulators were also selected because they share a range of practical investigative and enforcement problems or concerns.³⁵ They share the problem of determining when to commence an informal inquiry or a formal investigation (see [3.4]). They share common problems in relation to obtaining oral evidence and conducting oral examinations (see Chapter 4) and in relation to obtaining and protecting documentary evidence (see Chapter 5 and Chapter 6). They share a common concern of keeping information gathered during their investigations confidential to protect the secrecy and integrity of their investigations and to avoid jeopardising subsequent enforcement proceedings (see Chapter 7). They share the common concern or objective of conducting efficient and effective administrative, civil, civil penalty, or criminal proceedings (see Chapter 8, Chapter 9 and Chapter 10). They all experience common problems in relation to applications for review of their decisions (see Chapter 11).

It is demonstrated throughout this thesis that the Australian regulatory legislation does not adopt a uniform approach to addressing these matters.

[2.4] Statutory regulatory objectives

[2.4.1] *Public interest*

A statement of objectives affords the regulator a sense of purpose and direction thereby assisting it to prioritise, in the public interest, the types of complaints that it should investigate and enforce. Whether the investigation will further the regulator's objectives, should be a key factor that the regulator should take into account in deciding whether to commence an investigation, as discussed at [3.6].

³⁵ See generally *Rich v ASIC* (2004) 220 CLR 129; (2004) 78 ALJR 1354; 209 ALR 271; [2004] HCA 42 at [119] per Kirby J.

Objectives also help define the jurisdictional or operational limits of the regulators' investigation and enforcement powers. Accordingly, they play an important role in minimising regulatory overlap and confusion between the various regulators' jurisdictions (in the minds of both the regulator's staff and the general public). Clear regulatory objectives would also promote the public interest by assisting to prevent a duplication of investigative effort and save public resources (see [3.8]-[3.8.3]). Recent corporate collapses demonstrate that, in many cases, there is public confusion as to which regulator has jurisdiction in a particular matter. For example, in relation to the collapse of Henry Kaye's "National Investment Institute" group of companies one complainant said "We've contacted the ACCC. The ACCC tell us to contact ASIC. They contact ASIC. ASIC tell them to contact the ACCC. Who is out there, who is going to listen to us?"³⁶

A statutory statement of objectives for each regulator also serves a public interest function by assisting to resolve ambiguities in the relevant law. Where there is ambiguity in the statute (perhaps concerning the scope of the regulator's power or whether the affected person has a particular right), those objectives can be taken into account by the court in resolving the ambiguity.³⁷ Such an approach means that the courts may resolve the matter in a way that promotes the statutory objectives and the public interest underpinning the regulator's enabling legislation.

In addition, a formal statutory statement of regulatory objectives could be useful for measuring the success or otherwise and the accountability of all those regulators, such as ASIC, APRA, the ACCC and the ATO, who record quantifiable data, such as revenue or fees collected, fines imposed, and the number of administrative, civil and criminal proceedings that were successful or unsuccessful. Baldwin and Cave³⁸ identify

³⁶ Jenman N, speaking to Tony Jones on "Lateline" at <http://www.abc.net.au/lateline/content/2003/s998069.htm>, viewed on 26 November 2003.

³⁷ The court will take those objectives into account because of specific legislation such as s 11(3) of the *ASIC Act* or under the purpose approach in s 15AA of the *Acts Interpretation Act 1901* (Cth). See, for example, *ASC v Kippe* (1996) 14 ACLC 1226 at 1232-1233; and *Smith v Papamihail and ASIC* (1998) 88 FCR 80; (1998) 29 ACSR 184 at 192 and 194 per Carr J.

³⁸ Baldwin R and Cave M, "Understanding Regulation Theory Strategy, and Practice,"

accountability as a benchmark of effective regulation (see [1.5.1.2]). Such quantifiable data could be used to determine whether the regulator is meeting its objectives and thereby fulfilling its public interest functions as well as whether the regulator has used its funding and resources effectively. Such analysis would also assist to identify the strengths and weaknesses in the regulatory framework and provide an informed basis for suggestions for improvement in regulatory techniques and law reform.³⁹

[2.4.2] *Private interest*

A statutory statement of objectives provides a framework for the legitimate exercise of the regulator's investigative and enforcement powers and thereby promotes the private interest by placing a limit on the regulators' ability to infringe the privacy of the individual. A statement of objectives affords individuals some protection because they may challenge the regulator's action on the grounds of an abuse of power or "ultra vires" where such action is not supported by those objectives. The individual's ability to challenge a regulator's decision to commence an investigation is discussed at [3.7]-[3.7.5]. Review of the regulators' decisions on the ground of abuse of power and suggested reforms are discussed in Chapter 11.

Australian regulators

[2.5] *ASIC – functions and objectives*

The Wallis Inquiry⁴⁰ made a number of recommendations to the federal government to improve the efficiency of the Australian financial system and the cost-effectiveness of the regulation of that system. As a result of those recommendations, the federal government

Oxford University Press, Oxford, 1999, at pp 77 and 81.

³⁹ ALRC, Background Paper 7 – Review of Civil and Administrative Penalties in Federal Jurisdiction, at Item 2 "What is effective regulation?" and fn 64, at <http://www.austlii.edu.au>, viewed on 19 March 2003.

⁴⁰ The Financial System Inquiry Report, March 1997 (chaired by Stan Wallis), at <http://fsi.treasury.gov.au/content/FinalReport.asp>, viewed on 15 December 2006.

decided to replace the Australian Securities Commission by establishing ASIC and gave ASIC additional powers and responsibilities.⁴¹ ASIC has the functions of administering and enforcing the *Corporations Act* and the *ASIC Act* and of regulating the corporations, securities and futures industries in Australia. ASIC was also given consumer protection functions in relation to the financial services industry.⁴² ASIC shares investigative and enforcement functions with APRA and the ATO under the *Superannuation Industry (Supervision) Act 1993* (Cth). ASIC also shares investigative and enforcement functions with APRA under the *Retirement Savings Accounts Act 1997* (Cth) (see [1.5.7] and [3.8.2]).

ASIC's primary investigative powers are contained in the *ASIC Act* and those powers are utilised for the purpose of investigating suspected contraventions of the *Corporations Act* and the *ASIC Act*. It will be demonstrated in this thesis that ASIC's investigative and enforcement powers in the *ASIC Act* and the *Corporations Act* are superior to those available to the other Australian regulators. There is no principled reason for this inconsistency and it appears to be a product of the federal government's ad hoc approach to developing the regulatory laws. It will also be demonstrated that ASIC and the other Australian regulators lack a number of powers that are available to some foreign regulators. For example, they do not have the power to commence an investigation solely for the purpose of assisting a foreign regulator (see [7.5.4.1]), to pay pecuniary penalties to the victims of contraventions of the regulatory laws (see [8.7.2]), or to make "cease and desist orders" (see [10.9.2]).

ASIC's primary corporate regulation objectives are set out in s 1(2) of the *ASIC Act*.⁴³ Those objectives require ASIC to:

⁴¹ See ss 1A, 261 and 268 of the *ASIC Act*; and P Costello (Treasurer), Statement to the House of Representatives, "Reform of the Australian Financial System," 2 September, 1997. ASIC replaced the Australian Securities Commission (ASC) on 1 July 1998.

⁴² See Part 2 of the *ASIC Act*.

⁴³ See *Adelaide Steamship Co Ltd v Spalvins* (1994) 12 ACLC 542; *ASC v AS Nominees* (1995) 133 ALR 1 at 59 per Finn J; *Somerville v ASC* (1995) 13 ACLC 1527 at 1531 per Lockhart J; *Boucher v ASC* [1996] 41 ALD 274 at 278 per Northrop J; *ASC v Kippe* (1996) 14 ACLC 1226 at 1232-1233; *Boys v ASC* (1997) 15 ACLC 844 at 860 and 863 per Carr J; *Kippe v ASC* (1998) 16 ACLC 190 at 221 per SA Forgie; and *McLachlan v ASC* (1998) 16

- (a) strive to protect and promote the confidence of investors, consumers, creditors and corporations;
- (b) maintain, facilitate and improve the performance of the financial system and the entities (including corporations) within that system in the interests of commercial certainty thereby reducing business costs (associated with contraventions of the law) and improving the efficiency and development of the economy; and
- (c) achieve uniformity throughout Australia in the way it performs its functions.

Some of those objectives reflect the benchmarks of effective regulation discussed at [1.5.1.2].

Those objectives have been frequently referred to by the courts when interpreting the *ASIC Act*,⁴⁴ and in determining whether ASIC has acted within its statutory power⁴⁵ (see also [3.7.1]) or whether ASIC can obtain a particular enforcement order, such as an injunction.⁴⁶

One problem with ASIC's regulatory objectives is that they are too broadly stated and it is therefore difficult to measure whether the outcomes associated with each objective are being achieved.⁴⁷ Broad objectives are also unhelpful when trying to determine the dividing line between the respective regulatory responsibilities of the regulators and in reducing the problems associated with regulatory overlap or overlapping investigative and enforcement responsibilities (see also [1.5.7] and [3.8]). The HIH Royal Commission

ACLC 1488 at 1496 per Finn J. Also see Mr Garry Punch (Member for Barton), Australia, House of Representatives 1992, Debates vol HR 4, at 1390; and ASIC Releases, Policy Statement 103: Confidentiality and release of information, [25] at 40,894.

⁴⁴ *ASC v Kippe* (1996) 67 FCR 499; 14 ACLC 1226 at 1232-1233; and *Smith v Papamihail* (1988) 88 FCR 80; 29 ACSR 184 at 192 per Carr J.

⁴⁵ *ASIC v Plymin (No 2)* [2002] VSC 356 at [15].

⁴⁶ *ASIC v Pegasus Leveraged Options Group Pty Ltd* (2002) 41 ACSR 561 cited in *ASIC v Triton Underwriting Insurance Agency* [2003] NSWSC 1145 at [23]. See also *ASIC v Sweeney* [2001] NSWSC 114 at [34]-[35]; and *ASIC v Loiterton* [2004] NSWSC 172 at [32].

⁴⁷ Brown P and Tarca A, op cit n 1.

recommended that there should be greater clarity in the respective regulatory roles and responsibilities of ASIC and APRA to improve the overall effectiveness of corporate and prudential regulation.⁴⁸ ASIC's and APRA's governing legislation should contain detailed regulatory objectives that are drafted with greater precision than the present broad objectives found in the *ASIC Act* and the *Australian Prudential Regulation Authority Act 1998* (Cth).

ASIC's counterpart in the United Kingdom, the FSA, is governed by statutory regulatory objectives which provide that it was established to promote market confidence, public awareness, the protection of consumers and to reduce financial crime. When performing its functions, the FSA must have regard to such matters as the efficient use of resources and the facilitation of competition.⁴⁹ Those objectives also appear to be too broadly stated. In the United States, the legislation does not list any statutory objectives of the SEC.⁵⁰

[2.6] APRA – functions and objectives

APRA was established in 1998 by s 7 of the *Australian Prudential Regulation Authority Act 1998* (Cth) following recommendations by the Wallis Inquiry that a single prudential regulator be established for the financial services industry.⁵¹ APRA was established for the purpose of regulating banks, credit unions, building societies, life and general insurance companies,⁵² friendly societies and superannuation funds in accordance

⁴⁸ HIIH Royal Commission Final Report, "Regulation of General Insurance," 2003, at [8.3] and [8.4], <http://www.hihroyalcom.gov.au/finalreport/Chapter%208.HTM>, viewed on 22 February 2004.

⁴⁹ See ss 2(2), 2(3), 3, 4, 5 and 6 of the *Financial Services and Markets Act 2000* (UK).

⁵⁰ The literature indicates that one of the SEC's objectives is to "Encourage the adoption of high standards, fairness and transparency in foreign markets by increasing international cooperation": see SEC, 1999, Annual Performance Report and 2001 Annual Performance Plan (February 2000), SEC, 2004 Annual Performance Plan and 2002 Annual Performance Report (March 2003), cited in Tunstall I, op cit n 24, at p 283.

⁵¹ See ALRC, Discussion Paper 65: Civil and Administrative Penalties, "Overview of Federal Regulators," at [5.32], at <http://www.austlii.edu.au>, viewed on 19 March 2003.

⁵² APRA has power to grant and revoke authorisations to carry on insurance business, determine the prudential standards that general insurers are required to meet, require an insurer to appoint an independent actuary to investigate its outstanding claims, direct an

with the prudential regulation requirements of various Commonwealth laws including the *Banking Act 1959* (Cth), the *Insurance Act 1973* (Cth), the *Retirement Savings Accounts Act 1997* (Cth) and the *Superannuation Industry (Supervision) Act 1993* (Cth).⁵³

APRA is concerned with how financial institutions control the risks in their business activities to maximise the probability that those institutions will be able to meet their obligations to their depositors and policyholders. APRA is also concerned with matters such as the financial institution's financial soundness, its asset quality and liquidity, market and balance sheet risk and operational risk.⁵⁴

APRA's regulatory framework involves generic legislation⁵⁵ that sets out broad regulatory objectives. When performing its regulatory functions and developing policy, APRA must balance the objectives of financial safety and efficiency, competition, contestability and competitive neutrality.⁵⁶ APRA also has a number of specific objectives in s 3 of the *Superannuation Industry (Supervision) Act 1993* (Cth) and in the

insurer to make provision in its accounts for a specified liability, direct an insurer to dispose or not to dispose of assets, prohibit an insurer from issuing insurance policies, order an insurer to increase its paid up capital and order changes to its financial statements: see the *Insurance Act 1973* (Cth) cited in HIH Royal Commission, Final Report, op cit n 48, at [8.5.3].

⁵³ APRA regulates deposit-taking institutions under the one licensing regime contained in the *Banking Act 1959* (Cth). APRA has the power to act in the public interest (that is, in the interests of depositors) and may revoke licences, make prudential standards or issue enforceable directions, appoint investigators or statutory managers to an authorised deposit-taking institution in difficulty, or it may take control of the particular financial institution. APRA may take control of a life insurance company, general insurer, friendly society or superannuation fund, where the financial weakness of such a body may have a detrimental effect on the interests of members and policyholders. APRA may also wind-up the financial institution and distribute its assets: see ALRC, Discussion Paper 65, op cit n 51, at [5.32]-[5.36].

⁵⁴ House of Representatives Standing Committee on Economics Finance and Public Administration, *Review of the Australian Prudential Regulation Authority; Who Will Guard the Guardians?*, (2000), Commonwealth of Australia, Canberra 18 cited ALRC, Discussion Paper 65, op cit n 51, at [5.35] and [5.38] and fns 58 and 67.

⁵⁵ See ss 8 and 9 of the *Australian Prudential Regulation Authority Act 1998* (Cth); and APRA, Annual Report, 2000-2001, at p 17 cited in ALRC, Discussion Paper 65, op cit n 51, at [5.36] and fn 61.

⁵⁶ Sections 8 and 9 of the *Australian Prudential Regulation Authority Act 1998* (Cth).

Retirement Savings Accounts Act 1997 (Cth).⁵⁷ Section 2A of the *Insurance Act 1973* (Cth) provides that the objects of the Act (to be promoted by APRA) are to protect the interests of policy holders in ways that are consistent with the continued development of a viable, competitive and innovative insurance industry. This object is achieved in part by giving APRA an administrative power to disqualify persons from participating in the insurance industry on the ground of unfitness to act⁵⁸ (see [10.4]). This power is consistent with Braithwaite’s “responsive regulation” approach because it permits APRA to prevent a person from operating in a particular industry by way of administrative proceedings without the need to pursue criminal proceedings and seek a term of imprisonment.⁵⁹ It is argued that the ACCC and the ATO (when acting under the taxation legislation) should be given a similar administrative power to make disqualification orders (see [10.9.2]).

APRA’s failure to effectively perform its regulatory functions in cases such as the HIH collapse (see [1.5.1.3]) is partly the product of poor and outdated laws governing APRA (see [1.5.7] and [9.5.1]), poor staff training and procedures within APRA, and broad objectives which do not assist to resolve problems relating to APRA’s and ASIC’s overlapping regulatory responsibilities (see [1.5.7], [2.5] and [3.8]).

[2.7] ACCC – functions and objectives

The ACCC was established in 1995 by the *Competition Policy Reform Act 1995* (Cth) replacing the Trade Practices Commission. The ACCC is responsible for the administration and enforcement of the *Trade Practices Act 1974* (Cth), the *Prices Surveillance Act 1983* (Cth) and other Commonwealth legislation.⁶⁰ The *Trade Practices Act 1974* (Cth) deals with matters such as anti-competitive and unfair market practices

⁵⁷ See ss 22, 37, 91, 148, 157, 167 and 172 of that Act.

⁵⁸ *Kamha v APRA* [2005] FCAFC 248 at [3]-[7].

⁵⁹ Braithwaite J, “Restorative Justice and Responsive Regulation,” Oxford University Press, Oxford, 2002, at p 29.

⁶⁰ See generally s 6A of the *Trade Practices Act 1974* (Cth); and ALRC, Discussion Paper 65, op cit n 51, at [5.8] and [5.9].

including misuse of market power, anti-competitive agreements, price-fixing and primary boycotts, mergers or acquisitions of corporations (that lessen competition in a substantial market) and consumer protection in relation to the supply of goods and services.⁶¹ The *Prices Surveillance Act 1983* (Cth) gives the ACCC the power to examine the prices of selected goods and services with the aim of promoting competitive pricing and preventing price increases in those markets that lack competition. Various other Commonwealth legislation gives the ACCC duties in relation to broadcasting services, trademarks, and access to essential services, including airport services and natural gas pipeline systems.⁶² The ACCC is responsible for regulating national infrastructure services. The ACCC also has a “watchdog” role in relation to pricing and the goods and services tax.⁶³

Section 2 of the *Trade Practices Act 1974* (Cth) states that the object of the Act, (and therefore by implication, the function of the ACCC), is to “enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.” This statement of objectives is too wide to be meaningful and provides little assistance in resolving (in the public interest) ambiguities in the legislation. The private interest is not promoted either in that affected persons would find it difficult to challenge the actions of the ACCC on the ground of abuse of power in view of this very simplistic and broad statement of objectives.

The literature indicates that the ACCC has more specific objectives.⁶⁴ However, the problem is that those objectives are not expressly included in the *Trade Practices Act 1974* (Cth).

⁶¹ See generally ALRC, Discussion Paper 65, op cit n 51, at [5.9]-[5.12] at fns 10, 16 and 19.

⁶² See generally ALRC, Discussion Paper 65, op cit n 51, at [5.9] and fns 11 and 12.

⁶³ See ACCC, “Role and activities,” at <http://www.accc.gov.au>, viewed on 24 September 2005.

⁶⁴ The literature states that the ACCC's specific objectives are to prevent anti-competitive behaviour by businesses; provide protection for consumers in their dealings with suppliers of goods and services and manufacturers of goods; promote competitive pricing (including preventing price increases in markets where there is a lack of

There are no statutory objectives for the ACCC's foreign counterparts, the ATD⁶⁵ (United States) and the CC (United Kingdom).⁶⁶ However, the ATD's powers to conduct oral examinations and to require the production of books are governed by clearer express laws in comparison to the laws governing the ACCC's equivalent investigative powers, as discussed in Chapter 4 and Chapter 5.

[2.8] *ATO – functions and objectives*

The ATO was established (and vested with its investigative and enforcement powers) to collect and safeguard the federal government's revenue base. This revenue base funds the economic, political, and social policies of the federal government and the basic infrastructure (including the other Commonwealth regulators) that is necessary for Australian business activity and business regulation.

Some of the main legislation administered by the ATO includes the *Income Tax Assessment Act 1936* (Cth), the *Income Tax Assessment Act 1997* (Cth), the *Taxation Administration Act 1953* (Cth), the Fringe Benefits Tax legislation, the Goods and Services Tax (GST) legislation and the *Excise Act 1901* (Cth). The ATO administers the

competition); promote competition and efficiency in markets; encourage businesses to adopt fair trading practices in well informed markets; promote a fair and competitive trading environment for businesses and promote compliance through education programmes, investigations, litigation and enforceable undertakings: see ss 2 and 28 of the *Trade Practices Act 1974* (Cth); ACCC, Annual Report, 1999-2000 at 202-204 cited in ALRC, Background Paper 7, op cit n 39, at [5.8] and fn 8; and Clough J and Mulhern C, "The Prosecution of Corporations," Oxford University Press, Melbourne, 2002, at p 19.

⁶⁵ The literature indicates that its objectives are to "promote and protect the competitive process – and the American Economy - through enforcement of the antitrust laws. See United States Department of Justice Antitrust Division website, op cit n 29.

⁶⁶ The literature indicates that the objectives of the CC are to promote competition in the United Kingdom's economy, to improve the United Kingdom's performance and productivity domestically and internationally and to make markets work well for consumers (through lower prices, wider choice, more innovation and higher quality of goods and services) so as to achieve prosperity for all: see "The Roles of the Competition Commission and the Department of Trade and Industry in Promoting Competition," op cit n 30.

enforcement of more than 130 statutory penalty provisions in over twenty Commonwealth statutes (excluding GST related legislation).⁶⁷

The ATO has no statutory statement of objectives. Similarly, the IRS⁶⁸ (United States) and HMRC⁶⁹ (United Kingdom) have no statutory objectives. The ATO has stated that its regulatory objective is to “effectively manage and shape systems that support and fund services for Australians and give effect to social and economic policy through the tax system.”⁷⁰ However, this objective is too broad to be of practical use and has no legislative backing. According to the ALRC, an evaluation should be made of whether and how a statement of objectives would affect the ATO’s regulatory practice and whether such objectives could be both useful and stated in realistic and pragmatic terms (as opposed to “motherhood” statements of no real practical benefit).⁷¹

The ATO has been criticised on the ground that its annual reports have not provided sufficient detailed information concerning its imposition of administrative, civil and criminal penalties. The deficiencies in the ATO’s annual reports, coupled with a lack of statutory objectives, make it difficult to determine whether the ATO is efficiently and cost-effectively performing its regulatory functions and what improvements (if any) need to be made by the ATO in performing its functions (including its investigative and enforcement functions). Those problems also make it difficult to determine how effective the ATO is in terms of achieving a regulatory impact on taxpayers (by sending a

⁶⁷ ALRC, Discussion Paper 65: op cit n 51, at [5.44].

⁶⁸ However, the IRS has indicated that its purpose or mission is to provide a quality service to taxpayers by helping them meet and understand their tax responsibilities and by applying the tax laws with integrity and fairness to all and ensuring that those who are unwilling to comply with the tax laws pay their fair share: see Internal Revenue Service, op cit n 33.

⁶⁹ However, HMRC has stated that its objectives include the provision of a world class tax and customs service, to secure the collection of revenue from direct and indirect taxes efficiently, effectively and fairly while minimising costs to business: see HM Revenue and Customs, op cit n 34.

⁷⁰ ATO, Annual Report, 1999-2000 cited in ALRC, Background Paper 7, op cit n 39, at 1 “Introduction” and fn 64. See also ALRC, Discussion Paper 65, op cit n 51, at [5.44]-[5.53].

⁷¹ ALRC, Background Paper 7, op cit n 39, at 2 “What is Effective Regulation?”

compliance message).⁷² The lack of statutory objectives also makes it more difficult for the courts to resolve questions concerning the scope of the ATO's implied powers⁷³ or the scope of the implied protections that are afforded to individuals during the investigation process. In view of the above considerations, it is argued that there would be practical benefits for both the ATO and the taxpayer if the taxation legislation contained a set of specific regulatory objectives to underpin its stated powers and processes.

Section 8 of the *Income Tax Assessment Act 1936* (Cth) provides that the Commissioner shall have the general administration of the Act. The Commissioner derives substantial implied powers from this section.⁷⁴ It could be argued that implied powers may give the ATO greater flexibility in its investigative and enforcement activities. However, flexibility could also be achieved through appropriately drafted express provisions.

It is of concern that the taxation legislation governing the ATO's primary investigative functions depends heavily on the vagaries of implied powers and rights particularly given the importance of the ATO's revenue collecting function in relation to the proper functioning of the economy. As subsequently demonstrated in this thesis, it is also incongruous that the ATO has clearer investigative powers under the *Superannuation Industry (Supervision) Act 1993* (Cth) in comparison to its primary investigative powers in the taxation legislation. The ATO also lacks a number of powers that are available to its foreign counterparts. For example, the ATO has no power to release investigative information to professional disciplinary bodies (see [7.5.6]) or to apply to the court for an order disqualifying a person from acting in a particular industry on the ground of that person's contraventions of the taxation laws (see [8.8.3]).

⁷² ALRC, Discussion Paper 65, op cit n 51, at [5.53].

⁷³ See, for example, the litigation in *Industrial Equity Ltd v Commissioner of Taxation* (Cth) (1990) 170 CLR 649; 96 ALR 337 at 345, as discussed at [5.5].

⁷⁴ See, for example, *Industrial Equity Ltd v Deputy Commissioner of Taxation* (1990) 96 ALR 337 at 345 (in the context of a notice issued under s 263 of the *Income Tax Assessment Act 1936* (Cth), as discussed at [5.5].

[2.9] Conclusion

Each Australian regulator should be governed by clear and detailed statutory objectives. This suggested reform would assist:

- (a) the regulators to decide whether they should investigate a complaint;
- (b) to reduce regulatory overlap;
- (c) to determine whether the regulators are operating effectively;
- (d) the courts to resolve ambiguities in the regulators' governing legislation;
- (e) the courts to determine whether the regulators are acting within their powers;
- and
- (f) the regulated to challenge the legitimacy of the regulators' investigative and enforcement decisions.

Some Australian and foreign regulators (such as the ACCC, the ATD and the CC; or the ATO, the IRS and HMRC) have similar regulatory responsibilities or functions and objectives. However, as demonstrated in subsequent chapters, the ACCC's and the ATO's investigative and enforcement powers, unlike those of their foreign counterparts, depend heavily on implied powers. The Australian regulators also lack powers that are available to the foreign regulators.

It is argued in subsequent chapters that given that the Australian regulators share common public interest functions (including detecting and enforcing contraventions of the regulatory laws) and common regulatory problems or concerns, the legislation should be amended to give them a more uniform range of express investigative and enforcement powers that are based on world's best practice. Such a reform would put the Australian regulators on a par with their foreign counterparts (and, in some cases, on a par with other Australian regulators such as ASIC) and may enable them to more effectively achieve their objectives and facilitate more effective regulation.

CHAPTER 3

COMMENCEMENT OF INVESTIGATIONS

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CHAPTER 3

COMMENCEMENT OF INVESTIGATIONS

[3.1] Introduction

The regulators' investigative powers are conferred for a common purpose namely, to enable the regulators to perform the administrative function of gathering facts to assist them to make an informed assessment about whether a contravention of the relevant legislation has occurred and to decide whether administrative, civil, civil penalty or criminal proceedings, or a combination of these proceedings, should commence.¹ The regulators' investigative powers may also assist in the discovery of factors which cause a business to fail and the power is therefore an important aid to law reform.²

The analysis in this chapter indicates that:

- (a) there are no clear and uniform principles governing the Australian regulators' decisions on whether to conduct an informal inquiry or to conduct a formal investigation (see [3.4]);
- (b) there is no uniform threshold test that triggers the regulators' powers to commence an investigation (see [3.5.1]-[3.5.4]);

¹ See generally *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission* (1982) 152 CLR 460; *National Companies and Securities Commission v News Corporation Ltd* (1984) 52 ALR 417 at 428 per Gibbs CJ and at 439-440 per Brennan J; *Johns v Connor* (1992) 7 ACSR 519 at 531 per Lockhart J; *Constantine v Trade Practices Commission* (1994) 48 FCR 141 at 146; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1994) 68 ALJR 127 at 145 per Brennan J; *Boys v ASC* (1997) 15 ACLC 844 at 862 per Carr J; *Ex parte Wardley Australia Ltd* (1991) 9 ACLC 1565 at 1573-1574; (1991) 5 ACSR 786 at 796 per Murray J cited in *Johns v ASC* (1992) 10 ACLC 1057 at 1082-1083; *ASC v Deloitte Touche Tohmatsu* (1996) 14 ACLC 1486 at 1503-1504 citing the Eggleston Company Law Advisory Committee Report (1969); *ASIC v Plymin (No 2)* [2002] VSC 356 at [10] and [13]-[15] per Mandie J; and *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd* [2007] FCA 13 at [96] and [97]. See also Financial Services Authority, Handbook of Rules and Guidance, Enforcement Manual, Enforcement, Information gathering and investigation powers, at [2.11.1], <http://www.fsa.gov.uk/vhb/html/ENF/enf2.11.html>, viewed on 20 February 2004.

² *ASC v Deloitte Touche Tohmatsu* (1996) 14 ACLC 1486 at 1504 citing the Eggleston Company Law Advisory Committee Report (1969).

- (c) there are no guidelines which assist the Australian regulators to decide whether to commence a formal investigation (see [3.6]);
- (d) there are no clear and uniform principles in Australia governing the selection of a “lead investigator” to resolve the problems associated with overlapping investigative responsibilities or overlapping regulatory jurisdictions (see [3.8]-[3.8.3]); and
- (e) there is no uniform “protection and remedies” regime for informants under the Australian regulatory legislation (see [3.9]-[3.9.3.3]).

Given that the above problems affect all Australian regulators and the regulated, it is suggested that the Australian legislation should adopt a uniform approach to the resolution of those matters. The reforms suggested in this chapter would implement current best practice and would promote a more timely and cost-effective investigative and enforcement response thereby promoting more effective regulation.

[3.2] Public interest

The public interest in protecting businesses, consumers, corporations, creditors and investors from harm, and the public interest in protecting the revenue base, requires that regulators make timely and informed decisions to commence an investigation so that they can quickly ascertain whether there is, or is likely to be, a contravention of the regulatory legislation. The need for a quick response to contravening conduct is reinforced by the ease with which investors can lose their funds, the ease with which funds can be moved out of a corporation and the volatility of the share market when participants in the market suspect that a contravention may have occurred. The courts have indicated that any delay in ASIC’s investigation and enforcement response can exacerbate the losses suffered by the public.³

³ *ASIC v Australian Investors Forum Pty Ltd (No 3)* [2005] NSWSC 1198 at [28]. ASIC was criticised for the delay in commencing an investigation into the activities of the Westpoint Group. It was claimed that, during an 18 month delay by ASIC, additional people lost their life savings by investing in the group: see Kohler A speaking to Lucy J (former Chairman of ASIC), “ASIC defends actions over Westpoint,” Inside Business, at <http://www.abc.net.au/insidebusiness>, viewed on 19 February 2006. See also *ASIC v Emu Brewery Mezzanine Ltd* [2004] WASC 241; and *ASIC, in the matter of Richstar*

A timely investigative response, perhaps by early use of the oral examination power (see Chapter 4), means that the regulators can quickly take any necessary interlocutory action to prevent the dissipation of funds (pending proceedings for final remedial orders) thereby quickly (and hopefully) restoring market confidence. It is suggested that the public interest in ensuring the timely intervention by the regulators is best served by granting them broad powers to commence an investigation (see [3.5]), by providing clear guidelines on when an investigation should commence (see [3.6]) and on selecting the “lead investigator” (see [3.8.3]), and by providing clear protections and remedies for informants (see [3.9]-[3.9.3.3]).

[3.3] Private interest

The private interest requires that individuals should be protected from an abuse of statutory power by public regulators and that they should not be subjected to an unjustified invasion of their privacy or unnecessary harm to their reputation. The Australian regulators should be required to disclose to the subjects of the investigation sufficient information to enable those persons to determine whether the regulator’s decision to commence the investigation complies with the law and to provide them with the means of legitimately challenging any abuse of power (see [3.7]-[3.7.5]).

The proposed uniform guidelines concerning the selection of the “lead investigator” and reducing a duplication of investigative effort, also promote the private interest by ensuring that the individual is not subjected to the same or similar investigative requirements from two or more regulators regarding the same conduct (see [3.8.3]).

The private interest would also be promoted by introducing uniform protections and remedies for informants, as discussed at [3.9]-[3.9.3.3]. Such a reform would also encourage potential informants to provide information thereby promoting the public interest in ensuring a more timely intervention by the regulator.

Enterprises Pty Ltd (ACN 099 071 968) v Carey [2006] FCA 366.

[3.4] Informal inquiry or formal investigation?

The Australian⁴ and foreign regulators⁵ can commence an informal inquiry (that is, an inquiry without using their statutory investigative powers of compulsion) and ask a person to provide assistance by voluntarily answering questions and producing documents.

The regulators will usually consider a number of factors in deciding whether to act informally or formally including whether they have satisfied the necessary prerequisites to commencing a formal investigation such as whether they “suspect” or “believe” that a contravention of the legislation may have occurred (see [3.5]),⁶ the need for timely action (including the need to preserve documentary evidence from destruction - see Chapter 5), the need for immediate litigation to recover or to freeze assets (see Chapter 8), the need to quickly charge an accused who is about to leave the jurisdiction and whether witnesses are prepared to cooperate voluntarily, including whether that voluntary cooperation would only be forthcoming on terms that are unacceptable to the

⁴ See generally *Clough v Leahy* (1905) 2 CLR 139 at 157; *Church of Scientology v Woodward* (1982) 154 CLR 25 at 62 per Mason J; and *Bollag v Attorney-General (Cth)* (1997) 149 ALR 355 at 366 per Merkel J. The matter may be outside the regulator’s statutory investigative powers because the regulator has not formed the requisite suspicion to invoke those powers: see, for example, the discussion at [4.4]. In many cases, the ATO’s officers use the common law power to make an informal inquiry and, in the majority of cases, the taxpayer voluntarily provides the relevant information: see *Citibank Ltd v Commissioner of Taxation (Cth)* (1988) 88 ATC 4714 at 4724.

⁵ In the United Kingdom, HMRC relies on making an initial informal inquiry, and it will seek significantly lower penalties where those who contravene the tax laws voluntarily provide the required information: see HM Revenue and Customs: Code of Practice 9 (2005) at <http://www.hmrc.gov.uk/leaflets/cop9-2005.htm>, viewed on 6 February 2005. The same happens in Australia: see s 284-225 in Schedule 1 to the *Taxation Administration Act 1953* (Cth). In the United States, the SEC’s approach is to develop the facts through an informal inquiry by examining brokers’ records and reviewing trading data. The SEC may commence a formal investigation under s 21 of the *Securities Exchange Act 1934* (US) if the informal inquiry establishes sufficient grounds for a formal investigation: see Securities and Exchange Commission, <http://www.sec.gov/about/whatwedo.shtml>, viewed on 25 November 2003.

⁶ See s 13 of the *ASIC Act*; ss 263 and 264 of the *Superannuation Industry (Supervision) Act 1993* (Cth); s 95 of the *Retirement Savings Accounts Act 1997* (Cth); s 155 of the *Trade Practices Act 1974* (Cth); and s 264 of the *Income Tax Assessment Act 1936* (Cth).

regulator.⁷ Braithwaite indicates that practitioners resent requests from the ATO for voluntary cooperation and they perceive a danger in cooperating with the ATO.⁸

From the regulators' perspective, one advantage of an informal inquiry is that it may save time and cost for the regulator whereas the use of compulsory powers, such as the oral examination power, may involve delay, particularly where the examinee seeks to enforce their right to legal representation at the oral examination (see [4.7.1]). The presence of a lawyer at a compulsory oral examination, and the lawyer's objections, may disrupt the flow and timeliness of the examination. Delay may also occur where the affected person challenges the exercise of investigative powers on the ground of abuse of power under s 5(1)(e) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*AD(JR) Act*), as discussed in Chapter 11.

From the regulators' perspective, the main disadvantages of an informal inquiry are that:

- (a) volunteers may lawfully refuse to provide information on the grounds of the duty of confidentiality,⁹ the right to silence, the penalty privilege, the privilege against self-incrimination, and legal professional privilege. By contrast, those excuses (except, in some cases, legal professional privilege) are expressly or impliedly overridden by the regulators' statutory investigative powers (see [4.10.3] and 5.12.2)];

⁷ Chapman R, "Challenging the ASC – Section 19 of the ASC Law," (Paper delivered at the Corporate Lawyers and Regulators Forum, Hyatt Coolum, 19-21 May 1994 at p 1. See also Schonfeld MK, Associate Regional Director, SEC, "Planning and Managing Investigations," APEC Financial Regulators Training Initiative, National Training Program on Enforcement, Kuala Lumpur, Malaysia, May 2002, "The Investigative Process" at III; and ACCC, "Section 155 of the Trade Practices Act, Information gathering powers of the Australian Competition and Consumer Commission in relation to its enforcement function – The use of s 155 to obtain information," October 2000, at p 6, at <http://www.accc.gov.au>, viewed on 25 September 2005.

⁸ Braithwaite J, "Markets in Vice, Markets in Virtue", The Federation Press, Leichhardt, 2005 at p 61.

⁹ See, for example, *Parry-Jones v The Law Society* [1969] 1 Ch 1.

(b) they have no power to compel those persons to provide the relevant information.¹⁰

By contrast, in the context of a formal investigation, individuals have a statutory obligation to provide the information and there are severe penalties where examinees either refuse to provide information or provide false or misleading information (see [6.8.4]). In addition, the indemnity from civil and criminal liability and the evidential immunity provided by some of the legislation (to persons who are compelled to give information) may encourage examinees to give more information than volunteers (see [3.9.1] and [4.10.1]); and

(c) where the regulator suspects that a volunteer has contravened the legislation, it is required to give that volunteer a caution to the effect that the volunteer is not required to answer the questions but if he/she does answer, those answers may be used as evidence in subsequent proceedings.¹¹ Such a caution may dissuade the individual from subsequently volunteering information.¹² By contrast, in a formal investigation, the legislation impliedly overrides the requirement to give the caution.¹³

From the perspective of the regulated there may be little incentive to voluntarily provide information to the regulator because there is an inadequate protection regime in Australia for voluntary informants (see [3.9]-[3.9.3.3]), and they may receive greater protection under the legislative provisions governing the regulators' investigative

¹⁰ See generally, the Securities and Exchange Commission, Washington DC 2059, Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena, "Effect of Not Supplying Information."

¹¹ The caution is required to be given by virtue of the Judges Rules and by s 23U(1) of the *Crimes Act 1914* (Cth). See also *Bartlett v The Queen* (1991) 100 ALR 177 at 184. In the case of the FSA and the DTI in the United Kingdom, the requirement to give a caution in a voluntary interview is contained in the *Police and Criminal Evidence Act 1984* (UK) and the *Criminal Procedure and Investigations Act 1996* (UK). See also Financial Services Authority, op cit n 1, at [2.14.4].

¹² A failure to give the caution does not mean that the evidence is automatically excluded and admissibility depends upon a consideration of what is fair to the volunteer/accused in light of all of the relevant circumstances: see *R v Dolan* (1992) 58 SASR 501 at 504-505.

¹³ See the discussion at [4.10.2].

powers.¹⁴ The Law Council of Australia has suggested that ASIC should not ask a person to attend an informal interview without informing that person of the legal and practical significance of proceeding informally, rather than by way of a compulsory oral examination.¹⁵

The main factors discussed above could be incorporated into the proposed uniform guidelines governing the regulator’s decision on whether to commence a formal investigation (see [3.6]). Such an approach may allow the regulators to make a more timely and informed decision about the most appropriate way to proceed in a particular case.

[3.5] The regulators’ powers to commence an investigation

[3.5.1] *ASIC and equivalent foreign regulators*

ASIC has a broad power under s 13 of the *ASIC Act* to commence an investigation “where it has reason to suspect that there may have been committed” a contravention of the relevant law. Section 14 of that Act empowers the Minister to direct ASIC to commence an investigation where one of the grounds specified in s 14 is satisfied. ASIC has a duty to comply with the Minister’s request. ASIC may also commence an investigation, pursuant to s 15 on the basis of the information contained in the report of a receiver or liquidator. The grounds contained in s 14 and s 15 are intended to provide an independent source of investigative power to that contained in s 13. However, the

¹⁴ See, for example, the examinee’s right to legal representation (see [4.7.1]), the right to a copy of the record of examination (see [4.7.2]), the right to a private examination (see [4.8]) and the protection available by way of evidential immunity (see [4.10.2] and [4.10.3]). The Australian case law also indicates that by voluntarily providing information, the affected person may be held to have impliedly waived any legal professional privilege that would otherwise attach to the information in related proceedings: see *Goldberg v Ng* (1995) 185 CLR 83; *Mann v Carnell* (1999) 201 CLR 1; and *Rio Tinto Ltd v Commissioner of Taxation* [2005] FCA 1336. See further at [7.4.1].

¹⁵ See generally Kluver J, “ASC Investigations – Conducting s 19 Examinations and Disclosing Transcripts and Documents,” (Paper delivered at Corporate Lawyers and Regulators Forum, Hyatt Coolum, 20 May 1994) at p 2.

terminology used in s 14 and s 15 indicates that, in the majority of cases, the grounds contained in those sections would involve a suspected contravention of the relevant law and those grounds may fall within s 13.¹⁶

In the United States, the language used in the legislation governing the SEC indicates that it probably has a broader power than ASIC to commence an investigation. For example, s 21 of the *Securities Exchange Act 1934* (US) provides that the SEC may, in its discretion, make such investigations as it deems necessary to determine whether a person has, or is about to violate, the relevant law.¹⁷ The SEC can commence a formal investigation on the basis of a mere suspicion that a United States' securities law has been violated. The SEC does not have to demonstrate a probable or reasonable cause to conduct such an investigation.¹⁸

In the United Kingdom, the language used in the legislation governing the FSA also indicates that it probably has a broader power than ASIC to commence an investigation. For example, the FSA may where it thinks "there is good reason for doing so," appoint inspectors to conduct an investigation into the nature, conduct or state of the business (or a particular aspect of that business) of an authorised person or of an appointed representative or investigate the ownership or control of an authorised person.¹⁹ The FSA also has a range of specific powers to investigate suspected contraventions of various legislation.²⁰ The DTI may investigate the affairs of a corporation if the court declares that such investigation should take place or where it appears to the DTI that the corporation's affairs are being conducted for a fraudulent or

¹⁶ See, for example, the requirement of a suspected contravention in s 14(2)(a) and (b) of the *ASIC Act*.

¹⁷ See also United States Code, s 78u (a)(1); and Securities and Exchange Commission, *op cit*, n 10.

¹⁸ *United States v Morton Salt Co* 338 US 632 (1950) cited in *SEC v Fastow* (US District Court for the District of Columbia, December 2001), at <http://www.sec.gov/litigation/complaints/comp2lrl7270.htm>, viewed on 31 May 2004.

¹⁹ See s 167 of the *Financial Services and Markets Act 2000* (UK).

²⁰ See ss 21, 142, 165, 166, 167, 168, 169, 177, 191, 238, 284, 346, 398(1) and Schedule 4 of the *Financial Services and Markets Act 2000* (UK); and ss 24(1), 397 and Part V of the *Criminal Justice Act 1993* (UK).

unlawful purpose.²¹ There are also numerous other grounds listed in the legislation where the DTI can commence an investigation,²² including a specific power to investigate a corporation's ownership where it appears to the DTI that there is "good reason to do so,"²³ and a power to investigate share dealings by directors and their families "if it appears to the [DTI] that there are circumstances suggesting that a contravention may have occurred."²⁴ The Director of the Serious Fraud Office also has (an overlapping) power to investigate any suspected offence which involves serious or complex fraud.²⁵ The DTI can also appoint inspectors to investigate the affairs of a corporation, as the result of an application by the corporation or its members, and to report to the applicant on the results of that investigation provided that the applicant gives the DTI evidence to support the application and security for the costs of the investigation of not less than 5,000 pounds.²⁶

[3.5.2] ACCC and equivalent foreign regulators

The ACCC has a broad power under s 155 of the *Trade Practices Act 1974* (Cth) to commence an investigation where it has "reason to believe" that there may have been a contravention of that Act, or of the *Telecommunications Act 1997* (Cth), or of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth).²⁷ Similarly, in the United States, the ATD may exercise its investigative powers where it has "reason to believe" that a person may possess information relevant to the investigation.²⁸ The ATD also has power under the *International Antitrust Enforcement Assistance Act 1994* (US) to commence an investigation to obtain evidence relating to

²¹ Section 432(1) of the *Companies Act 1985* (UK).

²² Section 432(2) of the *Companies Act 1985* (UK). See also the DTI's wide powers to examine persons and to require the production of documents in s 83 of the *Companies Act 1989* (UK).

²³ Sections 442, 442(3), 442(3B) and 442(10) of the *Companies Act 1985* (UK).

²⁴ Sections 323, 324, 328, 446 and 446(4) of the *Companies Act 1985* (UK).

²⁵ Section 1(3) of the *Criminal Justice Act 1987* (UK).

²⁶ Section 431(1), (3) and (4) of the *Companies Act 1985* (UK).

²⁷ See generally, Clough J and Mulhern C, "The Prosecution of Corporations," Oxford University Press, Melbourne, 2002, at p 23.

²⁸ 15 USC, s 1312; and s 6201.

possible violations of foreign antitrust laws and to release that information to the relevant foreign regulator.²⁹ The ACCC has no similar statutory power (see [7.5.4.1]). In the United Kingdom, the CC may conduct an investigation where it has “reasonable grounds for suspecting” that a provision of the *Competition Act 1998* (UK) has been infringed.³⁰ The use of the word “suspecting” probably gives the CC a broader power to commence an investigation than the ACCC (see [3.5.5]).

[3.5.3] ATO and equivalent foreign regulators

The ATO has broad power under s 264 of the *Income Tax Assessment Act 1936* (Cth) to obtain oral and documentary evidence. Those investigation powers are not expressly limited by the requirement that the ATO must “suspect or believe” that a contravention of the taxation legislation may have been committed. It has been held that the ATO is empowered to undertake a “roving enquiry” and to “fish” for information.³¹ However, it is arguable that the ATO’s powers are limited by the requirement that they must be exercised for the purpose of performing its functions under the taxation legislation.³² By contrast, there is an express limitation on the ATO’s access power in s 263 of the *Income Tax Assessment Act 1936* (Cth) and the ATO can only utilise its access power for the purpose of performing its functions under the taxation legislation. However, the case law indicates that the required “purpose” is satisfied if the courts could find any connection with ascertaining the taxpayer’s taxable income or tax liability.³³ It

²⁹ 15 USC, s 1312; and s 6202.

³⁰ Section 25 of the *Competition Act 1998* (UK).

³¹ *Federal Commissioner of Taxation v ANZ Banking Group Ltd* (1979) 143 CLR 499 at 507, 517 and 524; *Industrial Equity Ltd v Deputy Federal Commissioner of Taxation* 90 ATC 5008; (1990) 170 CLR 649 and Clough J and Mulhern C, op cit n 27, at p 23.

³² Such a notice can only be issued for the purpose of obtaining information for the collection and protection of the revenue and the issue of the notice outside these purposes would constitute an improper exercise of power: see *Deputy Commissioner of Taxation v De Vonk* (1995) 61 FCR 564 at 306 and 316 per Foster J cited in *ASIC v Rich* [2005] NSWSC 62 at [247] by Austin J.

³³ *Industrial Equity Ltd v Deputy Federal Commissioner of Taxation* 90 ATC 5008; (1990) 170 CLR 649; and *Petroulias v Commissioner of Taxation* [2006] FCA 1821 at [5].

would be difficult on this test for a taxpayer to sustain an allegation of “improper purpose.”

By contrast, in the United States, the IRS’s investigative powers are expressly limited so that they can only be exercised for the purposes of ascertaining the taxpayer’s tax liability, investigating an offence, or the administration and enforcement of the United States’ revenue laws.³⁴ Similarly, in the United Kingdom, the legislation expressly provides that HMRC can only exercise its investigative powers where there are reasonable grounds for believing that a person has failed to comply with the relevant taxation law.³⁵

[3.5.4] ASIC, APRA or the ATO acting under other legislation

Where ASIC, APRA or the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth); or where ASIC or APRA are acting under the *Retirement Savings Accounts Act 1997* (Cth), they have the power to commence an investigation where it appears to them that a contravention of the legislation may have occurred.³⁶

APRA has power to appoint an inspector under s 52 of the *Insurance Act 1973* (Cth) where it appears to it that a corporation is unable to meet its liabilities or has failed to comply with a provision of the Act.³⁷

³⁴ See, for example, ss 7602 and 7612 of the *Internal Revenue Code* (US).

³⁵ See, for example, s 20(7A) of the *Taxes Management Act 1970* (UK).

³⁶ See s 263(1) of the *Superannuation Industry (Supervision) Act 1993* (Cth); and s 95(1) of the *Retirement Savings Accounts Act 1997* (Cth). APRA may also conduct an investigation where it appears that the financial position of a superannuation entity may be unsatisfactory or where the trustee of a regulated superannuation fund or approved deposit fund has not given effect to a determination of the Superannuation Complaints Tribunal: see s 37 of the *Superannuation Resolution of Complaints Act 1993* (Cth).

³⁷ HIH Royal Commission, Final Report, “Regulation of General Insurance - Disclosure of APRA’s enforcement actions,” at [8.6], at <http://www.hihroyalcom.gov.au/finalreport/Chapter%208.HTML>, viewed on 22 February 2004.

[3.5.5] *Law reform*

It is evident that there is no uniform terminology in the Australian, the United States' or in the United Kingdom's legislation which governs the regulators' powers to commence a formal investigation. Pearson has also highlighted the problems of inconsistent terminology being used to trigger identical regulatory obligations.³⁸

There is no principled reason why the Australian legislation uses different language to address the same question relating to when a regulator has the power to commence an investigation. The use of different language means that there is a different "threshold test" for each of the Australian regulators (or even different tests for the same regulator under different Acts) which must be satisfied before they have the power to commence an investigation. It is undesirable that some of the regulators' investigative powers are conditioned on the regulator having a "suspicion" and that other regulators' investigative powers are conditioned on those regulators having a "belief" because "suspicion" and "belief" have been given two different meanings in the case law.³⁹ The meaning of "suspicion" is broadly defined as "a state of conjecture or surmise where proof is lacking."⁴⁰ "Belief" is more narrowly defined as "an inclination of the mind towards assenting to, rather than rejecting a proposition."⁴¹ The case law indicates that the facts that provide the basis for a "suspicion" may be insufficient to establish a "belief." Accordingly,

³⁸ Pearson G, "Risk and the Consumer in Australian Financial Services Reform," 2006 SydLRev, at 9, at <http://www.austlii.edu.au>, viewed on 23 September 2006.

³⁹ *Coghill v McDermott* [1983] VR 751 per Marks J; and Richardson D, "Section 50 of the Australian Securities Commission Act 1989: White Knight or White Elephant?" (1994) 12 C&SLJ 418 at 426-427.

⁴⁰ *Hussein v Chong Fook Kam* [1970] AC 942 at 948 per Lord Devlin. "A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to 'a slight opinion, but without sufficient evidence', as Chambers' Dictionary expresses it": see *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266 at 303 per Kitto J cited in *George v Rockett* (1990) 93 ALR 483 at 490. Also see *ASC v Kutzner* (1998) 16 ACLC 182 at 187-188 per Heerey J; and *East Grace Corporation v Xing (No 2)* [2005] FCA 1266 at [36], [38] and [39] and the authorities cited therein.

⁴¹ *George v Rockett* (1990) 170 CLR 104 at 115; 93 ALR 483 at 491.

it may be more difficult for the regulator to establish a “belief” rather than a “suspicion.”⁴² Conversely, it may be comparatively easier for a challenger to establish that the regulator did not have the requisite “belief” than it would be to establish that the regulator did not have the requisite “suspicion.” To promote the public interest in giving the regulators broad investigative powers, it is suggested that all of the Australian regulators’ investigative powers should be subject to the requirement that the regulator “suspects” a contravention, rather than requiring the regulator to have the requisite “belief.” It is suggested that the private interests of the individual can be balanced with broad investigative powers by including a range of uniform protections within the Australian investigation regime, as discussed in Chapter 4 and Chapter 5.

It could be argued that this suggested reform may not be welcomed by the Commonwealth Treasury because it may limit the ATO’s present very broad investigative power. However, as noted above, the word “suspicion” has been given a reasonably wide interpretation in the case law. In addition, there is no principled reason why the ATO should have a wider investigative power than the other Australian regulators. This reform would promote greater certainty in the law, protect individuals from an almost “open-ended” power to invade their privacy and reduce the need to resort to litigation concerning the implied limits of the ATO’s investigation power.⁴³ This reform would also put the ATO’s investigative powers on a par with those of the IRS and HMRC. There is no evidence that the express limitation on the IRS’s or HMRC’s investigative powers has had any detrimental impact on their ability to perform their regulatory functions.

The DTI’s and the FSA’s numerous specific heads of investigative power (described at [3.5.1]) are overly technical and cumbersome and could be more easily challenged on the ground of lack of power or abuse of power. In some cases there may

⁴² *George v Rockett* (1990) 170 CLR 104 at 115; 93 ALR 483 at 490-491; *ASC v Kutzner* (1998) 25 ACSR 723; 16 ACLC 182 at 188; and *Seven Network Ltd v ACCC* (2004) 212 ALR 31; [2004] FCAFC 267 at [52].

⁴³ See, for example, the litigation in *Industrial Equity Ltd v Deputy Federal Commissioner of Taxation* 90 ATC 5008; (1990) 170 CLR 649.

be gaps where the DTI, or the FSA, lacks the power to investigate a specific matter. In some cases the DTI or the FSA, may discover factors from one specific investigation which call for a wider or different inquiry. In such a case, the DTI or the FSA would have to discontinue one investigation (causing delay and giving the suspects the opportunity to destroy evidence, leave the jurisdiction or otherwise hinder the investigation) and formally commence a wider or different investigation under another head of power. By contrast, the approach of giving the Australian regulators broad investigative powers (based on the requirement that they hold the requisite “suspicion”) does not give rise to such problems.

However, broad investigative powers may create problems in terms of overlapping investigative responsibilities thereby increasing the potential confusion in the minds of the public (particularly informants) as to the appropriate regulatory authority with which to lodge a complaint. The problem of overlapping investigative responsibilities and suggested reforms are discussed at [3.8]-[3.8.3].

It may be necessary to preserve the Minister’s power to direct ASIC to conduct an investigation (see [3.5.1]) where the Minister is of the view that the public interest requires that such an investigation be made. Such a power may be necessary to assist Ministers to properly discharge their ministerial functions. It could be argued that all of the other relevant Ministers should be given similar powers to compel the other regulators to conduct such investigations.

[3.6] Uniform guidelines governing the regulator’s decision to commence a formal investigation

The regulator’s decision about whether to commence an investigation requires the regulator to form a judgement on that issue. The HIH Report indicates that questions involving judgement can only be resolved consistently if the regulators have a set of criteria or guidelines governing the exercise of that judgement.⁴⁴ Given the common purposes

⁴⁴ HIH Royal Commission, op cit n 37, at [8.5.6].

served by the regulators' investigative powers (see [3.1]), and given the comments contained in the HIH Report, it is argued that there should be uniform guidelines which assist the Australian regulators to determine when a formal investigation should commence. Those guidelines could incorporate the factors discussed at [3.4] in relation to whether an informal inquiry or a formal investigation should be commenced by the regulator, and also the guidelines discussed at [3.8.3], which are designed to reduce the problems inherent in overlapping investigative responsibilities.

Because the regulators receive so many complaints each year,⁴⁵ it is essential that they move quickly to establish which complaints warrant investigation. It is apparent that the regulators are overburdened with complaints, do not have the resources to follow up all complaints and are using scarce resources in determining the complaints that warrant investigation.⁴⁶ Guidelines would assist to address those problems and promote the more effective use of limited resources.

In the case of the collapse of Henry Kaye's "National Investment Institute" Group of companies, the perception of some of the victims of that collapse was (rightly or wrongly) that the regulator was not interested or too busy and simply shredded

⁴⁵ In 2002-2003 ASIC received 9,292 complaints. ASIC resolved 66% of complaints made: see ASIC, *Annual Report, 2002-2003*, at p 15. Also see Stephen Menzies, (Special Adviser, National Investigations), "The investigative powers of the ASC", Australian Securities Commission Releases, October, 1991, CCH, at [80-028]. For data concerning the ACCC, see the Australian Law Reform Commission, Discussion Paper 65: Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation, 5, Overview of Federal Regulators at [5.12] and fn 16 and 17, at <http://www.austlii.edu.au>, viewed on 14 March 2004.

⁴⁶ The ACCC does not have the resources to investigate every complaint that it receives and, in determining which complaints should be investigated, it will consider factors such as the effective use of its resources in the public interest, the need to test the reach of the *Trade Practices Act 1974* (Cth), whether the alleged conduct involves new market issues and the number of consumers affected: see letter received from Kim McBey Director of the ACCC (North Queensland) dated 9 June 2005. The ACCC members meet weekly and make decisions on investigations, mergers, authorisations, whether to bring court proceedings, and decisions about access to infrastructure facilities: See ACCC, "Decision-making processes," at <http://www.accc.gov.au>, viewed on 24 September 2005.

complaints.⁴⁷ Guidelines as to when the regulator should commence an investigation may create greater certainty as to when a matter should be investigated thereby promoting greater confidence in the minds of the public that certain types of complaints will be acted upon. Guidelines may assist to change the type of perception described above.

The adoption of uniform guidelines would eliminate the need for individual regulators, like the ACCC,⁴⁸ to formulate their own ad hoc guidelines, would assist to ensure that the regulators' decisions to commence their investigations are made on a consistent basis over time thereby ensuring greater fairness (in that like cases would be treated alike) and would reduce the public perception of selective enforcement of the regulatory laws thereby reducing the possibility of revisiting the type of criticisms made in relation to the *Vizard* case.⁴⁹ The adoption of uniform guidelines would also assist the regulators to focus their attention on the key decision-making factors and to institute a more timely investigation of those complaints that satisfy the guidelines.

Any guidelines adopted should be legislatively based to ensure that they are observed by the regulators.

In those cases where the guidelines are satisfied, and the regulator fails to investigate, the regulator could be protected from any civil liability that may flow from a failure to investigate by retaining the general tenor of the existing legislation which gives the regulators an overriding discretion, rather than a duty, to investigate,⁵⁰ as discussed at

⁴⁷ Jenman N, speaking to Jones T on "Lateline"
<http://www.abc.net.au/lateline/content/2003/s998069.htm>, viewed 26/11/03.

⁴⁸ Ibid.

⁴⁹ *ASIC v Vizard* [2005] FCA 1037; and Maiden M, "Don't blame us, it's the system, says ASIC," *The Age*, 9 July, 2005 at <http://theage.com.au/news/business/dont-blame-us-its-the-system-says-asic/2005/07/08/1120704557190.html>, viewed on 5 February 2006.

⁵⁰ The regulators have a discretion, rather than a duty, to investigate particularly in view of the demise of Crown immunity: see *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53; and *Stovin v Wise* [1966] AC 923 at 958. However, this general rule is subject to any specific statutory provisions. For example, s 14 of the *ASIC Act* provides that the Minister may direct ASIC to conduct an investigation. In such a case, ASIC has a duty to

[3.5.1]. Arguably, it is not in the public interest that the regulators incur civil liability for a failure to investigate. Rather, liability should be imposed on those persons who have contravened the regulatory laws. The regulators should be given improved powers to assist private litigants to recover their losses, as discussed at [7.5.5], [8.7.1] and [8.7.2].

The uniform guidelines governing when a regulator will investigate a particular complaint should include a consideration of the following factors:

- (i) whether the regulator has jurisdiction;
- (ii) whether another regulator is the appropriate or “lead investigator” (see [3.8.3]);
- (iii) whether an informal inquiry may resolve the complaint (see [3.4]);
- (iv) the public interest in commencing the investigation including whether intervention satisfies the regulator’s objectives (see Chapter 2) and enforcement priorities;
- (v) whether any investigative and subsequent enforcement action will have a regulatory impact (such as sending a compliance message through both personal and general deterrence or educative effect) and promote public confidence in the regulatory system and relevant market;
- (vi) the nature of the contravention, including whether it involves a deliberate disregard of the relevant legislation or a serious wrongdoing or serious risk of loss or detriment to the public and the market;
- (vii) the duration and frequency of the contravention;
- (viii) whether the matter involves contravening conduct that is widespread throughout the community;
- (ix) whether the relevant persons have a history of contraventions (whether they are recidivists);
- (x) whether the matter concerns untested issues or untested regulatory powers or an ambiguity in a regulatory power;

investigate. Even if the guidelines imposed a duty to investigate, the regulators could be protected from any civil action flowing from a failure to investigate by including a defence in the legislation perhaps modelled on s 246 of the *ASIC Act* which provides that ASIC is not civilly liable where it acted in good faith when performing its functions.

- (xi) whether there is meaningful relief available or an appropriate remedy exists for the regulator to pursue;
- (xii) the prospects of success including the likelihood of recovering compensation for the victims and the likelihood of recovering investigative and enforcement costs; and
- (xiii) whether there are alternate enforcement methods.⁵¹

[3.7] Challenging the regulator’s decision to commence the investigation

[3.7.1] *Abuse of power and contempt of court*

The regulator’s decision to commence an investigation may be stayed (at common law) if it constitutes an improper exercise of power or abuse of power (*ultra vires*).⁵² The regulators must only exercise their investigative powers in good faith to perform their functions under the regulatory legislation. If they exercise their investigative powers for a collateral or ulterior purpose, such conduct can be challenged at common law on the ground of abuse of power.⁵³ However, for the reasons discussed at [3.7.4] it is very difficult for a person to challenge the regulator’s decision to commence the investigation on this ground.

⁵¹ Some of the items listed at (i)-(xiii) are discussed in ALRC Discussion Paper 65, op cit n 45, at [5.12] and fns 16, 17 and 18. See also Thomson P, “Section 50 of the ASC Law – the Power and its Application”(1993) 3 ASC Digest SPCH 75 cited in Richardson D, op cit n 39, at 430; and *ASC v Deloitte Touche Tohmatsu* (1996) 70 FCR 93; 14 ACLC 1486 at 1510-1511. See also Financial Services Authority, op cit n 1, at [2.6.1] and [2.6.2]. See generally Professor Berna Collier, “A knock at the door in the middle of the night, is it ASIC, ACCC or ATO? – ASIC’s Enforcement Powers and Activities,” Law Institute of Victoria, Annual Commercial Law Conference, 10 October 2003, <http://www.asic.gov.au/nsf>, viewed on 26 February 2004; and Schonfeld MK, op cit n 7, “Opening Investigations,” at IB. Also see the regulatory objectives contained in s 1(2) of the *ASIC Act*.

⁵² *ASC v Lucas* (1992) 7 ACSR 676 at 692-693 per Drummond J; and Kluver J, op cit n 15, at 1.

⁵³ ACCC, “Section 155 of the Trade Practices Act, Information gathering powers of the Australian Competition and Consumer Commission in relation to its enforcement function – Implied limits on the use of s 155 powers,” October 2000 at p 9, at <http://www.accc.gov.au>, viewed on 25 September 2005.

The regulator's power to investigate or examine a person terminates once civil or criminal proceedings (which are related to the investigation or examination) have commenced against that person as the regulator's investigative power is conferred for the purpose of determining whether such proceedings should commence and that purpose is complete once those proceedings have commenced.⁵⁴ The commencement or continuation of an investigation or examination in such circumstances may constitute an abuse of power or contempt of court particularly if the regulators use their investigative powers to obtain an advantage in civil litigation that the normal rules of discovery would deny.⁵⁵

It could also be argued that where a person is charged with an offence to which the investigation related, the regulator's power to examine that person in relation to that charge is probably read down by the accused person's right to silence at the concurrent criminal trial.⁵⁶ However, in *Environment Protection Authority v Caltex Refining Co Pty Ltd*,⁵⁷ Brennan J indicated that a regulator could require the production of books from a person who is charged with an offence to which the books are relevant. This is because books, unlike oral testimony, are real evidence which speak for themselves. According to Brennan

⁵⁴ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477; 68 ALJR 127 at 145 per Brennan J.

⁵⁵ *Brambles Holdings Ltd v Trade Practices Commission (No 2)* (1980) 32 ALR 328 at 335 per Franki J applying *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333; *Pioneer Concrete Pty Ltd v Trade Practices Commission* (1982) 152 CLR 460; *Hammond v The Commonwealth* (1982) 152 CLR 188 at 198 per Gibbs CJ (Mason and Murphy JJ agreeing); *Deputy Federal Commissioner of Taxation v De Vonk* (1995) 133 ALR 303 at 306; Hartnell AG, "Regulatory Enforcement by the Australian Securities Commission: An Inter-relationship of Strategies," at p 38, cited in Grabosky P and Braithwaite J, (Editors), "Business Regulation and Australia's Future," Australia Institute of Criminology, Canberra 1993; and Kluver J, "Report on Review of the Derivative Use Immunity Reforms," May, 1997 at [1.10]. However, there is inconsistent case law (particularly in relation to s 264 of the *Income Tax Assessment Act 1936* (Cth)) on the operation of the laws of contempt. Compare *Donovan v Deputy Commissioner of Taxation* (1992) 34 FCR 355; 92 ATC 4114 at 4120-4121 per Wilson J; and *Deputy Commissioner of Taxation v De Vonk* (1995) 133 ALR 303 at 306, 314 and 326 (Full Federal Court).

⁵⁶ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1994) 68 ALJR 127 at 145 per Brennan J. See also *De Greenlaw v NCSC* (1989) 15 ACLR 381 at 385 per Southwell J.

J, even if the regulator's statutory power to require the production of books terminates at the point that the accused is charged with an offence to which the books relate, the books (unlike oral evidence) could still be seized by a search warrant.⁵⁸ By contrast, Deane, Dawson and Gaudron JJ in *Environment Protection Authority v Caltex Refining Co Pty Ltd*⁵⁹ did not agree with the reasoning of Brennan J.

In the United Kingdom, the legislation governing the DTI's and the FSA's examination powers expressly provides that the examinee cannot be asked any question relating to the offence with which the examinee is charged.⁶⁰ The Australian legislation should be amended to include a similar, but wider, provision which bars the Australian regulators from using their investigative powers to require a person to provide oral or documentary information where that information is relevant to concurrent civil, civil penalty and criminal proceedings against that person. This would negate the need for a person to rely on the vagaries of common law principles as grounds for refusing to provide the information and avoid the possibility of that person being prosecuted under the legislation for non-compliance with the regulator's requirement to provide the information (see [6.8.1] and [6.8.3]). This reform would not prejudice the regulator's right to use its investigative powers to require a person to provide information if that information is not relevant to concurrent proceedings.⁶¹

⁵⁷ (1994) 68 ALJR 127 at 145.

⁵⁸ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1994) 68 ALJR 127 at 145.

⁵⁹ (1994) 68 ALJR 127 at 156.

⁶⁰ Section 434(5)(A) of the *Companies Act 1985* (UK); ss 83(6) and 83(6A) of the *Companies Act 1989* (UK); and ss 219(2) and 219(2A) of the *Insolvency Act 1986* (UK), in the case of the DTI; and s 174(1) and (2) of the *Financial Services and Markets Act 2000* (UK), in the case of the FSA. However, any statements voluntarily made by a person to the DTI or the FSA are admissible in concurrent or subsequent criminal proceedings: see *Financial Services Authority*, op cit n 1, at [2.10.5].

⁶¹ See generally *Hugall v McCusker* (1990) 2 ACSR 247; and *ASC v Lord* (1992) 10 ACLC 50 at 56 cited in *Kliver J*, op cit n 15, at p 11.

[3.7.2] *Reason to suspect or believe*

A challenger may obtain a stay (at common law) of the investigation if it was established that the regulator did not have the requisite “suspicion” or “belief” that a contravention may have been committed.⁶² That possibility is reinforced by the fact that the regulator cannot commence an investigation to determine whether there is a reason to suspect or believe.⁶³ This ground of challenge could also fall within the abuse of power ground discussed above.

However, it would be very difficult for a person to challenge the regulator’s decision on this ground as the regulator’s reason to “suspect or believe” that a contravention may have been committed does not have to be based on grounds that are objectively reasonable and may be based on hearsay or other information otherwise inadmissible as evidence in court.⁶⁴ In addition, the broad meaning of the word “suspicion” (see [3.5.5]) means that it is very difficult to prove that the regulator did not hold the requisite suspicion.

[3.7.3] *Natural justice*

It has been held in the United Kingdom that the rules of natural justice do not require a regulator to give a person an opportunity to make submissions as to why an investigation should not be commenced before it makes the decision to commence that investigation as the investigative stage is too remote from any subsequent decision to commence proceedings to attract those rules.⁶⁵ The same principle appears to apply to ASIC’s,⁶⁶ the ACCC’s,⁶⁷ and the ATO’s⁶⁸ decisions to commence an investigation and such decisions are probably not reviewable at common law on natural justice grounds.

⁶² *ASC v Lucas* (1992) 7 ACSR 676 at 692-693 per Drummond J.

⁶³ *BHP Co Ltd v NCSC* (1986) 160 CLR 492.

⁶⁴ *Coghill v McDermott* [1983] VR 751 per Marks J; and D Richardson, op cit n 39, at pp 426-427.

⁶⁵ *Norwest Holst Ltd v Department of Trade* [1978] 3 All ER 280 at 292 per Lord Denning MR, at 294 per Ormrod LJ and at 297 per Geoffrey Lane LJ.

⁶⁶ *Minosea v ASC* (1991) 14 ACSR 642 at 648-650 per Lindgren J.

⁶⁷ *Melbourne Home of Ford Pty Ltd v Trade Practices Commission* (1979) 36 FLR 450.

The problem is that, in the context of the Australian regulators, the same questions concerning the operation of the rules of natural justice in the investigation process (including decisions to investigate, to issue notices to attend for oral examination and notices to produce books) are repeatedly brought before the courts on a case by case basis for each regulator. Uniform statutory provisions which either exclude or limit the operation of “natural justice” in the investigative context would reduce the time-consuming and costly litigation in relation to this issue, as discussed at [4.7.3].

[3.7.4] *Difficulties in challenging the regulator’s decision*

It will be very difficult for a challenger to succeed on any of the grounds discussed above because the challenger bears the onus of proof and it is very difficult for the challenger to obtain access to the relevant documents possessed by the regulator. According to the case law, the Australian regulators are under no obligation to disclose the reasons for their investigations or the matters which caused the regulator to have reason to suspect or believe that there may have been a contravention of the relevant legislation⁶⁹ because such disclosure would undermine the effectiveness of their investigations.⁷⁰ Some Australian legislation simply provides that the regulators may inform the subject of the investigation that they are proposing to conduct an investigation into that person’s affairs⁷¹ and does not require them to make any other disclosures.

Furthermore, the Australian regulator’s decision to commence an investigation is not the “ultimate or operative determination” and it does not have the quality of “finality” to constitute a “reviewable decision”⁷² under the *Administrative Appeals Tribunal Act 1975*

⁶⁸ *May v Deputy Commissioner of Taxation* [1998] FCA 1247.

⁶⁹ *News Corporation Ltd v NCSC* (1983) 49 ALR 719 at 734 applying *Norwest Holst Ltd v Dept of Trade* [1978] 3 All ER 280 at 292-293. Also see *Little River Goldfields NL v Moulds*; *Lee v Moulds* (1992) 10 ACLC 121 at 127 per Davies J.

⁷⁰ *ASC v Ampolex Ltd* (1996) 14 ACLC 80 at 91 per Kirby P.

⁷¹ Section 263(1) of the *Superannuation Industry (Supervision) Act 1993* (Cth), and s 95(1) of the *Retirement Savings Accounts Act 1997* (Cth).

⁷² *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321; 94 ALR 11 at 23 per Mason CJ.

(Cth) (*AAT Act*) or the *AD(JR) Act*. Accordingly, the affected person cannot obtain reasons for that decision under that legislation.⁷³

[3.7.5] *Law reform*

It is suggested that the Australian legislation should require the Australian regulators to make similar disclosures to the affected persons to those made by the United Kingdom regulators⁷⁴ including disclosures relating to the legislative provisions pursuant to which the investigator has been appointed, the reasons for commencing or continuing the investigation, as the case may be, and any change in the scope or conduct of the investigation. There is some judicial support for this suggestion. For example, in *Boys v ASC*⁷⁵ Heerey J (French J concurring) suggested that it may be sound administrative practice for ASIC to prepare a signed document that records the holding of the suspicion required by the *ASIC Act* and which sets out the grounds for that suspicion. Those reforms would promote the private interest by giving the affected person more information upon which to make an informed decision. If an individual is given that information, that individual may be able to determine whether the regulator's decision complies with the law and whether relevant matters were taken into account.⁷⁶ Such information would also provide the individual with the means of legitimately challenging any abuse of power. Conversely, the provision of such information may deter individuals from making unmeritorious or uninformed applications for administrative or judicial review of decisions made by the regulators thereby promoting the public interest in not delaying the investigation process.⁷⁷

⁷³ See generally s 28 of the *AAT Act*; and s 13 of the *AD(JR) Act*.

⁷⁴ See s 170(2), (3), (4) and (9) of the *Financial Services and Markets Act 2000* (UK). See also the Financial Services Authority, *op cit n 1*, at [2.12.1]] and [2.12.7]; and HM Revenue and Customs Special Compliance Office Investigations: cases where serious fraud not suspected at <http://www.hmrc.gov.uk/pdfscop8.htm>, viewed on 23 December 2005.

⁷⁵ (1998) 80 FCR 403; 152 ALR 219; 26 ACSR 464; 16 ACLC 298 at 310.

⁷⁶ *Public Service Board of NSW v Osmond* (1986) 159 CLR 656; 63 ALR 559 at 562.

⁷⁷ See generally Kluver J, "ASC Investigations and Enforcement: Issues and Initiatives" (1992) 15(1) UNSWLJ 31, at pp 39-41.

It is also recognised that, for public interest reasons,⁷⁸ the Australian regulators should not be unduly hampered by obligations to disclose the details of their investigations. Accordingly, there would also have to be a limit in terms of the amount of information that is required to be released by the regulators to avoid the problem of releasing too much information or specific information that may prejudice the integrity of the investigation.⁷⁹ However, the Australian regulators should be required to release sufficient information to enable the individual to determine whether the particular regulator is acting within power when it makes its investigative demands.⁸⁰

[3.8] The regulators’ overlapping investigative responsibilities

[3.8.1] Introduction

Some Australian legislation confers overlapping investigative responsibilities on two or more regulators. There are also a number of case law examples involving overlapping investigative responsibilities (see [3.8.3]). They highlight the fact that, from the public’s point of view, it is sometimes very difficult to determine which regulator should be notified of a particular complaint. Comments made in the HIH Royal Commission’s Final Report, and in relation to the collapse of Henry Kaye’s “National Investment Institute” group of companies, indicate that, in some cases, there is confusion in the mind of the public (and confusion within the regulators’ own staff) as to which regulator has jurisdiction in a particular matter. This confusion may mean delay and an exacerbation of financial loss while it is determined which regulator should investigate the complaint.

⁷⁸ Those reasons relate to the need to quickly discover the truth about whether or not there has been a contravention of the corporations legislation and to protect investors, creditors and corporations. See Kluver J, *ibid*, at p 32.

⁷⁹ See generally *Johns v Connor* (1992) 35 FCR 1; 7 ACSR 519 at 531 per Lockhart J in the context of the disclosure requirements of a notice to attend for oral examination issued under s 19 of the *ASC Law* (now *ASIC Act*).

⁸⁰ See generally *MacDonald v ASC* (1993) 43 FCR 466; 11 ACLC 804 at 807; 116 ALR 514 at 517 per Davies J in the context of the disclosure requirements of a notice to produce books issued under s 30 of the *ASC Law* (now *ASIC Act*); and *General Benefits Pty Ltd & Tomblin v ASIC* [2001] SASC 137 at [28], [29] and [35].

Wilkins⁸¹ identifies the duplication of regulatory effort as a central problem in the Australian regulatory frameworks. According to Wilkins, duplication can make it impossible for businesses to operate and can have a detrimental impact on the development of a clear regulatory policy. Wilkins notes that there may be strong ideological or political differences underpinning the various regulatory regimes and, in the case of overlapping regulatory responsibilities, the regulated can find themselves as the “meat in the sandwich.” Wilkins is of the view that duplication or regulatory overlap may produce bad policy, legal uncertainty and the wrong type of regulatory infrastructure. Martin indicates that regulatory overlap produces inefficiencies and costly regulatory outcomes and reinforces business cynicism about complying with regulations.⁸² Grabosky indicates that the duplication in the Australian regulatory system is “wasteful, inefficient, and is an unnecessary burden on Australian taxpayers.” According to Grabosky, the Australian experience of jurisdictional conflicts over regulatory responsibilities can be contrasted with the situation in Europe where “impressive progress has been made towards the achievement of regulatory uniformity.”⁸³

[3.8.2] Statutory and case law examples of overlapping investigative responsibilities

There is some overlap between ASIC’s, APRA’s and the ATO’s regulatory functions in that they all have monitoring, supervisory and investigation functions in relation to superannuation funds. The investigation powers contained in Part 25 of the *Superannuation Industry (Supervision) Act 1993* (Cth) are conferred on ASIC, APRA and the ATO.⁸⁴

⁸¹ Wilkins R, “Duplication and Inconsistency of Regulation in a Federal System,” p 181 at 185 in Grabosky P and Braithwaite J, op cit n 55.

⁸² Martin J, “Making the Giant Competitive rather than Crushing – Industry Perspectives on Regulation Enforcement,” p 169 at 173 in Grabosky P and Braithwaite J, op cit n 55.

⁸³ Grabosky P, “Australian Regulatory Enforcement in Comparative Perspective,” 9 at pp 13-14 in Grabosky P and Braithwaite J, op cit n 55.

⁸⁴ Section 6(1)(a) and (b) of the *Superannuation Industry (Supervision) Act 1993* (Cth) sets out APRA’s regulatory responsibilities under that Act. Section 6(1)(c), (d), (e) and

ASIC and APRA also share regulatory responsibilities under the *Retirement Savings Accounts Act 1997* (Cth) in relation to monitoring and investigating retirement savings account providers.⁸⁵

There is also an overlap of ASIC's and APRA's regulatory functions in that all corporate financial entities are regulated by ASIC under the corporations legislation⁸⁶ and, at the same time, APRA is responsible for the prudential regulation of some of those corporate financial entities. ASIC also performs consumer protection functions in relation to the financial services provided by corporations which are prudentially regulated by APRA.⁸⁷ One difference between ASIC's and APRA's responsibilities is that ASIC is concerned to ensure that financial entities (who offer financial products) adequately disclose their financial position to consumers and that they (and all other corporate entities) do not trade whilst they are insolvent.⁸⁸ By contrast, APRA requires that the prudentially regulated financial entities maintain a minimum level of financial soundness so that they are able to pay the claims of policyholders in the ordinary course of business. The HIH Royal Commission indicated, in its Final Report, that ASIC is not required to give the same level of attention to the financial viability of prudentially regulated corporate entities as is expected of APRA. However, the HIH Royal Commission also indicated that where ASIC, in performing its regulatory responsibilities under the *Corporations Act*, identifies concerns about a prudentially regulated corporation's solvency, ASIC should investigate the matter in consultation with APRA.⁸⁹ There is obviously the need for greater clarity in the investigative and enforcement responsibilities of ASIC and APRA.

(f) and s 6(2) sets out ASIC's regulatory responsibilities under that Act.

⁸⁵ Section 3(1)(a) and (b) of the *Retirement Savings Accounts Act 1997* (Cth) sets out APRA's regulatory responsibilities under that Act. Section 3(1)(c) and (d) sets out ASIC's regulatory responsibilities under that Act.

⁸⁶ Defined in s 5(1) of the *ASIC Act* to include the *ASIC Act* and the *Corporations Act*.

⁸⁷ See s 13(6) of the *ASIC Act* and Division 2 of Part 2 of the *ASIC Act*. Financial services include the provision of financial products which in turn includes, among other things, insurance products, superannuation products and certain banking products: see ss 12BAA(7) and 12BAB(1) of the *ASIC Act*.

⁸⁸ See the prohibition in s 588G of the *Corporations Act*.

⁸⁹ HIH Royal Commission, Final Report, op cit n 37, at [8.3] and [8.4].

There are areas of possible investigative overlap between ASIC and the ACCC in that ASIC's broad power under s 13(1) of the *ASIC Act* to investigate suspected contraventions of Commonwealth law may include a suspected contravention of the *Trade Practices Act 1974* (Cth), provided the contravention concerns the management or affairs of a corporation or involves fraud or dishonesty and relates to a corporation. The potential for regulatory overlap is exacerbated by the fact that both Acts contain identical laws which prohibit a range of unfair practices including misleading or deceptive conduct and unconscionable conduct.⁹⁰ The courts have indicated that causes of action relating to misleading and deceptive conduct may be based upon "a tangled legislative weave" involving the relevant provisions of the *Fair Trading Act* of each State, s 52 of the *Trade Practices Act 1974* (Cth), ss 1041E or 1041H of the *Corporations Act* and s 12DA of the *ASIC Act*.⁹¹ However, such overlap is probably eliminated or reduced because ASIC's investigative and enforcement powers relate to the financial services industry only.⁹² ASIC has also entered into a Memorandum of Understanding (MoU) with the ACCC to reduce regulatory duplication.⁹³

There is, of course, a more obvious example of regulatory overlap in the sense that most of the persons who are regulated by ASIC, APRA and the ACCC are taxpayers and therefore also fall within the regulatory domain of the ATO. An investigation into the affairs of a taxpayer could also reveal that the conduct that constitutes a contravention of the taxation laws concurrently involves contraventions of the laws that fall within the regulatory domains of the other regulators.

⁹⁰ See Part IVA and Part V of the *Trade Practices Act 1974* (Cth); Division 2 of Part 2 of the *ASIC Act*; and s 1041H of the *Corporations Act*.

⁹¹ *Guglielman v Trescowthick* [2004] FCA 326 at [35].

⁹² See s 51AF of the *Trade Practices Act 1974* (Cth); and the definition of "services" in s 12BA(1) of the *ASIC Act*. See generally *ACCC and ASIC v Saatchi & Saatchi Australia Pty Ltd* [2004] FCAFC 34 at [11]; and *Guglielman v Trescowthick* [2004] FCA 326 at [27]-[29] and [35]. The ALRC has indicated that its research did not reveal areas of significant duplication of regulatory effort: see ALRC Discussion Paper 65 op cit n 45, at 8, Multiple Proceedings and Multiple Penalties, at [8.111]-[8.112].

⁹³ Memorandum of Understanding Between ASIC and the ACCC, signed 15 December 2004, at <http://www.asic.gov.au>, viewed 4 February 2006.

There are also a number of case law examples of overlapping investigative responsibilities. The National Australia Bank's recent \$360 million currency trading losses incurred as the result of unauthorised trading by its staff⁹⁴ had prudential regulation implications including possible contraventions of the *Banking Act 1959* (Cth) (APRA), of the *Corporations Act* (ASIC), of the *Crimes Act 1914* (Cth) (Australian Federal Police and Commonwealth DPP) and of the taxation legislation (ATO). The HIH case⁹⁵ involved contraventions of legislation within the regulatory domains of ASIC and APRA. The *Vizard* case⁹⁶ and ASIC's investigation of the "Offset Alpine Affair"⁹⁷ involved alleged contraventions of legislation within the regulatory domains of ASIC and the ATO.

[3.8.3] Proposed uniform guidelines to identify the lead investigator and to reduce the duplication of investigative effort

The problem of overlapping investigative responsibilities could be reduced if the Australian regulators and enforcement agencies adopted a uniform set of comprehensive guidelines designed to identify the "lead investigator" and to reduce duplication of investigative effort and the consequent waste of public resources in cases of mutual interest or concern. Under the guidelines each Australian regulator should be assigned the role of "lead investigator" in relation to particular regulatory functions so that the "lead investigator" can act as the first point of contact for complainants or informants.⁹⁸

⁹⁴ Letts S, Lateline, "Watchdog knew about NAB trade risk" <http://www.abc.net.au/lateline>, viewed on 20 February 2004. On 25 January 2005, ASIC commenced proceedings in the Melbourne Magistrates Court against two of the traders, Luke Duffy and Gianni Gray, with three charges each of using their positions dishonestly to gain advantage. The other two traders, David Bullen and Vince Ficarra, each face one charge of obtaining financial advantage by deception: see Nelson M, "Former NAB forex traders to face charges", at <http://www.trade2win.com/boards/archive/index.php/t-13192.html>, viewed on 7 January 2007.

⁹⁵ See, for example, *ASIC v Adler* [2002] NSWSC 171; *ASIC v Adler* [2002] NSWSC 483; *Adler v ASIC*; *Williams v ASIC* [2003] NSWCA 131.

⁹⁶ *ASIC v Vizard* [2005] FCA 1037 at [25].

⁹⁷ See generally *Kennedy v ASIC* [2005] FCAFC 32; and Wilson S, "Jail best deterrent for corporate crimes," *The Australian*, Tuesday 22 February, 2005 at p 25.

⁹⁸ HIH Royal Commission, Final Report, op cit n 37, at [8.3] and [8.4].

Such guidelines would create greater certainty, assist to promote greater public awareness and enhance cooperation between the Australian regulators and enforcement agencies and promote a more timely and efficient response to suspected contraventions of the legislation.

The need for a clear demarcation of investigatory functions by adopting the “lead investigator” concept and for the regulators to make better use of their powers to share information is demonstrated by the HIH collapse. In that case APRA should, arguably, have been the “lead investigator” responsible for the investigation of the matter. It could have taken any prudential enforcement measure and, at the same time, it could have released relevant information to ASIC so that ASIC could decide whether to commence proceedings under the *Corporations Act* or the *ASIC Act*. There was evidence before the HIH Royal Commission that those who worked in ASIC and APRA at an operational level assumed that the relevant information was being exchanged between ASIC and APRA at the APRA Board level (ASIC had a representative on APRA’s Board) when in fact it was not. The HIH Royal Commission recommended in its Final Report that ASIC and APRA develop formal and informal mechanisms for coordinating activities and exchanging information.⁹⁹ However, ASIC already has power to release information under s 127 of the *ASIC Act* but inexplicably this power was not utilised in the HIH case. The regulators’ powers to release information are discussed in Chapter 7.

The MoU between ASIC and the ACCC and the MoU between ASIC and APRA recognises that each regulator may receive a complaint that falls more appropriately within the jurisdiction of the other regulator, or may obtain information that is relevant to assisting the other regulator in investigating and enforcing the relevant laws.¹⁰⁰ Those MoUs set out some brief general principles that govern such a situation. However, they

⁹⁹ HIH Royal Commission, Final Report, op cit n 37, at [8.3], [8.5.1], Recommendation 20 and [8.5.7]; and see Financial System Inquiry 1997, Final Report (Stan Wallis, Chair), Australian Government Publishing Service Canberra, at p 177 cited in HIH Royal Commission, Final Report, at [8.5.1].

¹⁰⁰ Memorandum of Understanding Between ASIC and the ACCC, op cit n 93, at [7.1] and [9.1]; and Memorandum of Understanding Between ASIC and the APRA, at [7.1] signed 30 June 2004, at <http://www.asic.gov.au>, viewed 4 February 2006.

do not deal with the problems of overlapping investigative responsibilities including the identification of a “lead investigator” in the same detailed way as does the United Kingdom’s guidelines. A further problem with the existing MoUs is they were all prepared before the recent major corporate collapses, such as the HIH collapse. There is a case for redrafting all of the MoUs and policy statements in light of the lessons learned from those corporate collapses,¹⁰¹ and in light of the guidelines suggested in this section, so as to improve co-operation and information sharing between the regulators.

The United Kingdom’s regulators and enforcement agencies have developed a set of guidelines which are designed to:

- (a) determine which regulator should investigate cases of mutual interest or concern;
- (b) assist the regulators to co-operate effectively in joint investigations;
- (c) prevent a duplication of investigative effort; and
- (d) prevent subjects of the investigation being unfairly treated by reason of the involvement of two or more regulators in the same investigation.

The proposed Australian guidelines could be modelled on those used in the United Kingdom.¹⁰²

¹⁰¹ See generally Fagg S, “Calls for closer ties between ASX and ASIC, Lawyers Weekly, 4 March 2005 at <http://www.lawyersweekly.com.au/articles/7d/0c02d27d.asp>, viewed on 5 February 2006.

¹⁰² The guidelines provide that the regulator with the most appropriate regulatory functions and powers in relation to the particular matter should commence the investigation. The guidelines also set out a detailed range of factors to be considered in determining the appropriate “lead investigator.” Those factors include whether the suspected contravention has market confidence or consumer protection implications, the nature of the contravention (whether it involves serious or complex fraud), whether the contravention is best dealt with by administrative, civil or criminal proceedings, and whether the defendants are persons who are licenced or approved by a particular regulator. In view of these factors, the guidelines then list which regulator is the most appropriate regulator to take on the “lead investigator” role. They also provide that if one regulator has already commenced an investigation, the other regulator should liaise and discuss its concerns with the first regulator before deciding on the best course of action (whether to investigate, litigate or take some other action). The guidelines recommend that where regulators commence concurrent investigations, they should notify each other

Under the proposed Australian guidelines ASIC could be assigned the role of “lead investigator” in corporate insolvent trading matters, corporate governance matters, corporate disclosure matters¹⁰³ and in consumer protection matters concerning financial services and financial products. The HIH Royal Commission, in its Final Report, suggested that in general insurance matters APRA should be given the role of “lead investigator.” APRA should also be given the role of “lead investigator” in prudential regulation matters.

The ACCC should be assigned the role of “lead investigator” in consumer protection matters involving goods and services (excluding financial products and financial services) and in matters concerning anti-competitive behaviour. The MoU between ASIC and the ACCC provides a good summary of the current regulatory responsibilities of ASIC and the ACCC, at least in relation to their primary regulatory responsibilities. That summary could be adopted to assist in identifying those areas in which ASIC and the ACCC should be the “lead investigator.”¹⁰⁴

A particularly complex area in which to assign “lead investigator” responsibilities is in relation to ASIC’s, APRA’s and the ATO’s overlapping responsibilities under the *Superannuation Industry (Supervision) Act 1993* (Cth) and in relation to ASIC’s and APRA’s overlapping responsibilities under the *Retirement Savings Accounts Act 1997* (Cth). In relation to both pieces of legislation, ASIC should be assigned the role of “lead

of any significant developments in those investigations and of the major steps they propose to take including interviewing key witnesses, requiring the production of a large number of documents, executing search warrants and instituting civil and criminal proceedings: see Financial Services Authority, Handbook of Rules and Guidance, Enforcement Manual 2, Annexure 1 G: Information gathering and investigation powers, “Guidelines on investigation of cases of interest or concern to the Financial Services Authority and other prosecuting and investigating agencies,” at [2], [3], [7], [8], [9] and [11], at <http://fsahandbook.info/FSA/html/handbook/ENF/2/Annex1>, viewed on 2 February 2006.

¹⁰³ See the comments of Lucy J (former ASIC Chairman), speaking to Kohler A, “ASIC defends actions over Westpoint,” Inside Business, at <http://www.abc.net.au/insidebusiness>, viewed on 19 February 2006.

¹⁰⁴ Memorandum of Understanding Between ASIC and the ACCC, at [7.1] and Appendix B, signed 15 December 2004, at <http://www.asic.gov.au>, viewed on 4 February

investigator” where the complaint concerns corporate governance problems involving superannuation trustees or retirement savings account providers or where the complaint involves problems relating to inadequate disclosure to the members or beneficiaries of the superannuation or retirement funds. APRA should be assigned the role of “lead investigator” where the complaint relates to the prudential regulation of the superannuation or retirement funds.¹⁰⁵ The ATO should be assigned the role of “lead investigator” where the complaint concerns taxation issues involving a superannuation fund.¹⁰⁶

ASIC or APRA, as the case may be, should also be assigned the role of “lead investigator” where the defendants are persons who are licenced by either ASIC or APRA, to operate in the particular industry.

Where the appropriate remedy for a contravention of the regulatory legislation is that the defendant should be disqualified from acting in a particular industry, it is suggested that ASIC should be assigned the role of “lead investigator.” This is because ASIC, unlike most of the other Australian regulators, has the most comprehensive powers to make an administrative disqualification order or to seek a court imposed disqualification order. However, this is subject to the suggestion at [8.8.3] and [10.9.1] that the other Australian regulators be given the power to seek or make disqualification orders. If the latter reforms were adopted, then the “lead investigator” role would be allocated to the regulator that has the closest connection to the law that has been contravened.

An alternative reform option to the “lead investigator” concept is for the federal government to establish one “super regulator” involving a complete merger of ASIC and APRA thereby improving the coordination of corporate and prudential regulation. Whether the reforms suggested in this thesis could be implemented by retaining

2006.

¹⁰⁵ See generally s 6 of the *Superannuation Industry (Supervision) Act 1993* (Cth); and s 3 of the *Retirement Savings Accounts Act 1997* (Cth).

¹⁰⁶ See generally s 6 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

Australia's current "multiple regulator" model or by adopting a "single or super regulator" model are discussed in Chapter 12.

[3.9] Informants – protections and remedies

In many cases the timely intervention by the regulators is dependent upon them receiving information from informants.¹⁰⁷ The ACCC has indicated that in many cases the trigger to an investigation will be a complaint from an informant.¹⁰⁸ The SEC has indicated that it often obtains information concerning suspected contraventions of the legislation from informants.¹⁰⁹ The Australian regulators' experience is that many persons in a confidential or fiduciary relationship will not volunteer information without statutory protection.¹¹⁰ However, in the context of the primary regulatory activities of APRA, the ACCC and the ATO, there is no clear statutory "protection or remedies" regime for voluntary informants.¹¹¹ This may be a reflection of what Grabosky describes as a cultural inhibition in Australia against informing or "dobbing-in" one's fellow citizen.¹¹² However, this inhibition may be eroding. For example, in the context of ASIC and corporate regulation, reforms have been recently introduced into the *Corporations Act* that afford protections and remedies to a limited range of voluntary informants, as discussed at [3.9.3].

The concerns of informants are the same irrespective of which regulator they are dealing with. They are all concerned about any civil liability (including liability to pay damages for breach of a fiduciary or contractual duty of a confidentiality or damages for

¹⁰⁷ Approximately one third of the complaints received by ASIC are from auditors and liquidators: see A Gome, "ASC Turns up The Heat on Phoenixes", *Business Review Weekly*, August 5, 1996, 18 at 19.

¹⁰⁸ The ACCC detects contraventions through a variety of means including observation of market place conduct, proactive enquiries, information from governments (both Australian and overseas), research and analysis, government, consumer and business consultative and advisory mechanisms: see ACCC, "Enforcement priorities – Information dissemination," at <http://www.accc.gov.au>, viewed on 24 September 2005.

¹⁰⁹ Securities and Exchange Commission, *op cit* n 10.

¹¹⁰ Kluver J, *op cit* n 55, at [3.137].

¹¹¹ Kluver J, *op cit* n 77, at p 36.

¹¹² Grabosky P, "Australian Regulatory Enforcement in Comparative Perspective," p 9 at 17 in Grabosky P and Braithwaite J, *op cit* n 55.

defamation) or criminal liability or any detrimental employment consequences that may flow from providing the information to the regulator. Given these common concerns, and the public interest in the regulators quickly obtaining information, it is argued in this section that the Australian legislation should contain uniform protective provisions that will encourage informants (whether voluntary informants or informants who act under compulsion) to provide information.¹¹³ This would promote a more timely investigative and enforcement response by all regulators, reduce financial loss and promote public confidence in the regulatory system and in the financial markets.¹¹⁴ Clear disclosure procedures, protections and remedies for informants should assist to promote a culture of compliance and should lead to healthier business governance systems which are essential to the long term viability of Australian businesses.¹¹⁵

The need for a statutory reform is reinforced by the fact that the common law does not afford adequate protection or remedies to informants. The common law does not give informants any guidelines as to the proper reporting procedures and they are left in a position of uncertainty as to whether they will be protected and as to what protections (if any) are available.¹¹⁶

¹¹³ See generally the submissions made in *Hamilton v Naviede* [1995] 2 AC 75 at 99.

¹¹⁴ See generally Fisher J, Bewsey J, Waters M and Ovey E, "The Law of Investor Protection," Sweet & Maxwell, London, 2003, at pp 397-398.

¹¹⁵ Baxt B and Heeley C, "Whistleblowing: Get It Right and Everyone Wins," June 2003, Findlaw, viewed 22 February 2004.

¹¹⁶ See the problems highlighted by the decision in *Finers (a Firm) v Miro* [1991] 1 All ER 182 and discussed in Aitken L, "The Solicitor as Constructive Trustee" (1993) 67 ALJ 4 at 5 and 11-13. In some cases, voluntary informants may be protected by the common law rule that the public interest in the disclosure of serious crime to law enforcement agencies will always outweigh the public and private interests in the preservation of privacy or of confidentiality: see *Allied Mills v Trade Practices Commission* (1981) 34 ALR 105 at 126 and 141 per Sheppard J; *A v Hayden* (1984) 156 CLR 532 at 545-546 per Gibbs CJ; *Re A Company's Application* [1989] 2 All ER 248; Fisher J, Bewsey J, Waters M and Ovey E, op cit n 114, at p 387. However, informants would only be protected from legal action (for breach of confidentiality) where there is "a bona fide and reasonably tenable charge of crime": see *A v Hayden* (1984) 156 CLR 532 at 547 per Gibbs CJ. It is not clear at common law whether, and to what extent, informants must have reasonable grounds for their belief that a crime has been committed before they are released from their duty of confidentiality: see Kluver J, op cit n 77, at 36. The case law indicates that the "public interest" defence is ill-defined and limited to allegations of criminal acts: see *Weld-Blundell v Stephens*

[3.9.1] Informants who are compelled to provide information

Where the ATO and the ACCC are performing their primary regulatory functions under the taxation legislation or the *Trade Practices Act 1974* (Cth) respectively, informants who are compelled by a statutory notice to supply information to them have no clear statutory indemnity, protection or remedies¹¹⁷ and they must rely on the vagaries of the common law principles.

By contrast, where ASIC is conducting an investigation, s 92 of the *ASIC Act* affords informants who are compelled to provide information to ASIC (by way of an oral examination or notice to produce books) an indemnity from “any civil liability” that arises as the result of making disclosures to ASIC. There are similar provisions in s 341 of the *Superannuation Industry (Supervision) Act 1993* (Cth) and in ss 129 and 188 of the *Retirement Savings Accounts Act 1997* (Cth).

However, the extent of the protection afforded by those provisions is uncertain and it is not clear whether they protect a person from detrimental employment consequences. Those provisions should be amended to expressly give all informants, who provide investigative assistance to the regulators, an express right to pursue appropriate remedies for any detrimental consequences (including employment consequences) that flow from providing that assistance (see below at [3.9.3.3]).

[1920] AC 956 cited in Fisher J, Bewsey J, Waters M and Ovey E, op cit n 114, at p 386.

¹¹⁷ Section 162A of the *Trade Practices Act 1974* (Cth) only provides that a person who intimidates or causes damage to a person because they have given information to the ACCC is subject to a fine or imprisonment or both: see generally ACCC, “Collection and use of information – Informants,” October 2000 at pp 7-8, at <http://www.accc.gov.au>, viewed on 25 September 2005. A new immunity policy and procedure will be developed by the ACCC and the Commonwealth DPP which will provide some protection for informants in relation to the proposed criminal offence regime for cartel matters: see Baxt B and McDonald P, “The new trade practices penalty regime: compliance is not a luxury but an essential ingredient!,” Freehills, at http://www.freehills.com.au/publications/publications_4758.asp, viewed 7 on June 2005.

In addition, those provisions do not protect voluntary informants.¹¹⁸ Those provisions could be applied to voluntary informants by serving them with formal statutory notices to produce books or to attend for oral examination. The problem with this approach is that ASIC, APRA or the ATO cannot commence a formal investigation under the above legislation,¹¹⁹ and they cannot issue a notice to attend for examination,¹²⁰ or in some cases, they cannot issue a notice to produce books, unless they have reason to “suspect,” or “believe,” that a contravention may have occurred¹²¹ (see [3.5.1] and [5.5]). Consequently, it is preferable if those provisions were amended to protect all voluntary informants¹²² who provide investigative assistance to the regulator and, in the case of ASIC, who fall outside the narrow range of voluntary informants who are protected by s 1317AA of the *Corporations Act* (discussed below).

It is also argued that the legislation should not be restricted to only protecting informants where they make disclosures to the regulators and it should also protect informants where they make disclosures to management, the police or other independent bodies. If the protections were limited to informants who make disclosures to the regulators, the legislation would not encourage Australian businesses, management or employees and officers to take the responsibility for identifying and eliminating business fraud and misconduct.¹²³

¹¹⁸ Kluver J, op cit n 77, at 36.

¹¹⁹ See ss 13 or 15 of the *ASIC Act*; s 95(1) of the *Retirement Savings Accounts Act 1997* (Cth); and s 263(1) of the *Superannuation Industry (Supervision) Act 1993* (Cth); and s 264 of the *Income Tax Assessment Act 1936* (Cth).

¹²⁰ Section 19 of the *ASIC Act*; s 101 of the *Retirement Savings Accounts Act 1997* (Cth); and s 270 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

¹²¹ See ss 13(1), 19(1) and 28(c) and (d) and 30-34 of the *ASIC Act*; and Kluver J, op cit n 77, at p 36. ASIC does have power under s 28(a) and (b) of the *ASIC Act* to issue a notice to produce books even though it does not suspect that a contravention may have occurred. See also ss 93 and 100 of the *Retirement Savings Accounts Act 1997* (Cth); and s 269 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

¹²² Kluver J, op cit n 15, at p 2; and The 1995 Senate Committee Report Recommendation 1, the Joint Australian Law Reform Commission and Companies and Securities Advisory Committee Report on Collective Investments, Report No 65: *Collective Investments: Other People's Money* Vol 1 (1993), Recommendation 147.

¹²³ Phillipps T, “CLERP 9 whistleblower protection lacking,” Findlaw, Lawbook Co, <http://www.findlaw.com.au>, viewed 10 October 2003.

[3.9.2] *Statutory duty to inform*

Independently of whether the regulator is conducting an investigation, some persons have a statutory duty under the legislation to report certain matters to the regulator. Such informants are usually protected from civil liability for defamation by qualified privilege.¹²⁴ However, qualified privilege does not necessarily protect the informant from other forms of detrimental action, such as dismissal from their employment or demotion. In addition, as a general rule, qualified privilege does not protect voluntary informants.

The United States' legislation requires lawyers to report evidence of a material violation of the securities laws or breach of fiduciary duty or similar violation by a corporation "up the ladder" within the corporation to the chief legal counsel or the chief executive officer, the audit committee or to the full board of directors. The SEC has also proposed to introduce a "noisy withdrawal" rule which provides that if the corporation fails to respond appropriately to the lawyer's report of a material violation of a securities law, the lawyer is required to withdraw from representing the corporation and must report their withdrawal to the SEC.¹²⁵

Consideration should be given to adopting similar provisions in Australia but, if that were to occur, such provisions should be extended to other professionals including the corporation's accountants and auditors.

¹²⁴ See, for example, ss 89, 990L, 1100A, 1100B, 1100C and 1289 of the *Corporations Act*. For auditors, see ss 311 and 1220 of the *Corporations Act*; for receivers, see s 422(1) of the *Corporations Act*; for liquidators, see ss 476 and 533 of the *Corporations Act*; and *Kardas v ASC* (1998) 29 ACSR 304.

¹²⁵ See s 307 of the *Sarbanes-Oxley Act 2002* (US) (15 USC s 7245); and 17 FCR Part 205. See also Securities and Exchange Commission, Final Rule: Implementation of Standards of Professional Conduct for Attorneys, <http://www.sec.gov/rules/final/33-8185.htm>, viewed on 10 June 2004; and Jones Walker "SEC Issues Final Attorney Conduct Rule, Vol 24 March 2003, at <http://www.joneswalker.com>, viewed on 10 June 2004.

[3.9.3] *Voluntary informants – statutory protection*

The federal government's inability to legislate uniformly in relation to business regulatory activity is evidenced by the fact that, in the context of ASIC and corporate regulation, the *Corporate Law Economic Reform Program* (CLERP 9) introduced protection into the *Corporations Act* for a narrow range of voluntary informants. However, there are no similar proposals to introduce such protection in relation to informants who voluntarily supply information to APRA, the ACCC, or the ATO and they must rely on the vagaries and uncertainties associated with the common law principles.

Section 1317AA(1) of the *Corporations Act* (introduced by CLERP 9) protects a limited range of voluntary informants namely, officers and employees of corporations and persons who have a contract (for the supply of goods or services) with a corporation or employees of such persons. Sections 1317AB and 1317AC of the *Corporations Act* provide those voluntary informants with protection from the civil consequences (including civil liability for breach of confidence and defamation or detrimental employment consequences) and the criminal consequences that may otherwise arise as the result of making the disclosure to ASIC, the corporation's auditor, director, secretary or senior manager or other authorised person. Section 1317AD of the *Corporations Act* gives voluntary informants the right to recover compensation for damage caused by any victimisation that results from disclosing the information.

The advantage of this protection regime for voluntary informants is that it encourages informants to disclose the information to their manager or their employer so that the corporation is made aware of the problem and has the opportunity to remedy or control it before it becomes known to ASIC or the public. In some cases, the problem can be quickly addressed before it reaches the stage where it threatens the viability of the corporation.¹²⁶ By contrast, the disclosures contemplated by the indemnity provisions discussed at [3.9.1] (which only protect informants who act under compulsion) are those

¹²⁶ Baxt B and Heeley C, op cit n 115.

made at the investigative stage in a situation where the problem may have already become public knowledge and the corporation has collapsed.

[3.9.3.1] *Protecting the identity of voluntary informants*

Arguably, s 1317AA(1)(c) of the *Corporations Act* will not encourage informants because it requires informants to provide their names to ASIC which is often a major deterrent to potential informants.¹²⁷ The Explanatory Memorandum indicates that the information provided to ASIC under s 1317AA(1)(b)(i) of the *Corporations Act* will be protected by ASIC's statutory duty of confidentiality under the existing provisions of s 127 of the *ASIC Act*.¹²⁸ However, it is not clear whether the regulators' statutory duty of confidentiality protects the identity of voluntary informants or whether that duty only protects the identity of informants who act under compulsion.¹²⁹ The additional problem is that there is a wide range of voluntary informants who do not fall within the ambit of s 1317AA(1) of the *Corporations Act* and whose identity will not be protected by s 127 of the *ASIC Act*.

The ACCC has issued a policy statement indicating that it will protect the identity of informants because, if it does not, persons may be reluctant to provide it with information concerning alleged contraventions. However, this policy statement has no statutory backing and it cannot be relied upon by informants to compel the ACCC to protect their identities.

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¹²⁷ Phillipps T, op cit n 123.

¹²⁸ Explanatory Memorandum, *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003* (Cth) at [5.384].

¹²⁹ See ASIC Releases, Policy Statement 103: Confidentiality and release of information, 40,891 at [5]-[8]; and *Johns v ASC* (1993) 178 CLR 408.

¹³⁰ However, the ACCC has also indicated that, in some cases, the identity of the informant is an integral part of the investigation, and of the alleged offending conduct (such as unconscionable conduct), and, in such cases, it may not be possible to keep the informant's identity confidential: see generally ACCC, "Collection and use of information – Complainants and Informants," October 2000 at pp 7-8, and at p 16 citing *Re Telstra Corporation Ltd v ACCC* [2000] AATA 7, at <http://www.accc.gov.au>, viewed on 25 September 2005.

Given that the identity of a wide range of informants may not be protected by the Australian legislation, and the uncertainties associated with the common law doctrine of public interest immunity¹³¹ (see the discussion at [7.4.2]), it is argued that there should be uniform provisions in the Australian legislation which protect the identity of all informants (whether voluntary informants or informants who act under compulsion) and which provide that their identity may only be disclosed by the regulators in clearly defined circumstances. Those clearly defined circumstances could be modelled on similar provisions that exist in some of the foreign legislation. In New Zealand, for example, the *Evidence Amendment Act 1986* (NZ) provides that in trials for serious offences, the identity of informants (undercover police officers) is not to be disclosed without leave of the judge. Leave is only granted where the judge is satisfied that there is evidence which calls into question the credibility of the informant.¹³² In the United Kingdom, s 10 of the *Contempt of Court Act 1981* (UK) provides that the court cannot require a person to disclose the source of information unless such disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.¹³³

[3.9.3.2] *Protecting voluntary informants from civil or criminal liability*

Section 1317AA(1)(d) and (e) and s 1317AB of the *Corporations Act* provide that voluntary informants will be protected by the legislation from any civil or criminal liability for making the disclosure where they have reasonable grounds for suspecting a contravention of the corporations legislation and they act in “good faith” in making the disclosures.¹³⁴ Similarly, s 49C of the *General Insurance Reform Act 2001* (Cth) provides

¹³¹ *D v National Society for Prevention of Cruelty to Children* [1978] AC 171 at 218 per Lord Diplock; *Spargos Mining NL v Standard Chartered Australia Ltd (No 1)* (1990) 8 ACLC 87 at 87-88 per McClelland J; and *Jarvie v Magistrates' Court of Victoria* [1995] 1 VR 84 at 88 per Brooking J. See also *Connell v NCSC* (1989) 14 ACLR 765 at 771; 7 ACLC 748 at 753-754 per O'Bryan J; and *Zarro v ASC* (1992) 10 ACLC 831 at 851 per Gummow J.

¹³² Also see *Jarvie v Magistrates' Court of Victoria* [1995] 1 VR 84 at 94.

¹³³ This provision was considered in *In re An Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] AC 660 and referred to in *A v B Bank* [1993] QB 311 at 321.

¹³⁴ See generally Baxt B, Submission to the Joint Parliamentary Committee, CLERP 9,

an indemnity where a person, in good faith, provides the relevant information to APRA.¹³⁵ Those requirements are intended to raise the threshold for obtaining protection under the legislation. Where a person has a malicious or secondary purpose for providing the information, the requirement of “good faith” is not met and that person would not obtain any protection or remedies under the legislation.

In the United States, s 806 of the *Sarbanes-Oxley Act 2002* (US) requires informants to reasonably believe that there is a suspected contravention before they obtain any protection and denies informants any remedies where “bad faith” is involved in making the complaint.¹³⁶ Such limitations on obtaining protection are probably warranted in view of the fact there are provisions in the United States and in the United Kingdom which provide unusual incentives to informants. For example, the SEC has a power to encourage persons to provide information in insider trading cases and it may pay a bounty to informants not exceeding 10% of the civil penalty imposed against the defendant for insider trading.¹³⁷ Similar reforms could be introduced in Australia to assist to overcome the Australian cultural inhibitions identified by Grabosky¹³⁸ that militate against informing.

In the United Kingdom, ss 43B(1) and 43C of the *Public Interest Disclosure Act 1998* (UK) require that the informants’ suspicion that there has been a contravention of any civil or criminal law, or a miscarriage of justice, be based on reasonable grounds, that they

“The proposed regulatory revolution,” at http://www.aph.gov.au/Senate/committee/corporations_ctte/clerp9/submissions/sub006as.doc, viewed on 23 February 2004.

¹³⁵ See also s 49A of the *General Insurance Reform Act 2001* (Cth).

¹³⁶ See also Gibson, Dunn & Crutcher, “The Whistleblower Provisions of the *Sarbanes-Oxley Act of 2002*, <http://www.gdclaw.com/practices/publications/detail/i...>, viewed on 11 December 2003.

¹³⁷ Section 21A(e) of the *Securities Exchange Act 1934* (US). The IRS has indicated that it may also pay informants a reward: see Internal Revenue Service, “How Do You Report Suspected Tax Fraud Activity?,” at <http://www.irs.gov/compliance/enforcement/article/0,,id=106778,00.html>, viewed on 20 February 2006. HMRC also has the power to pay a reward to informants: see 26 of the *Commissioners for Revenue and Customs Act 2005* (UK).

¹³⁸ Grabosky P, “Australian Regulatory Enforcement in Comparative Perspective,” 9 at

act in “good faith” and that they make the disclosure in accordance with the provisions of the Act.¹³⁹

One problem with the requirements described above is that they may produce doubt in the minds of potential informants as to whether their belief is reasonable and whether the “good faith” threshold is met. In such cases, potential informants may also have doubts as to whether the protection and remedies under provisions like ss 1317AB-1317AD of the *Corporations Act* are available, thereby discouraging those persons from providing the information.¹⁴⁰ However, it could also be argued that these requirements impose sensible limits and that there is no public interest reason why informants who are motivated by malice, and who do not have reasonable grounds for their suspicion, should receive any statutory protection.

A further problem with the provisions in the *Corporations Act* is that there is a wide range of voluntary informants who do not fall within the ambit of those provisions and they are not protected by the existing indemnity provisions discussed at [3.9.1]. Similarly, in the United States, s 806 of the *Sarbanes-Oxley Act 2002* (US) only protects a narrow range of voluntary informants because it is restricted to protecting employees of publicly traded corporations. By contrast, in the United Kingdom, the *Public Interest Disclosure Act 1998* (UK) protects a wider range of voluntary informants because it protects “workers” and that term is widely defined in s 43K of that Act.

[3.9.3.3] *Protecting voluntary informants from detrimental employment consequences*

Section 1317AC of the *Corporations Act* prohibits persons from victimising or causing detriment to the informant in retaliation for the informant providing the relevant

¹⁴ in Grabosky P and Braithwaite J, op cit n 55.

¹³⁹ See ss 43A-43F of the *Public Interest Disclosure Act 1998* (UK). See generally Fisher J, Bewsey J, Waters M and Ovey E, op cit n 114, at pp 390-392 and 396.

¹⁴⁰ Explanatory Memorandum, *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003* (Cth) at [5.391]. See generally Kluver J, op

information. Section 1317AB gives the court the power to order the re-instatement of the employee to the same or comparable position. Section 1317AD gives informants rights to compensation where they suffer damage as the result of a contravention of s 1317AC (although, the Explanatory Memorandum states that the court may order any suitable remedy¹⁴¹). One problem is that the terms “victimisation” and “detriment” are wide and there may be litigation over their meaning. The Explanatory Memorandum indicates that the type of detriment contemplated includes termination of employment, a reduction in terms and conditions of employment, demotion or unequal or unfair treatment in the work place.¹⁴² It is preferable if the above terms were clearly defined in the legislation. For example, in the United Kingdom, s 47B of the *Public Interest Disclosure Act 1998* (UK) defines “detriment” to include “demotion, refusing a pay rise or a failure to promote and dismissal from employment.”¹⁴³

The Australian legislation could also adopt the approach in the United States where the legislation expressly prohibits a public corporation, its officers, employees, contractors and agents from dismissing, demoting, suspending, threatening, harassing or discriminating against an employee on the ground that the employee was an informant.¹⁴⁴ Section 806 of the *Sarbanes-Oxley Act 2002* (US) provides that the informants’ remedies not only includes re-instatement to their employment (with the same seniority or position)

cit n 77, at 36; and Baxt B, op cit n 134, at [7].

¹⁴¹ Explanatory Memorandum, *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003* (Cth) at [5.388].

¹⁴² Explanatory Memorandum, *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003* (Cth) at [5.388].

¹⁴³ Section 47B guarantees that the informant will not be subjected to any detriment from her/his employer on the ground that the informant has made a protected disclosure. This guarantee is enforceable by way of actions for reinstatement and/or compensation. A survey conducted in 1999 of 230 whistleblowers in the United Kingdom and the United States found that 84% subsequently lost their jobs. Another survey of 161 whistleblowers found that 11% had their salaries reduced, others were redeployed to less high profile jobs, denied promotion or sidelined from partnership opportunities: see the survey published in the *Independent*, 28 January, 1999 and a survey by Jos, Tompkins and Hayes, “In Praise of Difficult People: A Portrait of the Committed Whistleblower,” (1989) 49 *Public Administration Review* at p 552: see Fisher J, Bewsey J, Waters M and Ovey E, op cit n 114, at pp 385 and 395-396.

¹⁴⁴ See also Gibson, Dunn & Crutcher, op cit n 136.

but also gives them the right to recover back-pay plus interest and compensation for any special damages (including lawyer's fees, witness fees and litigation costs).¹⁴⁵ The legislation also provides for criminal penalties (fines and a maximum of 10 years imprisonment) against any person who "knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person" in response to the informant providing the information about a suspected breach of the relevant United States' laws.¹⁴⁶

In light of the above, it is suggested that all Australian legislation should afford all informants (whether voluntary or otherwise) uniform protection and remedies in respect of any detrimental action by employers or other persons where they had reasonable grounds for suspecting a contravention of the legislation and they provided the information in "good faith." It is incongruous that only voluntary informants who fall under s 1317AA(1) of the *Corporations Act* currently have such protection.

[3.10] Conclusion

A range of inconsistencies and inadequacies in the Australian regulators' power to commence an investigation and in relation to the protections afforded to informants have been highlighted in this chapter. Reforms have been suggested to address those problems and to promote more effective regulation.

Those reforms include:

- (a) uniform guidelines and a uniform threshold test in relation to the regulators' decision on whether to commence a formal investigation. This would assist the regulators to make decisions on a consistent basis over time thereby promoting the principle that like cases should be treated alike and should reduce the public's perception of selective enforcement of the regulatory laws;

¹⁴⁵ See also Gibson, Dunn & Crutcher, op cit n 136.

¹⁴⁶ Section 1107 of the *Sarbanes-Oxley Act 2002* (US); and 18 U.S.C, s 1513 cited in

- (b) uniform guidelines on selecting the “lead investigator.” This should promote a more timely enforcement response and should reduce a duplication of investigative effort thereby saving time and costs and would facilitate greater cooperation and greater coordination between the regulators in areas of mutual interest; and
- (c) a uniform “protection and remedies” regime for informants.

CHAPTER 4

EXAMINATIONS

by Tom Middleton

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CHAPTER 4

EXAMINATIONS

[4.1] Introduction

The regulators' power to issue a notice requiring a person to attend for an oral examination is a powerful investigative tool that is conferred on them to enable them to perform their investigative functions under the legislation.¹ The main object of the regulators' power to conduct an oral examination is to ask questions and (unlike court proceedings) to conduct a "fishing expedition"² to quickly uncover the truth about whether there has been, or is likely to be, a contravention of the relevant legislation.³ The regulators must be able to make timely⁴ use of their oral examination powers so they can quickly obtain information about possible contraventions of the regulatory laws. This information then allows them to decide (in a timely manner) whether to commence

¹ See generally *Seven Network Ltd v Australian Competition and Consumer Commission* [2004] FCAFC 267 at [48]; and *Seven Network Ltd v Australian Competition and Consumer Commission* [2004] FCA 1667 at [26].

² The term "fishing" has been described as "endeavouring, not to obtain evidence to support his case, but to discover whether he has a case at all": see *Commissioner for Railways v Small* (1938) 38 SR (NSW) 564 at 575 cited in *Spatialinfo Pty Ltd v Telstra Corporation Ltd* [2005] FCA 455 at [29]. See also *Re ABM Pastoral Co Pty Ltd* (1978) 3 ACLR 239 at 244 per Rath J; *Smorgon (No 3)* (1979) 79 ATC 4039 per Murhpy J; *Griffin & Elliot v Marsh* (1994) 94 ATC 4354 at 4357-4358 per Hunt CJ; Clough J and Mulhern C, "The Prosecution of Corporations," Oxford University Press, Melbourne, 2002, at p 23 citing *Federal Commissioner of Taxation v Australia and New Zealand Banking Group Ltd* (1979) 143 CLR 499 at 507, 517 and 524; and *Hart v Deputy Federal Commissioner of Taxation* [2005] FCA 1748 at [93].

³ See, for example, the Securities and Exchange Commission, Washington DC 2059, Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena, "Principal Uses of Information," at p 3.

⁴ To ensure that the oral examination is conducted in a timely manner, enforcement proceedings to compel a person to comply with a notice to attend an oral examination are summary in nature: see, for example, s 731 of the *Companies Act 1985* (UK); and ss 85 and 91 of the *Companies Act 1989* (UK). The United States' courts also give cases which concern questions about the validity of such notices priority over other court business: see *Jerry T O'Brien* 467 US 735; *SEC v Lavin* 111 F 3d 921, 926 (D.C. Cir 1997); *SEC v Sprecher* 594 F 2d 317, 319-320 (2nd Cir) 1979); *Donldson v United States* 400 US 517, 528-529 (1971) cited in *SEC v Fastow* (US District Court for the District of Columbia, December 2001), found at <http://www.sec.gov/litigation/complaints/comp2lrl7270.htm>, viewed on 31 May 2004.

administrative, civil (interlocutory and final), civil penalty or criminal or penalty proceedings, or a combination of those proceedings.⁵

Given that the regulators' power to conduct an oral examination serves the common public purposes described above, it is argued that they should have the same express statutory powers to achieve those purposes.

Because the regulators receive so many complaints warranting investigation, it is essential that they move quickly to establish the substance and the truth of the matter under complaint.⁶ It is argued in this chapter that the legislation should contain provisions that assist the regulators to respond promptly to a complaint by making early use of their oral examination power.⁷ This can be achieved by not only giving the regulators wide powers to examine persons on oath, but by ensuring that there is a clear legislative regime which expressly sets out the regulator's powers and the examinee's rights and obligations, and the procedures to be followed, during the conduct of the oral examination. Such express provisions would promote certainty in the law and reduce delays and costs in the conduct of the oral examination which may otherwise be incurred as the result of collateral litigation concerning these issues. This approach is also consistent with the principle of "transparency" which has been identified by Braithwaite

⁵ See generally *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission* (1982) 152 CLR 460; *NCSC v News Corporation Ltd* (1984) 52 ALR 417 at 428 per Gibbs CJ and at 439-440 per Brennan J; *Johns v Connor* (1992) 7 ACSR 519 at 531 per Lockhart J; *Constantine v Trade Practices Commission* (1994) 48 FCR 141 at 146; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1994) 68 ALJR 127 at 145 per Brennan J; *Boys v ASC* (1997) 15 ACLC 844 at 862 per Carr J; *Ex parte Wardley Australia Ltd* (1991) 9 ACLC 1565 at 1573-1574; (1991) 5 ACSR 786 at 796 per Murray J cited in *Johns v ASC* (1992) 10 ACLC 1057 at 1082-1083; *ASC v Deloitte Touche Tohmatsu* (1996) 14 ACLC 1486 at 1503 citing the Eggleston Company Law Advisory Committee Report (1969). See generally *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission* (1982) 152 CLR 460; *NCSC v News Corporation Ltd* (1984) 52 ALR 417 at 428 per Gibbs CJ and at 439-440 per Brennan J; *Johns v Connor* (1992) 7 ACSR 519 at 531 per Lockhart J; *Constantine v TPC* (1994) 48 FCR 141 at 146; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1994) 68 ALJR 127 at 145 per Brennan J; and *Boys v ASC* (1997) 15 ACLC 844 at 862 per Carr J.

⁶ For example, in 2003-2003, ASIC received 9,292 complaints, answered 672,000 telephone inquiries and had 875,000 visits to its consumer website (FIDO): see ASIC Annual Report, 2002-2003, at pp 41 and 49.

⁷ Kluver J, Report on Review of the Derivative Use Immunity Reforms, May, 1997 at [3.15].

and Drahos⁸ as an important factor in shaping global regulatory systems, as discussed at [1.5.3]. The suggested reforms are also consistent with the views of Baldwin and Cave⁹ who indicate that a good or effective regulatory regime is one that is supported by clear statutory powers (see [1.5.1.2]).

The suggested reforms may also shorten the length of the investigation thereby promoting the efficient use of public funds.¹⁰ Those reforms would also assist the regulators to take more timely interlocutory civil action to preserve property or to freeze assets (pending the outcome of the investigation, examination and subsequent civil or criminal proceedings) thereby minimising any financial loss that may be incurred by the victims including investors and creditors (creditors may include the ATO). This approach would also assist in maintaining or restoring public confidence in the regulatory system.¹¹

The suggested reforms represent current “best practice” and could be implemented by including them in the proposed *Investigation and Enforcement Powers Act* (Cth) (see [12.4.4]). This legislation would govern ASIC’s, APRA’s, the ACCC’s and the ATO’s oral examination powers and would afford uniform protections to the regulated. This legislation would produce more consistent and cost-effective regulatory outcomes because the regulators and the regulated would be governed by one set of standards that would be applied consistently across all Australian business and financial sectors and regulatory jurisdictions.

⁸ Braithwaite J and Drahos P, “Global Business Regulation,” Cambridge University Press, New York, 2000 at p 507.

⁹ Baldwin R and Cave M, “Understanding Regulation Theory Strategy, and Practice,” Oxford University Press, Oxford, 1999 at p 77.

¹⁰ According to Kluver J, ASIC completes more than 80% of its investigations within one year of commencement. See generally Kluver J, op cit n 7, at [3.14] and [3.15]. The ASC completed 67% of its major corporate investigations within twelve months and 48% of its market investigations (referrals from the Australian Stock Exchange) within 9 months: see ASC 1996/1997 Annual Report at 17.

¹¹ See Chapman R, "Challenging the ASC - s 19, ASC Law", Corporate Lawyers and Regulators Forum, Hyatt Coolum, 19-21 May, 1994 at 6. See also Farrell K, (ASC National Enforcement Co-ordinator), Australian Financial Review, 13 April 1993 cited in Richardson D, "Section 50 of the Australian Securities Commission Act 1989: White Knight or White Elephant?" (1994) 12 C&SLJ at 419.

[4.2] Public interest

The regulators' oral examination power is probably the most effective investigative method for promoting the public interest in quickly detecting, preventing and prosecuting contraventions of the legislation. The nature of oral questioning and cross-examination can result in the truth being revealed whereas with other investigative methods, such as written questions or simply a power to require the production of books (see Chapter 5), the truth would not necessarily come out.¹²

It is argued that the public interest in reducing delay in the regulators' investigative and enforcement response and in conducting the oral examination efficiently and effectively requires:

- (a) that the legislation clearly specify the information that must be disclosed in the regulators' oral examination notices thereby reducing the possibility of the validity of those notices being challenged on the ground of a defect in form (see [4.5]-[4.5.3.5]);
- (b) that the examinees and the regulators have express rights to legal representation at the examination (see [4.7.1]);
- (c) that the regulators have clear powers to maintain the integrity or secrecy of the investigation and oral examination (see [4.8]-[4.9]);
- (d) that the legislation clearly and uniformly restrict or abrogate the operation of natural justice (see [4.7.3]), the duty of confidence (see [4.6.2]), the right to silence (see [4.6.3]), the privilege against self-incrimination, the penalty privilege (see [4.10.2]) and legal professional privilege (see [4.10.3]) in the context of the oral examination power.¹³ The abrogation of those rights or protections should be expressly brought to the examinee's attention by an appropriate disclosure in the oral examination notice (see [4.5.3.5]); and
- (e) that there be clear rules relating to the evidential use that can be made of the examinee's answers in subsequent proceedings (see [4.10.2.1] and [4.10.3.1])

¹² *Robert Sterling Pty Ltd (in liq) & the Companies Act* [1979] CLC 32,549 at 32,551 per Needham J.

¹³ See generally Stephen Menzies (Special Adviser, National Investigations), "The investigative powers of the ASC," Australian Securities Commission Releases, October,

thereby promoting the public interest in bringing effective enforcement proceedings.

Those suggested reforms have some judicial support in that the courts have recognised that the regulators ought not be unduly fettered in the execution of their investigative function.¹⁴

[4.3] Private interest

While wide oral examination powers are preferable in terms of promoting the public interest, those powers must be balanced with clear procedures and protections in the legislation that promote the private interests of the individual examinees. Such an approach promotes a more timely investigation by reducing collateral litigation (based on whether the regulator has abused a power, or whether the regulator has an implied power or whether the examinee has a particular implied right) which would otherwise delay the investigation process.

The private interests of the examinees are the same irrespective of the regulator with which they are dealing. Accordingly, it is argued that the Australian legislation should afford uniform express protections and rights to those examinees (see [4.5.3.5], [4.7] and [4.10]). A clear specification of the examinees' rights in the legislation may also promote greater fairness. Only some individuals with significant financial resources may be able to establish, as the result of litigation, that they have implied protections under the current regulatory frameworks. By contrast, access to the courts for many individuals to resolve the present ambiguities in the law and to establish implied rights or protections is an unrealistic option.¹⁵ It is argued that if the individuals' rights are clearly set out in the legislation, those rights can be more readily invoked (that is, without the need for litigation) by all persons who are affected by the regulators' actions.

1991, CCH, [80-028].

¹⁴ *Johns v Connor* (1992) 7 ACSR 519 at 531 per Lockhart J.

¹⁵ See generally Mayer, E "The Role of Regulatory Enforcement in the Australian Economy," p 97 at 98 in Grabosky P and Braithwaite J (Editors), "Business Regulation and Australia's Future," Australia Institute of Criminology, Canberra 1993.

[4.4] Regulators' power to issue oral examination notices

As a general rule, the regulators must have commenced a formal investigation before they can issue a notice to attend for an oral examination. In the cases of ASIC under s 19 of the *ASIC Act*; or ASIC, APRA and the ATO under s 270 of the *Superannuation Industry (Supervision) Act 1993* (Cth); or ASIC and APRA under s 101 of the *Retirement Savings Accounts Act 1997* (Cth); those regulators can issue examination notices on the alternate grounds of “suspecting” or “believing” that a person can provide information that is relevant to the investigation.

The ACCC can only issue an oral examination notice under s 155(1) of the *Trade Practices Act 1974* (Cth) where it “believes” that a person can provide information that is relevant to the investigation.¹⁶

The ATO has a very broad power under the taxation legislation to require any person to give oral evidence concerning the taxpayer's income or assessment.¹⁷ Where the ATO is acting under the taxation legislation, its power to issue an oral examination notice is not expressly limited by the requirement that the ATO must suspect or believe that the person is capable of providing the relevant information.¹⁸

In the United States, the SEC can commence a formal investigation and therefore issue a subpoena requiring a person to attend an oral examination on the basis of a mere suspicion that a United States' securities law has been violated.¹⁹ Similarly, the IRS can

¹⁶ See generally *WA Pines Ltd v Bannerman* (1980) 41 FLR 175 at 179 and 188 cited in *Seven Network Ltd v ACCC* [2004] FCAFC 267 at [3] and [49].

¹⁷ Section 264 of the *Income Tax Assessment Act 1936* (Cth).

¹⁸ The Australian regulators' broad power to issue oral examination notices means that they could issue a notice to suspects or non-suspects: *ASC v Lord* (1991) 33 FCR 144; 10 ACLC 50 at 54 per Davies J; and *ASC v Lucas* (1992) 36 FCR 165; 7 ACSR 676 at 682 per Drummond J.

¹⁹ Section 20(a) of the *Securities Act 1933* (US); s 21(a) and (b) of the *Securities Exchange Act 1934* (US); 15 USC, ss 77t(a), 78u(a) and (b); and *SEC v Fastow* (US District Court for the District of Columbia, December 2001), found at <http://www.sec.gov/litigation/complaints/comp2lrl7270.htm>, viewed on 31 May 2004. See also Schonfeld MK, Associate Regional Director, SEC, “Planning and Managing Investigations,” APEC Financial Regulators Training Initiative, National Training Program on Enforcement, Kuala Lumpur, Malaysia, May 2002, “The Investigative Process” at III A 2. The SEC does not have to demonstrate a probable or reasonable

issue an examination summons merely on a suspicion that the law is being violated or simply to ensure that the law is not being violated.²⁰

In the United Kingdom, the DTI can issue an oral examination notice where it believes²¹ that a person can give information relevant to the investigation. The FSA and the CC can issue a notice where they consider²² that a person can give information relevant to an investigation.

There is no uniform terminology in the Australian, the United States' or in the United Kingdom's legislation that governs the regulators' powers to issue oral examination notices. There is no sound legal reason why the Australian legislation uses different language to address the same question relating to when the regulators can issue such notices. It is undesirable that the regulators' powers to issue oral examination notices under the *ASIC Act*, the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Retirement Savings Accounts Act 1997* (Cth) are conditioned on those regulators having either a "suspicion" or a "belief" because those words have been given two different meanings in the case law, as discussed at [3.5.1]-[3.5.5]. It may be more difficult for the regulator to establish a "belief," rather than a "suspicion" (see [3.5.5]). Conversely, it may be comparatively easier for a challenger to establish that the regulator did not have the requisite "belief" than it would be to establish that the regulator did not have the requisite "suspicion." Those provisions are poorly drafted

cause to conduct such an investigation: see *United States v Morton Salt Co* 338 US 632 (1950) cited in *SEC v Fastow* (US District Court for the District of Columbia, December 2001), found at <http://www.sec.gov/litigation/complaints/comp21rl7270.htm>, viewed on 31 May 2004. See also Fowler T, "Formal Upgrade of Enron Investigation gives subpoena power to SEC," *Houston Chronicle*, January 17 2002, at <http://www.houstonchronicle.com>, viewed on 31 May 2004. The ATD's oral examination power is contained in 15 USC, s 1312.

²⁰ Section 7602 of the *Internal Revenue Code* (US); *Holifield v United States*, 909 F.2d, 205 (7th Cir. 1990); *United States v Powell*, 379 US 48, 57 (1964) and *United States v Arthur Young & Co*, 465 US 805, 816 (1984) cited in Johnson G and Friedlander M, "Summons and Enforcement," at <http://www.irs.gov/pub/irs-tege/eotopicg93.pdf>, viewed on 26 February 2006.

²¹ Section 434(1) and (2) of the *Companies Act 1985* (UK). See also the DTI's wide powers to examine persons and to require the production of documents in s 83 of the *Companies Act 1989* (UK).

²² Sections 171(3) and 173(1) of the *Financial Services and Markets Act 2000* (UK). See also ss 167, 168(2), 171(1) and (2), 172, 173(2) and 173(3) of that Act; and s 26 of the *Competition Act 1998* (UK).

because if those regulators have the requisite suspicion, it would never be necessary to consider the more onerous requirement of whether they have the requisite “belief.” To promote the public interest in giving the regulators broad powers to issue such notices, it is suggested that all Australian regulators should have the power to issue the notice where they “suspect” that a person can provide the relevant information.

[4.5] Form of oral examination notices

The Australian legislation does not clearly or exhaustively specify the formal requirements for a valid notice. This uncertainty in the law means that, in some cases, the regulators are unsure as to what disclosures (concerning the investigation and oral examination) they are required to make for their notices to be formally valid. In addition, the recipients of such notices can delay the investigation process through collateral litigation challenging the formal validity of those notices on the ground of inadequate disclosure or defect in form.²³ Those problems impact on the regulators’ capacity to perform their functions effectively. It is suggested that the Australian regulators’ oral examination notices should be governed by a uniform prescribed form which specifies a concise and exhaustive list of the disclosures that they are required to make. The contents of the proposed prescribed form are discussed at [4.5.3.5].

Where ASIC issues an oral examination notice in relation to performing its functions under the *ASIC Act* and the *Corporations Act*, that notice must comply with a prescribed statutory form. This form requires ASIC to disclose a limited number of matters to the examinee including the examinee's right (under s 23(1) of the *ASIC Act*) to have a lawyer present at the examination (see [4.7.1]) and the effect of s 68 of the *ASIC Act* on the examinee’s right to claim the privilege against self-incrimination²⁴ (see [4.10.2]). However, in some cases, the courts have held that the general language used in this form impliedly requires a range of additional disclosures to be made for the notice to be formally valid (see [4.5.2]).

²³ *Re ABM Pastoral Co Pty Ltd* (1978) 3 ACLR 239 at 247 per Rath J.

²⁴ See generally ss 19, 19(2), and 85(3)(b) of the *ASIC Act*. Regulation 4 of the *Australian Securities and Investments Commission Regulations 2001* (Cth) provides that the prescribed form is Form 1.

Where ASIC, APRA or the ATO issue a notice under s 270 of the *Superannuation Industry (Supervision) Act 1993* (Cth); or ASIC and APRA issue a notice under s 101 of the *Retirement Savings Accounts Act 1997* (Cth); or the ACCC issues a notice under s 155 of the *Trade Practices Act 1974* (Cth); or the ATO issues a notice under s 264 of the *Income Tax Assessment Act 1936* (Cth); that legislation provides that they may give a “written notice” to a person requiring that person to appear for an oral examination. However, there is no prescribed form for the oral examination notices issued under this legislation.

In the United States, there are prescribed forms for the SEC’s subpoena,²⁵ the ATD’s the civil investigative demand²⁶ and the IRS’s summons.²⁷

In the United Kingdom, there is no statutorily prescribed form for the oral examination notices issued by the DTI²⁸ and the FSA.²⁹ The FSA is required to make a number of general disclosures to the subject of the investigation, as discussed at [3.7.5]. The legislation governing the CC expressly provides that the notice must inform the examinee of the subject matter and purpose of the investigation.³⁰

The uncertainty in the law has led to two conflicting judicial approaches in Australia as to the level of disclosure that is required in such notices.

²⁵ The subpoena is required to state the title of the matter, and the name and the address of the party serving the subpoena. The subpoena must command the recipient to attend at a specified place, date and time to give testimony in the matter: see Rule 45 of the United States’ Federal Rules of Civil Procedure.

²⁶ It is required to state the nature of the conduct constituting the alleged antitrust violation, the date, time and place of the oral examination, identify the investigator who will conduct the examination and identify the custodian who will retain custody of the record of examination: see 15 USC, s 1312(b)(1)(A), (B) and (4) (A) and (B).

²⁷ Form 2039 provides that it must state that it is issued for the purpose of inquiring into a tax liability, collecting tax liability, or investigating any offence connected with the administration or enforcement of the internal revenue laws concerning the person identified in the form for the periods shown in the form: see ss 7602, 7603, 7604, 7605, 7610 and 7210 of the *Internal Revenue Code* (US).

²⁸ See generally s 434 of the *Companies Act 1985* (UK).

²⁹ See generally ss 167, 168(2), 170(2), (4) and (9), 171(1) and (2), 172, 173(2) and 173(3) of the *Financial Services and Markets Act 2000* (UK).

³⁰ Section 26 of the *Competition Act 1998* (UK).

[4.5.1] *First approach to form*

The first approach to form dictates that the notice is formally valid if it appears regular on its face. Under this approach, the courts have indicated that there is no obligation on the regulator to set out in the notice or elsewhere the justification for the issue of the notice or the purpose for which it has been issued. This approach has been adopted in some cases involving s 155 of the *Trade Practices Act 1974* (Cth) and s 19 of the *ASIC Act*.³¹ This approach promotes the public interest underpinning the regulators' investigation powers because it provides the recipient with little opportunity to challenge the notice and encourages immediate compliance thereby assisting the regulator to quickly ascertain the truth of the matter.

[4.5.2] *Second approach to form*

Under the second approach to form, the courts have formulated a range of implied disclosure requirements that must be met for the notice to be formally valid. Some cases have indicated that to be formally valid, the notice must disclose the purpose for which it is issued, the relationship between the information sought and the matter under investigation to assist the recipient to determine whether the information sought does relate to that matter and whether the issuer is acting within power.³²

This approach has been adopted in some cases involving s 155 of the *Trade Practices Act 1974* (Cth), s 19 of the *ASIC Act* and s 264 of the *Income Tax Assessment Act 1936* (Cth).³³ The decisions in *Johns v Connor*³⁴ and *Johns v ASC (No 2)*³⁵ partly

³¹ *Melbourne Home of Ford Pty Ltd v Trade Practices Commission* (1979) 36 FLR 450; *Phillips v CAC (SA)* (1986) 11 ACLR 182; and *ASC v Lucas* (1992) 7 ACSR 676.

³² *Federal Commissioner of Taxation v Australia and New Zealand Banking Group Ltd (Smorgon's case)* (1979) 143 CLR 499 at 525 per Gibbs ACJ; *Pyneboard Pty Ltd v TPC* (1982) 39 ALR 565 at 571; *Bannerman v Mildura Fruit Juices Pty Ltd* (1984) 55 ALR 367 at 370; *SA Brewing Holdings Ltd v Baxt* (1989) 89 ALR 105 at 116 per Fisher and French JJ; *MacDonald v ASC* (1994) 12 ACSR 679, (1993) 11 ACLC 804 at 807; Kluver J, "ASC Investigations and Enforcement: Issues and Initiatives" (1992) 15(1) UNSWLJ 31 at p 42; and Bolton B, "Compelling Production of Documents To The ASC" (1995) QLSJ 221 at p 229.

³³ *SA Brewing Holdings Ltd v Baxt* (1989) 89 ALR 105; and *Pilnara Pty Ltd v Commissioner of Taxation* [1999] FCA 945.

³⁴ (1992) 35 FCR 1.

adopt the second approach to form³⁶ in that those decisions indicate that a notice to attend for examination (issued under s 19 of the *ASIC Act*) must disclose the section of the legislation that may have been contravened. This is an example of an implied disclosure requirement because the prescribed form for such a notice does not expressly require such a disclosure to be made. This disclosure requirement has been implied by the courts from the general language in s 19(3)(a) of the *ASIC Act* that the notice describe the “general nature of the matter under investigation” (see [4.5]). The approach in the above cases falls short of what the court required in *SA Brewing Holdings Ltd v Baxt*³⁷ in the context of a notice to produce books issued under s 155 of the *Trade Practices Act 1974* (Cth). In this case Fisher and French JJ held that the notice must go beyond describing the offence and section reference and it must disclose the necessary relationship between the information sought and the matter in respect of which it is sought. Their Honours indicated that there must be a sufficient description of the matter in the notice to enable the relationship to be discerned.³⁸

It is argued that a notice to appear for an oral examination should not have to meet the level of disclosure required by *SA Brewing Holdings Ltd v Baxt* because such disclosure could defeat the investigative purpose of the examination.³⁹ Full disclosure of relevant facts in the notice would not only alert the recipient of the progress of the investigation, but could close off other sources of inquiry thereby frustrating the purpose of that investigation.⁴⁰

It has been argued that the second approach to form (adopted in *SA Brewing Holdings Ltd v Baxt*) was developed in the context of notices to produce documents and a less precise test should apply to notices to attend oral examinations because the information to be sought at an oral examination can only be described in general terms at

³⁵ (1992) 35 FCR 146.

³⁶ *MacDonald v ASC* (1993) 11 ACLC 804 at 807 per Davies J. Also see B Bolton, *op cit* n 32, at p 229.

³⁷ (1989) 89 ALR 105.

³⁸ *SA Brewing Holdings Ltd v Baxt* (1989) 89 ALR 105 at 116 per Fisher and French JJ.

³⁹ Kluver J, “ASC Investigations – Conducting s 19 Examinations and Disclosing Transcripts and Documents” (Paper delivered at Corporate Lawyers and Regulators Forum, Hyatt Coolum, 20 May 1994) at pp 3-5.

⁴⁰ *NCSC v News Corporation Ltd* (1984) 52 ALR 417 at 437 per Mason, Wilson and Dawson JJ.

the time the notice is issued.⁴¹ Support for this argument is found in *Smorgon v Australian and New Zealand Banking Group Ltd*⁴² where it was held that a notice to attend for examination under s 264 of the *Income Tax Assessment Act 1936* (Cth) need not specify precise topics.

The ACCC has issued its own policy statement to address the uncertainty in the law but it has no statutory backing.⁴³

[4.5.3] *Law reform - formal requirements for oral examination notices*

[4.5.3.1] *Relevance*

There has been inconsistent case law on whether the regulators are required to make sufficient disclosures in their notices to assist the examinees to determine what is relevant for the purpose of the oral examination.⁴⁴

It is suggested that the regulators should be required to disclose in their notices the details of the legislation allegedly contravened (section numbers and the name of the Act), the names of the natural persons or corporations who are of interest to the investigation⁴⁵ and the time frame over which the contraventions allegedly occurred.

⁴¹ J Kluver, op cit n 32, at p 42.

⁴² (1976) 134 CLR 475.

⁴³ The ACCC is of the view that it is not required to set out in the notice all of the facts necessary to constitute a contravention of the *Trade Practices Act 1974* (Cth) nor does it have to set out the relevant evidence which caused it to issue the notice. According to the ACCC, the notice should provide enough detail so that the recipient knows what the possible contravention of the Act is. The ACCC has also adopted the practice of attaching a covering letter to the notice so that the recipient can better understand the formal language of the notice: see ACCC, “Section 155 of the Trade Practices Act, Information gathering powers of the Australian Competition and Consumer Commission in relation to its enforcement function – The use of s 155 to obtain information,” October 2000 at pp 10-11, at <http://www.accc.gov.au>, viewed on 25 September 2005.

⁴⁴ In *ASC v Avram* (1997) 15 ACLC 70 at 75 North J indicated that the disclosures in the notice are intended to assist the examinee to determine the relevance of questions to be asked at the examination. In *ASC v Graco* (1991) 5 ACSR 1 at 5 Jenkinson J rejected this suggestion (approved in *Johns v Connor* (1992) 7 ACSR 519 at 532 by Lockhart J).

⁴⁵ The regulator should not be required to identify suspects because the identity of suspects may not be known at the commencement of the investigation and the purpose

Such disclosures would assist examinees and their lawyers to determine what is relevant for the purpose of the examination⁴⁶ and would therefore assist those persons to prepare for that examination.

This suggestion is also consistent with the rules of natural justice which require that a person be given adequate notice of the alleged contravention.⁴⁷ The examinee could not give proper instructions to a lawyer and the lawyer could not give proper representation to the examinee at the oral examination if the examinee is not informed of the statutory provisions that the regulator suspects have been contravened. If the regulators were expressly required to make such disclosures, examinees could make their own decisions (based upon the suspected contraventions specified in the notice) as to whether the situation is serious enough to warrant legal representation at the examination.

[4.5.3.2] *Utility of examination*

The case law in the United Kingdom indicates that examinees are entitled to advance notice in general terms of the topics (but not the specific questions) on which they will be examined.⁴⁸ The court has indicated that from a public interest point of view, the utility of the examination would be prejudiced if examinees were not given some advance warning of the general nature of the topics on which they will be examined because those examinees will only be able to answer questions which are within their unrefreshed recollection and they will suffer no penalty for either lack of

of the investigation is to identify those suspects. In addition, such detailed disclosure may “tip off” suspects and lead to the destruction of evidence and close further lines of inquiry.

⁴⁶ Also see Newman S, "Recent developments concerning the Australian Securities Commission's powers to examine persons and to inspect and obtain books" [1992] BCLB at [316].

⁴⁷ *Connell v NCSC* (1989) 7 ACLC 748 at 754 per O'Bryan J; and *Story v NCSC* (1988) 13 ACLR 225 at 238 per Young J. By contrast, it has been held that the rules of natural justice do not apply to a notice to produce books *Minosea v ASC* (1994) 14 ACSR 642 (see [5.6.2]).

⁴⁸ *In re Norton Warburg Holdings Ltd and Norton Warburg Investment Management Ltd* [1983] BCLC 235; *In re Arrows Ltd (No 2)* [1992] BCLC 1176 cited in *Hamilton v Naviede* [1995] 2 AC 75 at 101-102 (in the context of liquidator's examinations under s 236 of the *Insolvency Act 1986* (UK)).

knowledge or failure to recollect.⁴⁹ In some Australian cases, the courts have indicated that recipients of the notices should be told the purpose of the investigation to enable them to determine the likely questions to be asked at the examination so that they can prepare for that examination.⁵⁰

It is recognised that the regulators should not be required to specify too much information in their notices as detailed disclosures may prejudice the integrity of the investigation, “tip off” suspects, lead to the destruction of evidence and close further lines of inquiry.⁵¹

A sensible balance between the competing public and private interests could be achieved if the regulators were required to give the examinees notice of the general topics on which they will be examined (but not the specific questions). This could be satisfied by giving the examinees notice of the information described previously under “relevance,” and sufficient information to enable them to determine whether the regulator is acting within its statutory power to issue the notice, as discussed at [4.4].

[4.5.3.3] *Obligation of examinee*

The obligation imposed on the recipient of a notice to attend for an oral examination is a complex one as that recipient will be required to answer a range of specific questions (under oath) relevant to the investigation. Such an obligation is much more complex than the simple obligation imposed on the recipient of a notice to produce books who is only required to produce specified books at a specified time and place (see Chapter 5). Accordingly, it is argued that the regulators should be required to disclose more information in their oral examination notices, in comparison to the disclosures required in their notices to produce books, to enable the examinee to adequately prepare for the examination.

⁴⁹ *Smorgon v Australia and New Zealand Banking Group Ltd* (1976) 134 CLR 475 at 492 per Stephen J in the context of the ATO’s power to conduct an examination under s 264 of the *Income Tax Assessment Act 1936* (Cth).

⁵⁰ *ASC v Avram* (1997) 15 ACLC 70 at 75 per North J.

⁵¹ Jenkinson J in *ASC v Graco*; and Lockhart J in *Johns v Connor* cited in Kluver J, *op cit* n 32, at pp 42-43.

[4.5.3.4] *Destruction of documents*

The difference in approach between the formal requirements of notices to appear for examination and of notices to produce books can also be justified on the ground that, unlike the situation with oral testimony, there is a danger that documentary evidence may be concealed or destroyed. Delay in compliance with a notice to produce books increases the opportunity for concealment or destruction of the relevant books. The public interest demands minimal formal disclosure requirements for notices to produce books to minimise the opportunity for delay through unmeritorious appeals based on a plethora of arguments as to alleged defects in the form of those notices.⁵²

[4.5.3.5] *Suggested formal requirements for oral examination notices*

In summary, it is suggested that the proposed prescribed form for oral examination notices should require the regulators to disclose:

- (1) the general nature of the matter to be investigated (including the section number(s) and the name of the Act allegedly contravened, the names of the natural persons or corporations who are of interest to the investigation and the time frame over which the contraventions allegedly occurred);
- (2) the identity of the regulator's inspector who will conduct the examination;
- (3) the time and place of the examination and an estimate of how long it will take;
- (4) the examinee's right to have the examination in private (see [4.9]);
- (5) the examinee's right to have a lawyer present at the examination (see [4.7.1]);
- (6) the effect of the regulator's examination power on the duty of confidentiality (see 4.6.2]), the right to silence, the privilege against self-incrimination, the penalty privilege (see [4.10.2]) and legal professional privilege (see [4.10.3]);
- (7) the examinee's right to a copy of the record of examination (see [4.7.2]);
- (8) the examinee's right to recover prescribed costs incurred in complying with the notice;

⁵² *ASC v Lucas* (1992) 7 ACSR 676 at 685 per Drummond J.

- (9) the examinee's right to judicial review of the regulator's decision to issue the notice on the ground of abuse of power (see Chapter 11);
- (10) the consequences of not complying with the notice, subject to the defence of "reasonable excuse" (see Chapter 6); and
- (11) contact details for further information from the regulator.⁵³

[4.6] Obligations of examinee

[4.6.1] Answer all relevant questions

In the case of most regulators, the examinee's obligation is to attend the oral examination and answer all questions that are "relevant" to the matter that the regulator is investigating.⁵⁴ In the case of the ATO, its oral examination power under s 264 of the *Income Tax Assessment Act 1936* (Cth), is not expressly limited by the requirement of "relevance" but that section does provide that the examinee can only be asked questions concerning the taxpayer's, or any other person's, income or assessment.

The permissible questions that can be asked by the regulators at the examination are given a wide interpretation in view of the public interest or public purpose being pursued (the discovery of the truth about whether there has been a contravention).⁵⁵ The concept of "relevance" in the litigation context does not apply to the regulators' investigative powers. Rules of litigation which limit discovery with respect to relevant issues (as defined by the pleadings) do not apply to the regulators' investigative

⁵³ See also generally ALRC Discussion Paper 65: Civil and Administrative Penalties Summary of Proposals and Questions 7. Fairness; and ASIC, Continuous disclosure obligations: infringement notices, An ASIC Guide, "The infringement notice process," May 2004, at [14], <http://www.asic.gov.au/asic/asic.nsf>, viewed on 8 June 2004.

⁵⁴ See s 19 of the *ASIC Act*; s 270 of the *Superannuation Industry (Supervision) Act 1993* (Cth); s 101 of the *Retirement Savings Accounts Act 1997* (Cth); s 155 of the *Trade Practices Act 1974* (Cth); s 21b of the *Securities Exchange Act 1934* (US); s 7602(3) of the *Internal Revenue Code* (US); s 434(2) of the *Companies Act 1985* (UK); and ss 171(3) and 173(1) of the *Financial Services and Markets Act 2000* (UK); and s 26 of the *Competition Act 1998* (UK).

⁵⁵ *Cousins v CAC* (1977) 3 ACLR 398 at 401-402 per Helsham CJ. Also see *R v Board of Trade* [1965] 1 QB 603; and *Breetveldt v Zan Zyl* [1972] 1 South African LR 304.

powers.⁵⁶ Unlike the litigation concept of “relevance,” it is not possible in an investigative context, to define in advance the limits of an investigation (and therefore what is relevant to that investigation). The regulators’ oral examination power can be used to inquire into facts that do not constitute a suspected contravention or that deny the possibility of a contravention or to establish facts that lead to a further line of inquiry or facts from which an inference can be drawn as to the existence of other facts more directly related to a suspected contravention.⁵⁷ If there is a real, as opposed to a fanciful, possibility that a line of questioning may provide information directly or indirectly relevant to the subject of the investigation, such a line of questioning is relevant to that investigation.⁵⁸ Kluver indicates that given this test, relevance is satisfied if any question asked has, with all due allowance, some relationship with one or more suspected contraventions identified in the regulators’ notice to appear for examination.⁵⁹

The wide definition of “relevance” in the investigative context means that it is very difficult for a person to challenge the regulator’s decision to ask a particular question on this ground.⁶⁰ The onus is on the examinee to prove the ground of the

⁵⁶ *Melbourne Home of Ford Pty Ltd v Trade Practices Commission* (1980) 31 ALR 519 at 529-530; *MF1 v NCA* (1991) 105 ALR 5 at 11 and 16 per Jenkinson J (Gray concurring at 17); and Kluver J, op cit n 39, at p 4. See also the statutory concept of relevance in s 55(1) of the *Evidence Act 1995* (NSW); and *ASIC v Vines* [2003] NSWSC 1237 at [14] and [18].

⁵⁷ *Melbourne Home of Ford Pty Ltd v Trade Practices Commission* (1980) 31 ALR 519 at 530 applied in *MF1 v NCA* (1991) 105 ALR 1 at 11-12 per Jenkinson J (Gray J concurring at 17) and at 22 per Ryan J.

⁵⁸ *Ross v Costigan* (1982) 41 ALR 319 at 334-335; and *ICAC v Cornwall* (1993) 116 ALR 97 at 132. In the United States, in the context of the SEC, the test is relevance to the SEC’s specific investigative purpose, and that purpose is determined by the SEC: see *SEC v Arthur Young* F. 2d at 1031 (D.C. Cir. 1978), 439 US 1071 (1979) cited in *SEC v Fastow* (US District Court for the District of Columbia, December 2001). Information is reasonably relevant to an SEC investigation when “not plainly incompetent or irrelevant to any lawful purpose”: see *SEC v Arthur Young* F. 2d0 at 1029 (D.C. Cir. 1978), 439 US 1071 (1979) (quoting *Endicott Johnson Corp v Perkins* 317 US 501, 509 (1943) cited in *SEC v Fastow* (US District Court for the District of Columbia, December 2001), found at <http://www.sec.gov/litigation/complaints/comp2lr17270.htm>, viewed on 31 May 2004.

⁵⁹ Kluver J, op cit n 39, at p 5.

⁶⁰ The ACCC’s requirement that the examinee provide the names and addresses of any possible or potential witnesses is invalid where that requirement has insufficient relevance to the matters specified in the notice: see *Riley McKay Pty Ltd v Bannerman* (1977) 15 ALR 561 at 568; *Seven Network Ltd v ACCC* [2004] FCAFC 267 at [78]-[80]; and *Seven Network Ltd v ACCC* [2004] FCA 1667 at [32]-[35].

objection and this onus may be difficult, if not impossible, to discharge because an examinee is not entitled to be told in advance of the questions to be asked nor is the regulator required to explain to the examinee why the questions are relevant to the investigation.⁶¹ By contrast, in the United States, the private interest of the individual is protected by the fact that the legislation expressly provides that, as a precondition to issuing the subpoena, the person who is asked by the SEC to issue the subpoena, may require the SEC to show the general relevance and reasonable scope of the testimony or other evidence sought.⁶² The Australian regulators' notices are not subject to such independent scrutiny before they are issued and this practice could be adopted in Australia provided that it did not unduly delay the issue of such notices.

Many Australian lawyers have been schooled in a legal education system that gives undue focus to “common law”⁶³ and traditional principles such as the concept of “relevance” in a civil litigation context and they are not sufficiently familiar with statutory investigative principles. It is suggested that a statutory definition of relevance should be included in the legislation which incorporates the broad principles described above. Such a definition would ensure that lawyers do not make unwarranted objections at the oral examination on the ground of relevance which are shaped by their traditional civil litigation notions of that concept.

[4.6.2] Confidentiality

In the context of ASIC, the case law indicates that the examinee is obliged to answer a question even though the answer may disclose information otherwise protected from disclosure on the ground of confidentiality.⁶⁴ This principle probably applies to the other Australian regulators but it is open to examinees to challenge this matter in the case of the other regulators through litigation. In the United Kingdom, in the context of the DTI and FSA, an examinee can refuse to answer questions on the

⁶¹ *Harper v Costigan* (1983) 50 ALR 665 at 675 per Morling J; and see *In re Arrows Ltd (No 2)* [1992] BCLC 1176 at 1194 cited by counsel in *Hamilton v Naviede* [1995] 2 AC 75 at 81.

⁶² See 17, Code of Federal Regulations, s 201.232 (US).

⁶³ Dietrich J and Middleton T, “Statutory remedies and equitable remedies,” (2006) 28 Australian Bar Review 136.

⁶⁴ *Parry-Jones v The Law Society* [1968] 2 WLR 397; *ASC v Ampolex* (1996) 38

ground of the banker's duty of confidentiality.⁶⁵ In the United States, there are special legislative provisions that permit a lawyer to disclose confidential client information to the SEC.⁶⁶

It is suggested that the public interest underpinning the Australian regulators' oral examination powers requires that the duty of confidentiality be expressly abrogated by the legislation. The private interest can be promoted by protecting the examinee from any civil liability that may flow from the breach of this duty by the indemnity discussed at [3.9.1]. The abrogation of this duty should also be brought to the examinee's attention by an appropriate disclosure in the oral examination notice (see [4.5.3.5]).

[4.6.3] *Right to silence*

At common law, there is no obligation on a person to answer questions asked by any government agency or to produce documents requested to a government agency. This principle is often described as the right to silence.⁶⁷ It could be argued that because the Australian regulators have the statutory power to require an examinee to answer all relevant questions, coupled with the fact that there is a penalty for non-compliance (see [6.8.3]), means that the legislation impliedly overrides the examinee's common law right to remain silent.⁶⁸ To remove any doubt, the legislation should expressly abrogate this right. This suggestion is made in view of

NSWLR 504; and *ASC v Zarro* (1991) 32 FCR 346.

⁶⁵ Section 452(1A) of the *Companies Act 1985* (UK); s 84(4) of the *Companies Act 1989* (UK); and s 175(5) of the *Financial Services and Markets Act 2000* (UK).

⁶⁶ See s 307 of the *Sarbanes-Oxley Act 2002* (US) (15 USC, s 7245); and 17 FCR Part 205.3(d). See also Securities and Exchange Commission, Final Rule: Implementation of Standards of Professional Conduct for Attorneys, <http://www.sec.gov/rules/final/33-8185.htm>, viewed on 10 June 2004; and Jones Walker "SEC Issues Final Attorney Conduct Rule," Vol 24 March 2003, at <http://www.joneswalker.com>, viewed on 10 June 2004.

⁶⁷ *Pyneboard Pty Ltd v Trade Practices Commission; Dunlop Olympic Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 351 cited in *ACCC v Daniels* [2001] FCA 244 at [23]. The right to silence is wider than the privilege against self-incrimination or the penalty privilege as it allows the accused to refuse to answer any questions and not just those that are self-incriminating: see Clough J and Mulhern C, op cit n 2, at p 44.

⁶⁸ See generally Chapman R, op cit n 11, at p 6. See also *Ryan v ASIC; In the matter*

the High Court's recent pronouncement in *ACCC v Daniels*⁶⁹ that fundamental common law rights can only be abrogated by clear language. The abrogation of this right should also be brought to the examinee's attention by an appropriate disclosure in the oral examination notice. Those suggestions are also consistent with the approach taken in some of the legislation which expressly abrogates the privilege against self-incrimination and which discloses this fact in the oral examination notice (see [4.5] and [4.10.2]).

[4.6.4] *Reasonable assistance*

The common law provides that a person has no general duty to provide reasonable assistance to the regulator.⁷⁰ This position has been modified by some of the legislation, as discussed below.

Where ASIC is acting under the *ASIC Act*;⁷¹ ASIC, APRA or the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth);⁷² or ASIC and APRA are acting under the *Retirement Savings Accounts Act 1997* (Cth);⁷³ the examinee can be required to provide reasonable assistance in connection with the investigation to the regulator. The term "reasonable assistance" is not defined in the legislation but has been defined in an Explanatory Memorandum for the purpose of the ATO's access power in s 263 of the *Income Tax Assessment Act 1936* (Cth). That definition provides that "reasonable assistance" includes physical acts such as providing a key to a locked safe, retrieving information stored on computers, producing documents and authorising persons to release information to the regulator, indicating verbally or otherwise the location of documents, the provision of adequate lighting and power, and adequate working space and facilities such as photocopying facilities.⁷⁴

of Allstate Explorations NL [2007] FCA 59 at [58].

⁶⁹ (2002) 213 CLR 593; 77 ALJR 40; 192 ALR 561; [2002] HCA 49.

⁷⁰ *O'Reilly v Commissioners of State Bank of Victoria* (1983) 153 CLR 1 at 41-42; and *Commissioner of Taxation v Australia and New Zealand Banking Group Ltd* (1979) 143 CLR 499 at 540.

⁷¹ See s 19(2) of the *ASIC Act*.

⁷² See s 270(c) of the *Superannuation Industry (Supervision) Act 1993* (Cth).

⁷³ See s 101(c) of the *Retirement Savings Accounts Act 1997* (Cth).

⁷⁴ It has been held that a person would not be required by the words "reasonable

The definition of reasonable assistance for the purpose of the ATO's access power has been referred to in cases involving ASIC.⁷⁵ Where ASIC is acting under s 19(2) of the *ASIC Act*, it has been held that the power to require reasonable assistance can be exercised independently of the oral examination power.⁷⁶ By contrast, the ATO only has a limited power to require a person to provide reasonable assistance when the ATO is exercising its statutory access power under s 263 of the *Income Tax Assessment Act 1936* (Cth).

The ACCC has no statutory power to require the examinee to provide reasonable assistance. In the case of the ACCC and the ATO (except in the limited case of s 263 discussed above), the common law applies and, as noted above, they cannot compel a person to provide reasonable assistance.

In the United Kingdom, the DTI and FSA have power to require the examinee to answer questions and "otherwise give the inspectors all assistance in connection with the investigation."⁷⁷ In the United States, the SEC and the ATD do not have a power to require an examinee to provide reasonable assistance.

There is no principled reason for the inconsistencies in the Australian regulators' ability to require a person to provide reasonable assistance. The current position is a product of the federal government's ad hoc approach to law reform, as discussed at [1.1.1]. It is suggested that all of the Australian regulators should have uniform powers to require a person to provide reasonable assistance in connection with the investigation and the term "reasonable assistance" should have a uniform statutory meaning. There should also be clear provisions that authorise the Australian regulators to require a person to provide reasonable assistance in connection with the

assistance" to provide assistance on matters unrelated to the exercise of the power such as answering questions about a person's general business affairs: *Kerrison v FC of T* (1986) 86 ATC 4103.

⁷⁵ *Smith v Papamihail* (1998) 29 ACSR 184 at 192. See also the Explanatory Memorandum to s 263(3) of the *Income Tax Assessment Act 1936* (Cth).

⁷⁶ *ASC v Kutzner* (1998) 16 ACLC 182 at 188-189; and *Smith v Papamihail* (1998) 29 ACSR 184 at 191.

⁷⁷ Section 434(2)(c) of the *Companies Act 1985* (UK); and s 173(4) of the *Financial Services and Markets Act 2000* (UK).

investigation irrespective of whether that person is required to attend for an oral examination.

[4.7] Rights of examinee

[4.7.1] Examinee's right to a lawyer

Where ASIC is acting under the *ASIC Act*;⁷⁸ ASIC, APRA and the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth);⁷⁹ or ASIC and APRA are acting under the *Retirement Savings Accounts Act 1997* (Cth);⁸⁰ that legislation gives examinees the express right to legal representation at the examination. There are similar provisions in the United States in the context of the SEC,⁸¹ the ATD,⁸² and the IRS.⁸³

In the context of the ACCC and the ATO (where the ATO is acting under the taxation legislation) and the DTI, the FSA and HMRC in the United Kingdom, the examinee has no express right to legal representation but may have an implied right to a lawyer.⁸⁴ Martin indicates that the absence of clear powers has assisted some regulators to abuse the investigation process by deliberately failing to warn examinees of their right to legal representation at the examination.⁸⁵

In the context of the ACCC's examinations, it has been held that the rules of natural justice or procedural fairness require that examinees have legal representation at

⁷⁸ Section 23 of the *ASIC Act*.

⁷⁹ Section 279 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

⁸⁰ Section 109 of the *Retirement Savings Accounts Act 1997* (Cth).

⁸¹ US Code of Federal Regulations, 17 CFR 203.7 (b)-(e).

⁸² 15 USC, ss 1312(i)(2); and 1312(i)(7)(A).

⁸³ Section 7521(b)(2) of the *Internal Revenue Code* (US).

⁸⁴ A person is entitled to a reasonable time to obtain legal representation, particularly where evidence against that person is highly technical in character. Legal representation assists the individual to understand the nature of the allegations and to prepare submissions on those allegations: see *Board of Education v Rice* [1911] AC 179.

⁸⁵ Martin J, "Making the Giant Competitive rather than Crushing – Industry Perspectives on Regulation Enforcement," 169 at 177 in Grabosky P and Braithwaite J, op cit n 15.

their examination to assist them in determining whether they are required to answer each question.⁸⁶

In *Scanlan v Swan*⁸⁷ it was held that a temporary denial of the ATO's access on the ground that the taxpayer wished to seek legal advice did not constitute the offence of obstruction.

It could be argued that a refusal to allow an examinee to be represented by a lawyer at the ACCC's or the ATO's examination, or a refusal to grant an examinee a reasonable time to seek legal advice, would constitute a denial of natural justice or an abuse of power and such conduct may be reviewable under ss 5(1)(a) or (e) or 6(1)(a) or (e) of the *Administrative Decisions (Judicial Review) Act 1977 (Cth) (AD(JR) Act)*.⁸⁸

In an attempt to address the lack of certainty in the law, the ATO,⁸⁹ the ACCC, the FSA and HMRC, have issued policy statements or codes of practice which provide that they will allow the examinee to be accompanied by a lawyer.⁹⁰ However, those policy statements or codes of practice do not have any statutory backing and do not have to be observed by the regulators and cannot be readily enforced by the examinees.

It should also be noted that none of the Australian legislation gives the regulators a right to be represented by a lawyer at the oral examination. However, they may have an implied right to a lawyer.⁹¹

⁸⁶ *Constantine v Trade Practices Commission* (1994) 48 FCR 141 at 150 per Jenkinson J.

⁸⁷ (1982) 82 ATC 4402 at 4405 in the context of the ATO's access power under s 263 of the *Income Tax Assessment Act 1936 (Cth)*.

⁸⁸ In the context of the statutory right to a lawyer under s 23 of the *ASIC Act*, it has been held that ASIC's decision to exclude a lawyer is reviewable on natural justice grounds: see *Gangemi v ASIC* (2003) 45 ACSR 383; [2003] FCA 494 at [28].

⁸⁹ Clough J and Mulhern C, op cit n 2, at p 34.

⁹⁰ See Financial Services Authority, Handbook of Rules and Guidance, Enforcement Manual at [2.14.2] and [2.14.3], <http://www.fsa.gov.uk/vhb/html/ENF/enf2.13.html>, viewed on 20 February 2004. See also HM Revenue and Customs, Code of Practice 8, Special Compliance Office Investigations, at <http://www.hmrc.gov.uk/pdfs/cop8.htm>, viewed on 20 February 2006. See also ACCC, Examinee's legal representation, op cit n 43, at p 16.

⁹¹ *A-G v Great Eastern Railway Co* (1880) 5 AC 473; *R v Gough*; *Ex parte AMIEU*

It is only in the context of ASIC, that the legislation expressly provides that the examinee's lawyer has the same protections and immunities as lawyers who appear before the court.⁹² It is not clear under the other legislation whether the examinee's lawyer, who appears before a regulator (which is an administrative body) under the examinee's express or implied right to legal representation, has the same protections and immunities (for example, from being sued for defamation) as lawyers have when they appear before the court. This problem also arises in the context of the regulators' implied right to a lawyer.

All of the Australian legislation should give examinees and the regulators express rights to legal representation and there should be express provisions that deal with the role of lawyers in those examinations and that afford lawyers the same immunities as if they were acting in court. It is argued that if both the regulators and examinees were represented by lawyers, this would also facilitate the proper and expeditious conduct of the examination particularly in those cases where the examinee is represented by a lawyer and the regulator's inspector (who conducts the examination) is not legally trained. Such a reform should also significantly reduce unwarranted objections by the examinee's lawyer during the examination.⁹³

[4.7.1.1] *Role of examinee's lawyer*

Where ASIC is acting under the *ASIC Act*,⁹⁴ ASIC, APRA or the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth),⁹⁵ or ASIC

(1965) 114 CLR 394; *Dunkel v Deputy Commissioner of Taxation* (1990) 27 FCR 524; (1990) 99 ALR 776 at 780 per Sheppard J; *ASC v Bell* (1991) 9 ACLC 1606 at 1616; *Johns v Connor* (1992) 7 ACSR 519 at 528 per Lockhart J; *Biochem Pharma Inc v Commissioner of Patents* (1998) 153 ALR 86 at 93; *ASIC v Loiterton* [2000] FCA 973 at [20] and [24]-[27]; and *Grant v Deputy Commissioner of Taxation* [2000] FCA 1298 at [22]-[28]. The ACCC is of the view that it has the right to legal representation at its examinations: see ACCC, *The Commission's use of counsel*, op cit n 43, at p 16.

⁹² Section 62(2) of the *ASIC Act*. See also s 158(2) of the *Trade Practices Act 1974* (Cth) but this provision only protects lawyers who appear before the Australian Competition Tribunal and this section has no application to examinations conducted by the ACCC under s 155 of that Act.

⁹³ *Dunkel v Deputy Commissioner of Taxation* (1990) 27 FCR 524; (1990) 99 ALR 776 at 781 per Sheppard J.

⁹⁴ Section 23 of the *ASIC Act*. Also see *Boys v ASC* (1997) 15 ACLC 844 at 872 per Carr J

and APRA are acting under the *Retirement Savings Accounts Act 1997* (Cth);⁹⁶ that legislation restricts what lawyers can do to assist examinees because it provides that the lawyer may only "at such times...as the inspector determines address the inspector and examine the examinee about matters about which the inspector has examined the examinee." The legislation empowers the inspector to stop a lawyer addressing the inspector or the examinee where the inspector is of the opinion that the lawyer is obstructing the examination.⁹⁷ The legislation imposes inconsistent penalties ranging between five to thirty penalty units for non-compliance with the inspector's requirements.⁹⁸ Where serious allegations are made, the rules of natural justice require that those allegations be tested by cross-examination.⁹⁹ However, in view of the clear language in the legislation referred to above, it would appear that cross-examination by the examinee's lawyer could be prevented.

To address the uncertainty in the law, the ACCC has issued a *Staff Instruction Paper* that outlines the lawyer's role at its oral examinations but this has no statutory backing and it is drafted from the ACCC's perspective.¹⁰⁰

In the case of the ACCC and the ATO (where it is acting under the taxation

⁹⁵ Section 279 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

⁹⁶ Section 109 of the *Retirement Savings Accounts Act 1997* (Cth).

⁹⁷ See ss 23(2), 63 and 65 of the *ASIC Act*; ss 279(2) and 284 of the *Superannuation Industry (Supervision) Act 1993* (Cth); and ss 109(2) and 115 of the *Retirement Savings Accounts Act 1997* (Cth). Some other regulators also have the power to prevent the examinee's lawyer from obstructing the examination: see s 155(5)(c) of the *Trade Practices Act 1974* (Cth); ss 8X and 8ZF of the *Taxation Administration Act 1953* (Cth); s 177 of the *Financial Services and Markets Act 2000* (UK); and s 21c of the *Securities Exchange Act 1934* (US).

⁹⁸ See s 63(1) of the *ASIC Act*; s 285 of the *Superannuation Industry (Supervision) Act 1993* (Cth); and s 115 of the *Retirement Savings Accounts Act 1997* (Cth).

⁹⁹ *Ansell v Wells* (1982) 43 ALR 41 at 63 per Lockhart J.

¹⁰⁰ According to the ACCC, the examinee's lawyer's role is limited to helping the examinee collect and prepare information for the examination, examine the examinee and clarify any of the examinee's responses, make submissions about any possible adverse findings against the examinee, and object to unclear, unfair or irrelevant questions. The ACCC has indicated that it will not permit a lawyer to interrupt or disrupt the examination. For this reason, the ACCC will not normally permit the examinee to consult with their lawyer prior to answering each question: see ACCC's *Staff Instruction Paper* at [12.10], at <http://www.accc.gov.au> cited in Clough J and Mulhern C, op cit n 2, at p 34. See also ACCC, *Examinee's legal representation*, op cit n 43, at pp 17 and 28 (Attachment 2).

legislation), the lack of express provisions creates uncertainty in the law and adds to the delay and costs because the scope of the lawyers' role would have to be ultimately determined by the courts.

In the United States, lawyers who appear before the SEC have greater freedom to represent the interests of examinees than under the Australian legislation. The United States' legislation provides that the examinee has the right to be advised by their lawyer before, during and after the conclusion of the examination. The examinee's lawyer may question the examinee briefly at the conclusion of the examination to clarify any of the answers given by the examinee. The examinee's lawyer also has the express right to make summary notes during the examination solely for the use of the examinee. In the case of examinees against whom there is an implication of wrongdoing, they (either alone or through their lawyer) have the right to cross-examine relevant witnesses and to provide rebuttal testimony or documentary evidence.¹⁰¹

It is suggested that the private interests of the examinee would be better protected if the Australian legislation adopted similar provisions.

[4.7.1.2] *Regulator's power to overrule the examinee's choice of lawyer*

The Australian legislation does not give the regulators any express powers to overrule the examinee's choice of lawyer or to exclude that lawyer from the examination. An implied power of exclusion may derive from the express power of some regulators under some of the legislation to determine who may appear at a private examination,¹⁰² as discussed at [4.9]. The regulators may also have an implied power to exclude a particular lawyer if they form the view, on reasonable grounds and in good faith, that to allow a particular lawyer to appear for the examinee may prejudice

¹⁰¹ US Code of Federal Regulations, 17 CFR 203.7(d) and (e). See also 15 USC, s 1312(i)(7).

¹⁰² Section 22 of the *ASIC Act* (ASIC); and *Johns v ASC* (1993) 178 CLR 408 at 422 per Brennan J; and *Gangemi v ASIC* [2003] FCA 494 at [33]; s 278 of the *Superannuation Industry (Supervision) Act 1993* (Cth) (ASIC, APRA or the ATO); and s 108 of the *Retirement Savings Accounts Act 1997* (Cth) (ASIC and APRA).

the collection of evidence during the examination or investigation.¹⁰³ If the collection of evidence at an oral examination is compromised, it usually proves to be an insurmountable impediment to successful civil, civil penalty or criminal proceedings.¹⁰⁴ The implied powers to exclude a lawyer do not operate to deny the examinee's right to legal representation but simply enable the regulator to overrule the examinee's choice of a particular lawyer.¹⁰⁵

The lack of an express power to exclude a particular lawyer has meant that the ACCC has issued a policy statement which is subject to the same problems outlined previously.¹⁰⁶

The Law Council of Australia has been critical of the unwillingness of some Australian regulators' inspectors to explain the grounds for their attempted exclusion of particular lawyers. It has argued that the inspectors' power to exclude lawyers is too wide and should be limited to situations where the lawyer's conduct amounts to obstruction or where the lawyer is a suspect or where the lawyer is not likely to comply with ethical requirements.¹⁰⁷

In the United States, the SEC has clearer and stronger powers, in comparison to the Australian regulators, to exclude a particular lawyer from the examination. The SEC has an unrestricted power to prevent a lawyer from representing more than one examinee in the same investigation.¹⁰⁸ The SEC may take action against witnesses or

¹⁰³ *NCA v A, B & D* (1988) 18 FCR 439; and *ASC v Bell* (1991) 9 ACLC 1606 at 1617 per Sheppard J.

¹⁰⁴ Chapman R, op cit n 11, at 8.

¹⁰⁵ *ASC v Bell* (1991) 9 ACLC 1606 at 1610 per Lockhart J.

¹⁰⁶ According to this policy, the ACCC will exclude the examinee's lawyer from the oral examination where the lawyer's presence may prejudice the examination. Such prejudice may arise where the lawyer attempts to represent more than one examinee in the same investigation, acts for the subject of the investigation not being the examinee, declines to give an undertaking to keep the content of the examination confidential, or where there is a real risk that the lawyer may be involved in the contraventions: see ACCC, Examinee's legal representation, op cit n 43, at p 16. In *ASC v Bell* (1991) 9 ACLC 1606 at 1609 and in *Stockbridge v Ogilvie* (1993) 11 ACLC 645 at 654 the court indicated that a lawyer should be excluded where that lawyer is a suspect.

¹⁰⁷ See the submissions of the Law Council of Australia to the 1994 Senate Inquiry cited in Kluver J, op cit n 39, at p 5.

¹⁰⁸ Rule 7(b) of the United States Securities Exchange Commission (SEC) Rules; and J

their counsel including suspension and disbarment of counsel from further appearance before the SEC where they engaged in “dilatatory, obstructionist or contumacious conduct” during the investigation or examination, or if they violated the Code of Federal Regulations.¹⁰⁹

It is suggested that the Australian legislation should give the regulators express powers to overrule the examinee’s choice of lawyer. Such powers would reduce challenges to the regulator’s decision to exclude a lawyer on the ground of abuse of power or a denial of natural justice. Those powers could be modelled on the factors listed in the ACCC’s policy statement. The Australian regulators should also have the same power as the SEC to prevent a lawyer representing more than one examinee in the same investigation. Those reforms would not prejudice the private interest in that while the examinees’ choice of a lawyer has been overruled, they still have the right to retain another lawyer. The Australian regulators should also be required to provide examinees and their lawyers with the reasons for the decision to exclude the particular lawyer. This reform is suggested because the case law indicates that where there is insufficient evidence for the exclusion of a lawyer and the regulator, for reasons related to protecting the integrity of the investigation, declines to provide evidence as to the reasons for the decision to exclude the particular lawyer, the Federal Court may quash the regulator’s attempt to exclude that lawyer.¹¹⁰

[4.7.2] *Copy of record of examination*

Where ASIC is acting under the *ASIC Act*,¹¹¹ ASIC, APRA or the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth);¹¹² or ASIC and APRA are acting under the *Retirement Savings Accounts Act 1997* (Cth);¹¹³ the

Kluver, op cit n 39, at pp 5-6.

¹⁰⁹ US Code of Federal Regulations, 17 CFR 203.7(b)-(e). Also see s 4C of the *Securities Exchange Act 1934* (US). The IRS has also developed procedures to deal with this problem: see IRM 4022.41(4)-(5) and 4022.42 cited in Johnson G, and Friedlander M, op cit n 20.

¹¹⁰ *ASC v Bell* (1991) 9 ACLC 1606. Also see Kluver J, op cit n 39, at pp 5-6.

¹¹¹ Sections 24 and 26 of the *ASIC Act*. These provisions apply to investigations of suspected contraventions of the *Corporations Act* and the *ASIC Act*.

¹¹² Section 280 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

¹¹³ Section 110 of the *Retirement Savings Accounts Act 1997* (Cth).

examinee has an express statutory right to a copy of the record or transcript of the examination. In the United States, the examinee has the same express right under the legislation governing the SEC,¹¹⁴ the ATD,¹¹⁵ and the IRS.¹¹⁶ In the case of the IRS, the legislation expressly gives examinees the right to make their own recording of the examination.¹¹⁷ In the context of the ACCC and the ATO (where the ATO is acting under the taxation legislation); and the DTI, the FSA, HMRC and the CC, in the United Kingdom; the examinees have no express statutory right to a copy of the record of examination but they may have an implied right to obtain a copy (under the rules of natural justice or procedural fairness – see [4.7.3]). However, the law is not clear. In some cases the court has held that the provision of a transcript to a witness is not “an immutable dictate of the rules of natural justice.”¹¹⁸ Martin indicates that the absence of clear powers has assisted some regulators to abuse the investigation process by deliberately failing to voluntarily provide records of examinations to examinees.¹¹⁹

The lack of certainty in the law has meant that the ACCC,¹²⁰ the FSA and HMRC¹²¹ have issued policy statements on this issue.

All Australian regulators should have a statutory obligation to make a record of the oral examination and a statutory obligation to give a copy of that record to the examinee and to the examinee’s lawyer. In the latter case, such a reform would better

¹¹⁴ US Code of Federal Regulations, 17 CFR 203.6.

¹¹⁵ 15 USC, s 1312(i)(6).

¹¹⁶ Section 7521(a)(2)(B) of the *Internal Revenue Code* (US).

¹¹⁷ Section 7521(a)(1) of the *Internal Revenue Code* (US).

¹¹⁸ *Adler v Cantwell* (1988) 14 ACLR 658; 7 ACLC 624 at 627; and *Connell v NCSC* (1989) 14 ACLR 765; 7 ACLC 748 at 754.

¹¹⁹ Martin J, Making the Giant Competitive rather than Crushing – Industry Perspectives on Regulation Enforcement, 169 at 177 in Grabosky P and Braithwaite J, *op cit* n 15.

¹²⁰ According to the ACCC’s policy, it will give the examinee a full transcript of the evidence given by the examinee as soon as reasonably practicable after the conclusion of the examination. The examinee’s record of examination is accompanied by a covering letter in which the ACCC invites the examinees to make written comments in relation to their record of examination by a specified date: see ACCC, Transcript, *op cit* n 43, at p 18.

¹²¹ According to their policies, they will provide a copy of the record of examination to the examinee: see Financial Services Authority, *op cit* n 90, at [2.14.2] and [2.14.3]. See also HM Revenue and Customs, *op cit*, n 90.

recognise the right of the examinee to be legally represented, as discussed at [4.7.1], and would clarify the regulators' right to impose the same non-disclosure conditions on the examinee's lawyer as can be imposed on the examinee,¹²² as discussed at [4.9].

The Australian legislation should also give the examinee a reasonable opportunity to check and correct the record of examination.¹²³ Such reforms would promote both public and private interests by ensuring that examinees and regulators have an accurate record of the examinee's evidence. The accuracy of the record of examination is important from the examinee's and the regulator's perspectives because it is on the basis of that record that the regulator may make the decision to commence proceedings against the examinee. An accurate record also assists the examinee's lawyer to provide proper legal advice to the examinee in relation to those proceedings.

Provided the examinee has been given a copy of the record of examination and has been given the opportunity to correct any errors in it, that record may serve a public interest function of streamlining the investigation and any subsequent proceedings because it contains an accurate account of the questions asked and the answers given at the examination.¹²⁴ An accurate record of examination means that the regulator has accurate information which may provide a springboard for further inquiries and that may result in the more expeditious finalisation of the investigation. An accurate record contains incontrovertible or agreed facts that should not be the subject of a future dispute between the regulator and the examinee. This may mean that subsequent proceedings are not delayed by the problems that may otherwise arise in relation to the difficulties of proving certain facts or by objections relating to the admissibility of the record of examination in those proceedings.

¹²² Kluver J, op cit n 7, at [3.139]-[3.141] and Recommendation 6.

¹²³ This right is afforded to examinees in the United States in the context of examinations conducted by the ATD: see 15 USC, s 1312(i)(4).

¹²⁴ *Trade Practices Commission v Ampol Petroleum (Victoria) Pty Ltd* (1994) 54 FCR

[4.7.3] *Natural justice*

The rules of natural justice or procedural fairness include the bias rule¹²⁵ and the hearing rules.¹²⁶ Those rules have been described as “fair play in action.”¹²⁷ They do not consist of a fixed body of rigid rules that apply inflexibly at all times to all situations. The rules of natural justice or procedural fairness may apply to administrative/investigative bodies like ASIC, APRA, the ACCC and the ATO as well as to the exercise of judicial power.¹²⁸

The inherently broad and imprecise nature of the rules of natural justice, coupled with the fact that the Australian legislation does not expressly provide for the operation of those rules¹²⁹ in the regulators’ investigations, creates uncertainty in the law as to their role in the regulators’ investigations and oral examinations.¹³⁰ There has also been a “considerable liberalisation in recent years of the criteria according to which courts imposed obligations of procedural fairness in connection with the exercise of statutory powers.”¹³¹ As a consequence of this uncertainty, there has been a considerable volume of litigation concerning whether the rules of natural justice apply to such investigations and, if so, concerning which natural justice rules apply to the investigation process.¹³²

316 at 325 per Davies J.

¹²⁵ This rule is based on the principle that judges should not hear their own cause: *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 350 per Mason J cited in *Allen v CAC (NSW)* (1988) 14 ACLR 632 at 636 by Mahoney JA.

¹²⁶ The hearing rules relate to the giving of notice of the hearing, the regulator’s use of material not disclosed to the affected person, cross-examination and the giving of reasons for the decision. See also *Dunlop v Woollahra Municipal Council* [1975] 2 NSWLR 446 at 468 per Wootten J.

¹²⁷ *Ridge v Baldwin* [1963] 1 QB 539 at 578 per Harman LJ; and *TCN Channel Nine v ABT* (1992) 28 ALD 829 at 858.

¹²⁸ *Kioa v West* (1985) 159 CLR 550 at 584 per Mason J; *Grassby v R* (1989) 168 CLR 1; *Annetts v McCann* (1990) 97 ALR 177 at 178 per Mason CJ, Deane and McHugh JJ; *NSW v Canellis* (1994) 124 ALR 513 at 523; and *Minister for Aboriginal and Torres Strait Islander Affairs v Western Australia; Minister for Aboriginal and Torres Strait Islander Affairs v Douglas* (1997) 149 ALR 78.

¹²⁹ *Johns v ASC* (1993) 178 CLR 408 at 470 per McHugh J; and *Auton v APRA* [2003] FCA 346 at [55].

¹³⁰ However, s 59(2)(c) of the *ASIC Act* expressly provides that the rules of natural justice must be observed in ASIC’s administrative hearings.

¹³¹ *May v Deputy Commissioner of Taxation* [1998] FCA 1247 per Goldberg J referring to *Minosea v ASC* (1991) 14 ACSR 642 at 648-650 per Lindgren J.

¹³² There has also been a considerable volume of litigation involving applications (under

The High Court has indicated that the rules of natural justice may apply to investigative powers (including oral examination powers) because the exercise of those powers may "destroy, defeat or prejudice a person's rights, interests or legitimate expectations."¹³³

It has been held that the presence in some of the legislation of some rights that are commensurate with some of the rules of natural justice¹³⁴ (for example, the right to a notice of an examination (see [4.4]), the right to a lawyer at the examination (see [4.7.1]), and the right to a copy of the record of examination (see [4.7.2])) does not mean that Parliament intended to exclude the other rules of natural justice from that legislation. An intention to exclude those rules must be clearly evident in the express words of the statute.¹³⁵ The courts have also indicated that the protections contained in the legislation governing ASIC (including the right to legal representation at an examination and the right to obtain a written record of the examination) do not constitute a code so as to exclude the rules of natural justice.¹³⁶

There are suggestions in the Australian¹³⁷ and United Kingdom¹³⁸ case law

ss 5(1)(a) and 6(1)(a) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth)) seeking judicial review of the regulators' decisions on the ground of an alleged denial of natural justice (see [11.5.6]).

¹³³ *Ainsworth v Criminal Justice Commission* (1992) 106 ALR 11 at 18 citing *Annetts v McCann* (1990) 97 ALR 177 at 178 per Mason CJ, Deane and McHugh JJ. Also see *Johns v ASC* (1993) 178 CLR 408 at 455 per Toohey J; *ATSIC v Ombudsman* (1995) 134 ALR 238 at 246 per Einfeld J; and *Boys v ASC* (1997) 15 ACLC 844 at 871-872 (applying *Kioa v West* (1985) 159 CLR 550 at 619 per Brennan J) in the context of the *ASIC Act*. The decision to commence an investigation does not attract the rules of natural justice: see *Ryan v ASIC; In the matter of Allstate Explorations NL* [2007] FCA 59 at [67].

¹³⁴ *Baba v Parole Board of NSW* (1986) 5 NSWLR 338 at 344-345, 347, and 349; and *Minister for Aboriginal and Torres Strait Islander Affairs v Western Australia; Minister for Aboriginal and Torres Strait Islander Affairs v Douglas* (1997) 149 ALR 78 at 90.

¹³⁵ *Johns v ASC* (1993) 178 CLR 408 at 470 per McHugh J; and *Boys v ASC* (1997) 15 ACLC 844 at 871-872 per Carr J.

¹³⁶ *Boys v ASC* (1997) 15 ACLC 844 at 871-872 per Carr J.

¹³⁷ It has been held that the ATO has a duty to treat taxpayers fairly: see CCH online at [6] and the authorities cited therein.

¹³⁸ *In Re Pergamon Press Ltd* (1971) Ch 388 at 407. See also Financial Services Authority, op cit 90, at [2.5.12]-[2.5.15]. Section 31 of the *Competition Act 1998* (UK) requires the CC to give written notice to the affected person to give that person the opportunity to make representations before the CC makes a final decision on whether the Act has been infringed.

that investigators have a general duty (based on the rules of natural justice) to act fairly. It has been held that where there is a prospect of the regulator making an adverse finding, fairness requires the regulator to give the subjects of the investigation the opportunity of putting their case and persuading the inspector to different views.¹³⁹ The duty to act fairly in investigations is also recognised in the United States.¹⁴⁰

[4.7.3.1] *Law reform*

The ALRC has suggested that there should be a legislative restatement of the common law presumption that all entities that are subject to a regulator's decision-making power must be afforded natural justice or procedural fairness in the absence of any express statutory statement excluding or limiting the operation of such protection.¹⁴¹

Given the imprecise nature of the rules of natural justice, and the imprecise content of the duty to act fairly, it is suggested that the Australian legislation should clearly state the role of natural justice or procedural fairness in the regulators' investigations and oral examinations. Such a reform would introduce certainty in the law and promote the private interest of the individual by clearly specifying the protections available. Such a reform would also promote the public interest in the regulator conducting a more timely investigation by reducing collateral litigation concerning whether the affected persons should be afforded various natural justice protections in the conduct of the investigation or oral examination. From the regulators' perspective, the adoption of formal requirements, such as those required by the rules of natural justice, could seriously limit the scope and timeliness of each regulator's enforcement action and inappropriately inject into the actions they commence issues irrelevant to the merits of the proceedings, concerning whether a particular individual had been afforded natural justice.¹⁴²

¹³⁹ *Bond Corporation Holdings Ltd v Sulan* (1990) 8 ACLC 562 at 570.

¹⁴⁰ World Trade Organisation – Permanent Mission of the United States - Procedural Fairness, 6 November 2002, fns 10 and 17.

¹⁴¹ ALRC, Discussion Paper 65, op cit n 53, at Proposal 7-1 and 7-2.

¹⁴² See generally, *Menzies S*, op cit n 13, at [80028].

The Australian legislation should exhaustively list which natural justice requirements apply to the investigation and oral examination process. For example, the legislation could specify that:

- (a) the regulator must be free from bias in relation to its initial decision to commence the investigation (that is, it must act in good faith and for a proper purpose in making this decision);¹⁴³
- (b) examinees must be afforded the right to legal representation (see [4.7.1]);
- (c) examinees (and their lawyers) must be given a copy of the transcript of their evidence (see [4.7.2] and [4.7.2.1]);
- (d) examinees must be given a copy of the interim and final reports of the investigation;
- (e) examinees must be given a right to be heard before publication of the final report of the investigation to correct any errors (see [4.7.2]); and
- (f) examinees must be given a right to be heard before a final decision is made to release the record of examination and other information relating to them publicly or to other regulators.¹⁴⁴

The suggested reforms could be supported by creating offences where the regulators' officers do not comply with the relevant requirements and by giving the examinee a statutory right to recover compensation for any loss suffered as a result of the breach.

The suggested reforms would address the current problem of similar matters

¹⁴³ This suggestion is consistent with the case law involving ASIC which indicates that it must be free from bias in relation to its decision to commence the investigation, but there is no general requirement that the investigating official or inspector must be free from bias in the conduct of the oral examination including the framing of questions at the examination: see *Boys v ASC* (1998) 16 ACLC 298 at 311-312 per Heerey J (French J concurring) citing *Karounos v CAC* (1989) 7 ACLC 567 at 570-571 per King CJ; and *Clements Bower; Yaxley v Bower; Rouse v Bower* (1990) 8 ACLC 801 at 809 per Neasey J.

¹⁴⁴ This suggestion is consistent with the case law involving ASIC which indicates that where ASIC intends to release the examinee's record of examination to another regulator or agency, the rules of natural justice require it to afford the examinee/suspect an opportunity to be heard on that matter before it releases such information: see *Johns v ASC* (1993) 178 CLR 408; and the regulators' power to release such information under ss 25(3) and 127(3) and (4) of the *ASIC Act*, and s 3E of the *Taxation Administration Act 1953* (Cth).

being repeatedly litigated in the context of the different regulators and resolve those matters “once and for all” for all regulators and the regulated. The reforms are not without precedent. On 3 July 2002 the *Migration Act 1958* (Cth) was amended by inserting ss 51A-64 which introduced an exhaustive statement of the operation of the natural justice hearing rules in relation to visa applications under the Act.¹⁴⁵

[4.8] Privacy of examinations

Where ASIC is acting under the *ASIC Act*,¹⁴⁶ ASIC, APRA or the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth);¹⁴⁷ or ASIC and APRA are acting under the *Retirement Savings Accounts Act 1997* (Cth);¹⁴⁸ the legislation expressly provides that the examination must be conducted in private and that the persons entitled to be present at the examination are the regulator’s inspector, the examinee, a staff member approved by the regulator and any other person approved by the regulator’s inspector. The legislation also expressly provides that the examinee’s lawyer may attend.¹⁴⁹ The legislation imposes a penalty of 10 penalty units or imprisonment for three months or both upon a person who is present at an examination but who is not authorised to attend that examination.¹⁵⁰ However, the legislation does not give the regulator’s inspector express powers or grounds on which that inspector can remove a person (who was originally authorised to attend the examination) from the examination.

There are no express provisions in the *Trade Practices Act 1974* (Cth) or in the taxation legislation on whether the oral examination must be conducted in public or private. This means that the parties may need to resort to litigation to determine this question.

¹⁴⁵ See Administrative Review Council, “The Scope of Judicial Review, Discussion Paper,” 2003, p 62, at fn 66.

¹⁴⁶ Section 22 of the *ASIC Act*. See also *Johns v ASC* (1993) 178 CLR 408 at 422 per Brennan J; and *Gangemi v ASIC* [2003] FCA 494 at [33].

¹⁴⁷ Section 279 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

¹⁴⁸ Section 108 of the *Retirement Savings Accounts Act 1997* (Cth).

¹⁴⁹ See s 23 of the *ASIC Act*; s 279 of the *Superannuation Industry (Supervision) Act 1993* (Cth); and s 109 of the *Retirement Savings Accounts Act 1997* (Cth).

¹⁵⁰ See s 22(3) of the *ASIC Act*; s 278(3) of the *Superannuation Industry (Supervision) Act 1993* (Cth); and s 108(3) of the *Retirement Savings Accounts Act 1997* (Cth).

The common law provides that litigation should be conducted in open court, rather than by way of a private hearing. Publicity is the very soul of justice and contributes to the integrity of judges and promotes public confidence in the administration of justice.¹⁵¹ By contrast, in the investigative context, the decision in *Constantine v Trade Practices Commission*¹⁵² indicates that the Trade Practices Commission (now the ACCC) had an implied power to conduct an examination under s 155 of the *Trade Practices Act 1974* (Cth) in private so as to protect the integrity and secrecy of the examination or investigation.

However, one problem with relying on an implied power is that it does not answer all of the related questions including who can be present at a private examination; on what grounds can persons be refused entry to the examination; how, and on what grounds, can persons be removed from the examination; and what penalty can be imposed on persons attending an examination who are not entitled to be at that examination. The ACCC has also issued a policy statement that deals with some of those issues¹⁵³ but it has no statutory backing.

In the United States, the legislation governing the SEC and the ATD (but not the IRS) expressly provides that the examination shall be conducted in private and specifies who may be present at the examination. The SEC has an express power to prevent witnesses and their counsel from being present during the examination of any other witness.¹⁵⁴

¹⁵¹ *Harman v Secretary of State for the Home Department* [1983] AC 280 at 303 per Lord Diplock; *Russell v Russell* (1976) 134 CLR at 520 per Gibbs J; and *ASIC v Rich* [2002] NSWSC 198 at [9] and [11].

¹⁵² (1994) 48 FCR 224. See also *Gangemi v ASIC* [2003] FCA 494.

¹⁵³ The ACCC has indicated that it will exclude all third parties from the examination (except the examinee's lawyer) including any employer, where the examinee is an employee. The ACCC is of the view that the exclusion of third parties is justifiable on the ground that its oral examination is investigative rather than judicial: see ACCC, Exclusion of third parties, op cit n 43, at p 16.

¹⁵⁴ United States Securities and Exchange Commission, at <http://www.sec.gov/about/whatwedo.shtml>, viewed 25 November 2003. Also see US Code of Federal Regulations, 17 CFR, ss 203.4(b), 203.5, 203.6 and 203.7(b) and (c); and 15 USC, s 1312(i)(2). However, the case law indicates that the IRS's examiner controls who may be present in the interview room. As a general rule, only the taxpayer, the taxpayer's lawyer and the IRS's staff are permitted in the interview room: *Holifield v United States*, 909 F.2d, 205 (7th Cir. 1990); *United States v*

In the United Kingdom, the legislation does not contain any express provisions dealing with the privacy or otherwise of the regulators' oral examinations. Consequently, the FSA and HMRC have developed policies on their investigative interviews and interview procedures.¹⁵⁵ However, they do not provide any detail on whether the examination is conducted in private or public or on whether the FSA's inspectors have the power to admit or remove persons from the examination.

The Australian legislation should expressly provide that the oral examination be conducted in private. The regulators should have express powers to both restrict the persons who may attend the examination and seek the imposition of penalties against those who fail to comply with the regulators' requirements in relation to the privacy of the examination. If the examinations are conducted without clear privacy provisions and without clear powers to restrict the publication of evidence, then suspects and examinees who are yet to be called as witnesses, would be "tipped off" as to the course of the investigation and may tailor their evidence to suit the developing situation which would frustrate the regulator's attempt to discover the truth about whether there had been a contravention of the relevant legislation. Publicity may forewarn suspects that particular evidence is required and they may destroy relevant documentary evidence. Publicity may also mean that sources of information will "dry up" and result in the closure of further lines of inquiry, particularly where informants wish to keep their identity secret.

Such express provisions may also promote the private interests of the examinee by ensuring that any prejudicial disclosures which may be injurious to that examinee's personal or business reputation or business confidences or trade secrets are not made public.¹⁵⁶

Powell, 379 US 48, 57 (1964) and *United Sates v Arthur Young & Co*, 465 US 805, 816 (1984) cited in Johnson G and Friedlander M, op cit n 20.

¹⁵⁵ Financial Services Authority, Handbook of Rules and Guidance, Enforcement Manual, Information Gathering and Investigation Powers, The FSA's policy: interviews and interview procedures," Enforcement Annexure 2G: Statement of Policy on s 169(7) interviews, <http://www.fsa.gov.uk/vhb/html/ENF/enf2annex2.html>, viewed on 4 June 2004. See also HMRC, Code of Practice 8, op cit n 90.

¹⁵⁶ *ASIC v Whitlam* [2002] NSWSC 526 at [3]; and *Gangemi v ASIC* [2003] FCA 494 at [25] and [38] per French J.

[4.9] Undertakings of confidentiality by examinee and non-disclosure conditions

The regulator's power to direct that the oral examination be conducted in private is of little value if examinees are able to publicly disclose matters raised at that examination. However, the case law indicates that examinees do not owe any equitable duty of confidentiality to the regulator.¹⁵⁷ In addition, the Australian regulators have no general express powers to require examinees to give undertakings to maintain the confidentiality of what has occurred at the examination but they may have an implied power to obtain such undertakings.¹⁵⁸

Where ASIC is acting under the *ASIC Act*,¹⁵⁹ ASIC, APRA or the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth);¹⁶⁰ or ASIC and APRA are acting under the *Retirement Savings Accounts Act 1997* (Cth);¹⁶¹ the legislation gives those regulators the power to impose conditions in relation to the release of records of examination to examinees. The conditions may require the examinee to give an undertaking to abstain, for a certain time, from disclosing information acquired, or evidence given, at the examination to any person except a lawyer for the purpose of enabling that lawyer to give legal advice or to otherwise act as the examinee's lawyer.

¹⁵⁷ See *Finnane v Australian Consolidated Press Ltd* (1978) 4 ACLR 15 at 20-23 per Needham J; *Barton v Csidei* [1979] 1 NSWLR 524; *Constantine v Trade Practices Commission* (1994) 48 FCR 141 at 148; and *Trade Practices Commission v Ampol Petroleum (Vic) Pty Ltd* (1994) 54 FCR 316 at 323-324 per Davies J.

¹⁵⁸ *Constantine v Trade Practices Commission* (1994) 48 FCR 141 at 146-147 per Jenkinson J. Also see *NCSC v Bankers Trust Australia Ltd* (1989) 1 ACSR 330 at 346 per Beaumont & Einfeld JJ; and *Gangemi v ASIC* [2003] FCA 494 at [31]-[37] per French J. Section 8XB of the *Taxation Administration Act 1953* (Cth) prohibits all persons from directly or indirectly recording, divulging or communicating to another person, or otherwise making use of information with respect to *another person's* affairs which is, or at any time has been, in the Commissioner's possession, and which has been obtained in breach of a taxation law. However, this section does not appear to prevent examinees from disclosing information relating to their *own* oral examination.

¹⁵⁹ Sections 24(2)(b) and 26 of the *ASIC Act*; and see *Boys v ASC* (1997) 15 ACLC 844 at 872 per Carr J.

¹⁶⁰ Sections 280(3) and 282 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

¹⁶¹ Sections s 110(3) and 112 of the *Retirement Savings Accounts Act 1997* (Cth).

One problem with the regulators' power to impose conditions is that it is restricted to situations where the regulator releases records of examination to the examinee and does not apply where the examinee does not request a copy of those records. In addition, the regulators' power to impose conditions is restricted to the written record of examination and does not clearly extend to audiovisual or audiotape recordings of that examination.

The ACCC and the ATO (when acting under the taxation legislation) have no express power to impose non-disclosure conditions on the release of the record of examination.

In the United States, the SEC and the ATD have an express power to refuse the examinee's request for a copy of the record of examination where there is "good cause" for such refusal. In such a case, the SEC and the ATD may permit the examinee to simply inspect the record of examination.¹⁶² In the case of the IRS, the legislation gives taxpayers the statutory right to make their own audio recording of the examination and imposes no express restriction on the use that the taxpayer may make of that recording.¹⁶³

In the United Kingdom, the FSA has adopted a policy of giving examinees an audiotape copy of their record of interview¹⁶⁴ but that policy does not provide any detail on the steps that may be taken by the FSA to ensure that the examinee does not prejudice the secrecy or integrity of the investigation.

The secrecy and integrity of the investigation would be better preserved, if the Australian legislation gave all regulators an express power to prevent or restrict examinees and their lawyers from publicly disclosing what has occurred at the oral examination (until after the investigation has been completed). Indeed, the judiciary has called for such a reform.¹⁶⁵ This suggested reform would clarify the law, avoid the delay and cost that can result when reliance is placed on implied powers and eliminate

¹⁶² *US Code of Federal Regulations*, 17 CFR 203.6; and 15 USC, s 1312(i)(6).

¹⁶³ Section 7521(a)(1) of the *Internal Revenue Code* (US). This provision does not apply to criminal investigations: see s 7521(d).

¹⁶⁴ Financial Services Authority, *op cit* n 90, at [2.14.3].

the need for the regulators to issue their own policy statements on this issue (which do not have any statutory backing).¹⁶⁶

[4.10] Privileges and the admissibility of statements made at the examination in subsequent proceedings

[4.10.1] *General rule on admissibility of answers*

As a general rule, the answers given by an examinee at an oral examination are admissible (subject to the applicable rules of evidence)¹⁶⁷ in the regulators' subsequent legal proceedings, unless those answers are not relevant to those subsequent proceedings¹⁶⁸ or are protected from admission by the privilege against self-incrimination, the penalty privilege or legal professional privilege. Where those privileges are abrogated by the legislation, the privileged information may also be protected from admission by evidential immunity. The problem is that despite the common purposes served by those privileges and the common regulatory problems that arise from their operation, the Australian legislation does not adopt a consistent approach to dealing with those matters.

[4.10.2] *The privilege against self-incrimination, the penalty privilege and evidential immunity*

The common law privilege against self-incrimination means that a person is not bound to answer any question or produce any document or thing if that material would have a tendency to expose that person to conviction for a crime.¹⁶⁹ The common law penalty privilege provides that a person cannot be compelled to disclose

¹⁶⁵ *Gangemi v ASIC* [2003] FCA 494 at [35] per French J.

¹⁶⁶ ACCC, Direction to examinee not to disclose, op cit n 43, at p 16.

¹⁶⁷ See for example, s 174(1) of the *Financial Services and Markets Act 2000* (UK).

¹⁶⁸ See s 76(1)(b) of the *ASIC Act*; s 290(3) of the *Superannuation Industry (Supervision) Act 1993* (Cth); and s 120(3) of the *Retirement Savings Accounts Act 1997* (Cth).

¹⁶⁹ *Lamb v Munster* (1882) 10 QBD 110 at 111; *Sorby v Commonwealth* (1983) 152 CLR 281 at 288; and *Microsoft Corporation v CX Computer Pty Ltd* [2002] FCA 3 at [32] and [37].

evidence that may expose that person to a penalty.¹⁷⁰

Where ASIC is acting under the *ASIC Act*; or where ASIC, APRA and the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth); that legislation provides that the privilege against self-incrimination and the penalty privilege are not reasonable excuses for the examinee refusing to answer a question at an oral examination.¹⁷¹ The examinee must answer the self-incriminating questions but is afforded “use evidential immunity” in relation to those answers which means that those answers (but not derivative or secondary evidence derived from those answers) are not admissible in any subsequent criminal or penalty proceedings against that examinee (except proceedings for a false statement).¹⁷² The examinee is also afforded “use evidential immunity” in relation to the fact that the examinee signed the record of examination. “Derivative use evidential immunity”¹⁷³ was abolished in 1992 as the result of complaints by the ASC (now ASIC) that “derivative use evidential immunity” made it too difficult to successfully prosecute examinees in subsequent criminal or penalty proceedings.¹⁷⁴ This provides an example of what Braithwaite and Drahos refer to as the role of actors in shaping regulatory systems,¹⁷⁵ as discussed at [1.3.4].

Since 1992, “use evidential immunity” is only available under the above legislation to natural persons and is not available to corporations.¹⁷⁶ However, despite

¹⁷⁰ *Refrigerated Express Lines Australasia Pty Ltd v Australian Meat and Livestock Corporation* (1979) 42 FLR 204 at 207-208; and *ASIC v ABC Fund Managers Ltd* [2001] VSC 92 at [4].

¹⁷¹ Section 68(1) of the *ASIC Act*; and ss 287, 287(3) and 290(2) of the *Superannuation Industry (Supervision) Act 1993* (Cth).

¹⁷² See s 68(2) and (3) and s 76(1)(a) of the *ASIC Act*.

¹⁷³ “Derivative use evidential immunity” means that whilst the privileges are expressly abrogated by the legislation, the answers given by an examinee cannot be used by the regulator/prosecution to gather other incriminating evidence (secondary evidence or evidence derived from the original evidence/answers) for admission against that examinee in any subsequent criminal or penalty proceedings.

¹⁷⁴ See ss 68(3) and 76(1)(a) of the *ASIC Act*. See also The Joint Submission of the ASC and the Commonwealth DPP for amendment of s 68 of the ASC Law and s 597 of the Corporations Law to the Joint Committee on Corporations and Securities, referred to in Longo JP, “Powers of Investigation of the ASC,” (1992) *C&SLJ* 10(4) 237 at 242.

¹⁷⁵ Braithwaite J and Drahos P, *op cit* n 8, at pp 19, 27 and 157.

¹⁷⁶ See s 68(2) of the *ASIC Act*; and s 1316A of the *Corporations Act*; and s 287(2A)

the protection of “use evidential immunity,” the self-incriminating evidence may be used in civil proceedings against the examinee. The self-incriminating evidence may also be used in any civil, criminal or penalty proceedings against a person not being the examinee, subject to the hearsay rule.¹⁷⁷

Where ASIC and APRA are acting under the *Retirement Savings Accounts Act 1997* (Cth), s 117 provides that the privilege against self-incrimination and the penalty privilege are not reasonable excuses for an examinee refusing to answer questions at an oral examination. Section 117(2) affords the examinee the protection of “use evidential immunity” and “derivative use evidential immunity” in relation to the self-incriminating statements made at the examination and in relation to the fact that the examinee signed the record of examination. This legislation gives the examinee a wider evidential immunity than that available under the *ASIC Act* or the *Superannuation Industry (Supervision) Act 1993* (Cth). Section 117(2) does not make it clear whether a corporation can claim evidential immunity or whether it is restricted to natural persons. This question may be answered by reference to the Australian common law which provides that a corporation does not have the capacity to claim the privilege against self-incrimination as it is a human right.¹⁷⁸ The position is the same in the United States.¹⁷⁹ By contrast, a corporation can claim this privilege at common law in the United Kingdom,¹⁸⁰ Canada,¹⁸¹ and New Zealand.¹⁸²

of the *Superannuation Industry (Supervision) Act 1993* (Cth).

¹⁷⁷ Section 75 of the *Evidence Act 1995* (Cth) permits the admission of hearsay evidence in interlocutory proceedings; and see *ASIC v Elm Financial Services Pty Ltd* [2004] NSWSC 306 at [11] and [12].

¹⁷⁸ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1994) 68 ALJR 127. This position is consistent with ss 128 and 187 of the *Evidence Act 1995* (Cth); and ss 128 and 187 of the *Evidence Act 1995* (NSW). However, unusually s 11C of the *Insurance Contracts Act 1984* (Cth) provides that an insurer may refuse to comply with ASIC’s notice requiring the production of insurance documents on the ground of incrimination of the insurer.

¹⁷⁹ A corporation cannot claim the privilege against self-incrimination in the United States because the State created corporations and presumably reserved a right to investigate them and allowing corporations to claim the privilege would frustrate legitimate governmental actions designed to regulate them: see *Hale v Henkel* 201 US 43 (1906) cited in Clough J and Mulhern C, op cit n 2, at p 39. See also Johnson G, and Friedlander M, op cit n 20.

¹⁸⁰ *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 547; and *Triplex Safety Glass Co v Lancegaye Safety Glass (1934) Ltd* [1939] 2 KB 395.

¹⁸¹ *Webster v Solloway Mills & Co* (1931) 1 DLR 831; *Klein v Bell* [1955] 2 DLR

Where oral examinations are conducted by the ACCC, s 155(7) and s 159 of the *Trade Practices Act 1974* (Cth) provide that the examinee is not excused from answering the question on the ground of the privilege against self-incrimination. The examinee is afforded “use evidential immunity” in subsequent criminal proceedings (except proceedings under s 155). Unusually, in the context of the privilege against self-incrimination, s 155(7)(b) affords “use evidential immunity” to a corporation in any criminal proceedings (except proceedings under the *Trade Practices Act 1974* (Cth)). Section 155(7) is silent on the question of the penalty privilege and that question must be resolved by the Australian common law which provides that a corporation does not have the capacity to claim the penalty privilege.¹⁸³ By contrast, a corporation can claim this privilege at common law in the United Kingdom¹⁸⁴ and New Zealand.¹⁸⁵ Given the express abrogation of the privilege against self-incrimination by ss 155(7) and 159, it is arguable that the natural person’s common law right to claim the penalty privilege has been impliedly overridden by s 155. As the legislation does not expressly deal with the penalty privilege, there is no statutory evidential immunity given to the examinee in relation to that privilege.

It has been held that s 264 of the *Income Tax Assessment Act 1936* (Cth) impliedly overrides the privilege against self-incrimination as a ground for refusing to answer a question at the ATO’s oral examination.¹⁸⁶ Because this position has been arrived at by way of case law, the *Income Tax Assessment Act 1936* (Cth) does not protect the private interest of the examinee and does not expressly afford the

513; *R v Amway Corporation* [1989] 1 SCR 21; *R v Church of Scientology of Toronto* (1997) 42 CRR (2d) 284 cited in Clough J and Mulhern C, op cit n 2, at p 39.

¹⁸² *New Zealand Apple & Pear Marketing Board v Master & Sons Ltd* [1986] 1 NZLR 191.

¹⁸³ *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1992) 52 FCR 96.

¹⁸⁴ *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 547; and *Triplex Safety Glass Co v Lancegaye Safety Glass (1934) Ltd* [1939] 2 KB 395.

¹⁸⁵ *New Zealand Apple & Pear Marketing Board v Master & Sons Ltd* [1986] 1 NZLR 191.

¹⁸⁶ This position was arrived at by the courts by implication from the effect of the penalties for non-compliance contained in ss 8C and 8D of the *Taxation Administration Act 1953* (Cth). See *Commissioner of Taxation v De Vonk* (1995) 61 FCR 564 at 567, 579-584 (in the context of s 264 of the *Income Tax Assessment Act 1936* (Cth)); and *Watson v Commissioner of Taxation* [1999] FCA 1796 at [48]. The ATO issues a letter with its notices which states that its oral examination powers override the privilege against self-incrimination: see *Hart v Deputy Commissioner of*

examinee any statutory evidential immunity in exchange for the abrogation of the privilege. It may also follow that the ATO's investigative powers are not subject to the penalty privilege but this is yet to be judicially tested.

In the United Kingdom, in the context of oral examinations conducted by the DTI and the FSA, the privilege against self-incrimination has been impliedly overridden by the legislation.¹⁸⁷ Because the legislation governing the DTI and the FSA does not expressly deal with this privilege, the private interest of the examinee is not protected and it does not afford the examinee any statutory evidential immunity.¹⁸⁸

In the United States, the regulatory legislation has been shaped by the Fifth Amendment to the United States Constitution which affords the individual the protection of the privilege against self-incrimination.¹⁸⁹ Accordingly, the legislation provides that an examinee can object to answering a question at an examination on the ground of the privilege against self-incrimination and the penalty privilege. However, there is a further (time-consuming) court process by which the regulators can obtain the self-incriminating answers where they demonstrate that it is in the public interest.

Taxation [2005] FCA 1748 at [4].

¹⁸⁷ *Re London Investments Plc* [1992] 2 All ER 842; and *R v Saunders* [1996] Crim LR 420; *Saunders v United Kingdom* Case no 43/1994/490/572, 17 December 1996; and Article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (Rome, November 4, 1950) cited in The Law Commission, Consultation Papers, Discussion Forum Part VII, The Relationship Between Civil and Criminal Proceedings For Trade Secret Misuse at [8.25] found at <http://www.lawcom.gov.uk/library/lccp150/pt8.htm>, viewed on 20 November 2004. The legislation governing the CC, or the Office of Fair Trading, expressly provides that any incriminating statements made by the examinee are generally inadmissible against that examinee in subsequent proceedings for an offence: see s 30A of the *Competition Act 1998* (UK); and s 197 of the *Enterprise Act 2002* (UK).

¹⁸⁸ For example, in *Muldoon v ASIC* [2005] FCA 1432 at [22]-[23] Graham J indicated that ASIC's decision to seek the assistance of the DTI in the United Kingdom to interview witnesses in relation to an investigation into the affairs of Multiplex Ltd meant that the interviews would be governed by *Companies Act 1989* (UK) which provided fewer protections for the relevant witnesses, such as the absence of any statutory evidential immunity, than would be the case if the witnesses were examined under the *ASIC Act*.

¹⁸⁹ *Fisher v United States*, 425 US, 391, 409 (1976); and *United States v Schmidt*, 816 F.2d 1477, 1481-1482 (10th Cir. 1987) cited in G Johnson and M Friedlander, op cit n 20.

Where this occurs, the examinee is protected by “use evidential immunity” and “derivative use evidential immunity” in relation to the use of those answers in subsequent criminal or penalty proceedings except in a subsequent criminal proceeding for perjury, giving a false statement or otherwise failing to comply with the court's order.¹⁹⁰ The reason for this procedure and immunity is that the Supreme Court of the United States has held that the abrogation of the examinee's/witness' privilege against self-incrimination did not offend the Fifth Amendment to the Constitution provided the legislation granted that person appropriate immunity (namely, use and derivative use evidential immunity). The Court indicated that the object of the privilege was to protect the examinee/witness from prosecution and not to protect that person from the compulsory disclosure of information that might bring that person into disrepute.¹⁹¹

[4.10.2.1] *Law reform*

There is no sound legal reason why the position in relation to the privilege against self-incrimination, the penalty privilege and any associated evidential immunity should not be the same under all of the Australian regulatory legislation. This is especially so given that the rationale for those privileges (to maintain a fair State/individual balance and to ensure that the onus is on the prosecution to prove its case¹⁹²) is a constant and does not change depending upon the regulator with which the individual is dealing. There is no sound legal reason why examinees should be denied the protection of “use evidential immunity” in the context of the ATO's oral examinations. The protection of “use evidential immunity” for corporations, in the context of the ACCC, is unusual and is inconsistent with Australian common law and

¹⁹⁰ See *Antitrust Civil Process Act* (15 USC, s 1312(i)(7)(A) and (B); and 18 USC, Part V, s 6002 and s 6004). Also see USC, s 6001(1) which says that “agency of the United States” as used in the USC includes the SEC, the ATD and other agencies of the United States including the Federal Trade Commission.

¹⁹¹ See *Kastigar v United States* 406 US 441 cited in Standing Committee On Legal Affairs, Scrutiny Report, 12 November 2003, Report No 39, found at <http://www.legassembly.act.gov.au/com>, viewed on 20 November 2004.

¹⁹² See generally *Caltex Refining Co Pty Ltd v State Pollution Control Commission* (1991) 25 NSWLR 118 at 127-128; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477; 68 ALJR 127 at 138, 161-162; *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96; *Daniels v ACCC* (2002) 77 ALJR 40; [2002] HCA 49 at [31]; *Adler and Williams v ASIC* [2003] NSWCA 131 at [660]; *Rich v ASIC* [2003] NSWCA 342 at [32] and [38]; and

with other regulatory and evidential statutes.¹⁹³ It is recommended that the Australian legislation be amended in accordance with the provisions of the *ASIC Act* by expressly abrogating those privileges for natural persons and corporations and by affording natural persons (not corporations) “use evidential immunity” (and not “derivative use immunity”) in relation to their answers in subsequent criminal or penalty proceedings. This reform would promote the public interest by ensuring that the regulator can obtain all relevant information and make an informed decision about whether to commence legal proceedings. It would also address the prosecution difficulties that are otherwise created when the regulators are not permitted to use secondary evidence or derivative evidence in their enforcement proceedings. This reform also balances private interests by ensuring, through evidential immunity, that persons are not compelled to “convict themselves out of their own mouths” which is consistent with the principal common law objective of the privilege.¹⁹⁴ The common law privilege is not concerned with preventing the use of secondary or derivative evidence.

[4.10.3] *Legal professional privilege and evidential immunity*

Legal professional privilege means that, at common law, in civil and criminal cases, confidential communications between clients and their lawyers do not have to be given in evidence or otherwise disclosed by the clients or their lawyers (unless the lawyers have their clients’ consent). Legal professional privilege applies to confidential communications between clients, their lawyers and third parties made for the dominant purpose of use in litigation (whether actual or contemplated) or made for the dominant purpose of giving or receiving legal advice.¹⁹⁵

Rich v ASIC (2004) 78 ALJR 1354; 206 ALR 271; [2004] HCA 42 at [24].

¹⁹³ See, for example, the abrogation of the privilege in the context of corporations in s 187 of the *Evidence Act 1995* (NSW); and s 187 of the *Evidence Act 1995* (Cth).

¹⁹⁴ *Hugal v McCusker* (1990) 2 ACSR 145; 8 ACLC 573 at 578. See also *Cornwell v The Queen* [2007] HCA 12 at [148].

¹⁹⁵ *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49; [1999] HCA 67; *Commissioner of Taxation (Cth) v Pratt Holdings Pty Ltd* [2003] FCA 6 at [39]; *Pratt Holdings Pty Ltd v Commissioner of Taxation (Cth)* (2004) 207 ALR 102; [2004] FCAFC 122 at [2] and [84]; *In the matter of Southland Coal Pty Ltd (rec & mgrs apptd) (in liq)* [2006] NSWSC 899 at [14]; and ss 118 and 119 of the *Evidence Act 1995* (Cth).

Where ASIC is acting under the *ASIC Act*;¹⁹⁶ ASIC, APRA or the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth);¹⁹⁷ or ASIC and APRA are acting under the *Retirement Savings Accounts Act 1997* (Cth);¹⁹⁸ the legislation expressly provides that only an examinee, who is a lawyer, can refuse to comply with a requirement to answer questions on the ground of legal professional privilege. This legislation therefore creates a new statutory category of “lawyer’s legal professional privilege” which does not exist at common law or under any other legislation. At common law, legal professional privilege is the privilege of the client and not the lawyer.¹⁹⁹ By contrast, examinees, who are not lawyers, cannot refuse to answer a question on the ground of their own (client) legal professional privilege as it has been held in *Corporate Affairs Commission (NSW) v Yuill*²⁰⁰ that the legislation impliedly overrode the client’s legal professional privilege.

In *Daniels v ACCC*²⁰¹ Kirby sounded a word of warning and indicated (by way of *obiter dictum*) that the decision in *Yuill’s* case departed from the High Court’s strict rule that legal professional privilege is only abolished by express language in the statute or by “clear and unmistakable implication.” Similarly, the ALRC has indicated that any abrogation of legal professional privilege should be by a clear legislative provision.²⁰² It is possible that in a future case the High Court will revisit the position for ASIC in relation to the operation of the examinee’s (client’s) legal professional privilege in its investigations. Any future decision on the *ASIC Act* will have direct implications for the identical provisions in the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Retirement Savings Accounts Act 1997* (Cth).

¹⁹⁶ Section 69(2) of the *ASIC Act*.

¹⁹⁷ Section 288(2) of the *Superannuation Industry (Supervision) Act 1993* (Cth).

¹⁹⁸ Section 118(2) of the *Retirement Savings Accounts Act 1997* (Cth).

¹⁹⁹ *Baker v Campbell* (1983) CLR 52; 49 ALR 385 at 408.

²⁰⁰ (1991) 172 CLR 319 in the context of the Corporate Affairs Commission’s investigative powers contained in former ss 296(2) and 308 of the *Companies (Qld) Code 1981* (now s 69 of the *ASIC Act*, and arguably the identical provisions in the legislation described above).

²⁰¹ (2002) 213 CLR 593; 77 ALJR 40; 192 ALR 561; [2002] HCA 49 at [88]-[90].

²⁰² ALRC “Review of the Uniform Evidence Acts,”

4 July 2005 at [13.47], at

<http://www.austlii.edu.au/au/other/alrc/publications/dp/69/13.html#Heading78>,

viewed on 19 August 2005.

Where the examinee (not being a lawyer) is compelled to give oral answers, which are normally protected, at common law, from disclosure by legal professional privilege, those answers are not admissible in any subsequent administrative, civil, civil penalty, criminal or penalty proceedings. This is because the *ASIC Act*, the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Retirement Savings Accounts Act 1997* (Cth) all afford examinees “use evidential immunity” (but not “derivative use evidential immunity”) in relation to the privileged answers in those subsequent proceedings.²⁰³

There is no statutory provision that expressly deals with the operation of legal professional privilege in the case of oral examinations conducted by the ACCC and the ATO (in the context of the taxation legislation). In the case of the ACCC, an examinee could refuse to answer questions on the ground of legal professional privilege as it has been held in *ACCC v Daniels*²⁰⁴ that s 155 of the *Trade Practices Act 1974* (Cth) does not impliedly override the client’s legal professional privilege.²⁰⁵

It has been held that the ATO’s oral examination power in s 264 of the *Income Tax Assessment Act 1936* (Cth), and its access power in s 263 of that Act, do not impliedly override the client’s legal professional privilege.²⁰⁶

In the United States, an examinee (whether or not a lawyer) could refuse to answer a question at an SEC or ATD²⁰⁷ or IRS²⁰⁸ examination on the ground of legal

²⁰³ Section 76(1)(d) of the *ASIC Act*, s 290(5) of the *Superannuation Industry (Supervision) Act 1993* (Cth), and 120(5) of the *Retirement Savings Accounts Act 1997* (Cth).

²⁰⁴ (2002) 213 CLR 593; 77 ALJR 40; 192 ALR 561; [2002] HCA 49.

²⁰⁵ Section 155(7B) was introduced after the decision in *ACCC v Daniels* (2002) 213 CLR 593 and expressly provides that a person cannot be required to produce a document that would disclose information that is the subject of legal professional privilege. Unusually, s 155(7B) does not deal with the position in relation to oral answers.

²⁰⁶ *Baker v Campbell* (1983) 153 CLR 52. Although there was some doubt in *Australia and New Zealand Banking Group Ltd v Deputy Federal Commissioner of Taxation* (2001) ATC 4140 at 4143 per Sundberg J citing the Federal Court decision in *ACCC v Daniels* [2001] FCA 244 (which was subsequently overruled by the High Court in *Daniels v ACCC* [2002] HCA 49). The ATO issues a letter with its notices which states that legal professional privilege may be claimed by the examinee: see *Hart v Deputy Commissioner of Taxation* [2005] FCA 1748 at [4].

professional privilege. It has been held that the examinee cannot make a blanket claim of the privilege at the beginning of the IRS's examination and must claim the privilege on a question-by-question basis.²⁰⁹

The approach in the United Kingdom is that statutes that confer on the regulators broad discretionary powers will be interpreted as being subject to fundamental common law rights, such as legal professional privilege, unless those rights have been expressly, or by necessary implication, overridden by the legislation.²¹⁰ In the United Kingdom, an examinee (whether or not a lawyer) could refuse to answer a question at the regulators' examination on the ground of legal professional privilege. However, in the cases of the DTI or the FSA, where the examinee is a lawyer, that lawyer must disclose the name and address of the client.²¹¹ The legislation expressly provides that the CC cannot compel a person to disclose a privileged communication.²¹²

[4.10.3.1] *Law reform*

It is difficult to reconcile the fact that, on the one hand, the *ASIC Act*, the *Superannuation Industry (Supervision) Act 1993* (Cth), and the *Retirement Savings Accounts Act 1997* (Cth) create a new statutory category of "lawyer's legal professional privilege" and impliedly override the examinee's (client's) legal

²⁰⁷ *Antitrust Civil Process Act*; and 15 USC, ss 1312(c), 1312(i)(7)(A) and s 1314(c) cited in *Daniels v ACCC* [2002] HCA 49 at [110] by Kirby J.

²⁰⁸ Tax Regulations – s 3411; and Internal Revenue Service, United States Department of Treasury, "Confidentiality privileges relating to taxpayer communications," at <http://www.irs.gov/individuals/article0,,id=97246,00.html>, viewed on 13 February 2006.

²⁰⁹ *Upjohn Company v United States*, 449 US 383 (1981); and *Holifield v United States*, 909 F 2d 201, 203-205 (7th Cir 1990) cited in G Johnson and M Friedlander, op cit n 20.

²¹⁰ Legal professional privilege has not been expressly or impliedly overridden by the United Kingdom's taxation legislation: see *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] 2 WLR 1299; [2002] 3 All ER 1 cited in *Daniels v ACCC* [2002] HCA 49 at [108] by Kirby J.

²¹¹ Section 452(1)(a) of the *Companies Act 1985* (UK); s 83(5) of the *Companies Act 1989* (UK); and ss 175(4) and 413 of the *Financial Services and Markets Act 2000* (UK).

²¹² Section 30 of the *Competition Act 1998* (UK) cited in *Daniels v ACCC* [2002] HCA 49 at [110] by Kirby J.

professional privilege while, on the other hand, the examinee's (client's) privilege has been impliedly preserved by the *Trade Practices Act 1974* (Cth) and the *Income Tax Assessment Act 1936* (Cth). This difficulty is exacerbated by the fact that the rationale for this privilege (to maintain client confidentiality and to promote the administration of justice by encouraging persons to seek legal advice)²¹³ is a constant and does not change depending upon the regulator with which the individual is dealing. The ALRC has also indicated that there is a "huge disparity" between the investigative powers of the regulators and the operation of legal professional privilege. The ALRC is currently conducting a review of the regulators' investigative powers with a view to providing greater consistency and certainty in relation to legal professional privilege.²¹⁴ In contrast to the position in Australia, it is evident from the above discussion that all of the foreign regulators' investigative powers are subject to the examinee's (client's) legal professional privilege.

There is no sound legal reason why the position in relation to the examinee's (client's) legal professional privilege should not be the same under all of the Australian regulatory legislation. It could be argued that the Australian regulators' powers should be subject to the operation of this privilege and that the examinee should be able to refuse to answer questions that fall within the scope of the privilege. Arguably, this reform would not significantly impact upon the regulators' ability to collect evidence particularly in view of the narrow range of information that is protected by the privilege and in view of the fact that the ATO (when acting under the taxation legislation), the ACCC and the foreign regulators, appear to effectively carry out their investigations

²¹³ *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 487 and 490; *Ritz Hotel Ltd v Charles Ritz Ltd [No 22]* (1988) 14 NSWLR 132 at 133-134; *Dalleagles v ASC* (1991) 6 ACSR 498 at 506; *Trade Practices Commission v Ampol Petroleum (Vic) Pty Ltd* (1994) 54 FCR 316 at 320; *Greenough v Gaskell* (1883) 39 ER 618 at 621; *Grant v Downs* (1976) 135 CLR 674 at 685; *Baker v Campbell* (1983) 153 CLR; 49 ALR 385 at 393; and *Pratt Holdings Pty Ltd v Commissioner of Taxation (Cth)* (2004) 2004 ATC 4526; [2004] FCAFC 122 at [13] and [83].

²¹⁴ ALRC, "Review of the Uniform Evidence Acts," 4 July 2005 at [13.47], at <http://www.austlii.edu.au/au/other/alrc/publications/dp/69/13.html#Heading78>, viewed on 19 August 2005; and ALRC, "Issues Paper 33 Client Legal Privilege and Federal Investigatory Bodies," 2 April 2007, at <http://www.austlii.edu.au/au/other/alrc/publications/issues/33/>, viewed on 23 April 2007.

despite being unable to obtain privileged information.²¹⁵ By contrast, the ALRC has indicated that given the investigatory difficulties faced by the commercial regulators, such as the ACCC, it may be appropriate that legal professional privilege should not be available to persons in the context of the ACCC's investigations.²¹⁶

An alternative and preferable reform option, which balances competing public and private interests, is to abrogate legal professional privilege in all of the Australian regulators' investigations. This would promote the public interest in giving the regulators access to all relevant information. This approach is supported by the New South Wales Ombudsman who suggested that the Uniform Evidence Acts should be amended to abrogate the privilege in relation to investigations conducted by watchdog bodies established by Commonwealth, State or Territory governments.²¹⁷ The private interest could be protected by giving the examinee "use" and "derivative use" evidential immunity so that the privileged statements made by the examinee at the examination are inadmissible against that examinee in all subsequent proceedings.

This suggested reform is consistent with the recent approach of the federal government when it enacted the *James Hardie (Investigations and Proceedings) Act 2004* (Cth). This Act abrogates legal professional privilege as a ground for refusing to comply with ASIC's investigative requirements made in relation to its investigation of the James Hardie Group.²¹⁸ The federal government is of the view that the public must have confidence in the regulation of corporations, corporate conduct, financial markets and services and that this confidence would be undermined if ASIC was inhibited in its James Hardie investigations by claims of privilege. According to the federal government, this privileged material may offer critical evidence as to the purpose and nature of the relevant transactions and the abrogation of the privilege is necessary to

²¹⁵ In *Daniels v ACCC* (2002) 213 CLR 593; [2002] HCA at [35], [45] and [55] the High Court indicated that there was no evidence that the retention of the privilege would significantly impair the functions of the ACCC or render its investigative power useless, futile or inoperative. See also Healy G and Eastwood E, "Legal Professional privilege and the investigative powers of the Australian Securities and Investments Commission" (2005) 23 C&SLJ 375 at 386.

²¹⁶ ALRC, "Review of the Uniform Evidence Acts," op cit n 214, at [13.47].

²¹⁷ op cit n 214, at [1.81].

²¹⁸ See Explanatory Memorandum to *James Hardie (Investigations and Proceedings) Act 2004* (Cth) at [4.14].

achieve the higher policy interest of effective corporate regulation.²¹⁹ However, it should also be noted that this legislation does not extend beyond James Hardie investigations and does not necessarily reflect a wider federal government policy concerning the abrogation of the privilege.

Healy and Eastwood have indicated that, in the case of particular corporate scandals such as James Hardie, it may be in the public interest that all evidence (including otherwise privileged evidence) be available. However, they were also of the view that the James Hardie case does not justify a much broader abrogation of legal professional privilege. They indicated that the broader abrogation of the privilege may result in:

- (a) lawyers giving verbal legal advice, which is impracticable in complex factual matters and may mean that the client is not fully advised;
- (b) a reluctance on the part of clients to be honest in giving instructions thereby affecting the quality of the advice that can be given; or
- (c) that no legal advice will be sought.²²⁰

However, those concerns could be addressed by affording the client the evidential immunity described above.

[4.11] Conclusion

It is of major concern that despite the importance of the ACCC's and the ATO's regulatory activities (when it is acting under the taxation legislation), those regulators have a very poor express statutory oral examination regime and they and the regulated must primarily rely upon the vagaries of implied powers. The problem with relying on implied powers was discussed at [1.5.4].

A range of inconsistencies and inadequacies in the Australian regulators' oral examination powers have been highlighted in this chapter and reforms have been

²¹⁹ Ibid, at [1.4], [4.23], [4.24] and [4.25].

²²⁰ Healy G and Eastwood E, op cit n 215, at pp 388-390.

suggested to address those problems and to achieve greater efficiencies in relation to the exercise of those powers and, therefore, more effective regulation.

Those reforms include:

- (a) uniform powers outlining when oral examination notices can be issued and governing the regulators' powers to conduct such examinations;
- (b) a prescribed form that sets out the information that must be specified in all regulators' oral examination notices;
- (c) uniform provisions that preserve the privacy and confidentiality of oral examinations; and
- (d) uniform provisions that set out the obligations, rights and protections of examinees including uniform provisions that deal with the operation of the privileges discussed in this chapter.

CHAPTER 5

PRODUCTION OF BOOKS

by Tom Middleton

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CHAPTER 5

PRODUCTION OF BOOKS

[5.1] Introduction

The regulators' powers to issue notices to produce books serve common public interest objectives including enabling the regulators to quickly obtain, and to preserve, documentary evidence, to use that evidence in determining whether there has been a contravention of the regulatory laws, and to secure vital evidence for use in subsequent legal proceedings.¹ Given these commonalities, it is argued that they should have the same express statutory powers to achieve those objectives.

In the absence of a statutory power to compel the production of books, the regulators would have to rely on voluntary cooperation or they would have to rely on the normal pre-trial discovery process to obtain documentary evidence or they would have to satisfy the requirements to obtain a search warrant.²

As noted at [3.4], the main problem with relying upon voluntary cooperation is that where persons refuse to provide the books or information, the regulators have no power to compel those persons to provide the relevant material. The normal rules of pre-trial discovery (which preserve general law privileges) are also deficient and they were never intended to be used by the regulators as an investigative tool. Those rules involve formal procedures which can mean delay in obtaining the documents. Given the volatility of the Australian securities and financial markets and the ease with which funds may be shifted out of a corporation, delay may exacerbate financial loss and may also increase the opportunity for the destruction of important documentary evidence³ thereby jeopardising subsequent civil and criminal proceedings. It is for these reasons that the regulators need

¹ See generally *Kotan Holdings Pty Ltd v Trade Practices Commission* (1991) ATPR 41-134 cited in Clough J and Mulhern C, "The Prosecution of Corporations," Oxford University Press, Melbourne, 2002, at p 28.

² The problems with the regulators' current search warrant powers and suggested reforms are discussed in Chapter 6.

³ *ASC v Ampolex Ltd* (1996) 14 ACLC 80 at 91 per Kirby P.

clear and wide powers to immediately demand that persons produce documentary evidence that is relevant to their investigations.

The regulators also require wide powers to demand the production of books because civil or criminal contraventions of the regulatory laws often involve complex facts and documentary evidence can be essential in overcoming some of the difficulties in proving contraventions of those laws. Fisse and Braithwaite have emphasised the difficulty of proving who are involved in contraventions of the regulatory laws.⁴ Unlike conventional crime, the immediate victim of civil or criminal contraventions of the regulatory legislation is often a corporation or a more amorphous entity, such as the market (the investing public and creditors). The corporation is an inanimate legal fiction often controlled by the perpetrator, unlike the human victim of civil or criminal contraventions of the general law. There is therefore often no human victim with direct familiarity of the circumstances surrounding the contraventions of the relevant law.⁵ The regulator may be unable to interview any human victim and must rely heavily on documentary evidence such as the books of the corporation (the victim) concerned. According to Kluver, documentary evidence "is often the most powerful tool that the [regulator] has in investigating and proving the offence" and is "crucial to corporate prosecution."⁶

The analysis indicates that the regulators do not have equal or uniform express statutory powers to compel the production of documentary evidence (see [5.5.1]), to deal with documentary evidence when it is produced to, or seized by, them (see [5.9]-[5.9.4]), to obtain documentary evidence when their notices to produce books are not complied with (see [5.11]), or to use that documentary evidence in subsequent proceedings (see [5.12]-[5.12.2.1]). It is argued that those inconsistencies are unwarranted and that uniform express powers will assist the regulators to intervene and to take appropriate enforcement or remedial action in a more timely manner, thereby protecting and promoting public and

⁴ Fisse B and Braithwaite J, "Corporations, Crime and Accountability," Cambridge University Press, New York, 1993, at p 182.

⁵ Mr Kerr (the Member for Denison) Australia, House of Representatives 1992, Debates vol. HR 4, at p 1375.

⁶ Kluver J, "Report on Review of the Derivative Use Immunity Reforms," May, 1997 at

private interests and promoting more efficient and effective regulation. The suggested reforms are consistent with the views of Baldwin and Cave⁷ who indicate that a good or effective regulatory regime is one that is supported by clear statutory powers (see [1.5.1.2]).

The suggested reforms represent current “best practice” and could be implemented by including them in the proposed *Investigation and Enforcement Powers Act* (Cth) (see [12.4.4]). This legislation would govern ASIC’s, APRA’s, the ACCC’s and the ATO’s powers to issue notices to produce books and would also afford uniform protections to the regulated.

[5.2] Public interest

The public interest in giving the Australian regulators clear and effective powers to obtain and to use documentary evidence requires that:

- (a) they be given the power to demand the production of a wide range of documentary material (see [5.4]);
- (b) the legislation clearly specifies the circumstances in which notices to produce books can be issued (that is, within, and outside, a formal investigation - see [5.5.1]);
- (c) they be given the power to require the production of books “forthwith” (see [5.7.5.2]);
- (d) the legislation clearly specifies the disclosures that must be made in the regulators’ notices in order to ensure their formal validity (see [5.7.6]) thereby reducing the possibility of delay in compliance with those notices by challenges to those notices on the ground of a defect in form or an abuse of power (see [5.6.1]);

[3.16] and [3.106].

⁷ Baldwin R and Cave M, “Understanding Regulation Theory Strategy, and Practice,” Oxford University Press, Oxford, 1999 at p 77.

- (e) the legislation clearly specifies the persons to whom such notices can be issued (see [5.8]-[5.8.2.1]);
- (f) their power to require the production of books overrides the duty of confidentiality (see 4.6.2)], the privilege against self-incrimination and the penalty privilege (see [5.12.1.1]) and legal professional privilege (see [5.12.2.1]). If a broad range of excuses for non-compliance with the notice were available, then those excuses could be abused by suspects to achieve delay which may lead to the destruction of documentary evidence;
- (g) there be clear rules relating to the regulators' powers where the documents are produced (see [5.9]-[5.9.4.]) or where they are not produced (see [5.11]); and
- (h) there be clear rules relating to the evidential use that the regulator can make of the documents in subsequent proceedings (see [5.12]-[5.12.2.1]).

[5.3] Private interest

The private interests of the recipients of notices to produce books are the same and it is argued that they should be given the same clear express protections and rights irrespective of the regulator with which they are dealing. This suggestion is consistent with the approach discussed at [1.5.4] and [4.3] of ensuring that the regulated's rights and obligations are apparent on the face of the regulatory legislation. This approach should also promote more immediate compliance with the regulators' notices by reducing the potential for collateral litigation challenging their notices thereby promoting more effective regulation.

[5.4] Definitions

The width of the regulators' powers to demand the production of "books" is directly dependent on the width of the definition of that word. However, there is

currently no consistent approach in the Australian legislation on this issue. Where ASIC is acting under the *ASIC Act* or the *Corporations Act*; or ASIC, APRA or the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth); the word "books" is widely defined in that legislation to include "a register; any other record of information, financial reports or financial records, however compiled, recorded or stored, and a document."⁸ Where ASIC and APRA are acting under the *Retirement Savings Accounts Act 1997* (Cth), the definition of "books" is identical except that it refers to "accounting records,"⁹ rather than to "financial records." Section 155(1)(b) and (c) of the *Trade Practices Act 1974* (Cth) refers to "documents," rather than to "books," and that word is widely defined in s 4(1) of that Act, as discussed below. Section 264(1)(b) of the *Income Tax Assessment Act 1936* (Cth) refers to "books, documents and other papers." Those words are not defined in the taxation legislation.

The inclusion of the word "document" in the above legislation arguably gives the regulators the power to demand the production of a wide range of material because it is widely defined in s 25 of the *Acts Interpretation Act 1901* (Cth) to include "any paper or other material on which there is writing; any paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; and any article or material from which sounds, images or writings are capable of being reproduced." This definition applies to the Australian regulatory laws unless expressly excluded by those laws.¹⁰ There is also a different definition of the word "document" in s 4(1) of the *Trade Practices Act 1974* (Cth). The definitions of the word "document" may be wide enough to keep abreast of changes in technology and may include information stored on electronic devices such as ipods and network servers, but the position is not clear. The search warrant provisions in the *Crimes Act 1914* (Cth) contain clear express provisions that permit access to, and the copying of, "data" and

⁸ See s 5(1) of the *ASIC Act*; s 9 of the *Corporations Act*; and s 10(1) of the *Superannuation Industry (Supervision) Act 1993* (Cth). See also *Green v FP Special Assets Ltd* (1991) 9 ACLC 75 at 81 Williams J (Ambrose J concurring); and *Currency Brokers (Aust) Pty Ltd v CAC (NSW)* (1986) 4 ACLC 381 at 384 per Bryson J.

⁹ Section 16 of the *Retirement Savings Accounts Act 1997* (Cth).

¹⁰ Section 5A of the *ASIC Act*; s 5C of the *Corporations Act*; s 4N(3) of the *Trade Practices Act 1974* (Cth); and s 264A(23) of the *Income Tax Assessment Act 1936* (Cth).

“information” held in computers including “computer programmes,” and “data storage devices” which form part of a computer network.¹¹ Given that a *Crimes Act 1914* (Cth) search warrant can be utilised when a notice to produce books is not complied with (see [6.7.1]), there should be uniformity between the types of “books” or “documents” that can be demanded by the regulators under their notices and the material that may be seized by a search warrant when such notices are not complied with.

There is no sound legal reason why the definition of “books” or “documents” should differ under the various Australian statutes. The legislation should be amended to provide that the Australian regulators have the power to require the production of “documents” as opposed to “books” or any other word. The meaning of “document” could then be determined solely by reference to the existing broad definition of that word in the *Acts Interpretation Act 1901* (Cth) (subject to whether that definition captures all current methods of electronically storing information and subject to ensuring parity with the definitions contained in the *Crimes Act 1914* (Cth)). This approach would reduce the confusing array of terminology currently used in the Australian legislation and reduce the uncertainty in the law created by the federal government’s ad hoc approach to enacting regulatory laws.

[5.5] Scope of the regulators’ power to issue a notice to produce books

Section 28 of the *ASIC Act*¹² provides that ASIC's power to require the production of books is only exercisable when it is investigating suspected contraventions of the corporations legislation (which includes the *Corporations Act* and the *ASIC Act*¹³) and certain other Commonwealth, Territory or State laws, or when it is performing non-investigatory or surveillance and monitoring functions, such as ensuring compliance with the corporations legislation. On a literal reading, this latter purpose empowers ASIC to issue a notice to produce books for the purpose of conducting random inspections or audits

¹¹ See the definitions in s 3C of the *Crimes Act 1914* (Cth). Also see ss 3E and 3K, 3L and 3LA of that Act.

¹² Also see *ASC v Dalleagles Pty Ltd* (1992) 10 ACLC 1104 at 1108.

¹³ See the definition of “corporations legislation” in s 5(1) of the *ASIC Act*.

of books to ensure that the relevant person is complying with the corporations legislation.¹⁴ This random audit power assists ASIC to undertake proactive surveillance programmes.¹⁵

Where ASIC, APRA or the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth); or ASIC and APRA are acting under the *Retirement Savings Accounts Act 1997* (Cth); that legislation provides that the regulators have the power to issue a notice requiring the production of books outside a formal investigation for the purpose of simply monitoring superannuation entities or retirement savings accounts providers. The legislation also authorises them to issue such notices for the purposes of conducting an investigation into the affairs of a superannuation entity or retirement savings accounts provider.¹⁶

Section 155(1) of the *Trade Practices Act 1974* (Cth) provides that the ACCC may issue a notice to produce documents to any person who the ACCC has reason to believe¹⁷ is capable of producing documents relevant to a matter that may constitute or constitutes a contravention of that Act. The language used in s 155(1) indicates that the ACCC's express statutory power to issue such notices is limited to formal investigations.

¹⁴ *Phillips v CAC (SA)* (1986) 11 ACLR 182; Richardson D, "Section 50 of the Australian Securities Commission Act 1989: White Knight or White Elephant?," (1994) 12 *C&SLJ* 418 at 426; Menzies S, "The Investigative Power of the ASC" (Paper Delivered at ASC Investigations and Enforcement Seminar in Perth on 31 October 1991) *ASC Digest* (update 38) 106 at 119 cited in Bolton B, "Compelling Production of Documents To The ASC" (1995) *QLSJ* 221 at p 222.

¹⁵ A recent study indicates that ASIC's proactive surveillance program has addressed fundamental issues relating to proper disclosure in financial accounts and has had a material impact on the financial results of the corporations investigated: see Brown P and Tarca A, "Achieving High Quality, Comparable Financial Reporting: A comparison of Independent Enforcement Bodies in Australia and the United Kingdom, March 2005, at 7, at http://papers.ssrn.com/so13/papers.cfm?abstract_id=691702, viewed on 22 February 2006.

¹⁶ Sections 253, 255 and 269 of the *Superannuation Industry (Supervision) Act 1993* (Cth); and ss 93 and 100 of the *Retirement Savings Accounts Act 1997* (Cth).

¹⁷ The reason to believe must be an actual belief for which there is a proper basis in fact and must relate to the capacity of the person to provide the information: See *Kotan Holdings Pty Ltd v Trade Practices Commission* (1991) ATPR 41-134 cited in Clough J and Mulhern C, *op cit* n 1, at p 24.

Section 264 of the *Income Tax Assessment Act 1936* (Cth) does not expressly provide that the ATO's power to require the production of books is limited to a formal investigation of the taxpayer's affairs. The lack of certainty in the law has meant that the parties have had to resort to litigation to determine the scope of that power. It has been held that the ATO has an implied power under general law to conduct random inspections of books for the purpose of ensuring compliance with the taxation legislation.¹⁸ The problems with relying on implied powers were discussed at [1.5.4].

The Australian regulators have power to issue a notice to produce books (or a notice to attend for oral examination, see [4.4]) to both suspects and non-suspects.¹⁹ However, their powers to issue notices to produce books to suspects and non-suspects are generally limited to formal investigations and those broad powers do not address the problem that some regulators lack a clear power to issue such notices outside a formal investigation for the purpose of conducting random audits to ensure compliance with the law.

In the United States, the SEC's and the ATD's express statutory powers to require the production of documents is limited to formal investigations.²⁰ It is not clear whether

¹⁸ *Industrial Equity Ltd v Deputy Commissioner of Taxation* (1990) 96 ALR 337 at 345 (in the context of a notice issued under s 263 of the *Income Tax Assessment Act 1936* (Cth)).

¹⁹ The phrase "non-suspects" refers to persons who are not currently or ultimately subject to civil or criminal proceedings. Notices can be issued to non-suspects because the legislation authorises the regulators to issue notices to produce books to persons who happen to possess documents relevant to the investigation even though they have no other involvement in that investigation (see s 33 of the *ASIC Act*, *ASC v Lucas* (1992) 7 ACSR 676 at 682 per Drummond J; and *ASC v Lord* (1992) 10 ACLC 50 at 54 per Davies J), or to persons who the regulator believes on reasonable grounds have custody or control of documents relevant to the investigation (see s 269 of the *Superannuation Industry (Supervision) Act 1993* (Cth) - ASIC, APRA and the ATO), or to persons who the regulator believes are capable of giving information (s 155(1) of the *Trade Practices Act 1974* (Cth) - ACCC). The ATO has the power to issue a notice to produce books to non-suspects as the taxation legislation expressly provides that a notice can be issued to a person irrespective of whether that person is a taxpayer: see s 264(1)(b) of the *Income Tax Assessment Act 1936* (Cth).

²⁰ Section 21(a) and (b) of the *Securities Exchange Act 1934* (US). See also 17 Code of Federal Regulations, s 201.232 (US); 15, USC, s 78u(b) and 15 USC, s 1312(a). The ATD's power to issue a civil investigative demand is only exercisable in the context of a formal investigation: see generally *United States v Union Oil Co* (1965) 343 F 2d 29; ss

those regulators have any implied random audit power. The IRS can issue a summons requiring the production of documents to determine if a tax return is correct, to determine tax liability and to inquire into any contravention of the revenue laws.²¹ The first purpose suggests that the IRS can issue a summons for the purpose of conducting random audits.

In the United Kingdom, the DTI's power to require the production of books is generally limited to situations where it is conducting a formal investigation.²² However, the DTI has a limited power to require a corporation (and no other person) to produce its documents outside a formal investigation where there the DTI has "good reason" for making such a requirement.²³

The FSA has clear powers to issue a notice to produce books within a formal investigation or outside a formal investigation for the purpose of performing its various non-investigatory regulatory functions.²⁴

The CC's power to require the production of documents is limited to formal investigations.²⁵

HMRC has power to issue a notice to produce documents for the purpose of determining whether a person may be subject to any tax liability and, if so, the amount of such tax liability.²⁶ The latter power may give HMRC a random audit power, but a notice

3, 101 and 102 of the of the *Antitrust Civil Process Act 1962* (US); and *Hart-Scott-Rodino Antitrust Improvements Act 1976* (US) cited in *WA Pines Pty Ltd v Bannerman* (1980) 41 FLR 169 at 189 by Lockhart J.

²¹ See s 7602 of the *Internal Revenue Code* (US); and Johnson G and Friedlander M, "Summons and Enforcement" at <http://www.irs.gov/pub/irs-tege/eotopicg93.pdf>, viewed on 26 February 2006.

²² Section 434(2) of the *Companies Act 1985* (UK).

²³ Section 447(2) of the *Companies Act 1985* (UK).

²⁴ See ss 2-6, 165(1) and (4), 171(2) and (3), 172(2), 173(3) and 175(1) of the *Financial Services and Markets Act 2000* (UK).

²⁵ Section 26 of the *Competition Act 1998* (UK).

²⁶ Section 20 of the *Taxes Management Act 1970* (UK). HMRC also has the power to require the production of documents for the purposes of conducting certain inquiries: see s 19A of the *Taxes Management Act 1970* (UK).

can only be issued in this situation where the relevant person has refused to voluntarily produce the documents.²⁷

[5.5.1] *Law reform*

According to Braithwaite, there has been a perception that there is a low probability of the ATO detecting contraventions of the taxation laws and that, as a result, “effective deterrence was wildly implausible.” However, Braithwaite also indicates that tax enforcement policy has improved in recent years and he has emphasised the importance of the ATO maintaining heightened audit levels.²⁸ The Australian regulators’ detection rates could be further improved if all of the legislation clearly specified the purposes for which notices to produce books could be issued and if they were all given clear express powers to issue such notices for the purpose of conducting random audits to ensure compliance with the law. Such a reform would promote the public interest by creating greater certainty in the law thereby reducing the delay in complying with the notice and the costs which may be otherwise associated with collateral litigation concerning the scope of the regulators’ implied powers to issue such notices or concerning allegations of an abuse of the regulators’ statutory powers to issue such notices. Even if all of the regulators are given an express random audit power, the private interest of the recipient of the notice is protected in that the random audit or monitoring power could only be exercised by them for the purpose of ensuring compliance with the legislation and this power could not be utilised for purposes not related to that legislation.

[5.6] Challenging the notice to produce books

[5.6.1] *Abuse of power*

In the context of the taxation and corporations legislation, it has been held that the ATO’s and ASIC’s investigative powers must be exercised in good faith for the purposes for

²⁷ Section 20B(1) of the *Taxes Management Act 1970* (UK).

²⁸ Braithwaite J, “Markets in Vice, Markets in Virtue”, The Federation Press, Leichhardt,

which they were conferred, and due regard must be had to those who are affected by the exercise of those powers.²⁹ Arguably, those principles would apply to all Australian regulators. However, there are no express provisions in the Australian legislation to ensure that those principles are observed.

The regulator's decision to issue a notice to produce books for a purpose not authorised by the regulatory legislation (see [5.5]), or that is defective in form (see [5.7]-[5.7.2]), or that is burdensome or oppressive,³⁰ or that requires the production of irrelevant information³¹ would be reviewable under s 5(1)(e) and s 5(2) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*AD(JR) Act*) on the ground of an improper exercise of power or abuse of power. However, there is a range of reforms that could be introduced to reduce the potential for such abuses of power occurring thereby reducing the need for judicial review, as discussed below.

There is no clear judicial or legislative authority on whether the regulator must disclose information in the notice to produce books to allow the recipient to determine whether it was issued for a purpose that is authorised by the legislation.³² It is suggested that the notices should make sufficient disclosure to allow the recipients to determine whether the regulator is acting within power (see [5.7.3.1]). Such information would then assist to determine whether they should make an application for review of the regulator's decision to issue the notice and may dissuade unmeritorious review applications.

2005 at pp 68 and 177-178.

²⁹ *Federal Commissioner of Taxation v Australia and New Zealand Banking Group Ltd* (1979) 143 CLR 499 at 521 cited in Clough J and Mulhern C, op cit n 1, at p 29. See also *Little River Goldfields NL v Moulds*; *Lee v Moulds* (1992) 10 ACLC 121 at 129; and *ASC v Lucas* (1992) 7 ACSR 676 at 682.

³⁰ See generally *Spargos Mining NL v Standard Chartered Australia [N o 2]* (1990) 8 ACLC 89 at 91-92.

³¹ *Commissioner for Railways v Small* (1983) SR (NSW) 564 at 575; *Bailey v Beagle Management Pty Ltd* [2001] FCA 60 at [31]; and *R v Turner (No 5)* [2001] TASSC 60 at [4].

³² *ASC v Lucas* (1992) 7 ACSR 676; and cf *MacDonald v ASC* (1993) 11 ACLC 804.

In the United States, the legislation governing the SEC contains a range of provisions designed to reduce the possibility of abuse of power and that expressly protect the private interests of the individual. It provides that the SEC, in issuing the subpoena, is required to take reasonable steps to avoid imposing undue burden or expense on the person who is the subject of the subpoena. The court is expressly given a power to modify the SEC's subpoena to prevent an undue burden. The subpoena also expressly informs the recipients that:

- (a) they have 14 days to object to the subpoena and to serve upon the party who issued the subpoena the grounds for objecting to it;
- (b) the court may quash or modify the subpoena if it fails to allow a reasonable time for compliance³³ (see [5.7.5.1]); and
- (c) they may challenge it on the ground that it is unreasonable, excessive in scope or unduly burdensome.³⁴

The legislation governing the IRS expressly provides that a taxpayer shall not be subjected to unnecessary investigations and that, as a general rule, a taxpayer should not be subjected to more than one inspection of their books for each taxable year.³⁵

In some Australian cases, the courts have recognised that the regulators must administer the regulatory legislation in such a way as not to impose on a person a burden disproportionate to the value of the information sought.³⁶ Rather than rely on the present case-by-case approach, it is suggested that the Australian legislation should require similar

³³ A notice requiring the production of a large number of relevant documents is not oppressive provided the recipient is given a reasonable period of time in which to produce those documents: see *Hill v Minister for Community Services and Health* (1991) 102 ALR 661 at 669 per Olney J; *Smorgon v Australia and New Zealand Banking Group Limited (Smorgon (No 1))* (1976) 134 CLR 475 at 491-492 per Stephen J; and *Clifford Corporation Ltd v ASIC* (1998) 30 ACSR 130 at 137-138 per Lindgren J: see also [5.7.5.1].

³⁴ Rule 45 of the Federal Rules of Civil Procedure; and the supplementary notes to the subpoena entitled "Protection of Persons Subject to Subpoenas." See also 17 Code of Federal Regulations, s 201.232.

³⁵ Section 7605 of the *Internal Revenue Code* (US).

³⁶ *Nicol v Brisbane City Council* [1969] Qd R 371 at 377 citing *Halsbury's Laws of England*, 3rd ed, vol 12, at 60; *SRKKK and SRNNN v ASIC* [2002] AATA 584 at [9]-[11] and [37]; and *Hart v Deputy Federal Commissioner of Taxation* [2005] FCA 1748 at [15].

disclosures to that contained in the SEC's subpoenas to be made in the Australian regulators' notices to produce books so that recipients are informed of their rights and of the legitimate grounds upon which they may challenge those notices. Such an approach would also direct the regulators' attention to the relevant requirements when drafting their notices, thereby reducing the risk of challenges to those notices on grounds such as abuse of power. This approach may promote more timely and effective regulation.

[5.6.2] *Natural justice*

According to the case law in Australia (in the context of ASIC where it is acting under the *ASIC Act* and the ATO where it is acting under the taxation legislation), and in the United Kingdom, the regulators conduct in relation to the preparation and issue of the notice to produce books and their decisions to issue such a notice are not reviewable on natural justice grounds.³⁷ The position may be the same when notices to produce books are issued by the regulators under the other Australian legislation but this is yet to be judicially tested. As noted at [4.7.3], the problem is that the same questions regarding the operation of the rules of natural justice in the investigative context are raised by challengers under the

³⁷ The fact that the regulators can demand immediate compliance with their notices to produce books coupled with the fact that there are severe penalties for non-compliance, suggests that compliance with such a notice should not be suspended until the requirements of natural justice are met: see *Norwest Holst Ltd v Secretary of State for Trade* [1978] 1 Ch 201; *Sixth Ravini Pty Ltd v Deputy Commissioner of Taxation* (1985) 85 ATC 4307 at 4313 per Northrop J; *Allen Allen & Hemsley v Deputy Commissioner of Taxation* (1988) 81 ALR 617 at 632; *Hare v Gladwin* (1988) 82 ALR 307 at 330; *Minosea v ASC* (1994) 14 ACSR 642 at 648-651 per Lindgren J; *ASC v Ampolex Ltd* (1996) 14 ACLC 80 at 91 per Kirby P; and *Ryan v ASIC; In the matter of Allstate Explorations NL* [2007] FCA 59 at [62]. Accordingly, ASIC's or the ATO's decision to issue a notice to produce books, and their conduct in relation to the preparation and issue of the notice, are not reviewable under ss 5(1)(a) or 6(1)(a) of the *AD(JR) Act* on the ground of a denial of natural justice. If a recipient could refuse to comply with the notice on the ground that a plethora of natural justice requirements have not been met, the resulting delay means that there is an increased risk that the relevant documents may be destroyed, concealed or removed from jurisdiction. The destruction of the documents, or the delay in the regulator obtaining the information, could jeopardise the investigation process and any subsequent enforcement action and exacerbate financial loss or delay the recovery of compensation for the victims, or the recovery of taxes, as the case may be:

different statutes. A uniform statement across the Australian legislation to the effect that the regulators' decisions to issue notices to produce books are not reviewable on natural justice grounds would resolve this problem.

[5.6.3] *Custodian*

The practice of placing documents in the possession of an independent custodian, pending the outcome of a dispute, has been adopted in the context of search warrants issued under s 3E of *Crimes Act 1914* (Cth) where a claim of legal professional privilege is made.³⁸ The United States' legislation governing the ATD provides that where a person complies with a notice to produce books, those documents are placed in the possession of a custodian. The legislation also sets out the circumstances in which the custodian can release the documents to the ATD.³⁹

The Australian legislation should provide that where the recipient intends to challenge the notice to produce books on grounds such as abuse of power, those books must be deposited, within the original time stated in the notice, with a custodian (a person who is independent of the regulator and the recipient), so that those books are in safe custody until the outcome of the recipient's challenge to the validity of the notice is known. This reform would promote the public interest in preserving documentary evidence as well as safeguarding the private interests of individuals by protecting them from arbitrary and unlawful interference with their privacy.

see *ASC v Ampolex Ltd* (1996) 14 ACLC 80 at 91 per Kirby P; and *Melbourne Home of Ford Pty Ltd v Trade Practices Commission* (1979) 36 FLR 450 at 456 per Smithers J.

³⁸ "General Guidelines Between the Australian Federal Police and the Law Council of Australia as to the Execution of Search Warrants on Lawyers' Premises, Law Societies and Like Institutions in Circumstances Where a Claim of Legal Professional Privilege is Made," 3 March 1997, Guidelines 25, 28 and 30. See also *Kennedy v Wallace* [2004] FCA 332 at [72].

³⁹ See 15 USC, s 1313.

[5.7] Form of notice to produce books

The Australian legislation does not clearly or uniformly specify the formal requirements for a valid notice. As a result of the discussion in this section, a summary of the suggested formal requirements for a valid notice is set out at [5.7.6].

The uncertainty in the law means that, in some cases, the regulators are unsure about what disclosures (for example, concerning the investigation) they are required to make in their notices to produce books. The recipients of such notices can therefore delay the investigation process through collateral litigation challenging the formal validity of the notices on the ground of inadequate disclosure. If there is a significant or material defect in form, the notice may be challenged on the ground that the regulator has not acted within its statutory power to issue notices.⁴⁰

Where ASIC issues a notice to produce books in relation to performing its functions under the *ASIC Act* and the *Corporations Act*, the notice must comply with a prescribed statutory form.⁴¹ However, the general language used in this form impliedly requires a range of additional disclosures to be made for the notice to be formally valid (see [5.7.2]). This prescribed form, unlike the prescribed form for ASIC's oral examination notice (see [4.5]), does not require disclosure to the recipient of the fact that the privilege against self-incrimination is not a reasonable excuse for refusing to comply with the notice.

None of the other Australian legislation requires the notice to produce books to comply with a statutorily prescribed form nor is there any clear indication in that legislation of what details must be included in the notice for it to be formally valid.⁴² In addition, the

⁴⁰ *Re ABM Pastoral Co Pty Ltd* (1978) 3 ACLR 239 at 247 per Rath J. Such challenges are commonly made on the ground of abuse of power under s 5(1)(e) of the *AD(JR) Act*.

⁴¹ The matters that must be disclosed in the notice are found in ss 30-33 of the *ASIC Act*; Form 2; and Regulation 5 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).

⁴² Where ASIC, APRA or the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth); or where ASIC and APRA are acting under the *Retirement Savings Accounts Act 1997* (Cth); ss 269 and 100 respectively of those Acts provide that the

Australian legislation does not require the regulators to inform the recipients of the effect of such notices on the duty of confidentiality, the right to silence, the privilege against self-incrimination, the penalty privilege or legal professional privilege.

In the United States, there is prescribed form for the SEC's subpoena⁴³ and for the IRS's summons to produce documents.⁴⁴ The ATD's "civil investigative demand" is required to state the nature of the conduct constituting the alleged antitrust violation, describe the class or classes of documentary material to be produced with such "definiteness and certainty as to permit such material to be fairly identified" and prescribe a date "which will provide a reasonable period of time within which such material so demanded may be assembled and made available for inspection and copying or reproduction."⁴⁵

There is no uniformity in the United States regarding the formal requirements for a valid notice, but at least the legislation requires greater specificity or detail in the notices than is the case for most of the Australian regulators' notices.

In the United Kingdom, there are no provisions in the DTI's, the FSA's or HMRC's governing legislation that clearly indicate what the formal requirements of a valid notice to

inspector may give a written notice to a person requiring that person to produce books. Section 155 of the *Trade Practices Act 1974* (Cth) provides that the ACCC may give a written notice to a person requiring that person to produce documents within the time and manner specified in the notice to a person specified in the notice. Section 264 of the *Income Tax Assessment Act 1936* (Cth) provides that the Commissioner may give a written notice to a person requiring that person to produce books. However, there is no statutorily prescribed form for any of these notices.

⁴³ It requires the subpoena to state the title of the matter, the name and the address of the party serving the subpoena. The subpoena must command the recipient to "produce for inspection and copying...at a specified place, date and time a list of documents." As noted at [5.6.1], the prescribed form also requires that the recipients be informed of their rights to object. The recipients must also be informed that they cannot be compelled to produce privileged material: see Rule 45 of the Federal Rules of Civil Procedure; and the supplementary notes to the subpoena entitled "Protection of Persons Subject to Subpoenas"; and s 21 b of the *Securities Exchange Act 1934* (US).

⁴⁴ Form 2039, and ss 7602, 7603, 7604, 7605, 7610 and 7210 of the *Internal Revenue Code* (US).

⁴⁵ 15 USC, s 1312(b)(1)(A), (2)(A), (B) and (C).

produce documents are.⁴⁶ In the case of the CC, the legislation provides that the notice to produce books must indicate the subject matter and the purpose of the investigation and the nature of the relevant offences. The notice must also specify the time and place for the production of the documents and the manner and form in which the documents are to be provided.⁴⁷

It is evident that there is no uniformity in the United Kingdom regarding the formal requirements for a valid notice, and the position is probably no better than in Australia.

[5.7.1] *First approach to form*

As noted at [4.5.1], the first approach to form dictates that the notice to attend for oral examination is valid if it appears regular on its face and if it meets any express disclosure requirements contained in the section of the legislation pursuant to which it is issued. This approach has also been adopted in some cases involving ASIC's and the ATO's notices to produce books.⁴⁸

⁴⁶ Section 434(2)(a) of the *Companies Act 1985* (UK). Sections 171(2) and 173(3) of the *Financial Services and Markets Act 2000* (UK) simply provide that the FSA's investigator may require a person to produce, at a specified time and place, specified documents of a specified description. Section 19A and s 20A of the *Taxes Management Act 1970* (UK) simply provide that the notice must be in writing and specify a time for the production of the documents which is not less than 30 days from the date of service of the notice.

⁴⁷ Section 26 of the *Competition Act 1998* (UK).

⁴⁸ For example, in some cases, the courts have held that there is no reason for implying into the clear words of the relevant section further implied requirements such as disclosure of the purpose for which the notice was issued: see *Phillips v CAC (SA)* (1986) 11 ACLR 182; *Salter v NCSC* (1988) 13 ACLR 253 at 259-260; *ASC v Lucas* (1992) 7 ACSR 676; and *Hart v Deputy Federal Commissioner of Taxation* [2005] FCA 1748 at [95]-[98]. In the latter case, Greenwood J held that it was sufficient if the purpose was made known to the recipient through other documents such as an accompanying letter. There is no need to disclose how the documents specified in the notice relate to the affairs of any of the corporations listed in the notice: see *ASC v Zarro* (1992) 10 ACLC 11 at 18 where Spender J indicated that the notice was valid provided that ASIC was able to show (by extrinsic evidence) to the court during the subsequent proceedings that such a relationship existed. See also *ASC v Lucas* (1992) 7 ACSR 676 at 694 per Drummond J; and *General Benefits Pty Ltd & Tomblin v ASIC* [2001] SASC 137 at [49] per Doyle CJ. There is no need to disclose the alleged or suspected contravention of the relevant legislation: see *Clifford Corporation Ltd v ASIC* (1998) 30 ACSR 130 at 136. The regulators need not disclose the

The reason for this approach to form is that some courts are of the view that it would be an "impossible imposition" on the regulator if its inquiries were dependent in every case on an obligation to detail, in the notice, a range of implied disclosure requirements. According to some case law, Parliament's intention in giving the regulators the power to require the production of books would be frustrated if the obligation of the recipient to produce books arose not on receipt of the notice, but only after the recipient or the court was satisfied that a range of implied disclosure requirements had been met.⁴⁹

[5.7.2] *Second approach to form*

As discussed at [4.5.2], under the second approach to form, the courts have formulated a range of implied disclosure requirements that must be met before the notice to attend for oral examination can be regarded as formally valid. This approach has also been adopted in a number of cases involving ASIC's, the ATO's and the ACCC's notices to produce books.⁵⁰

nature of their belief in relation to possible contraventions of the legislation: see *Hare v Gladwin* (1988) 82 ALR 307 at 330 per Sheppard J, in the context of the Electoral Commission's power to issue notices to produce books under s 316 of the *Commonwealth Electoral Act 1918* (Cth); and *ASC v Lucas* (1992) 7 ACSR 767 at 685 per Drummond J.

⁴⁹ *ASC v Zarro* (1992) 10 ACLC 11 at 18; and *Melbourne Home of Ford Pty Ltd v Trade Practices Commission* (1979) 36 FLR 450 at 456 per Smithers J.

⁵⁰ In some cases, the courts have held that the notices must satisfy a range of implied disclosure requirements including the disclosure of sufficient information to make it clear to the recipient that the regulator is undertaking an inquiry which it is empowered to undertake by identifying the source of power for the issue of the notice: see *General Benefits Pty Ltd & Tomblin v ASIC* [2001] SASC 137 at [35] per Doyle CJ. The notices must disclose how the documents required to be produced are relevant to the inquiry: see *MacDonald v ASC* (1993) 11 ACLC 804 at 807; and *Federal Commissioner of Taxation v Australian and New Zealand Banking Group Ltd* (1979) 143 CLR 499 at 525 per Gibbs ACJ. They must disclose the particular affairs of the corporation or relevant person that are the subject of the investigation and the possible contravention of the legislation that may have been committed: see *MacDonald v ASC* (1993) 11 ACLC 804 at 807 (1993) 11 ACLC 804 at 809. In reaching his decision, Davies J followed *Johns v ASC (No 2)* (1992) 10 ACLC 1057. Although the decision in *Johns v ASC (No 2)* concerned a notice to attend for an oral examination and s 19(3)(a) of the *ASIC Act*, Davies J was of the view that the reasoning in this case equally applied to a notice to produce books issued under s 30 of that Act. It could be argued that the requirement to disclose the possible contravention fails to recognise that the range of possible contraventions under the *Trade Practices Act 1974* (Cth) is more

[5.7.3] *Preferred approach to form*

The second approach to form is problematic because the types of disclosures required by this approach are unclear and may vary depending on the particular purpose (whether a formal investigative purpose or a non-investigative or monitoring purpose) relied upon by the regulator when issuing the notice. The lack of clarity is also exacerbated by the fact that there has been conflict between the various judges in the Federal Court and the State courts as to what disclosures should be made.⁵¹

Given that the level of disclosure required is unclear, the recipient may be able to delay compliance through litigation challenging the validity of the notice on the ground of inadequate disclosure.⁵² The most usual challenge would be on the ground that the notice did not sufficiently identify the nature of the matter under investigation or any other non-investigative purpose or display the relationship between the identified purpose and the documents sought.⁵³ The preferred disclosures that should be made in the notice are discussed below.

[5.7.3.1] *Purpose for which notice is issued*

The disclosure of the purpose for which the notice was issued would give the recipients more information so that they can make an informed decision on whether to comply. Such disclosure would also promote the public interest in securing immediate compliance. That is, a failure to include the purpose in the notice may result in refusals to comply which would not have otherwise taken place and could make it more likely that the recipient would challenge the regulator's decision to issue the notice on the ground of abuse

limited than those under the corporations legislation or taxation legislation. The task of the ACCC of identifying suspected contraventions and of putting that information in the notice is far less onerous than the task faced by ASIC and the ATO: see Kluver J, "ASC notices to produce documents: conflict in the Federal Court" [1993] BCLB 314.

⁵¹ See Kluver J, *ibid*

⁵² Bolton B, *op cit* n 14, at p 232.

⁵³ Kluver J, *op cit* n 50.

of power.⁵⁴

Conversely, there are good policy reasons why the regulators should not be required to disclose the purpose of issuing the notice. The regulator may be reluctant to describe the nature of the matter under investigation because the integrity of the investigative process may be jeopardised if they were required to prematurely disclose such information. Such disclosure may also “tip off” suspects as to the regulators’ lines of inquiry and may result in the destruction of documents.

On balance, it is argued that the purpose for which the notice is issued should be disclosed in the notice by making a general statement that the notice is issued in relation to the investigation of the affairs of a named corporation or natural person and that the investigation relates to a particular time period. In those cases where the regulator is not conducting a formal investigation, the notice should disclose that it was issued for the purpose of the regulator carrying out its other regulatory functions, for example, “ensuring or monitoring compliance” with the relevant legislation.

[5.7.3.2] *Suspicious may change*

At the early stage of the investigation, when a notice to produce books is issued, the regulator may not have a clear idea of what sections of the legislation may have been contravened.⁵⁵ If the regulator was required to specify in the notice to produce books from the outset what sections may have been contravened, this could severely impede the investigation. As the investigation progresses, the regulator’s suspicions may change. Under the second approach to form, the regulator may be required to issue fresh notices to produce books each time its suspicions changed as to what sections of the legislation may have been contravened. This approach not only imposes an additional administrative

⁵⁴ See *ASC v Lucas* (1992) 7 ACSR 676 at 685-686 per Drummond J; and s 5(1)(e) of the *AD(JR) Act*. Also see Kluver J, op cit n 50.

⁵⁵ Kluver J, op cit n 50, suggests that this is recognised by the differences in language between ss 13(1) and 19 of the *ASIC Act* (formal investigations) and ss 28(a), (b), and 30-34 (production of books without a formal investigation).

burden on the regulator in issuing fresh notices, but also affords recipients a greater opportunity to challenge the validity of the notice on the ground of a defect in form.

[5.7.3.3] *Avoiding delay and destruction of documents*

The difference in approach between the formal requirements of notices to appear for examination, and of notices to produce books, can also be justified on the ground that, unlike the situation with oral testimony, there is a danger that documentary evidence may be concealed or destroyed or sent out of the jurisdiction. Any delay in complying with the notice to produce documents increases the risk that the documents may be concealed or destroyed. Accordingly, the public interest in preserving the documents and in giving the regulator quick access to all relevant documents demands minimal formal disclosure requirements for notices to produce books to minimise the opportunity for delay through unmeritorious appeals based on arguments relating to alleged defects in the form of those notices.⁵⁶

[5.7.3.4] *Natural justice*

As indicated above at [5.6.2], the rules of natural justice or procedural fairness do not apply to notices to produce books. By contrast, as discussed at [4.7.3], those rules do apply to the conduct of oral examinations. Accordingly, there is no natural justice requirement that the section number and the name of the legislation allegedly contravened be disclosed in the notice to produce books.⁵⁷

⁵⁶ *ASC v Lucas* (1992) 7 ACSR 676 at 684-685. Also see *Dwyer v NCSC* (1988) 15 NSWLR 285 at 287 per McLelland J; *Gray v CCA (Vic)* (1988) 13 ACLR 516; and *Spargos Mining NL v Standard Chartered Australia Ltd (No 2)* (1989) 1 ACSR 314 at 319, 8 ACLC 89 at 94-95 per McLelland J.

⁵⁷ The rules of natural justice require that such disclosures be made in the notice to attend for oral examination: see *Connell v NCSC* (1989) 7 ACLC 748 at 754 per O'Bryan J; and *Story v NCSC* (1988) 13 ACLR 225 at 238 per Young J. By contrast, it has been held that the rules of natural justice do not apply to a notice to produce books: see *Minosea v ASC* (1994) 14 ACSR 642.

[5.7.4] *Specify books to be produced*

Where ASIC is acting under the *ASIC Act*, the notice to produce books must require the production of “specified” books.⁵⁸ Where ASIC, APRA and the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth); or where ASIC and APRA are acting under the *Retirement Savings Accounts Act 1997* (Cth), the notice must require the production of “any relevant books,” rather than “specified” books.⁵⁹ Section 155 of the *Trade Practices Act 1974* (Cth) provides that the ACCC’s notice to produce books can require the production of “any such documents” that are relevant to the investigation. The taxation legislation broadly provides that the ATO’s notice must require the production of “all books,” rather than specified books.⁶⁰

In the United States, the SEC’s subpoena requires the recipient to produce “specified” documents that are relevant to its investigation.”⁶¹

In the United Kingdom, the legislation provides that, in some cases, the DTI’s, the FSA’s and the CC’s notice “specify” the documents that are required to be produced.⁶² In the case of the FSA, the legislation does define the word “specified” but that definition is unhelpful as it simply provides that “specified means specified in a notice in writing.”⁶³

In view of the above, the predominant approach appears to be that the notice must “specify” the books required to be produced. It is suggested that all the Australian

⁵⁸ See ss 30-34 of the *ASIC Act*.

⁵⁹ Sections 255 and 269 of the *Superannuation Industry (Supervision) Act 1993* (Cth); and ss 93 and 100 of the *Retirement Savings Accounts Act 1997* (Cth).

⁶⁰ Section 264(1)(b) of the *Income Tax Assessment Act 1936* (Cth).

⁶¹ Section 21(a) and (b) of the *Securities Exchange Act 1934* (US); and see the subpoena contained in Rule 45 of the Federal Rules of Civil Procedure.

⁶² Sections 434(2) and 447(2) of the *Companies Act 1985* (UK); and s 83(2)(b) of the *Companies Act 1989* (UK); ss 165(1) and (4), 169(1), 171(2) and (3), 172(2) and 173(3) of the *Financial Services and Markets Act 2000* (UK); and s 26 of the *Competition Act 1998* (UK). By contrast, the taxation legislation does not use the word “specified”: see s 19A and 20 of the *Taxes Management Act 1970* (UK).

⁶³ Sections 165(10), 171(6) and 172(5) of the *Financial Services and Markets Act 2000* (UK).

legislation should empower the regulators to require the production of “specified” documents that are relevant to the regulatory purpose being pursued. However, there are currently two inconsistent approaches in the case law as to the meaning of the word “specified.” This uncertainty has resulted in costly and time-consuming litigation concerning the question of whether the regulators have given a sufficient description in their notices of the books that they require to be produced.⁶⁴

Some cases indicate that the word "specified" could be given a strict meaning and could be interpreted as being satisfied only when the notice identifies the book or document by its name, date, author or any other unmistakable identification.⁶⁵ Under this approach, the recipients of notices do not have to produce documents that are not specified in the notice even if they know that the documents are relevant to the investigation.⁶⁶ This approach may unduly restrict the investigation,⁶⁷ or defeat the investigative purpose underlying the issue of the notice.⁶⁸ If the word “specified” was given a narrow, strict or punctilious⁶⁹ interpretation so as to limit the regulator’s power to require the production of books to situations where those books are relevant to specific transactions or sections of the legislation (allegedly contravened), it would be necessary to issue a fresh notice in respect of each variation of the offending transactions. This approach could result in additional delay and cost.⁷⁰

By contrast, in other cases, the word “specified” has been interpreted in a way that

⁶⁴ See, for example, *Currency Brokers (Aust) Pty Ltd v CAC (NSW)* (1986) 10 ACLR 623 at 627-629 per Bryson J.

⁶⁵ *Currency Brokers (Aust) Pty Ltd v CAC (NSW)* (1986) 10 ACLR 623 at 627-629 per Bryson J.

⁶⁶ *Lane v Registrar of the Supreme Court of NSW* (1981) 148 CLR 245 at 258-259; (1981) 35 ALR 322 at 331; and *Currency Brokers (Aust) Pty Ltd v CAC (NSW)* (1986) 10 ACLR 623 at 627-629 per Bryson J. See also *X v APRA* [2007] HCA 4 at [54] and [56].

⁶⁷ *Hardie v Cooke* [1990] 2 Qd R 351 at 354 per Byrne J.

⁶⁸ *Currency Brokers (Aust) Pty Ltd v CAC (NSW)* (1986) 10 ACLR 623 at 628 per Bryson J.

⁶⁹ See *Currency Brokers (Aust) Pty Ltd v CAC (NSW)* (1986) 10 ACLR 623 at 627 per Bryson J.

⁷⁰ *Spargos Mining NL v Standard Chartered Australia Ltd (No 2)* (1990) 8 ACLC 87 at 93 per McLelland J.

authorises the regulator to require the production of books that relate to the substance of the transaction or matter that is of concern to the regulator or that relate to the substance of the contravention that may have occurred, rather than particular books that relate to specific sections of the legislation that have been allegedly contravened.⁷¹ The public interest underlying the regulators' investigative powers could be promoted by defining the word "specified" in terms that promote this approach. The private interest could also be protected by adopting the approach in the United States by adding a proviso to the effect that the word "specified" requires the regulator to identify with sufficient clarity the documents that are required to be produced so as to permit the recipient to fairly identify the relevant documents.⁷² A clear description of the books, in the terms suggested above, would allow the recipient to make an informed decision to either comply, or refuse to comply, with the notice.

This reform would also reduce the current problem of recipients challenging notices to produce books, which do not clearly describe the documents, on the ground of a defect in form or on the basis of a "reasonable excuse" thereby promoting the public interest in the regulators obtaining immediate compliance with their notices. This reform would also promote the private interest by clearly informing recipients of their obligations under the notice and would reduce the potential for unfair prosecutions of recipients. That is, it would be unfair to the recipients if they were prosecuted for not producing certain books where their failure to produce was due to a lack of a clear understanding as to what the regulator required.⁷³

⁷¹ *Spargos Mining NL v Standard Chartered Australia Ltd (No 2)* (1990) 8 ACLC 87 at 93 per McLelland J.

⁷² In the United States, in the context of the ATD, see: 15 USC, s 1312(b)(1)(A), (2)(A), (B) and (C). See generally *Riley McKay v Bannerman* (1977) 15 ALR 561 at 566 per Bowen CJ; *Federal Commissioner of Taxation v Australian and New Zealand Banking Group Ltd (Smorgon's case)* (1979) 143 CLR 499 at 525 per Gibbs ACJ; *Melbourne Home of Ford Pty Ltd v Trade Practices Commission* (1980) 31 ALR 519 at 531; *Pyneboard Pty Ltd v Trade Practices Commission* (1982) 57 FLR 368 at 375 per Northrop, Deane and Fisher JJ; *Perron Investments Pty Ltd v DCT* (1989) 90 ALR 1 at 19 per Hill J; *MacDonald v ASC* (1993) 11 ACLC 804 at 809 per Davies J; and *Hart v Deputy Federal Commissioner of Taxation* [2005] FCA 1748 at [22] citing *Fieldhouse v Commissioner of Taxation* (1989) 25 FCR 187 at 208.

⁷³ See generally *MacDonald v ASC* (1993) 11 ACLC 804 at 809.

[5.7.5] *Time and place for production of books*

The notice to produce books should only be formally valid if it specifies the time and place for the production of books. However, there is no consistent approach in the Australian legislation on those basic issues. Some of the legislation provides that the notice must specify the time and place at which the books are to be produced.⁷⁴ However, s 264 of the *Income Tax Assessment Act 1936* (Cth), s 269 of the *Superannuation Industry (Supervision) Act 1993* (Cth) and s 100 of the *Retirement Savings Accounts Act 1997* (Cth) do not expressly require that information relating to the time and place of production be specified in the notice.

The public interest requires that all Australian regulators be given the express power to require the production of documents at a specified time and place and, where necessary, to demand immediate compliance with their notices so as to minimise delay and the opportunity for the destruction of documents. However, it is also recognised that, in some legitimate cases, the legislation should also afford the recipient a reasonable time to comply with the notice.⁷⁵ Those competing interests and suggested reforms are discussed below.

[5.7.5.1] *Reasonable time to produce books*

In the cases of notices to produce books that are issued by ASIC in Australia, the SEC and the ATD, in the United States, and the FSA, in the United Kingdom, the legislation protects the private interest of the recipient by expressly providing that the time and place specified for the production of books must be reasonable in all of the circumstances.⁷⁶ In the United Kingdom, the legislation expressly provides that a person has a defence to the

⁷⁴ See, for example, ss 30-33 of the *ASIC Act*; Regulation 5 of the *Australian Securities and Investments Commission Regulations 2001* (Cth); s 155 of the *Trade Practices Act 1974* (Cth); s 26 of the *Competition Act 1998* (UK); and ss 19A and 20A of the *Taxes Management Act 1970* (UK).

⁷⁵ *Hopfner v Flavel* (1990) 8 ACLC 706 at 711 per Mullighan J.

⁷⁶ Section 87(a) of the *ASIC Act*; Rule 45 of the Federal Rules of Civil Procedure, Parts C & D (c)(3)(A) (SEC); 15 USC, s 1312(b)(2)(B) (ATD); and s 165(2)(a) of the *Financial Services and Markets Act 2000* (UK) (FSA).

DTI's prosecution for non-compliance with a notice to produce books if that person can establish that it was not reasonably practicable for her/him to comply with the notice.⁷⁷ Presumably this may include a defence based on the fact that the DTI gave an unreasonable time for compliance. In the case of HMRC, in the United Kingdom, the legislation expressly provides that the recipient must be given a reasonable opportunity to deliver the documents.⁷⁸

The requirement to give the recipient a reasonable time to comply with the notice has been impliedly recognised in the context of the Australian taxation legislation. The ATO's failure to give a reasonable time for compliance may constitute an abuse of power. Whether the ATO has given the recipient a reasonable time for compliance is based on an objective test involving a consideration of a number of factors.⁷⁹ In the context of some Australian legislation, it could also be argued that where the recipients of notices are required to produce too many documents in too short a time period, the practical difficulties of compliance (resulting from the size and range of the task) would constitute a "reasonable excuse" for non-compliance with the notice. The need for a uniform "reasonable excuse" defence is discussed at [6.8].

It has been held that the recipient is also entitled to a reasonable time to seek legal advice before complying with the ATO's requirement to produce documents and that a temporary denial of the ATO's access to information or premises on reasonable grounds (to seek legal advice) does not constitute the offence of obstruction.⁸⁰ The denial of a

⁷⁷ Section 447(7) of the *Companies Act 1985* (UK).

⁷⁸ See s 20B of the *Taxes Management Act 1970* (UK).

⁷⁹ Those factors are discussed in *Deputy Federal Commissioner of Taxation v Ganke* (1975) 75 ATC 4097 at 4101 per Nagle J; *Ganke v Deputy Federal Commissioner of Taxation (No 2)* (1982) 82 ATC 4474 at 4477 per Yeldham J; *McVey v Commissioner of Payroll Tax (Vic)* (1985) 85 ATC 4131 at 4137 per Kaye J; *Perron Investments Pty Ltd v Deputy Commissioner of Taxation* (1989) 90 ALR 1 at 30 per Hill J; *Clarke v Deputy Federal Commissioner of Taxation* (1989) 89 ATC 4521 (cited in *ASC v Zarro* (1992) 10 ACLC 11 at 16 by Spender J); *Hart v Deputy Federal Commissioner of Taxation* [2005] FCA 1748 at [22] and [23]; and Woellner, Vella, Burns and Barkoczy, *Australian Taxation Law*, 16th Ed, CCH, Sydney, 2006, at [30-180].

⁸⁰ *Scanlan v Swan* (1982) 82 ATC 4402 at 4404 and 4405 per Helman J (in the context of ss 232 and 263 of the *Income Tax Assessment Act 1936* (Cth)).

reasonable opportunity to consult a lawyer may result in a declaration that the exercise of a statutory power is invalid on the ground of abuse of power.⁸¹

It is arguable that similar implied rights, to those described above in the context of the ATO's powers, may exist for recipients in the context of notices to produce books issued by all of the other Australian regulators. Rather than determine these matters on a case-by-case basis, all of the Australian legislation should expressly provide that, in certain cases (such as where a large volume of material must be produced), the regulators must give the recipients a reasonable time to comply with their notices and a reasonable time to seek legal advice before complying with the notices.

The obvious danger inherent in such suggested reforms is that recipients may seek to abuse those rights for the purpose of achieving delay. It has been held that there are situations where the assertion of the common law right to seek legal advice is spurious and unreasonable.⁸² The potential for abuse of those rights could be partly addressed by requiring the recipient to produce the documents to a "custodian" within the original time for compliance prescribed by the notice whilst legal advice is sought or pending the outcome of any challenge to the validity of the notice, as suggested at [5.6.3]. This potential for abuse could also be dealt with by imposing a costs penalty where recipients bring an unmeritorious review application,⁸³ as discussed at [11.6.7].

[5.7.5.2] *Production of books forthwith*

In the context of Australia and the United Kingdom, it has been held that the efficient operation of the regulatory legislation and the achievement of its purposes would be frustrated if the regulators could not insist on immediate compliance with their notices.⁸⁴

⁸¹ *Federal Commissioner of Taxation v Citibank Ltd* (1989) 85 ALR 588 (in the context of the execution of a search warrant). Also see *Allitt v Sullivan* [1988] VR 621.

⁸² See *Fischer v Douglas* [1978] Qd R 27.

⁸³ *Re Kirby* 85 ATC 4559 at 4566; and *ASIC v Australian Investors Forum Pty Ltd* [2004] NSWSC 491 at [29].

⁸⁴ *ASC v Ampolex Ltd* (1996) 14 ACLC 80 at 91-92 per Kirby P. Also see *R v Justices of Berkshire* (1879) 4 QBD 469.

However, only ASIC,⁸⁵ and the DTI,⁸⁶ have an express power to require that the books be produced “forthwith” upon service of the notice. By contrast, in the case of HMRC, the legislation expressly provides that the notice to produce documents must specify a time for the production of the documents which is not less than 30 days from the date of service of the notice.⁸⁷

All Australian regulators should have the same express power as ASIC and the DTI to require the production of books “forthwith” provided such a requirement is reasonable in the circumstances of the case. Such a power may prevent the destruction of documentary evidence by assisting the regulators to more quickly obtain a search warrant to seize documents in those cases where the regulators’ search warrant power is conditional upon proving non-compliance with the notice to produce books⁸⁸ (see [6.7.1]). It is easier to establish non-compliance with a notice which requires the production of books “forthwith” than would be the case where the regulator simply had the power to demand compliance with the notice within a reasonable time. In some cases, a failure to comply within a reasonable time may only be established where the regulator can prove an unreasonable delay or procrastination on the part of the recipient of the notice.⁸⁹ In this latter situation, unscrupulous recipients are given the opportunity to destroy the relevant documents before a search warrant can be issued.

⁸⁵ Section 87(b) of the *ASIC Act*.

⁸⁶ Section 447(3) of the *Companies Act 1985* (UK).

⁸⁷ Sections 19A and 20A of the *Taxes Management Act 1970* (UK).

⁸⁸ The search warrant powers contained in the following legislation are conditional upon non-compliance with a notice to produce books: see s 35(1)(b) of the *ASIC Act*; s 271(b) of the *Superannuation Industry (Supervision) Act 1993* (Cth); s 103(1)(b) of the *Retirement Savings Accounts Act 1997* (Cth); s 448(1) of the *Companies Act 1985* (UK); and s 176(2) of the *Financial Services and Markets Act 2000* (UK). By contrast, a search warrant issued under s 3E of the *Crimes Act 1914* (Cth), may be obtained where there is a suspected criminal contravention of Commonwealth law, as discussed at [6.7.1].

⁸⁹ *Keen Brothers Pty Ltd v Young* (1983) 33 SASR 481.

[5.7.6] Law reform - formal requirements for notices to produce books

In view of the matters discussed at [5.7]–[5.7.5.2], the Australian legislation should be amended by including a provision which specifies a concise and exhaustive list of the disclosures that the regulators are required to make in their notices to produce books.

It is suggested that the regulators’ notice to produce books should:

- (1) state the full name and address of the person to whom the notice is to be given;
- (2) identify the general nature of the matter to be investigated (but need not identify the section numbers and the name of the Act, see [5.7.3.1]–[5.7.3.2]), or where there is no formal investigation, state that the notice is issued in relation to performing a particular regulatory function such as “ensuring or monitoring compliance with the legislation;”
- (3) specify the books that relate to the substance of the relevant transactions with sufficient clarity⁹⁰ as to permit the recipient to fairly identify the relevant books (see [5.7.4.1]);
- (4) specify the time and place for production of those books (see [5.7.5]);
- (5) identify the employee of the regulator to whom the books must be delivered;
- (6) state the effect of the regulator’s power to require the production of books on the duty of confidentiality, the right to silence, the privilege against self-incrimination, the penalty privilege and legal professional privilege (see [5.12]–[5.12.2.1]);
- (7) state that the recipient has the right to recover prescribed costs incurred in complying with the notice;
- (8) state that the recipient has the right to seek legal advice before complying with the notice (see [5.7.5.1]);

⁹⁰ See also *Seven Network Ltd v ACCC* [2004] FCAFC 267 at [49].

- (9) state that the recipient has the right to seek judicial review of the regulator's decision to issue the notice on the ground of abuse of power (see [5.6.1] and [5.7.3.1]);
- (10) state that the recipient must, within the original time required for compliance, give the books to a custodian (see [5.6.3]) while the recipient exercises the rights referred to in (8) or (9) above;
- (11) state the consequences of not complying with the notice, subject to the defence of "reasonable excuse" (see Chapter 6); and
- (12) give the contact details for further information from the regulator.⁹¹

[5.8] Who can receive a notice?

[5.8.1] Corporations

There is uncertainty in the case of some regulators as to whether a notice to produce books can be served on a corporation. In some cases, a corporation may be civilly or criminally liable for contraventions of the regulatory laws. The difficulties of establishing civil or criminal liability of the corporation are discussed at [9.7]-[9.7.4]. Those difficulties are exacerbated if the regulator cannot obtain the corporation's books. Accordingly, it is argued that the regulator should have clear powers to require a corporation to produce its documents.

ASIC has an express power to issue a notice to produce books to a corporation under s 30 of the *ASIC Act*. The ATO has the power under the taxation legislation to issue a notice to produce books to a "person" and that word is defined in that legislation to include a corporation.⁹² However, where ASIC, APRA or the ATO are acting under

⁹¹ See also generally ALRC, Discussion Paper 65: Civil and Administrative Penalties Summary of Proposals and Questions 7. Fairness; and ASIC, Continuous disclosure obligations: infringement notices, An ASIC Guide, "The infringement notice process," May 2004, at [14], <http://www.asic.gov.au/asic/asic.nsf>, viewed on 8 June 2004.

⁹² Sections 6(1) and 264 of the *Income Tax Assessment Act 1936* (Cth).

the *Superannuation Industry (Supervision) Act 1993* (Cth),⁹³ or where ASIC and APRA are acting under the *Retirement Savings Accounts Act 1997* (Cth),⁹⁴ the legislation provides that the notice can be issued to a “person” and does not expressly provide that such a notice can be issued to a corporation. The same problem arises where the ACCC issues a notice under the *Trade Practices Act 1974* (Cth).⁹⁵ It could be argued that because s 155(7)(b) of the *Trade Practices Act 1974* (Cth) gives a corporation evidential immunity in relation to incriminating answers, information or documents provided under compulsion (see [5.12.1]), it follows that the ACCC can give a corporation a notice to attend for oral examination or to produce books. The regulators could also have the power to serve notices on corporations because s 23 of the *Acts Interpretation Act 1901* (Cth) defines the word “person” word to include a corporation. This Act may not apply to all of the regulatory laws as its operation depends on whether it has been excluded by those laws.⁹⁶

The *Acts Interpretation Act 1901* (Cth) does not finally resolve the matter because the case law indicates that a notice to attend for an oral examination cannot be served on a corporation by reason of the fact that a corporation is an artificial entity or inanimate legal fiction and therefore has no ability to attend an oral examination and give evidence.⁹⁷ By contrast, the case law supports the view that the Australian regulators can issue a notice to produce books to a corporation and require it to produce documents.⁹⁸

⁹³ Sections 255 and 269 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

⁹⁴ Sections 93 and 100 of the *Retirement Savings Account Act 1997* (Cth).

⁹⁵ Section 155(1) of the *Trade Practices Act 1974* (Cth).

⁹⁶ See, for example, s 5A of the *ASIC Act*.

⁹⁷ *Smorgon v ANZ Banking Group Ltd* (1976) 134 CLR 475 at 481-485 per Stephen J; *Rochfort v Trade Practices Commission* (1982) 43 ALR 659 at 667 per Mason J; *MFI v National Crime Authority* (1991) 105 ALR 1 at 15; *MacDonald v ASC* (1994) 12 ACLC 246 at 250; *Fieldhouse v Commissioner of Taxation (Cth)* 1898 25 FCR 187 at 281; and *Re Chircan Holdings* [2002] NSWSC 988 at [12].

⁹⁸ *Ex parte Gerard & Co Pty Ltd; Re Craig* (1944) 44 SR NSW 370 at 377 per Jordan CJ; *Penn-Texas Corporation v Murat Anstalt (No 2)* [1964] 2 QB 647 at 663 per Denning MR; *Senior v Holdsworth*; *Ex parte Independent Television News Ltd* [1976] 1 QB 23 at 32; *Smorgon v ANZ Banking Group Ltd* (1976) 134 CLR 475 at 486 per Stephen J; *Rochfort v Trade Practices Commission* (1982) 43 ALR 659 at 667 per Mason J; *ASC v Zarro* (1992) 10 ACLC 11; *MacDonald v ASC* (1994) 12 ACLC 246 at 249; and *Re Chircan Holdings* [2002] NSWSC 988 at [12].

In the United States, the legislation does not always give clear guidance on whether a notice to produce books can be issued to a corporation.⁹⁹

In the United Kingdom, the regulators can issue notices to produce books to corporations.¹⁰⁰

All of the Australian legislation should adopt the approach in s 30(1)(a) of the *ASIC Act* which expressly provides that a notice to produce books (as opposed to a notice to attend for an oral examination) can be issued to a corporation thereby avoiding the type of litigation discussed above. With the exception of the *ASIC Act*, the Australian legislation is also silent on the question of how a corporation can comply with a notice to produce books. Accordingly, this matter should also be expressly dealt with by the legislation. The reason for this suggestion is that such an express provision would avoid the difficulties that may arise at common law, as discussed below.

[5.8.1.1] *Production of corporation's books by corporation's officer - common law problems*

At common law, officers of a corporation are not bound to produce documents which they hold for that corporation when that corporation has forbidden production of

⁹⁹ See the lack of clarity in Rule 45 of the Federal Rules of Civil Procedure (US); and 15 USC, s 1312(a). However, in the case of the ATD, while the legislation expressly provides that an investigative notice is issued to a “person,” that legislation also specifically provides a procedure for serving notices on corporations: see 15 USC, s 1312(e) and (g). The legislation governing the IRS expressly recognises that a notice to produce books can be issued to the corporation’s officer: see s 7602(a)(2) of the *Internal Revenue Code* (US).

¹⁰⁰ FSA and the CC have power to issue a notice to produce books to a person: see ss 165(1) and 171(2) of the *Financial Services and Markets Act 2000* (UK); and s 26 of the *Competition Act 1998* (UK). Schedule 1 of the *Interpretation Act 1978* (UK) provides that “person” includes a corporation. The DTI has an express power to issue a notice to produce books to a corporation: see ss 434(2) and 447(2) of the *Companies Act 1985* (UK); and s 83(2)(b) of the *Companies Act 1989* (UK). HMRC has the power to issue the notice to a “taxpayer”: see s 19A of the *Taxes Management Act 1970* (UK). Section 20(6) of that Act provides that a “taxpayer” includes a company that has ceased to exist.

those documents.¹⁰¹ The common law reason for this rule is that the officer's possession is not theirs but that of the corporation¹⁰² or that, in the absence of the corporation's consent, the officer lacks the authority to produce the corporation's documents.¹⁰³

[5.8.1.2] *Privileges and duties*

In *Rochfort v Trade Practices Commission*¹⁰⁴ Mason J indicated that the notice should be given to the corporation or employer (rather than to the officer or employee) so that it, as the owner of the documents, is afforded the opportunity to object to production on the ground of the privilege against self-incrimination or legal professional privilege. However, the reasoning in this case does not apply with equal force today. The decision in *Rochfort v Trade Practices Commission* predates the decision in *Environment Protection Authority v Caltex Refining Co Pty Ltd*¹⁰⁵ in which the High Court held that a corporation cannot claim the privilege against self-incrimination at common law. In addition, the Australian regulatory laws override a natural person's right to refuse to comply with the regulator's notice on the grounds of the privilege against self-incrimination or the penalty privilege (see [5.12.1]). However, Mason J's comments do have merit in the context of legal professional privilege in that, in some cases as discussed at [5.12.2], a person (including a corporation) can refuse to comply with a regulator's notice on the ground of legal professional privilege.

The statutory obligation to comply with the notice to produce books also overrides any contractual duty to follow instructions or equitable obligation of confidentiality that the recipient (officer) may owe to the corporation, as discussed [4.6.2]. So the fact that the

¹⁰¹ *Crowther v Appleby* (1873) LR 9 CP 23; and *Euclase & Co v Louisville and Nashville Railroad Co* [1912] 1 KB 135 cited in *Rochfort v Trade Practices Commission* (1982) 43 ALR 659 at 665 by Mason J.

¹⁰² *Earl of Falmouth v Moss* (1822) 11 Price 455; 147 ER 530.

¹⁰³ *Euclase & Co v Louisville and Nashville Railroad Co* [1912] 1 KB 135 at 145 per Vaughan Williams LJ and at 147-148 per Buckley LJ cited in *Rochfort v Trade Practices Commission* (1982) 43 ALR 659 at 665 by Mason J.

¹⁰⁴ (1982) 43 ALR 659 at 666-667.

¹⁰⁵ (1994) 68 ALJR 127.

corporation may have “forbidden” the officer from producing the documents is not relevant in the context of the regulators’ investigative powers.

[5.8.1.3] *Practical solution*

The regulators should have the clear power to issue the notice to produce books to the corporation and the power to require the corporation to comply with the notice. This reform would overcome the common law difficulties described above of requiring officers/employees to produce the corporation’s/employer’s documents. The Australian legislation should also adopt the approach in s 84 of the *ASIC Act* which clearly outlines how an artificial entity like a corporation can comply with the notice. Section 84 provides that where a requirement (including a requirement to comply with a notice to produce books) is made of a corporation, ASIC can require the corporation, through a person who is, or has been, its officer, to comply with that requirement. There is a similar provision in s 447(3) of the *Companies Act 1985* (UK), in the case of the DTI. The subpoena used by the SEC in the United States expressly provides that the corporation is required to designate one or more of its officers, directors, or managing agents, or other persons who consent, to comply with the subpoena on its behalf.¹⁰⁶

[5.8.2] *Persons who have custody or control or who do not have custody or control of books*

ASIC, APRA and the ATO have the power to require a person to produce documents which are in that person’s “custody or control.”¹⁰⁷ It has been held that a person has “custody or control” of books if that person has the physical ability to produce

¹⁰⁶ Rule 30(b)(6) of the Federal Rules of Civil Procedure (US).

¹⁰⁷ See s 33 of the *ASIC Act* which gives ASIC the power to issue a notice to produce books to a person who has “possession” of those books. “Possession” is defined in s 86 of the *Corporations Act* to mean “custody or control.” See also ss 255 and 269 of the *Superannuation Industry (Supervision) Act 1993* (Cth); ss 93 and 100 of the *Retirement Savings Accounts Act 1997* (Cth); and s 264 of the *Income Tax Assessment Act 1936* (Cth). See also the definition of “possession” in s 175(1) of the *Financial Services and Markets Act 2000* (UK).

those books even though the employer/corporation has legal control of those books as the owner thereof.¹⁰⁸ Such an interpretation promotes the statutory policy that the regulators' powers to require the production of books must be effective.¹⁰⁹ Accordingly, ASIC, APRA and the ATO can require any person who has physical control of the documents in question to produce those documents irrespective of whether that person has legal possession or is the owner of the books.¹¹⁰ This means that the common law rule, described at [5.8.1.1], which provides that the employees' possession is not theirs, but is that of their employer, would not apply in the context of a notice to produce books issued by ASIC, APRA or the ATO.

In the United States, the ATD can only require a person to produce books that are in that person's "custody or control."¹¹¹ The IRS may only require persons who have "possession, custody or care" of the relevant books to produce those books.¹¹²

In the United Kingdom, HMRC can only require the production of documents that are in a person's "possession or power."¹¹³

In contrast to the legislation discussed above, s 30(1)(b) of the *ASIC Act* gives ASIC an express power to require "eligible persons" to produce documents irrespective of whether they have "custody or control" of those documents at the time they receive the notice. "Eligible persons" are defined in s 5(1) of the *ASIC Act* to include the corporation's officers and directors. This legislation puts recipients of notices in a difficult position because it creates a statutory obligation to produce the books, or imposes a penalty for non-compliance, irrespective of whether they have custody or control of those books. It is not clear whether the omission of the requirement of "custody or control" from s 30(1)(b) is a drafting error or whether Parliament was of the view that, given the nature of the recipient

¹⁰⁸ *Federal Commissioner of Taxation v Australia and New Zealand Banking Group Ltd (Smorgon's case)* (1979) 143 CLR 499 at 520 per Gibbs ACJ.

¹⁰⁹ *ASC v Dalleagles Pty Ltd* (1992) 10 ACLC 1104 at 1111; and *Sullivan v Earl of Caithness* [1976] 2 WLR 361 at 363 per May and Parke JJ (Lord Widgery CJ agreeing).

¹¹⁰ *Federal Commissioner of Taxation v Australia and New Zealand Banking Group Ltd (Smorgon's case)* (1979) 143 CLR 499 at 520 per Gibbs ACJ.

¹¹¹ 15 USC, s 1312(g).

¹¹² Section 7602(2) of the *Internal Revenue Code* (US).

contemplated by s 30(1)(b), it is assumed that such a person would have custody or control of the relevant books.

There are similar provisions in the *Superannuation Industry (Supervision) Act 1993* (Cth), which empower the regulator to require “relevant persons”¹¹⁴ to produce books, and in the *Retirement Savings Accounts Act 1997* (Cth), which empower the regulator to require “authorised persons” to produce the books,¹¹⁵ irrespective of whether those persons have custody or control.

By contrast, in the United Kingdom, the DTI’s power to require a corporation’s “officers and agents” (which overlaps with “eligible persons,” “relevant persons,” or “authorised persons” described above) to produce books is subject to the requirement that the books must be in the officer’s or agent’s “custody or power.”¹¹⁶ In addition, where a person is required by the DTI to produce books, that person has a statutory defence to a prosecution for non-compliance with that notice if that person can establish that the documents were not in her/his “possession or control.”¹¹⁷

The ATO has power to issue taxpayers with an “offshore information notice” which can require them to produce documents that are kept outside Australia which the Commissioner believes are relevant to the assessment of those taxpayers. The legislation does not expressly require the documents to be in the “custody or control” of the taxpayer and the notice is effective even if the taxpayer is incapable of complying with the notice.¹¹⁸

The ACCC can issue a notice to produce books under s 155 of the *Trade Practices Act 1974* (Cth) to any person who it has “reason to believe” is capable of

¹¹³ See ss 19A and 20 of the *Taxes Management Act 1970* (UK).

¹¹⁴ See s 255 of the *Superannuation Industry (Supervision) Act 1993* (Cth) and the definition in s 10(1) of that Act.

¹¹⁵ See s 93 of the *Retirement Savings Accounts Act 1997* (Cth) and the definition in s 16 of that Act.

¹¹⁶ Section 434(2)(a) of the *Companies Act 1985* (UK).

¹¹⁷ Section 447(7) of the *Companies Act 1985* (UK).

¹¹⁸ Sections 264A and 264A(16) of the *Income Tax Assessment Act 1936* (Cth).

furnishing information and that power is not expressly subject to the requirement that the books must be in a person's "custody or control."

Under some of the Australian laws, the recipient may be able to argue that they have a reasonable excuse for non-compliance where they can establish that they have no custody or control over the books¹¹⁹ but that requires the recipient to embark upon expensive and time consuming litigation to establish this defence.

[5.8.2.1] *Law reform*

The Australian legislation should be amended to provide greater protection to the recipient by expressly providing that the Australian regulators can only require persons who the regulator suspects have "custody or control" of books to produce those books. This suggested reform is consistent with the law governing the issue of subpoenas in court proceedings in Australia.¹²⁰ The recipients could also be given a statutory defence to prosecution for non-compliance based on the fact that they have no "custody or control." Alternately, such a defence could be included within a uniform "reasonable excuse" defence, as discussed at [6.8]. Where the recipients of the notices do not have custody or control of the relevant books, they should simply be required to identify the person who, to the best of their knowledge, last had custody or control of the books, as discussed at [5.11].

[5.9] Regulators' powers where books are produced or seized

[5.9.1] *Inspect and copy books*

Where ASIC issues a notice to produce books under the *ASIC Act*; ASIC, APRA or the ATO issue the notice under the *Superannuation Industry (Supervision) Act 1993* (Cth); or ASIC and APRA issue the notice under the *Retirement Savings Accounts Act 1997* (Cth); and the books are produced pursuant to the notice, or are obtained by a search warrant, that

¹¹⁹ *Hill v Minister for Community Services and Health* (1991) 102 ALR 661 at 669 per Olney J. See further at [6.8].

legislation expressly provides that those regulators may take possession of the books¹²¹ and may inspect, copy and take extracts from those books.¹²² The ATD, in the United States, has a similar express power¹²³ as does the DTI,¹²⁴ the FSA,¹²⁵ and the CC,¹²⁶ in the United Kingdom.

By contrast, the ACCC and the ATO (when acting under the taxation legislation) have no similar express powers. It is preferable if they were given equivalent express powers so as to avoid the need to rely on the vagaries of implied powers and the potential problem of affected persons challenging the regulators' attempts to deal with the books in particular ways.

[5.9.2] Use books in a proceeding

In the context of a notice to produce books issued under the *ASIC Act*, the *Superannuation Industry (Supervision) Act 1993* (Cth), or the *Retirement Savings Accounts Act 1997* (Cth), where the recipient complies with the notice, the legislation provides that the regulator may use, or permit the use of, the books (by other regulators or the Commonwealth DPP) for the purpose of commencing a proceeding against a person.¹²⁷ In the case of ASIC, the word "proceeding" is defined in the *ASIC Act* to include a proceeding before a court or a hearing or examination before a tribunal (which includes ASIC).¹²⁸ Accordingly, the legislation authorises ASIC to use the books in any subsequent

¹²⁰ See generally *Kennedy v Wallace* [2004] FCA 636 at [22].

¹²¹ Sections 37(2) of the *ASIC Act*; 273(2) of the *Superannuation Industry (Supervision) Act 1993* (Cth); and 104(2) of the *Retirement Savings Accounts Act 1997* (Cth).

¹²² Sections 37(3) of the *ASIC Act*; 273(3) of the *Superannuation Industry (Supervision) Act 1993* (Cth); and 104(3) of the *Retirement Savings Accounts Act 1997* (Cth).

¹²³ 15 USC, s 1312(b)2(B).

¹²⁴ Section 447(5)(a)(i) of the *Companies Act 1985* (UK); and s 83(4) of the *Companies Act 1989* (UK).

¹²⁵ Section 175(2)(a) of the *Financial Services and Markets Act 2000* (UK).

¹²⁶ Section 26(6) of the *Competition Act 1998* (UK).

¹²⁷ Sections 37(4) of the *ASIC Act*; 273(4) of the *Superannuation Industry (Supervision) Act 1993* (Cth); and 104(4) of the *Retirement Savings Accounts Act 1997* (Cth).

¹²⁸ Section 5(1) of the *ASIC Act*.

examinations or administrative hearings conducted by ASIC¹²⁹ (or by the other regulators) as well as in any subsequent court proceedings.

In the United States, the SEC has express powers to use oral examination transcripts and documentary evidence in its enforcement proceedings.¹³⁰ The ATD has an express power to use “investigative files” (which includes transcripts of oral examinations and documentary material) in any proceedings before a court, a grand jury, or a Federal administrative or regulatory agency.¹³¹ The DTI, in the United Kingdom, also has express powers to use documents obtained by compulsion in civil and criminal proceedings.¹³²

There are no express provisions that authorise the ACCC or the ATO (when acting under the taxation legislation) to use the books in a proceeding but those regulators may have implied powers to do so.¹³³ The FSA, in the United Kingdom, may also have a similar implied power.¹³⁴

There are examples in the case law where individuals have challenged the regulator’s ability to use books in particular proceedings.¹³⁵ To reduce the possibility of such challenges in the future, the Australian regulators should be given an express power to use the books in a proceeding and the word “proceeding” should be clearly defined to remove any doubt about the types of proceedings in which the books may be used. The legislation governing APRA, the ACCC and the ATO should contain a definition of the word “proceeding” similar to that contained in the *ASIC Act* to make it clear that the books

¹²⁹ See, for example, *ASC v Kippe* (1996) 67 FCR 499.

¹³⁰ See, for example, the Securities and Exchange Commission, Washington DC 2059, Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena, “Principal Uses of Information”, at p 3; and 17 CFR 201.102(e).

¹³¹ 15 USC, s 1313(d)(1).

¹³² Section 449(1) of the *Companies Act 1985* (UK).

¹³³ The implied power may derive from s 155(7) of the *Trade Practices Act 1974* (Cth); or s 3E of the *Taxation Administration Act 1953* (Cth), as the case may be.

¹³⁴ See generally ss 348 and 349 of the *Financial Services and Markets Act 2000* (UK).

¹³⁵ See generally *ASC v Kippe* (1996) 67 FCR 499.

can be used in administrative proceedings before the regulator (see Chapter 10) and in all types of court proceedings.

[5.9.3] *Retention of books*

The *ASIC Act*, the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Retirement Savings Accounts Act 1997* (Cth) provide that where books are produced to the regulators, they are authorised to retain possession of those books for as long as necessary to achieve any of the purposes specified in that legislation.¹³⁶ The ACCC has a similar power.¹³⁷ The ATO (where it is acting under the taxation legislation) has no express power to retain books for as long as necessary to achieve its regulatory purposes. This means that the ATO can only retain the books with the consent of the owner.¹³⁸

In the United States, the legislation gives the “custodian” an express power to retain the ATD’s “investigative files” (including documentary evidence) while they may be required in the relevant proceedings. The custodian has a power to release the documentary evidence to the person who produced that evidence where the relevant proceeding has been completed or has not been commenced within a reasonable time after the completion of the investigation.¹³⁹

In the United Kingdom, the only express power given to the DTI and the FSA to

¹³⁶ Sections 37(5) of the *ASIC Act*; 273(5) of the *Superannuation Industry (Supervision) Act 1993* (Cth); and 104(5) of the *Retirement Savings Accounts Act 1997* (Cth).

¹³⁷ Section 156 of the *Trade Practices Act 1974* (Cth). See also ACCC, “Section 155 of the Trade Practices Act, Information gathering powers of the Australian Competition and Consumer Commission in relation to its enforcement function – Use of information, documents and evidence obtained under s 155,” October 2000 at p 19, at <http://www.accc.gov.au>, viewed on 25 September 2005.

¹³⁸ However, if the books were seized by a search warrant issued under s 3E of the *Crimes Act 1914* (Cth), they must be returned if the reason for their seizure no longer exists, or it is decided that they will not be used in evidence in criminal proceedings, or the period of 60 days after their seizure ends, whichever first occurs: see s 3ZV of the *Crimes Act 1914* (Cth).

¹³⁹ 15 USC, s 1313(c) and (e).

retain documents is in the context of documents seized by search warrants.¹⁴⁰

It is suggested that public interest considerations would dictate that it is not reasonable for a regulator to have to re-deliver books to the owner where the owner is a suspect as such action may prejudice the security and integrity of vital documentary evidence.¹⁴¹ Accordingly, all of the Australian regulators, including the ATO, should be given clear powers to retain books for as long as necessary for the purpose of performing their regulatory functions. A balance between competing public and private interests could be achieved if the Australian legislation afforded the owner of the books the right to be provided with a copy of those books and by affording the owner an express right to the return of those books once the proceedings, or other regulatory functions, to which the books are relevant, have been completed.

[5.9.4] Statements

The complexity of modern commerce and of civil and criminal contraventions of the regulatory laws means that the regulators may require direct assistance from the perpetrator or from the person who created the relevant documents to make sense of those documents.¹⁴² However, the Australian regulators do not have consistent powers to require such persons to provide an explanation of the relevant books.

The *ASIC Act*, the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Retirement Savings Accounts Act 1997* (Cth) expressly provide that the person who produced the books, or the person who compiled the books, may be required to make a statement explaining to the best of that person's knowledge and belief any matter relating to

¹⁴⁰ Section 448(6) of the *Companies Act 1985* (UK); and s 176(8) of the *Financial Services and Markets Act 2000* (UK).

¹⁴¹ See *Adelaide Steamship Co Ltd v Spalvins* (1994) 12 ACLC 542 at 544-545 per Branson J.

¹⁴² Longo JP, "The Powers of Investigation of the Australian Securities Commission: Balancing the Interests of Persons and Companies under Investigation with the Interests of the State" at pp 43 and 47 in Grabosky P and Braithwaite J (Editors), "Business Regulation and Australia's Future," Australia Institute of Criminology, Canberra 1993.

the compilation of those books or any matter to which those books relate.¹⁴³ A failure to comply with this provision, without a reasonable excuse, can result in the imposition of a penalty.¹⁴⁴ A person could not refuse to make an explanatory statement on the ground of the privilege against self-incrimination or the penalty privilege¹⁴⁵ or, in the case of some regulators, legal professional privilege.¹⁴⁶ The ACCC and the ATO (when it is acting under the taxation legislation) and the United States' regulators do not have an express power to require a person who has produced the books to make a statement explaining the books.

In the United Kingdom, the DTI,¹⁴⁷ the FSA,¹⁴⁸ and the CC,¹⁴⁹ have express powers to require persons to provide an explanation of the documents that they produce.¹⁵⁰ HMRC may require the person who produced the documents to also furnish such particulars as HMRC may reasonably require.¹⁵¹

The ACCC and the ATO could ask the person who produced the books to voluntarily provide the required explanation about the books. The problems with voluntary cooperation were discussed at [3.4]. Alternately, they could require the person, who produced the documents, to attend for a subsequent oral examination to explain the

¹⁴³ Sections 37(9) of the *ASIC Act*; 273(9) of the *Superannuation Industry (Supervision) Act 1993* (Cth); and 104(9) of the *Retirement Savings Accounts Act 1997* (Cth).

¹⁴⁴ Sections 63 of the *ASIC Act*; 285 of the *Superannuation Industry (Supervision) Act 1993* (Cth); and 115 of the *Retirement Savings Accounts Act 1997* (Cth).

¹⁴⁵ Sections 68 of the *ASIC Act*; 287 of the *Superannuation Industry (Supervision) Act 1993* (Cth); and 117 of the *Retirement Savings Accounts Act 1997* (Cth).

¹⁴⁶ Sections 69 of the *ASIC Act*; 288 of the *Superannuation Industry (Supervision) Act 1993* (Cth); and 118 of the *Retirement Savings Accounts Act 1997* (Cth).

¹⁴⁷ Section 447(5)(a)(ii) of the *Companies Act 1985* (UK).

¹⁴⁸ Section 175(2)(b) of the *Financial Services and Markets Act 2000* (UK).

¹⁴⁹ Section 26(6) of the *Competition Act 1998* (UK).

¹⁵⁰ In the case of the DTI and the FSA, a person cannot refuse to make an explanatory statement on the ground of the privilege against self-incrimination or the penalty privilege but could refuse to do so on the ground of the banker's duty of confidence (see s 84(4) of the *Companies Act 1989* (UK); and s 175(5) of the *Financial Services and Markets Act 2000* (UK)) or legal professional privilege (see s 452 of the *Companies Act 1985* (UK), s 83(5) of the *Companies Act 1989* (UK) and s 413 of the *Financial Services and Markets Act 2000* (UK)).

¹⁵¹ Section 20 of the *Taxes Management Act 1970* (UK).

documents. However, this would require the issue of an additional notice requiring that person to attend for oral examination. Those regulators could routinely issue a notice to produce documents and a notice to attend for oral examination to the same person so that they can require that person to attend for an oral examination to explain the documents.¹⁵² This latter suggestion is problematic particularly given that, in the case of all regulators, the notice to attend for oral examination can only be issued in the context of a formal investigation (see [4.4]), and, in the case of some regulators, the notice to produce books can be issued outside formal investigations (see [5.5]). It is preferable if all regulators have an independent power (that is, independent of the oral examination power) to require the recipient of the notice to produce books to make a statement explaining those books, if so required.

[5.10] Affected persons' rights where books are produced or seized

[5.10.1] *Inspection and copying of books*

All of the Australian legislation (except the taxation legislation) provides that while the books are in the regulator's possession, the regulator must permit persons who are ordinarily entitled to inspect those books, such as the owner, to inspect those books at all reasonable times.¹⁵³ The *Trade Practices Act 1974* (Cth) (unlike the other Australian legislation) also permits the owner of the books to make copies or take extracts from the books.¹⁵⁴

The legislation governing the DTI, the FSA, HMRC and the CC (in the United Kingdom); and the SEC and the IRS (in the United States); does not give the owner of the books any express rights of inspection or to make copies of, or to take extracts from, the books while they are in the regulator's possession. By contrast, the legislation governing the

¹⁵² See generally 17 Code of Federal Regulations, s 201.232 (US).

¹⁵³ The regulator may also permit any other person to inspect those books: see s 37(7) of the *ASIC Act*; s 273(7) of the *Superannuation Industry (Supervision) Act 1993* (Cth); s 104(7) of the *Retirement Savings Accounts Act 1997* (Cth); and s 156(3) of the *Trade Practices Act 1974* (Cth).

ATD provides that the person who produced the books, or who gave the oral testimony, may (under such reasonable terms and conditions as the Attorney-General prescribes) inspect those books or the transcript, as the case may be.¹⁵⁵

The Australian legislation should give the owner of the books, and any other relevant person, clear rights to inspect, and to make copies, or be provided with copies of the books (that are in the regulator's possession) for legitimate business or private purposes.

[5.11] Regulators' powers where books are not produced

The Australian legislation (except the *Trade Practices Act 1974* (Cth) and the taxation legislation) provides that where a person fails to produce books, that person may be required to inform the regulator, to the best of that person's knowledge and belief, of where the books may be found and to identify the person who last had custody of the books and to state where that person may be found.¹⁵⁶ A failure to provide this information may result in the imposition of a penalty.¹⁵⁷

In the United Kingdom, the DTI,¹⁵⁸ the FSA,¹⁵⁹ and the CC¹⁶⁰ have similar express powers to require a person to disclose where the books may be found.¹⁶¹

The Australian legislation (except the *Trade Practices Act 1974* (Cth) and the taxation legislation) provides that where a person has not complied with an investigative requirement (including a notice to produce books), the regulators may certify that failure

¹⁵⁴ Section 156(3) of the *Trade Practices Act 1974* (Cth).

¹⁵⁵ 15 USC, s 1313(c)(4).

¹⁵⁶ Sections 38 of the *ASIC Act*; 274 of the *Superannuation Industry (Supervision) Act 1993* (Cth); and 105 of the *Retirement Savings Accounts Act 1997* (Cth).

¹⁵⁷ Sections 63 of the *ASIC Act*; 285 of the *Superannuation Industry (Supervision) Act 1993* (Cth); and 115 of the *Retirement Savings Accounts Act 1997* (Cth).

¹⁵⁸ Section 447(5)(a)(ii) of the *Companies Act 1985* (UK).

¹⁵⁹ Section 175(3) of the *Financial Services and Markets Act 2000* (UK).

¹⁶⁰ Section 26(6) of the *Competition Act 1998* (UK).

¹⁶¹ Section 175(3) of the *Financial Services and Markets Act 2000* (UK).

to the court and obtain a court order that the recipient comply with the notice.¹⁶² This matter is discussed at [6.5].

Where a person has not complied with a notice to produce books, the Australian regulators may obtain a search warrant to seize those books. However, they have inconsistent search warrant powers, as discussed in Chapter 6.

The Australian regulators need more than one enforcement option to deal with the problem of non-compliance with a notice to produce books. It is suggested in Chapter 6 that they should be given a uniform range of enforcement options¹⁶³ as this would increase the prospect of obtaining and preserving vital documentary evidence.

[5.12] Admissibility of books in subsequent proceedings

[5.12.1] *The privilege against self-incrimination and the penalty privilege and evidential immunity*

Section 68(1) of the *ASIC Act* provides that the privilege against self-incrimination or the penalty privilege are not reasonable excuses for the recipient refusing to comply with ASIC's notice to produce the books. The recipient (a natural person or corporation) is not afforded "use evidential immunity" (unlike the position for natural persons in relation to oral examinations - see [4.10.2]) or "derivative use evidential immunity" in relation to the contents of those books. Accordingly, all of the evidence contained in the books is admissible in any subsequent proceedings. Prior to 1992, examinees (who claimed the privilege against self-incrimination or the penalty privilege) were afforded use evidential immunity in relation to the fact that they had produced documents at the examination. This immunity prevented the prosecution from putting into evidence in a subsequent prosecution the fact that the defendant had produced the documents. This immunity made it difficult for the prosecution to link the defendant

¹⁶² See ss 70 of the *ASIC Act*, 289 of the *Superannuation Industry (Supervision) Act 1993* (Cth) and 119 of the *Retirement Savings Accounts Act 1997* (Cth).

with the documents that established the commission of the offence. For that reason, this immunity was abolished by amending the *ASC Law* (now *ASIC Act*) in 1992.¹⁶⁴ However, as discussed below, this particular immunity still exists in some of the other Australian legislation.

Where ASIC, APRA and the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth), s 287 provides that the privilege against self-incrimination or the penalty privilege are not reasonable excuses for the recipient of the notice refusing to produce the books. The recipient (a natural person or corporation) is not afforded “use evidential immunity” or “derivative use evidential immunity” in relation to the contents of those books. However, unusually (in comparison to the *ASIC Act*) s 287(3) affords the recipients (who claim the privilege against self-incrimination or the penalty privilege) use evidential immunity in relation to the fact that they had produced the books. This immunity makes it difficult for the prosecution to link the defendant with the documents that establish the commission of the offence. Since 1999, this evidential immunity is only available to natural persons and is not available to corporations.¹⁶⁵

Where ASIC and APRA are acting under the *Retirement Savings Accounts Act 1997* (Cth), the position is the same as that described above in the context of the *Superannuation Industry (Supervision) Act 1993* (Cth)¹⁶⁶ except that s 117(2) of the *Retirement Savings Accounts Act 1997* (Cth) does not make it clear whether a corporation can claim the privilege against self-incrimination or the penalty privilege (and any associated statutory evidential immunity) in relation to the fact of production of books or whether those privileges are restricted to natural persons. This question must be resolved by the common law. As discussed at [4.10.2], the Australian common law indicates that a corporation cannot claim either of those privileges.

¹⁶³ See generally Fisse B and Braithwaite J, op cit n 4, at p 88.

¹⁶⁴ Kluver J, op cit n 6, at [3.110]-[3.112]; and *Corporations Legislation (Evidence) Amendment Act 1992* (Cth).

¹⁶⁵ See s 287(2A) of the *Superannuation Industry (Supervision) Act 1993* (Cth).

¹⁶⁶ See s 117(1)(2)(a)(iii) and (3)(b) of the *Retirement Savings Accounts Act 1997* (Cth).

Section 155 of the *Trade Practices Act 1974* (Cth) expressly overrides the privilege against self-incrimination and a person cannot refuse to produce documents to the ACCC on the ground of this privilege. However, s 155 affords the recipient (a natural person or corporation) “use evidential immunity” in relation to the contents of the documents in subsequent criminal proceedings (except proceedings under s 155).

Where the ATO issues a notice to produce books under s 264 of the *Income Tax Assessment Act 1936* (Cth), the position is the same as that discussed at [4.10.2] in the context of oral examinations. Accordingly, that legislation impliedly overrides the privilege against self-incrimination and a person cannot refuse to produce documents on the ground of this privilege nor can they claim any evidential immunity in relation to the contents of those documents.

The position in relation to the United Kingdom regulators’ statutory powers to require the production of documents and the recipient’s general law right to claim the privilege against self-incrimination is not clear. The position is complicated by the fact that the United Kingdom joined the European Economic Community in 1972. Article 6(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (Rome, November 4, 1950) provides that it is unlawful to demand the production of self-incriminating documents.¹⁶⁷ The affect of this Convention on the United Kingdom’s domestic law is explained at [2.2.3].

In the context of subpoenas or civil investigative demands requiring the production of books issued by the SEC and the ATD, in the United States, the position is the same as discussed at [4.10.2] in relation to oral examinations. In the case of the IRS, taxpayers can refuse to produce their personal papers which are in their possession on the ground of the privilege against self-incrimination.¹⁶⁸ As discussed at [4.10.2], a corporation cannot claim the privilege against self-incrimination in the United States.

¹⁶⁷ See also *Funke v Funke* [1993] 16 EHRR 297; and *Cremieux v France* [1993] 16 EHRR 357 cited in Fisher J, Bewsey J, Waters M, and Ovey E, “The Law of Investor Protection,” Sweet & Maxwell, London, 2003 at pp 590 and 596-597.

¹⁶⁸ See the Fifth Amendment to the United States Constitution; and Johnson G and

[5.12.1.1] *Law reform*

There is no sound legal reason why the position in relation to the privilege against self-incrimination, the penalty privilege and any associated evidential immunity should not be the same under all of the Australian legislation. This is especially so given that the rationale for those privileges is a constant and does not change depending upon the regulator with which the individual is dealing, as discussed at [4.10.2.1]. The fact that a natural person is afforded use evidential immunity in relation to the fact of production of books under the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Retirement Savings Accounts Act 1997* (Cth), but not under the *ASIC Act*, is a further example of the federal government's ad hoc approach to regulatory reform. The protection of use evidential immunity in relation to the contents of documents and for corporations, in the context of the *Trade Practices Act 1974* (Cth), is unusual and is inconsistent with the other regulatory and evidential statutes.

The Australian legislation should be amended in accordance with the provisions of the *ASIC Act* by expressly abrogating the privilege against self-incrimination and the penalty privilege for natural persons and corporations as grounds for refusing to comply with a notice to produce books. All of the Australian legislation should expressly provide that natural persons and corporations do not have any evidential immunity in relation to the contents of compulsory produced books and in relation to the fact of production of those books. The reason for this suggestion is that documentary evidence is often crucial in proving contraventions of the regulatory legislation, particularly where the victim is the corporation, or a more amorphous entity such as the market, or where there is no human victim who can testify as to exactly what occurred, as discussed at [5.1]. This reform is also consistent with the decision in *Environment Protection Authority v Caltex Refining Co Pty Ltd*¹⁶⁹ where the majority of the High Court indicated that the privilege against self-incrimination had no application to documents that are, in their nature, real evidence.

Friedlander M, op cit n 21.

¹⁶⁹ (1993) 178 CLR 477; 68 ALJR 127 at 137 per Mason CJ and Toohey J and at 166 per

[5.12.2] *Legal professional privilege and evidential immunity*

The *ASIC Act*, the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Retirement Savings Accounts Act 1997* (Cth) expressly provide that only a recipient, who is a lawyer, can refuse to comply with a requirement to produce books on the ground of legal professional privilege.¹⁷⁰

By contrast, clients (including natural persons and corporations) cannot refuse to produce a book on the ground of their own (client) legal professional privilege as it has been held that the *ASIC Act* (and arguably the identical provisions in the legislation described above) impliedly overrides the client's legal professional privilege.¹⁷¹ Unlike the position in relation to oral answers (see [4.10.3]), the legislation described above does not afford the recipient (client) any evidential immunity in relation to the contents of the otherwise (at common law) privileged books.¹⁷² Accordingly, the contents of those books are admissible in any subsequent proceedings.

There is no statutory provision that expressly deals with legal professional privilege in the case of the ATO (where the ATO is acting under the taxation legislation). The principles are the same as those discussed at [4.10.3] in the context of oral examinations and the recipient (a natural person or corporation) may refuse to comply with the notice to produce books on the ground of this privilege.¹⁷³

Section 155(7B) of the *Trade Practices Act 1974* (Cth) was recently introduced and expressly provides that a natural person or corporation cannot be required to produce

McHugh J; but see also at 151, per Deane, Dawson and Gaudron JJ (dissenting).

¹⁷⁰ Sections 68(2) of the *ASIC Act*; 288(2) of the *Superannuation Industry (Supervision) Act 1993* (Cth); and 118(2) of the *Retirement Savings Accounts Act 1997* (Cth).

¹⁷¹ The relevant authorities are discussed at [4.10.3].

¹⁷² Section 76(1)(d) of the *ASIC Act*, s 290(5) of the *Superannuation Industry (Supervision) Act 1993* (Cth); and 120(5) of the *Retirement Savings Accounts Act 1997* (Cth) only afford use evidential immunity in relation to oral answers and do not apply to documentary evidence.

¹⁷³ See the authorities discussed at [4.10.3].

a document that would disclose information that is the subject of legal professional privilege.¹⁷⁴

In the United States, a person may refuse to comply with a notice to produce books on the ground of legal professional privilege, in the cases of the SEC, the ATD and the IRS. The position is the same in the United Kingdom, in the cases of the DTI, the FSA, HMRC¹⁷⁵ and the CC.¹⁷⁶ The relevant principles for those regulators were discussed at [4.10.3].

[5.12.2.1] *Law reform*

As discussed at [4.10.3.1], it is difficult to reconcile the fact that the recipient's (client's) legal professional privilege has been impliedly abrogated by the *ASIC Act*, the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Retirement Savings Accounts Act 1997* (Cth), but has been expressly preserved by the *Trade Practices Act 1974* (Cth) and impliedly preserved by the *Income Tax Assessment Act 1936* (Cth). Legal professional privilege has also been expressly or impliedly preserved by all of the foreign regulatory legislation. There is no evidence that some Australian regulators, such as ASIC, have a greater need to access material, normally protected by legal professional privilege, than other regulators, such as the ACCC or the ATO. The inconsistent treatment of legal professional privilege under the Australian legislation cannot be supported on any sound legal grounds. The common law rationale for this privilege is a constant and does not change depending upon the regulator with which the individual is dealing.

It is recognised that there are complex arguments for, and against, the retention of the privilege in the context of the regulators' investigations. As suggested at [4.10.3.1], the preferable reform option, which balances competing public and private interests, is to abrogate legal professional privilege in all of the Australian regulators' investigations. This

¹⁷⁴ See also *Daniels v ACCC* (2002) 77 ALJR 40; 192 ALR 561; [2002] HCA 49 at [86].

¹⁷⁵ This privilege is expressly preserved in the context of HMRC's power to require the production of documents by s 20B(8) of the *Taxes Management Act 1970* (UK).

¹⁷⁶ Section 30 of the *Competition Act 1998* (UK).

would promote the public interest in giving the regulators access to all relevant information. The private interest could be protected by giving the client “use” and “derivative use” evidential immunity so that the privileged documents produced by the client are inadmissible against that person in all subsequent proceedings.

[5.13] Conclusion

It is evident that the ACCC’s and the ATO’s (where it is acting under the taxation legislation) powers to require the production of books, are deficient in comparison to those of ASIC, APRA and the ATO (where the ATO is acting under the *Superannuation Industry (Supervision) Act 1993* (Cth)), as the ACCC and the ATO (where it is acting under the taxation legislation) must rely on many implied powers and the regulated must rely on implied rights or protections. In some cases, there are no implied powers or protections.

A range of inconsistencies and inadequacies in the Australian regulators’ powers to require the production of books have been highlighted in this chapter. Reforms have been suggested to address those problems and to achieve greater efficiencies in relation to the exercise of those powers and, therefore, more effective regulation.

Those reforms include:

- (a) uniform powers outlining when notices to produce books can be issued and who can receive such notices;
- (b) a prescribed form that sets out the information that must be specified in all regulators’ notices to produce books;
- (c) uniform powers to use books that are produced or seized;
- (d) uniform powers to obtain books when they are not produced; and
- (e) uniform protections and rights for the recipients of such notices including uniform provisions dealing with their rights to access books produced and to claim the privileges and associated evidential immunity discussed in this chapter.

CHAPTER 6
ENFORCEMENT POWERS
by Tom Middleton

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CHAPTER 6

ENFORCEMENT POWERS

[6.1] Introduction

This chapter deals with the regulators' powers to enforce compliance with their investigative requirements, including the requirements to attend for oral examination and answer questions, and to produce books. Some enforcement options are not uniformly available to all of the Australian regulators and there appears to be no sound legal reason for this inconsistency. Given that the enforcement powers serve a common purpose, namely, to compel individuals to comply with the regulators' investigative requirements, it is argued that the Australian regulators should have uniform enforcement powers. It is also argued that there must be a balance between the public interest factors underpinning the enforcement of the law and the private interest factors which include preserving the private rights (including privacy) of the individual.¹

If the regulators had the same broad range of enforcement options, this would increase the likelihood of obtaining more timely and cost-effective compliance with their investigative requirements. Having a range of enforcement options is consistent with Braithwaite's enforcement pyramid and with his views on "responsive regulation," as discussed at [1.3.3]. The range of enforcement options considered in this chapter allows the regulators to adopt a less interventionist approach at first (such as a freezing order) but also gives them the option of escalating their enforcement response by seeking more serious sanctions, such as criminal penalties. A range of enforcement options also sends a signal to the regulated that the regulators can escalate the enforcement response when less interventionist methods fail. This, in turn, gives the regulated an incentive to make regulation work at the lower levels of intervention.²

¹ See generally see Prefontaine DC QC, "Implementing International Standards In Search and Seizure: Striking The Balance Between Enforcing The Law and Respecting the Rights of the Individual," a paper presented at the Sino Canadian International Conference on the Ratification and Implementation of Human Rights Covenants: Beijing, China, October 2001.

² See generally Fisse B and Braithwaite J, "Corporations, Crime and Accountability,"

The suggested reforms, particularly in relation to search warrants, are designed to introduce clear express provisions into the legislation thereby reducing the need to rely on the vagaries of implied powers. The suggested reforms would promote simplicity in procedure; promote fairness in, and the just determination of, enforcement proceedings; and reduce unjustifiable expense and delay³ and are consistent with the benchmarks of “effective regulation” as described by Baldwin and Cave⁴ at [1.5.1.2]. The suggested reforms also reflect what Baldwin and Cave⁵ describe as the “command and control” approach to regulation. The advantage of this approach is that regulatory standards or requirements can be immediately enforced because they are backed by law. These reforms could be included in the proposed *Investigation and Enforcement Powers Act* (Cth) (see [12.4.4]). This legislation would give the Australian regulators uniform enforcement powers and afford uniform protections to the regulated.

[6.2] Public interest

It is argued that all regulators should have the power to make “freezing orders” (see [6.4]), a certification power (see [6.5]) and statutory access powers (see [6.6]-[6.6.3]) because they give the regulators a very quick mechanism for enforcing non-compliance with their investigative requirements and they promote the public interest by allowing the regulators to obtain information quickly.

Search warrant powers promote the public interest by allowing the regulators to quickly obtain documentary evidence and to protect such evidence from destruction. There are a wide range of search warrant powers available to each regulator but there is no uniformity in relation to:

Cambridge University Press, New York, 1993, at 88; and Braithwaite J, “Responsive Regulation for Australia,” p 81 at 93-94 in Grabosky P and Braithwaite J (Editors), “Business Regulation and Australia’s Future,” Australia Institute of Criminology, Canberra 1993.

³ Argued by analogy from United States Federal Rules of Criminal Procedure, Rule 2.

⁴ Baldwin R and Cave M, “Understanding Regulation Theory Strategy and Practice,” Oxford University Press, Oxford, 1999 at pp 76-77. See the discussion at [1.5.1.2].

⁵ Baldwin R and Cave M, *ibid*, at p 35. See further at [1.3.2].

- (a) their ability to obtain search warrants urgently (see [6.7.2.1]);
- (b) the formal disclosure requirements of search warrants (see [6.7.3]-[6.7.3.2]);
- (c) the procedures governing the execution of those warrants (see [6.7.4.2]-[6.7.4.5]); and
- (d) the operation of the various privileges when those warrants are executed (see [6.7.5] and [6.7.6]).

From the perspective of ensuring a timely enforcement response, those matters should be clearly and uniformly dealt with in the legislation as clear express provisions may assist to reduce challenges to the regulators' use of search warrants on grounds such as abuse of power.

The threat of criminal penalties for non-compliance with an investigative requirement promotes the public interest by encouraging compliance because they create a personal and general (community wide) deterrent to non-compliance. One problem with the present criminal penalty regime is that it does not send a uniform message of compliance because, in many cases, there are inconsistent offence, defence and penalty provisions across the different regulatory laws even though they deal with similar contravening conduct. The complexity of criminal penalty proceedings is exacerbated by the fact that there are difficulties in determining the relationship between the offences and defences in the *Criminal Code Act 1995* (Cth) or the *Crimes Act 1914* (Cth) (*Crimes Act*) and those contained in the specific regulatory laws (see [6.8]-[6.8.7]). It is argued that there should be a standardised and principled approach in relation to enacting criminal penalties for non-compliance with investigative requirements. Reforms are suggested to ensure that criminal penalties are an effective option of last resort in terms of Braithwaite's "responsive regulation" approach and his enforcement pyramid.⁶

⁶ See generally Braithwaite J, "Restorative Justice and Responsive Regulation," Oxford University Press, Oxford, 2002, at 29; and Braithwaite J, "Markets in Vice, Markets in Virtue", The Federation Press, Leichhardt, 2005, at p 178.

[6.3] Private interest

All of the regulators' search warrant powers involve the same serious invasion of the individual's privacy. However, despite the fact that the private interest concerns of the persons whose premises are searched are always the same, there are no uniform protections for them. The rights and protections available vary depending on which search warrant power is being utilised by the regulator. For example, in the case of a *Crimes Act* search warrant, material subject to legal professional privilege cannot be seized (see [6.7.5.2]) but in the case of some other search warrants, such material can be seized (see [6.7.5.1]). The Australian legislation should afford individuals uniform rights and protections in relation to the regulators' search warrant powers.

In many cases, even though the different legislation creates similar offences, there is no uniformity in the terminology used to create those offences and there is no uniformity in the defences that may be claimed or in the penalties that may be imposed. Those inconsistencies appear to be the result of the federal government's ad hoc approach to regulation, as discussed at [1.1.1]. It is argued that public and private interests require that there should be a uniform criminal penalty regime to deal with non-compliance with the regulators' investigative requirements. This regime should include uniform offence, defence and penalty provisions so that similar contravening conduct is treated alike regardless of the regulator with which the individual was dealing (see [6.8]-[6.8.7]).

[6.4] Freezing orders

Where a person has not complied with ASIC's investigative requirement to provide information, ASIC may make a "freezing order" under Part 3 Division 8 of the *ASIC Act*. ASIC may unilaterally (that is, without the need for an application to the court) make the "freezing order" thereby eliminating the delay that is otherwise associated with an application to the court. The effect of such an order is that a person may be restrained from disposing or acquiring any interest in securities of a corporation, or from voting in respect of

a matter, until that person complies with ASIC's requirement.⁷ The problem with ASIC's power to make a "freezing order" is that it is narrow in scope and is limited to securities and shares and does not extend to the general property of the corporation or natural person who is the subject of the investigative requirement.

Where ASIC, APRA or the ATO are carrying out their investigative functions under the *Superannuation Industry (Supervision) Act 1993* (Cth), they have the power to make freezing orders under s 264 against a broad range of assets. However, and illogically, where ASIC and APRA are carrying out their investigative functions under the *Retirement Savings Accounts Act 1997* (Cth), they have no equivalent power to make a "freezing order."

In the United Kingdom, the DTI, in the context of an investigation into share dealings, has a narrow and unilateral power (that is, no court order is required) to prevent a person from dealing with shares and debentures until the DTI is given the information it requires about those shares and debentures.⁸

The ACCC and the ATO do not have any statutory power to make a "freezing order" but they may obtain an interim injunction reasonably quickly (perhaps in a matter of hours – see [10.9.2]) to restrain the disposition of property but the injunction power is not as effective as some regulators' unilateral power to make a freezing order. This is because, to obtain an interim injunction, the ACCC and the ATO would have to demonstrate to the court that there is a serious question to be tried and that the balance of convenience favours the grant of the interim injunction.⁹ Given that the purpose of the investigation is to gather relevant facts to be used as evidence in subsequent proceedings, those requirements can be difficult to satisfy at the early investigative stage. In addition,

⁷ See generally *Centurion Trust Company Ltd v ASIC* [2003] AATA 1146 at [20].

⁸ Section 445 of the *Companies Act 1985* (UK).

⁹ See generally s 80 of the *Trade Practices Act 1974* (Cth); and Trade Practices Act Review, Chapter 5: "Cease and desist powers" at <http://tpareview.treasury.gov.au/content/report/html/Chpt5.asp>, viewed on 8 April 2004.

it is not clear whether the regulators could obtain an injunction to freeze assets on the basis of non-compliance with an investigative requirement.

The Australian legislation should give all regulators uniform powers to freeze relevant assets where a person unlawfully refuses to comply with an investigative requirement to provide information. This reform would promote the public interest by giving the regulators a cost-effective and timely enforcement option to obtain compliance in comparison to the more costly and protracted option of commencing criminal proceedings for a penalty. This reform is also consistent with Braithwaite’s “responsive regulation” approach as it involves a less interventionist enforcement option in comparison to immediately seeking criminal penalties.¹⁰ The private interests of the affected person could be protected in cases where the regulators’ investigative requirements are unlawful because the decision to make such a requirement would be reviewable on the ground of abuse of power and the freezing order could be quashed.¹¹ While such an application may be costly, in the case of a successful application, the court could order that the regulator pay the applicant’s costs.

If the “freezing order” enforcement response is unsuccessful, the regulators could then escalate their enforcement response by seeking a court order for compliance (see [6.5]), obtain search warrants (see [6.7]) and, as a last resort, seek criminal penalties (see [6.8]).

[6.5] Court order to comply with investigative requirements

Where ASIC is acting under the *ASIC Act*,¹² ASIC, APRA or the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth);¹³ or ASIC or APRA are

¹⁰ See generally Fisse B and Braithwaite J, op cit n 2, at p 88; and Braithwaite J, “Responsive Regulation for Australia,” op cit n 2, at pp 93-94.

¹¹ under s 5(1)(e) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). See also s 16 of that Act.

¹² Section 70 of the *ASIC Act*.

¹³ Section 289 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

acting under the *Retirement Savings Accounts Act 1997* (Cth);¹⁴ and they are satisfied that a person has, without reasonable excuse, failed to comply with an investigative requirement (for example, to produce books or to attend for an oral examination or to answer questions at that examination), the regulator may certify that failure to comply to the court.¹⁵ The court may then inquire into the case and may order the person to comply with the regulators' investigative requirement as specified in the order. Non-compliance with the court order constitutes contempt of court. In the United Kingdom, the FSA and the DTI can utilise a similar certification procedure.¹⁶ In the United States, the SEC, ATD and IRS can obtain an order for judicial enforcement of their investigative requirements.¹⁷

The certification power promotes the public interest by providing the regulators with a quick means of enforcing their investigative requirements because the court may make an order on the basis of the information in the regulator's certificate without the need for a lengthy trial.¹⁸ The certification procedure reduces delays in the investigation process thereby reducing the opportunity for wrongdoers to conceal or to destroy documentary evidence. A reduction in delay may also minimise financial loss¹⁹ and improve the prospects of recovering compensation for the victims, or recovering taxes, as the case may be.

The private interests of the persons who are the subjects of the investigative requirements are protected in that they have a right to appear before the court and adduce evidence to prove to the court that they had a reasonable excuse for failing to comply with

¹⁴ Section 119 of the *Retirement Savings Accounts Act 1997* (Cth).

¹⁵ See s 70 of the *ASIC Act*; *ASC v Dalleagles Pty Ltd* (1992) 10 ACLC 1104; and *ASIC v Pappas* [2006] FCA 1785 at [6] and [23].

¹⁶ Section 177 of the *Financial Services and Markets Act 2000* (UK); ss 436 and 731 of the *Companies Act 1985* (UK); and s 85 of the *Companies Act 1989* (UK).

¹⁷ Section 21c of the *Securities Exchange Act 1934* (US); 15 USC, s 1314(a) and (e); and s 7604(b) of the *Internal Revenue Code* (US).

¹⁸ *Von Doussa v Owens* (1982) 6 ACLR 833 at 839 per Cox J; and *MacDonald v ASC* (1994) 12 ACLC 246 at 252.

¹⁹ *ASIC v Australian Investors Forum Pty Ltd (No 3)* [2005] NSWSC 1198 at [28].

the regulator's requirement.²⁰ The private interest is also protected by the fact that the regulator's decision to issue the certificate is reviewable.²¹

There is no certification procedure available to the ACCC or to the ATO (where it is acting under the taxation legislation). In the case of the ATO, the taxation legislation provides that where a person is convicted of an offence for not complying with the ATO's investigative requirements, the court may, in addition to imposing a penalty for non-compliance, order the person to comply with that investigative requirement.²² Given that this procedure requires the person to be convicted of an offence before they can be ordered to comply, it is clearly not as expeditious as the certification procedure described above.

Given the advantages of the certification procedure, it is suggested that the ATO (when acting under the taxation legislation) and the ACCC should also have power to certify a failure to comply with their investigative requirements to the court.

[6.6] Access powers

[6.6.1] *Common law access power*

All Australian regulators could rely on a common law implied power of access where they are making an informal inquiry, that is, an inquiry that does not involve the use of their statutory powers of compulsion. The problem with an informal inquiry is that there is no right of enforcement where the individual refuses to voluntarily comply with the regulators' request for access, as discussed at [3.4]. The common law implied power of access²³ is therefore often ineffective because that implied licence only allows the regulators to go to the occupier's front door and ask permission to enter.²⁴ The implied licence does

²⁰ *MacDonald v ASC* (1994) 12 ACLC 246 at 252 per Hill J.

²¹ under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). See *MacDonald v ASC* (1994) 12 ACLC 246 at 252 per Hill J.

²² Sections 8G and 8H of the *Taxation Administration Act 1953* (Cth). See also s 19B of the *Crimes Act 1914* (Cth).

²³ See generally *Williams v Keelty* [2001] FCA 1301 at [308] per Hely J.

²⁴ *Robson v Hallett* [1967] 2 QB 939 at 953-954; and *Brunner v Williams* (1975) 73 LGR

not authorise the regulators to have the full and free access they may require.²⁵ That is, the regulators do not have an implied licence to enter premises for investigative purposes. Consequently, the common law implied power of access is of little value to the regulators where documents are at risk of destruction or removal by the owner or occupier of the premises because that person can refuse access or immediately terminate the implied licence.²⁶

ASIC, when performing its primary corporate regulatory functions under the *Corporations Act* or the *ASIC Act*, does not have a statutory access power. Similarly, the DTI, the FSA, and HMRC, in the United Kingdom, have no statutory access power and they must also rely on the common law implied power of access.²⁷

From ASIC's perspective, the problem with the common law implied power of access is that it creates uncertainty as to the lawfulness or otherwise of ASIC's officers' decision to enter private property particularly where there is subsequent conflicting evidence as to whether the occupier of the premises gave directions that those officers leave the premises.²⁸ The need for a statutory access power is demonstrated by the fact that if ASIC's officers remained on the premises after the implied licence has been revoked, they may be liable to an action for trespass to land.²⁹

266. See also Balkin RP and Davis JLR, "Law of Torts," Second Edition, Butterworths, Sydney, 1996, at p 117.

²⁵ *Shattock v Devlin* [1990] 2 NZLR 88 at 106. See also Balkin RP and Davis JLR, *ibid*, at p 117.

²⁶ Kluver J, "ASC Investigations and Enforcement: Issues and Initiatives" (1992) 15(1) UNSWLJ 31 at p 44.

²⁷ See generally Woellner R, "Australian Taxation Law," CCH, Sydney, 2003 at [2-150].

²⁸ See generally *Williams v Keelty* [2001] FCA 1301 at [308]. This case involved a *Crimes Act* search warrant.

²⁹ *Robson v Hallett* [1967] QB 939 at 951 per Lord Parker; *Camilla Holdings Pty Ltd v International Task Pty Ltd (in liq)* (1987) 5 ACLC 972 at 974; *Plenty v Dillon* (1991) 171 CLR 635; 98 ALR 353 at 361; and *Pringle v Everingham* [2006] NSWCA 195 at [75]. As ASIC's officers have no statutory right of access, they may not be able to claim the defence to civil liability in s 246 of the *ASIC Act* that they were "performing or exercising a statutory power" when they allegedly committed the act of trespass. See also Balkin RP and Davis JLR, *Law of Torts*, *op cit* n 24, at pp 117-119 and the authorities cited therein.

[6.6.2] *Statutory access powers*

A statutory power of access is available to the ACCC³⁰ and the ATO³¹ (where the ATO is acting under the taxation legislation).

ASIC, APRA and the ATO may utilise statutory access powers under ss 256 and 268 of the *Superannuation Industry (Supervision) Act 1993* (Cth) for the purpose of performing their functions under that Act of monitoring and investigating superannuation entities.³² ASIC and APRA may also utilise statutory access powers under ss 94 and 99 of the *Retirement Savings Accounts Act 1997* (Cth) for the purpose of performing their functions under that Act of monitoring and investigating retirement savings account providers. It is incongruous that ASIC has a statutory access power for the purpose of performing its limited functions under the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Retirement Savings Accounts Act 1997* (Cth), but has no statutory access power in relation its main corporate regulation functions.

An analysis of the statute and case law indicates that there are a number of unwarranted inconsistencies in the Australian regulators' current access powers. For example, there is no uniformity in relation to:

- (a) whether those powers may be exercised at the premises of suspects and of non-suspects, such as the premises of auditors, accountants, banks or solicitors;³³

³⁰ See s 154D (previously s 155(2)) of the *Trade Practices Act 1974* (Cth). This power can only be exercised with the occupier's consent.

³¹ See s 263 of the *Income Tax Assessment Act 1936* (Cth). See also the access powers in ss 13F, 13G and 66 of the *Taxation Administration Act 1953* (Cth). Section 13F(4) requires the occupier to provide reasonable facilities and assistance for the effective exercise of the investigation powers under that section.

³² ASIC's administrative responsibilities and functions under this Act are set out in s 6. See particularly s 6(2)(b).

³³ Only s 263 of the *Income Tax Assessment Act 1936* (Cth) makes it clear that the access power applies to the premises of suspects and non-suspects: see generally Clough J and Mulhern J, "The Prosecution of Corporations," Oxford University Press, Melbourne, 2002, at p 30. See also *O'Reilly v State Bank of Victoria* (1983) 153 CLR 1, 83 ATC 4156; *Kerrison v FC of T* 86 ATC 4103; *FC of T v Citibank Ltd* 89 ATC 4268; and *Allen, Allen & Hemsley v DFC of T* 89 ATC 4294.

- (b) whether those powers may be utilised within, or outside, a formal investigation;³⁴
- (c) the time when those powers may be exercised;³⁵
- (d) whether those powers require the consent of the occupier before they can be exercised;³⁶
- (e) whether they authorise the regulators to secure the documents to protect them from concealment or destruction pending the issue of a search warrant;³⁷
- (f) whether they require a person at the premises to give the regulator reasonable assistance when exercising those powers.³⁸ If so, who is required to provide reasonable assistance;³⁹ and

³⁴ Only ss 256 and 268 of the *Superannuation Industry (Supervision) Act 1993* (Cth); and ss 94 and 99 of the *Retirement Savings Accounts Act 1997* (Cth) clearly state that the access power may be utilised within, and outside, a formal investigation.

³⁵ Section 263 of the *Income Tax Assessment Act 1936* (Cth) gives the ATO the power to obtain access to premises at “any time” and this may include any time of the day or night. By contrast, ss 256 and 268 of the *Superannuation Industry (Supervision) Act 1993* (Cth) and ss 94 and 99 of the *Retirement Savings Accounts Act 1997* (Cth) give the regulators the power to access premises at any “reasonable time.” Section 7606 of the *Internal Revenue Code* (US) gives officers of the IRS the power to enter premises during the daytime or at night while the premises are open: see generally Woellner R, “Section 263 powers of access – why settle for second best?,” (2005) 20 *Australian Tax Forum* 365 at pp 370-371.

³⁶ Section 263 of the *Income Tax Assessment Act 1936* (Cth) does not require the ATO to obtain the consent of the occupier before it enters the premises. By contrast, s 256 of the *Superannuation Industry (Supervision) Act 1993* (Cth), s 94 of the *Retirement Savings Accounts Act 1997* (Cth) and s 154D of the *Trade Practices Act 1974* (Cth) require the regulators to obtain consent. The CC, in the United Kingdom, is required to give the occupier at least two days notice of its intention to enter the premises. However, such notice is not required where the occupier is a suspect in the investigation: see s 27 of the *Competition Act 1997* (UK).

³⁷ The Australian statutory access powers permit the regulators to enter the premises and to copy relevant documents. However, they do not authorise the regulators to forcibly seize and remove documents. The documents could only be forcibly seized and removed pursuant to a search warrant, as discussed at [6.7]-[6.7.7]. However, an application to the magistrate or issuing officer for a search warrant may entail additional delay and there is no guarantee that a search warrant will be issued (see [6.7.2]-[6.7.2.1]). Section 80 of the *Income Tax Act 1967* (Malaysia) authorises the regulator to seize the relevant documents where those documents cannot be reasonably inspected without taking possession of them, or where there is a risk that they will be destroyed or concealed if they are not seized, or where they may be needed as evidence in future proceeding: see Woellner R, *op cit* n 35, at p 382.

³⁸ At common law, the occupier is not required to give the investigators/regulators or the

(g) the operation of the penalty privilege, the privilege against self-incrimination and legal professional privilege.⁴⁰

[6.6.3] *Law reform*

All Australian regulators should be given uniform and broad access powers that can be utilised within, or outside, a formal investigation and that authorise access to the premises of suspects and non-suspects.

A balance between the public interest in obtaining access and the private interest in protecting privacy could be achieved by ensuring that all Australian legislation provided that the regulators can enter premises at any reasonable time, or during specified hours, including night time, if the premises are open to the public during the night. The regulators should have the power to enter premises without prior warning and without consent of the occupants. This is particularly so where there is a risk of documents being destroyed or removed from premises if such a warning was given.⁴¹ The ACCC has just been given new access powers and s 154E of the *Trade Practices Act 1974* (Cth) authorises the ACCC to secure the evidential material at the premises pending the issue of a search warrant. A similar power should be available to all the Australian regulators.

police positive assistance, for example, by assisting those persons to locate documents or by the provision of facilities: see *O'Reilly v Commissioners of the State Bank of Victoria* (1983) 153 CLR 1 at 41-42 per Gibbs CJ, Wilson and Dawson JJ (in the context of s 263 of the *Income Tax Assessment Act 1936* (Cth)); and *Federal Commissioner of Taxation v Australia and New Zealand Banking Group Ltd* (1979) 143 CLR 499 at 540 per Mason J. To overcome this problem, s 263(3) of the *Income Tax Assessment Act 1936* (Cth) requires the occupier to give all "reasonable facilities and assistance" to the ATO's officers when exercising the access power. By contrast, in the context of the access powers under the other Australian legislation there is no clear obligation imposed on the occupier to provide reasonable assistance: see generally Woellner R, op cit n 35, at p 388.

³⁹ The fact that only "occupiers" or a "person in charge" of premises are obliged to provide the reasonable facilities and assistance may limit the scope of the "reasonable assistance" powers. For example, the word "occupier" may not include employees: See generally *Koowarta v Bjelke Petersen* (1982) 153 CLR 168 at 267; and *Hefferman, Heelan v Hayward* [1986] VR 417 at 420-422 cited in Woellner R, op cit n 27, at [2-145].

⁴⁰ The uncertainties in the law are the same as those discussed at [4.10.2] and [4.10.3].

⁴¹ See generally Woellner R, op cit n 35, at p 372.

The Australian regulators' statutory access powers should contain provisions that require the "occupier" to provide "reasonable assistance" to the regulator. The word "occupier" should be broadly defined to include the legal owner or occupier (such as the lessee) of the premises and all persons who are physically present at the premises at the time of entry. "Reasonable assistance" should be defined to empower the regulator to require the relevant person to answer questions that will assist in locating the relevant documents, to open locked rooms and storage devices and to provide information held on a computer in a form that can be taken from the premises. That definition should also incorporate the matters discussed at [4.6.5] in the context of the regulators' oral examination powers.

The uncertainties in relation to the operation of the privileges in the context of the regulators' access powers should be resolved by express uniform statutory provisions that are consistent with those suggested at [4.10.2.1] and [4.10.3.1].

If the Australian regulators were given broader and clearer access powers, the private interest of the affected person would still be protected by the fact that those powers would be subject to the common law requirements that they can only be exercised to promote a purpose of the relevant legislation and they must be exercised in good faith.⁴² If those requirements were not satisfied, the regulators could not rely on any statutory defence to civil liability for trespass. If the regulators decided to exercise their power of access for a collateral or ulterior purpose, the affected person could challenge that decision on the ground of an abuse of statutory power.⁴³ In addition, any evidential material obtained through an improper exercise of the access power would be regarded as evidence that has been illegally obtained and its admissibility in future proceedings would be subject to the *Bunning v Cross*⁴⁴ discretion (see [6.7.4.1]). The private interest is also protected by the fact that the regulators cannot use the access power to obtain

⁴² See *Clyne v Deputy Federal Commissioner of Taxation* (1985) 85 ATC 4597. See generally Woellner R, op cit n 35, at p 368.

⁴³ under s 5(1)(e) of the *AD(JR) Act*. See generally *Bradley v Commonwealth* (1973) 128 CR 557 at 574-575; *WA Pines Pty Ltd v Bannerman* (1980) 30 ALR 559 at 567; and *ASC v Kutzner* (1998) 16 ACLC 182 at 187-188.

⁴⁴ (1978) 141 CLR 54; and *Arno v Forsyth* (1986) 9 FCR 576; 65 ALR 125 at 128-129.

evidence in concurrent proceedings because that would constitute contempt of court as it would enable the regulator to obtain an unfair litigious advantage.⁴⁵

[6.7] Search warrants

In this section, the inconsistencies and deficiencies in the search warrant powers, and in the protections afforded to the regulated, are highlighted and reforms are suggested.

[6.7.1] *The range of search warrant powers available to the regulators*

Where ASIC is acting under the *ASIC Act*; ASIC, APRA and the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth); or ASIC and APRA are acting under the *Retirement Savings Accounts Act 1997* (Cth); and a person fails to comply with their notice to produce books, they have the power, with the assistance of the Australian Federal Police (AFP), to obtain a search warrant which authorises them to seize the books that should have been produced under the notice.⁴⁶ Those search warrant powers can be utilised by the regulators in investigations of suspected civil or criminal contraventions of the regulatory laws.

However, this legislation does not authorise the regulators to obtain search warrants without warning because it provides that they can only be obtained where there has been prior non-compliance with a notice to produce books. The notice to produce books alerts the recipient to the fact that the regulator requires certain documents and that a search warrant may be on its way. The recipient is therefore afforded an opportunity to alter, destroy or conceal the books prior to the execution of the search warrant thereby

⁴⁵ See generally *Commercial Bureau (Aust) Pty Ltd v Allen* (1984) 84 ATC 4198; and *Saunders v Federal Commissioner of Taxation* (1988) 88 ATC 4349 at pp 4352-4353 and 4356-4359 per Northrop J cited in Woellner R, op cit n 27, at [2-145].

⁴⁶ Sections 35 and 36 of the *ASIC Act*; ss 271-272 of the *Superannuation Industry (Supervision) Act 1993* (Cth); and ss 102 and 103 of the *Retirement Savings Accounts Act 1997* (Cth).

prejudicing the effectiveness of the regulator's investigation. By contrast, search warrants can be issued under other Australian legislation without prior warning because they can be issued on the basis of a suspected contravention of the relevant law, as discussed below.

The problem of prior warning could be reduced if ASIC made greater use of its power to require the production of books "forthwith"⁴⁷ followed by an immediate issue of the *ASIC Act* search warrant where there is non-compliance with the notice.⁴⁸ However, the other Australian regulators do not currently have an express power to require the production of books "forthwith" (see [5.7.5.2]) and this suggestion would not assist them.

ASIC also has a narrow search warrant power under s 530C of the *Corporations Act*, in the context of a corporation's liquidation, which authorises the seizure of documents where there is a risk that they will be concealed or destroyed.

All Australian regulators may (with the assistance of the AFP) obtain a search warrant (which authorises them to search for, and to seize, evidential material) under s 3E of the *Crimes Act*. The precondition for the issue of a *Crimes Act* search warrant is that there must be a suspected criminal contravention of a Commonwealth law. This would be satisfied where there is non-compliance with any of the investigative demands made by the regulators (see [6.8]-[6.8.5]). The search warrant power under the *Crimes Act* (unlike the *ASIC Act*, the *Superannuation Industry (Supervision) Act 1993* (Cth) or the *Retirement Savings Accounts Act 1997* (Cth)) is not restricted to cases involving non-compliance with a notice to produce books. A *Crimes Act* search warrant may be used as a general investigative tool in relation to suspected criminal contraventions.

The ACCC was recently given the power to obtain a search warrant to seize "evidential material," that is, material that may afford evidence of a contravention of the

⁴⁷ See s 87(b) of the *ASIC Act*. The DTI, in the United Kingdom, has a similar power: see s 447(3) of the *Companies Act 1985* (UK).

⁴⁸ Kluver J, "CAC (NSW) v Yuill: the Demise of Legal Professional Privilege?"(1991) 16 BCLB 215; and Kluver J, *op cit* n 26, at p 44.

Trade Practices Act 1974 (Cth).⁴⁹ The ACCC's new search warrant power is similar to the search warrant power contained in the *Crimes Act* except that it applies more broadly to suspected civil or criminal contraventions of the *Trade Practices Act 1974* (Cth).

All Australian Commonwealth regulators may be able to utilise the limited search warrant power under the *Proceeds of Crime Act 2002* (Cth). This legislation provides that an authorised officer (which includes an officer of the regulator) may obtain a search warrant which authorises the search for, and seizure of, tainted property (the proceeds of an indictable offence or an instrument of an indictable offence) or evidential material (evidence relating to the benefits derived from an indictable offence).⁵⁰

In the United States, the SEC, ATD, and IRS have a broad power to obtain a search warrant to obtain evidence of a crime, contraband or fruits of crime, or property designed or intended for use in a crime.⁵¹

In the United Kingdom, the DTI, the FSA, and the CC, have power to obtain a search warrant:

- (a) where there is non-compliance with a notice to produce books;
- (b) where there are reasonable grounds to believe that if a notice to produce books were given, it would not be complied with or that the books would be removed or tampered with or destroyed; and
- (c) in relation to suspected criminal contraventions of the legislation.⁵² HMRC has a specific power to obtain a search warrant where there are reasonable grounds for suspecting serious taxation fraud.⁵³

⁴⁹ See Part XID and s 154X of the *Trade Practices Act 1974* (Cth); the *Trade Practices Legislation Amendment Bill 2004* (Cth); and Barbov K and Emanuel L, "Tougher penalties for anti-competitive conduct and new search and seizure powers for the ACCC," <http://www.findlaw.com.au/articles/default.asp?task=read&id=12594&site=LE>.

⁵⁰ Sections 8, 225-260 and 338 of the *Proceeds of Crime Act 2002* (Cth).

⁵¹ 15 USC, ss 3102-3104 and Rule 41(c) of the *Federal Rules of Criminal Procedure*; s 7608(a) and (b) of the *Internal Revenue Code* (US); and Woellner R, op cit n 27, at [2-150].

⁵² Section 448(1) and (2) of the *Companies Act 1985* (UK); ss 176(1), (2), (3) and (4) of the *Financial Services and Markets Act 2000* (UK); and ss 27 and 28 of the *Competition*

The range of search warrant powers in the Australian legislation is the product of the federal government's ad hoc approach to developing and amending the regulatory laws. These powers could be improved by consolidating them into one Act which can be utilised by all regulators thereby giving them the advantages that the individual search warrant powers presently confer on each regulator. It is suggested that the legislation should provide that all Australian regulators may apply for a search warrant:

- (a) to seize books that were not produced as required by the notice to produce books;
- (b) where there are reasonable grounds to believe that a notice to produce books would not be complied with (as per the United Kingdom's legislation);
- (c) to investigate suspected civil or criminal contraventions of Commonwealth law; or
- (d) to search for, and seize, the proceeds of crime.

[6.7.2] *Application for, and issue of, search warrants*

Where ASIC is acting under the *ASIC Act*,⁵⁴ ASIC, APRA or the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth);⁵⁵ or ASIC or APRA are acting under the *Retirement Savings Accounts Act 1997* (Cth);⁵⁶ those regulators may apply for a search warrant by presenting to a magistrate an "information on oath" setting out their reasonable grounds for suspecting⁵⁷ that there are, or there may be, within the next three

Act 1998 (UK).

⁵³ Section 20C of the *Taxes Management Act 1970* (UK); and Woellner R, op cit n 27, at [2-150].

⁵⁴ Section 35 of the *ASIC Act*.

⁵⁵ Section 271 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

⁵⁶ Section 102 of the *Retirement Savings Accounts Act 1997* (Cth).

⁵⁷ Suspicion "in its ordinary meaning is a state of conjecture or surmise where proof is lacking: I suspect but I cannot prove": see *Hussein v Chong Fook Kam* [1970] AC 942 at 948 per Lord Devlin. Also see *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266 at 303 per Kitto J; *George v Rockett* (1990) 93 ALR 483 at 490; *ASC v Kutzner* (1998) 25 ACSR 723, 16 ACLC 182 at 188; *Harts v Commissioner, Australian Federal Police* [2002] FCA 245 at [18]; *Seven Network Ltd v ACCC* (2004) 212 ALR 31, [2004] FCAFC 267 at [49]; and *East Grace Corporation v Xing (No 2)* [2005] FCA 1266 at [38].

days, books on a person's premises⁵⁸ whose production has been required under a notice to produce books and that have not been produced in breach of that notice.

A Commonwealth regulator, or the AFP, may apply for a *Crimes Act* search warrant.⁵⁹ Section 3E(1) of the *Crimes Act* provides that the applicant is required to lay before an “issuing officer”⁶⁰ an “information on oath” setting out the applicant’s reasonable grounds for suspecting that there is, or there will be, within the next 72 hours, evidential material⁶¹ at premises. Section 154X of the *Trade Practices Act 1974* (Cth) contains similar grounds for the issue of a search warrant except that the application is made to a “magistrate”.

In the United Kingdom, the procedures governing the application for, and issue of, search warrants in the context of the FSA, the DTI and the CC, are similar to that in Australia except that the search warrant is issued by a justice of the peace (or a magistrate in the case of the CC or a “judicial authority” in the case of HMRC⁶²).

In the United States, the legislation provides that a federal law enforcement officer or attorney for the government may apply to a magistrate or judge for the issue of a search warrant. The magistrate or judge may issue a search warrant if he or she is satisfied by an affidavit or other information that there is “probable cause”⁶³ to search for property that is

⁵⁸ The word "premises" is widely defined in s 9(1) of the *Corporations Act*; s 10(1) of the *Superannuation Industry (Supervision) Act 1993* (Cth); and s 16 of the *Retirement Savings Accounts Act 1997* (Cth).

⁵⁹ *Williams v Keelty* [2001] FCA 1301 at [128].

⁶⁰ Defined in s 3C of the *Crimes Act*.

⁶¹ This refers to material that would afford evidence as to the commission of an offence: see *George v Rockett* (1990) 170 CLR 104 at 120 cited in *Adler v Gardiner* [2002] FCA 1141 at [20].

⁶² The search warrant is issued by a “judicial authority” if it is satisfied by the “information on oath” given by the taxation officer that there are reasonable grounds for suspecting serious taxation fraud, and that evidence of such fraud is to be found on the premises specified in the warrant: see s 20C of the *Taxes Management Act 1970* (UK).

⁶³ This phrase is satisfied if there are reasonable grounds to believe that a law has been violated and there is evidence to be found in the relevant premises: see Prefontaine DC QC, *op cit* n 1.

relevant to the purposes previously described at [6.7.1].⁶⁴ The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. The requirement of “probable cause” for the issue and execution of the warrant assists to protect the individual’s Fourth Amendment rights.⁶⁵

There is a strong argument that the search warrant powers under the *ASIC Act*, the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Retirement Savings Accounts Act 1997* (Cth) are unconstitutional under s 77(iii) (Chapter III) of the *Commonwealth of Australia Constitution Act 1900* (UK) (the Constitution) because that legislation confers an administrative function (the issuing of a search warrant) on a magistrate or a judicial officer.⁶⁶ By contrast, it was held in *Price v Fitzgerald*⁶⁷ that because s 3E(1) of the *Crimes Act* provides that an “issuing officer,” rather than a “magistrate,” has the power to issue a search warrant under that Act, that section was constitutionally valid. This decision was subsequently given statutory recognition by the enactment of s 3CA of the *Crimes Act* and s 154ZA of the *Trade Practices Act 1974* (Cth) which expressly provide that a magistrate, when performing certain functions under those Acts, is acting in a personal capacity and not as a member of a court. Despite the potential constitutional problem being highlighted in the above case, the *ASIC Act*, the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Retirement Savings Accounts Act 1997* (Cth) still provide that “magistrates,” rather than “issuing officers,” are authorised to issue search warrants and they make no reference to magistrates acting in a personal capacity.

Under the proposed uniform search warrant power, it is suggested that the grounds stated in the *Crimes Act* and in the other Australian legislation could be consolidated to provide that the “issuing officer” (rather than magistrate) may issue a search warrant where he or she is satisfied, on reasonable grounds, that there is, or will be, within the next 72 hours, evidential material (rather than books) at the premises that are relevant to the matters

⁶⁴ *Federal Rules of Criminal Procedure*, Rule 41(b), (c) and (d).

⁶⁵ Prefontaine DC QC, op cit n 1.

⁶⁶ *Price v Fitzgerald* [2000] FCA 134 at [11] citing *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 151-152; *Hilton v Wells* (1985) 157 CLR 57 at 67; and *R v Murphy* (1985) 158 CLR 596 at 613-616.

discussed at [6.7.1] including the performance of particular regulatory functions (which justified the issue of the original notice to produce books), the investigation of suspected civil or criminal contraventions or the recovery of the proceeds of crime.⁶⁸

Longo and the ALRC have indicated that the private interest should be protected by tightening the procedures governing the issue of search warrants by requiring the applicant to state in the “information on oath” why the warrant is necessary and by requiring the issuing officer to clearly state the reasons justifying the issue of the warrant.⁶⁹ The private interest is already partly protected by the fact that the courts will protect the privacy and freedom of the individual by scrutinising search warrants carefully in relation to the validity of their issue and the power they confer.⁷⁰ The courts have indicated that issuing officers must ensure that a finding of reasonable grounds for the issue of the warrant is supported by credible facts and circumstances⁷¹ and that they cannot simply act “parrot-like” on the assertion of the regulator or as a “rubber stamp” for the regulator, or the police.⁷²

[6.7.2.1] *Obtain a search warrant urgently*

Section 3R of the *Crimes Act* allows the regulators, with the assistance of the AFP, to apply for search warrants by telephone, telex, facsimile or other electronic means in an

⁶⁷ [2000] FCA 134 at [20], [22] and [28].

⁶⁸ To promote the public interest in the regulators obtaining the search warrant, the legislation should provide that the issuing officer, in determining whether the reasonable grounds for the issue of the warrant exist, may consider not only the information on oath, but any oral evidence of the applicant. This would overcome the common law problem that issuing officers can only consider the “information on oath”: see *George v Rockett* (1990) 170 CLR 104; 93 ALR 483 at 488. This problem has been overcome by s 35(2) and 36(3) of the *ASIC Act*.

⁶⁹ Longo JP, “The Powers of Investigation of the Australian Securities Commission: Balancing the Interests of Persons and Companies under Investigation with the Interests of the State,” p 43 at 46-47 in Grabosky P and Braithwaite J, op cit n 2.

⁷⁰ *George v Rockett* (1990) 170 CLR 104 at 110-111; *Challenge Plastics Pty Ltd v Collector of Customs (Vic)* (1993) 115 ALR 149 at 155 per Heerey J; and *Hart v Commissioner, Australian Federal Police* [2002] FCAFC 392 at [66].

⁷¹ *Crowley v Murphy* (1981) 34 ALR 496 at 515 per Lockhart J citing *Aguilar v Texas* 378 US 108 (1964).

⁷² *George v Rockett* (1990) 93 ALR 483 at 488 citing *Bowden v Box* [1916] GLR (NZ) 443

“urgent case” or where the delay caused by an application in person would frustrate the effective execution of the warrant. Section 3R(5) also provides that the issuing officer must inform the applicant by telephone, telex, facsimile or other electronic means of the terms of the warrant and the day on which, and the time, it was signed. There are equivalent provisions in ss 229-230 of the *Proceeds of Crime Act 2002* (Cth), ss 38H and 38I of the *Mutual Assistance in Criminal Matters Act 1987* (Cth) and s 154Y of the *Trade Practices Act 1974* (Cth). There are also equivalent provisions in the United States.⁷³ By contrast, the search warrant powers contained in the *ASIC Act*, the *Corporations Act*, the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Retirement Savings Accounts Act 1997* (Cth) do not authorise those regulators to obtain a search warrant by the more expeditious electronic methods described above. It is suggested that all Australian regulators should have uniform powers to obtain search warrants urgently.

[6.7.3] *Form of search warrant*

There is no uniformity in relation to the formal requirements of the various search warrants that may be issued under the Australian legislation. Search warrants issued under the *ASIC Act*, the *Corporations Act*, the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Retirement Savings Accounts Act 1997* (Cth) have less formal requirements to satisfy than those under the *Crimes Act*, the *Proceeds of Crime Act* and the *Trade Practices Act 1974* (Cth), as discussed at [6.7.3.1]. Defects in the formal requirements of search warrants are often challenged on grounds such as abuse of statutory power.⁷⁴ Greater clarity and uniformity in the formal requirements of search warrants would promote the public interest in a quicker enforcement response by reducing the number of such challenges thereby promoting more timely and cost-effective regulatory outcomes and thus more effective regulation (see [1.5.1.2]). Such a reform would also promote private interests

at 444 per Edwards J.

⁷³ *Federal Rules of Criminal Procedure*, Rule 41(d)(3).

⁷⁴ under s 5(1)(e) of the *AD(JR) Act* or error of law under s 5(1)(f) of that Act: see generally *Parker v Churchill* (1986) 9 FCR 334; *Commissioner of Taxation (Cth) v Citibank* (1989) 85 ALR 588; *Salerno v NCA [No 2]* (1997) 75 FCR 133; *Price v Elder* [2000] FCA 133; *Williams v Keelty* [2001] FCA 1301; and *Harts Australia Ltd v Commissioner, Australian Federal Police* [2002] FCA 245.

because clearer formal requirements will provide more information to the affected person about the legitimate limits of the invasion of their privacy (including the boundaries of the search) and will assist them to decide whether they can legitimately challenge the warrant.⁷⁵

[6.7.3.1] *Requirement for search warrant to specify particulars*

The *ASIC Act*, the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Retirement Savings Accounts Act 1997* (Cth) contain minimal formal requirements and simply provide that the warrant must specify the premises to be searched and the books to be seized, and state whether entry is to be made at any time of the day or night or only during specified hours.⁷⁶ The legislation also provides that the warrant must specify that it ceases to have effect on a specified day not more than seven days after the day of its issue.⁷⁷

By contrast, in the context of search warrants issued under the *Crimes Act*, the *Proceeds of Crime Act 2002* (Cth) and the *Trade Practices Act 1974* (Cth),⁷⁸ the legislation imposes a greater number of express formal disclosure requirements. This is partly explicable because the only purpose of the search warrant powers in the *ASIC Act*, the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Retirement Savings Accounts Act 1997* (Cth) is to seize books that were not produced in breach of the notice to produce books whereas under the other legislation the search warrants are issued for a broader range of investigative purposes. However, it can also be argued that some differences in the express formal requirements of the different types of search warrants are a product of both poor drafting and the federal government's ad hoc approach to the development of the search warrant powers.

⁷⁵ The courts will protect the private interest by insisting on strict compliance with the formal requirements for search warrants: see *George v Rockett* (1990) 93 ALR 483 at 487.

⁷⁶ The legislation authorises entry "at any time of the day or night" to overcome the common law rule that, in the absence of directions in the authorising statute or warrant itself, it should be executed in the day time: see *Crowley v Murphy* (1981) 34 ALR 496 at 522 per Lockhart J.

⁷⁷ Section 36(4) of the *ASIC Act*; s 272(5) of the *Superannuation Industry (Supervision) Act 1993* (Cth); and s 103(5) of the *Retirement Savings Accounts Act 1997* (Cth).

⁷⁸ See the formal disclosure requirements in ss 3E(5) of the *Crimes Act 1914* (Cth); 227(1) of the *Proceeds of Crime Act 2002* (Cth); and 154X of the *Trade Practices Act 1974* (Cth).

There are also some implied disclosure requirements that may be required in *Crimes Act*, *Proceeds of Crimes Act* and *Trade Practices Act* search warrants. For example, for those search warrants to be formally valid, in some cases, the issuing officer must ensure that an endorsement appears on the face of the search warrant which specifies that material protected by legal professional privilege cannot be seized.⁷⁹ By contrast, in the case of search warrants issued under the *ASIC Act*, the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Retirement Savings Accounts Act 1997* (Cth), material normally protected by legal professional privilege can be seized (see [6.7.5.1]).

In the United States, the search warrants are required to identify the person or property to be searched; identify the property to be seized; in some cases, describe the offence; identify the magistrate to whom the property seized must be returned; specify that the warrant is valid for no longer than ten days; and specify that the warrant can only be executed in the day time unless there is good cause to order otherwise.⁸⁰

In the United Kingdom, in the context of the DTI and the FSA,⁸¹ the legislation does not clearly set out the formal requirements of a valid search warrant. The legislation governing the CC expressly requires the search warrant to state the subject matter and the purpose of the investigation and the nature of the offence in respect of which the warrant was issued.⁸²

The proposed uniform search warrant power should adopt the type of formal disclosure requirements contained in s 3E(5) of the *Crimes Act 1914* (Cth) with allowance for some of those disclosure requirements to be deleted depending on the purpose (discussed at [6.7.1]) for which the warrant is issued. The search warrant should also expressly disclose:

⁷⁹ *Arno v Forsyth* (1986) 9 CR 576. See also *Commissioner of Taxation (Cth) v Citibank* (1989) 85 ALR 588. See s 3ZX of the *Crimes Act 1914* (Cth); and s 264 of the *Proceeds of Crime Act 2002* (Cth).

⁸⁰ *Federal Rules of Criminal Procedure*, Rule 4(b), and Rule 40(e)(1).

⁸¹ See s 448 of the *Companies Act 1985* (UK); and s 176 of the *Financial Services and Markets Act 2000* (UK).

⁸² Section 29 of the *Competition Act 1998* (UK).

- (a) that the occupier is required to provide reasonable assistance to the search team (see [6.7.4.2]);
- (b) that, in some cases, material not specified in the warrant can be seized (see [6.7.4.4]); and
- (c) that the warrant authorises the seizure of material protected, at common law, by the penalty privilege and the privilege against self-incrimination (see [6.7.6]) and legal professional privilege (see [6.7.5]).

Such express formal disclosure requirements would avoid the problem highlighted in previous case law⁸³ of issuing officers forgetting to include the disclosures (impliedly required by the case law) on the search warrants and reduce the number of review applications to quash those warrants on the ground of a defect in form.

[6.7.3.2] *Specification of the offence*

A *Crimes Act* search warrant can only be issued where an “offence” is suspected and is specified in the warrant.⁸⁴ The new search warrant provisions in the *Trade Practices Act 1974* (Cth) more broadly require that the warrant specify the “contravention.”⁸⁵ In the context of *Crimes Act* search warrants, the courts have given two different interpretations as to when such a warrant has satisfied the formal requirement relating to “specification of the offence.” This inconsistency does not promote the principle of treating like cases alike. This problem may also arise in relation to the new search warrant powers in the *Trade Practices Act 1974* (Cth). However, this problem does not arise in relation to search warrants issued under the *ASIC Act*, the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Retirement Savings Accounts Act 1997* (Cth) as that legislation does not require the suspected civil or criminal contravention to be specified.

⁸³ See, for example, *Arno v Forsyth* (1986) 9 FCR 576 where the issuing officer failed to disclose on the face of the warrant that material protected by legal professional privilege could not be seized under a *Crimes Act* search warrant. See also *Perron Investments Pty Ltd v Deputy Commissioner of Taxation (Cth)* (1989) 90 ALR 1 at 11.

⁸⁴ Section 3E(5)(a) of the *Crimes Act*; and *Harts Australia Ltd v Commissioner, Australian Federal Police* (1996) 141 ALR 493 at 497 per Drummond J.

⁸⁵ Section 154X of the *Trade Practices Act 1974* (Cth).

The first approach requires detailed specification of the offence in the warrant "to enable the person whose premises are being searched to know the exact object of the search."⁸⁶ This approach places greater emphasis on safeguarding the interests of the individual, rather than on the investigatory function of a search warrant. From the regulators' public interest perspective, this approach is undesirable because a search warrant is an investigative tool that is often issued before any charge can be adequately framed.⁸⁷ This approach would unduly hamper criminal investigations where there is good reason to suspect a serious crime but no precise idea of what the exact nature of that crime may be or of the exact section of the Act that may have been contravened.⁸⁸ A strict approach to the specification of the offence would lead to litigation concerning whether the appropriate level of disclosure was made in the warrant causing delays, affording persons the opportunity to destroy evidence and increasing the costs for the affected person and the regulator.

By contrast, the second or wide approach maintains that detailed specification of offences in the search warrant is impractical at the investigative stage and could impede the investigative process.⁸⁹ Under this approach, all that is necessary for a valid search warrant is that there be a sufficient description of the offence to enable the occupier of the premises to understand, and, if necessary, to obtain legal advice about, the permissible limits of the search.⁹⁰

⁸⁶ *Parker v Churchill* (1986) 65 ALR 107 at 120 per Jackson J (Bowen CJ and Lockhart J concurring) citing *R v Tillet; Ex parte Newton* (1969) 14 FLR 101 at 113 per Fox J; and *Crowley v Murphy* (1981) 34 ALR 496 at 519.

⁸⁷ *Parker v Churchill* (1985) 63 ALR 326 at 330 per Burchett J quoted in *Beneficial Finance Corporation Ltd v Commissioner of Australian Federal Police* (1991) 103 ALR 167 at 178 by Burchett J.

⁸⁸ *OPSM Pty Ltd v Withers* (1987) 71 ALR 269 at 274.

⁸⁹ *Beneficial Finance Corporation Ltd v Commissioner of Australian Federal Police* (1991) 103 ALR 167 at 178-179; and *OPSM Pty Ltd v Withers* (1987) 71 ALR 269 at 274. Also see Kluver J, *op cit* n 26, at pp 44-46.

⁹⁰ *Lear v Wills* (1992) 28 ALD 809 at 811-812 per Hill J. Search warrants issued for the purpose of investigating complex taxation fraud or complex corporate or financial crime may require more latitude or generality in the requirement that the offence be specified than search warrants that are issued in relation to other forms of crimes: see *Arno v Forsyth* (1986) 9 FCR 576; (1986) 65 ALR 125 at 139 per Lockhart J; and *Harts Australia Ltd v Commissioner, Australian Federal Police* (1996) 141 ALR 493 at 502 and 504-505 per Drummond J.

A broad approach to specification of the offence confers wide powers of search and seizure and is therefore preferred from the perspective of the public interest in ensuring that the regulators have effective powers of investigation. It is suggested that the wide approach should be expressly recognised in the proposed uniform search warrant power. This would promote the public interest underpinning the search warrant power and eliminate the existing uncertainty in the law. The private interest of the affected person can still be protected in that, if the warrant is too wide and vague (in relation to the description of the alleged offences, the facts constituting the alleged offences or the description of the items to be seized), it is akin to a general warrant (that is, an unlimited search) and is void for uncertainty.⁹¹

[6.7.4] *Execution of search warrant*

[6.7.4.1] *Competing public and private interests*

The public interest in detecting and effectively prosecuting crime requires that the search team be given clear and wide powers to seize material that is relevant to proving the contravention.

There is an obvious tension between the public interest and the private interests of the affected persons. The execution of a search warrant constitutes a serious invasion of an individual's privacy. In the context of the *Crimes Act*, the *Proceeds of Crime Act* and the *Trade Practices Act* search warrants, there are a number of express provisions that promote the private interests of the affected person. For example, the legislation requires the executing officers to announce that they are authorised to enter premises before they enter those premises so as to give the occupier a reasonable time to allow entry⁹² (as opposed to the executing officers using force to obtain entry). A similar provision exists in

⁹¹ *Arno v Forsyth* (1986) 9 FCR 576; (1986) 65 ALR 125 at 139-140 per Fox J.

⁹² Section 3ZS of the *Crimes Act*; s 239 of the *Proceeds of Crime Act 2002* (Cth); s 154M of the *Trade Practices Act 1974* (Cth); and s 38X of the *Mutual Assistance in Criminal Matters Act 1987* (Cth).

the United Kingdom.⁹³ The *Crimes Act*, the *Proceeds of Crime Act 2002* (Cth) and the *Trade Practices Act 1974* (Cth) also require that:

- (a) the details of the search warrant be given to the occupier;⁹⁴
- (b) the occupier be given a right to obtain copies of things seized;⁹⁵
- (c) the occupier be given a receipt for the things seized under the warrant;⁹⁶ and
- (d) the things seized be returned to the occupier when the reason for seizure no longer exists.⁹⁷

There are no similar provisions in the *ASIC Act*, the *Corporations Act*, the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Retirement Savings Accounts Act 1997* (Cth). It is suggested that such protections should be included in the proposed uniform search warrant power.

The private interest is also protected by the fact that, as a general rule, the executing officers are not permitted to conduct a negative search of a person's premises. A negative search is a search of all the files at the person's (such as a lawyer's) premises, including files relating to matters not mentioned in the warrant, for the purpose of ensuring that there are no relevant documents amongst them. A negative search may be permissible where the premises of a person implicated in the offence are searched.⁹⁸ Most individuals will be unaware of their general law rights at the time of a search and they may only

⁹³ Section 29(3) of the *Competition Act 1998* (UK).

⁹⁴ Section 3H of the *Crimes Act*; s 240 of the *Proceeds of Crime Act 2002* (Cth); s 154N of the *Trade Practices Act 1974* (Cth); and s 38K of the *Mutual Assistance in Criminal Matters Act 1987* (Cth).

⁹⁵ Section 3N of the *Crimes Act*; s 249 of the *Proceeds of Crime Act 2002* (Cth); s 154S of the *Trade Practices Act 1974* (Cth); and s 38P of the *Mutual Assistance in Criminal Matters Act 1987* (Cth).

⁹⁶ Section 3Q of the *Crimes Act*; s 253 of the *Proceeds of Crime Act 2002* (Cth); s 154T of the *Trade Practices Act 1974* (Cth); and s 38R of the *Mutual Assistance in Criminal Matters Act 1987* (Cth). A similar provision is found in the United States' *Federal Rules of Criminal procedure*, Rule 41(f)(3).

⁹⁷ Section 3ZV of the *Crimes Act*; s 256 of the *Proceeds of Crime Act 2002* (Cth); s 154U of the *Trade Practices Act 1974* (Cth); and s 38ZA of the *Mutual Assistance in Criminal Matters Act 1987* (Cth).

⁹⁸ *Crowley v Murphy* (1981) 34 ALR 496 at 524-526 per Lockhart J; and *Baker v Campbell* (1983) 49 ALR 385 at 397 per Gibbs CJ.

become aware of those rights after the search when they seek legal advice concerning the legality of the search and seizures. Accordingly, it is suggested that the legislation should require the warrant to expressly disclose that a negative search is not generally permitted.

The private interest may also be protected, where there is an unlawful seizure, by the evidential rule in *Bunning v Cross*⁹⁹ which provides that the court has a discretion, based on public policy, to exclude evidence where it has been illegally obtained. In exercising this discretion, the court must give consideration to the public interest in convicting those who commit criminal offences and to the public interest in protecting a person from unlawful and unfair treatment.¹⁰⁰ The operation of the discretion to exclude the evidence depends on the illegal acts being shocking, willful and warranting a criminal sanction.¹⁰¹ Similar principles operate in the United States, Canada and the United Kingdom.¹⁰² In the United States, the affected person is given an express right to apply for the return of property where it was seized as the result of an unlawful search.¹⁰³ The Australian legislation should give the individual the same right.

[6.7.4.2] *Reasonable assistance*

The public interest in conducting an effective search dictates that the occupier of the premises being searched should be required to provide reasonable assistance to the search team in locating the relevant documents that are identified in the search warrant. The *ASIC Act* imposes a statutory obligation on the occupier or person in charge of the premises being searched to give the search team all reasonable facilities and assistance for the effective execution of the search warrant.¹⁰⁴ By contrast, the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Retirement Savings Accounts Act 1997* (Cth) do not impose any

⁹⁹ (1978) 141 CLR 54; and *Arno v Forsyth* (1986) 9 FCR 576; 65 ALR 125 at 128-129.

¹⁰⁰ *R v Ireland* (1970) 126 CLR 321 at 334; and *Bercove v Hermes (No 3)* (1983) 51 ALR 109 at 113-114.

¹⁰¹ Heydon, JD, *Cross on Evidence* (Butterworths, Sydney 1996) at [27295].

¹⁰² See Prefontaine DC QC, *op cit* n 1.

¹⁰³ *Federal Rules of Criminal Procedure*, Rule 41(g).

¹⁰⁴ See s 65(2) of the *ASIC Act*.

obligation on the occupier to give the search team such assistance.¹⁰⁵

Recent amendments to the *Crimes Act* give the executing officers a general power to require a person to provide reasonable assistance¹⁰⁶ and a specific power to require a person to provide reasonable assistance in accessing data held on a computer, to copy that data to a storage device and to convert that data to a documentary form.¹⁰⁷ There are similar provisions in the *Proceeds of Crime Act 2002* (Cth),¹⁰⁸ the *Trade Practices Act 1974* (Cth)¹⁰⁹ and the *Mutual Assistance in Criminal Matters Act 1987* (Cth).¹¹⁰

In the case of the FSA, the DTI, and the CC, in the United Kingdom, there is no obligation on the occupier to provide “reasonable assistance” but the search team can require any person on the premises to provide an explanation of any relevant document or information or to state where such material may be found.¹¹¹ In the United States, the search warrant powers in the *Federal Rules of Criminal Procedure* do not contain a “reasonable assistance” power.

The proposed uniform search warrant power should give all of the regulators a

¹⁰⁵ Section 19(2)(a) of the *ASIC Act*; s 270(c) of the *Superannuation Industry (Supervision) Act 1993* (Cth); and s 101(c) of the *Retirement Savings Accounts Act 1997* (Cth) give the regulators a general power to require a person to provide reasonable assistance in connection with the investigation, provided the relevant person has been given prior written notice that he/she will be required to provide such assistance. Presumably, this general power could be used by the regulators to require the relevant person to provide reasonable assistance during the execution of a search warrant, but the legislation does not make this clear. However, because of the requirement of “prior notice,” this general power may not be a practical method of compelling the provision of reasonable assistance during the execution of a search warrant, the effectiveness of which may depend on an element of surprise. The ACCC or ATO (where it is acting under the taxation legislation) do not have any equivalent general power to require a person to provide reasonable assistance in connection with their investigations.

¹⁰⁶ Section 3G of the *Crimes Act 1914* (Cth).

¹⁰⁷ Section 3LA of the *Crimes Act 1914* (Cth).

¹⁰⁸ Sections 238 and 246 of the *Proceeds of Crime Act 2002* (Cth).

¹⁰⁹ Section 154Q of the *Trade Practices Act 1974* (Cth).

¹¹⁰ Sections 38J, 38L, 38M and 38N of the *Mutual Assistance in Criminal Matters Act 1987* (Cth).

¹¹¹ Section 176(5)(d) of the *Financial Services and Markets Act 2000* (UK); s 448(3)(d)

power to require the relevant person to provide reasonable assistance to the search team. The term “reasonable assistance” should also be uniformly defined in way that is consistent with the principles discussed [4.6.4] and [6.6.3]. This reform would not only promote the public interest in increasing the effectiveness of the execution of search warrants, but would promote the private interest because the regulators would be required to exhaust the possibility of obtaining reasonable assistance before resorting to the use of reasonable force.¹¹²

[6.7.4.3] *Bring equipment to premises to examine or to process things and use electronic equipment at premises*

Section 3K of the *Crimes Act* provides that the executing officer may bring to the premises being searched any equipment reasonably necessary for the examination or processing of things found at the premises in order to determine whether they are things that may be seized under the search warrant. There are equivalent provisions in ss 243 and 244 of the *Proceeds of Crime Act 2002* (Cth) and s 154G of the *Trade Practices Act 1974* (Cth). In the United Kingdom, the CC has a similar power.¹¹³ Those provisions would authorise the search team to bring computers to the premises to examine computer disks found on the premises.

There are no equivalent provisions in the *ASIC Act*, the *Superannuation Industry (Supervision) Act 1993* (Cth) or the *Retirement Savings Accounts Act 1997* (Cth). The need for such a provision is evident when it is recalled that a notice to produce books, issued under this legislation, could require a person to produce information stored in an electronic format, including information stored on computers or disks (see [5.4]).

Section 3L of the *Crimes Act* provides that the executing officer may operate electronic equipment at the premises to access data if that officer believes on reasonable grounds that the data might contain evidential material and that the equipment can be

of the *Companies Act 1985* (UK); and s 28 of the *Competition Act 1998* (UK).

¹¹² See *Kerrison v Commissioner of Taxation (Cth)* (1986) 82 FLR 223.

operated without damage to that equipment. The officer can operate the facilities at the premises to put that evidential material in documentary form.¹¹⁴ Section 3L(1A) of the *Crimes Act* provides that if the executing officer believes, on reasonable grounds, that any data accessed by operating the electronic equipment might constitute evidential material, the executing officer may copy the data to a disk or other device brought to the premises and take the device from the premises. There are similar provisions in ss 245 of the *Proceeds of Crime Act 2002* (Cth) and ss 154H and 154ZB of the *Trade Practices Act 1974* (Cth).¹¹⁵

In the United Kingdom, the police, the CC and HMRC, have express powers, when executing a search warrant, to require any relevant information stored on a computer to be produced in a form which is visible and legible and which can be taken away from the premises.¹¹⁶ In the United States, the IRS has no express power to use equipment at the premises but it does have a specific power to require a person, by way of summons, to produce any tax related computer software so that it can be analysed by the IRS.¹¹⁷

The search warrant powers in the *ASIC Act*, the *Corporations Act*, the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Retirement Savings Accounts Act 1997* (Cth) do not give the search team any express power to operate electronic equipment at the premises. It was proposed to amend the *ASIC Act* and give ASIC a specific power, when executing a search warrant under that Act, to make mirror

¹¹³ Section 28 of the *Competition Act 1998* (UK).

¹¹⁴ See s 3L(2)(b) of the *Crimes Act*. See generally *Hart v Commissioner, Australian Federal Police* [2002] FCAFC 392; and *Egglisshaw v Australian Crime Commission* [2006] FCA 819.

¹¹⁵ In light of recent litigation, these provisions should be amended to clarify their application to computers and to clarify what the search team may copy from computers. For example, it was only after lengthy and costly litigation that Branson J, in *Kennedy v Baker* [2004] FCA 562 at [66], [70] and [78] held that s 3L(1A) of the *Crimes Act* authorised the executing officer to copy all of the data held on the computer hard drive, thereby creating an imaged hard drive, and to take that imaged hard drive from the premises.

¹¹⁶ Section 20 of the *Police and Criminal Evidence Act 1984* (UK); s 28 of the *Competition Act 1998* (UK); and s 20C of the *Taxes Management Act 1970* (UK).

¹¹⁷ Section 7612 of the *Internal Revenue Code* (US).

images of computer hard drives.¹¹⁸ This amendment would enable the search team to quickly obtain information stored on computers and avoid the need to engage in the more cumbersome process of seizing computer hardware. It would also mean that the affected person is not deprived of computer hardware for potentially lengthy periods of time, as occurs at present. It appears that scarce drafting resources prevented this amendment from proceeding and priority was given instead to drafting the recent financial services regulation and licensing provisions.¹¹⁹ This proposed amendment only concerned ASIC's specific search warrant power in the *ASIC Act* and the federal government gave no consideration to a more uniform approach. There was no suggestion by the federal government that similar amendments should be made to the search warrant powers in the *Superannuation Industry (Supervision) Act 1993* (Cth) or the *Retirement Savings Accounts Act 1997* (Cth).

All Australian regulators should have clear powers (under the proposed uniform search warrant power) to use and to examine all computer equipment and disks and to seize evidence that is stored in an electronic format.

[6.7.4.4] *Search and seizure of material not specified in the search warrant*

At common law, in the context of indictable offences, there is inconsistent case law on whether investigators may preserve evidential material by seizing it in the absence of a search warrant. In the United Kingdom, there have been suggestions that evidential material could be seized in such cases.¹²⁰ However, this approach has not been adopted by the courts in Australia on the ground that this is not an area where common law rules should be developed to “plug up” gaps in the legislative scheme.¹²¹ The *ASIC Act*, the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Retirement Savings Accounts Act 1997* (Cth) do not give the regulators any express power to seize evidential

¹¹⁸ *Financial Services Reform Bill 2000* (Cth).

¹¹⁹ Longo J, Australian Corporate News (CCH, 17 October 2001) at p 385.

¹²⁰ *Ghani v Jones* [1970] 1 QB 693 at 708-709 per Lord Denning MR; and *Chic Fashions (West Wales) Ltd v Jones* [1968] 2 QB 299 at 233 per Lord Denning MR.

¹²¹ *Levine v O'Keefe* [1929] VLR 302; [1930] VLR 70; and *Challenge Plastics Pty Ltd v*

material without a search warrant.¹²²

By contrast, the *Proceeds of Crime Act 2002* (Cth) confers a power on an authorised officer (which includes an officer of the regulator) to search for, and to seize, tainted property (the proceeds of an indictable offence or an instrument of an indictable offence) or evidential material (evidence relating to the benefits derived from an indictable offence) without a search warrant in “emergency situations”.¹²³ The problem with this legislation is that it only applies to cases involving the recovery of the proceeds of crime and it cannot be used as a general investigative tool.

Section 3F(1)(d) of the *Crimes Act* contains a similar but, in some ways, narrower provision to that contained in the *Proceeds of Crime Act 2002* (Cth). Section 3F(1)(d) of the *Crimes Act* authorises the seizure of (but not the search for) certain evidential material found during the search even though that material was not specified in the warrant.¹²⁴ There is a similar provision in s 154G of the *Trade Practices Act 1974* (Cth) and in the United Kingdom.¹²⁵

The proposed uniform search warrant power should give the Australian regulators

Collector of Customs (Vic) (1993) 115 ALR 149 at 158.

¹²² It is arguable that because Parliament has clearly specified the circumstances in that legislation in which the power of search and seizure can be exercised (where there has been prior non-compliance with a notice to produce books), the regulators have no implied common law power to seize additional evidential material (that is, material that was not specified in the original notice to produce books): see *Levine v O’Keefe* [1930] VLR 70; *Challenge Plastics Pty Ltd v Collector of Customs (Vic)* (1993) 115 ALR 149 at 158; and compare *Ghani v Jones* [1970] 1 QB 693 at 708-709.

¹²³ “Emergency situations” include those cases where the authorised officer suspects, on reasonable grounds, that the tainted property or evidential material is at a particular location, that there is a risk that the tainted property or evidential material will be concealed, lost or destroyed before a search warrant can be obtained and that it is necessary to search for, and to seize, that property or material without a search warrant because the circumstances are serious and urgent: see ss 8, 251-252 and 338 of the *Proceeds of Crime Act 2002* (Cth).

¹²⁴ Also see s 3E(6)(a) of the *Crimes Act*; and *Harts Australia Ltd v Commissioner, Australian Federal Police* (1996) 141 ALR 493 at 504 per Drummond J.

¹²⁵ Section 19 of the *Police and Criminal Evidence Act 1984* (UK); and s 448(4) of the *Companies Act 1985* (UK).

(with the assistance of the AFP) the power to search for, and to seize, documents without a search warrant in those “emergency situations” not covered by the *Proceeds of Crime Act 2002* (Cth), that is, in emergency situations involving indictable offences but not involving the recovery of the proceeds of an indictable offence. The reason for this suggestion is partly based on the limited scope of the provisions in the *Proceeds of Crime Act 2002* (Cth), the narrow scope of the provisions contained in the *Crimes Act 1914* (Cth) and the *Trade Practices Act 1974* (Cth), and partly on the fact that, as discussed at [6.8.2], the Australian legislation does not ensure the preservation of documentary evidence.

[6.7.5] *Legal professional privilege*

[6.7.5.1] *ASIC Act, Superannuation Industry (Supervision) Act 1993 (Cth), and Retirement Savings Accounts Act 1997 (Cth)*

Where the regulators obtain search warrants under the *ASIC Act*, the *Superannuation Industry (Supervision) Act 1993* (Cth), or the *Retirement Savings Accounts Act 1997* (Cth), that legislation impliedly overrides the client's legal professional privilege as a ground for the client refusing to comply with a search warrant issued under that legislation.¹²⁶ By contrast, where a lawyer refused to comply with a notice to produce books, it is not clear whether that lawyer could refuse to comply with any subsequent search warrant on the ground of the lawyer's statutory right under that legislation¹²⁷ to claim legal professional privilege. Kluver¹²⁸ argues that because the regulators' specific search warrant powers are directed at a search of premises (not of persons), the AFP could seize privileged documents located at a lawyer's premises. Kluver indicates that lawyers could only rely on their statutory right to claim legal professional privilege as a ground for refusing to provide reasonable assistance (in the case of ASIC, see [6.7.4.2])¹²⁹ in relation to the execution of

¹²⁶ Section 69 of the *ASIC Act*; s 288 of the *Superannuation Industry (Supervision) Act 1993* (Cth); s 118 of the *Retirement Savings Accounts Act 1997* (Cth); and *Corporate Affairs Commission of NSW v Yuill* (1991) 9 ACLC 843.

¹²⁷ Section 69(2) of the *ASIC Act*; s 288(2) of the *Superannuation Industry (Supervision) Act 1993* (Cth); and s 118(2) of the *Retirement Savings Accounts Act 1997* (Cth).

¹²⁸ Kluver J, *op cit*, n 48.

¹²⁹ See s 65(2) of the *ASIC Act*.

the search warrant. However, such action may justify a negative search of the lawyer's premises¹³⁰ (see [6.7.4.1]).

[6.7.5.2] *Crimes Act, Proceeds of Crime Act and Trade Practices Act*

Section 3ZX of the *Crimes Act*¹³¹ and s 264 of the *Proceeds of Crime Act 2002* (Cth) expressly preserve the operation of legal professional privilege in relation to the execution of search warrants under that legislation and privileged material cannot be seized.¹³² By contrast, in the context of the new search warrant powers in the *Trade Practices Act 1974* (Cth), there is no similar express provision. In view of the decision in *Daniels v ACCC*,¹³³ it is likely that those new search warrant powers do not authorise the seizure of privileged material (see [4.10.3]).

To protect the private interest of the individual, the case law provides that for a *Crimes Act* search warrant to be valid, an appropriate endorsement should appear on the face of the warrant specifying that privileged material cannot be seized.¹³⁴ The private interest is also protected by the common law principle that where those executing a *Crimes Act*

¹³⁰ Kluver J, op cit, n 48.

¹³¹ See also *Baker v Campbell* (1983) 153 CLR 52; 49 ALR 385 (Murphy, Wilson, Deane and Dawson JJ) overruling *Crowley v Murphy* (1981) 34 ALR 496 at 520 per Lockhart J; and *O'Reilly v Commissioners of the State Savings Bank of Victoria* (1983) 153 CLR 1. See also *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1984-1985) 156 CLR 385 at 393.

¹³² See the "General Guidelines Between The Australian Federal Police and The Law Council Of Australia As To The Execution Of Search Warrants On Lawyers' Premises, Law Societies And Like Institutions In Circumstances Where A Claim Of Legal Professional Privilege Is Made" issued 7 November 1986 and amended on 3 March 1997: see Law Council News, "Search warrants involving legal professional privilege" *Australian Lawyer* (1997) 32(4) 29; and see generally SB McNicol, "Unresolved Issues Arising from the General Guidelines Between the AFP and the Law Council of Australia" (1998) 72 ALJ 137. See also *Perron Investments Pty Ltd v Deputy Federal Commissioner of Taxation* (1989) 90 ALR 1 at 11 per Lockhart J.

¹³³ (2002) 213 CLR 593; 77 ALJR 40; 192 ALR 561; [2002] HCA 49. Section 155(7B) of the *Trade Practices Act 1974* (Cth) was recently introduced and expressly provides that a person cannot be required to produce a document that would disclose information that is the subject of legal professional privilege, but this section does not expressly apply to the new search warrant powers under this Act.

search warrant fail to give the occupier an adequate opportunity to make a claim of legal professional privilege, that search is beyond power and illegal.¹³⁵ The affected person could also seek judicial review of the decision to conduct such a search on the ground of abuse of power.¹³⁶

[6.7.5.3] *Foreign regulators*

In the United Kingdom¹³⁷ and in the United States¹³⁸ the legislation provides that material protected by legal professional privilege cannot be seized under a search warrant.

[6.7.5.4] *Law reform*

It is difficult to reconcile the fact that the search warrant powers under the *ASIC Act*, the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Retirement Savings Accounts Act 1997* (Cth) authorise the regulators to seize material normally

¹³⁴ *Arno v Forsyth* (1986) 9 FCR 576; (1986) 65 ALR 125.

¹³⁵ *Commissioner of Taxation (Cth) v Citibank* (1989) 20 FCR 403; *Kennedy v Baker* [2004] FCA 562 at [96]; and *Kennedy v Baker (No 2)* [2004] FCA 809 at [8].

¹³⁶ Section 5(1)(e) of the *AD(JR) Act*.

¹³⁷ Section 452(2) of the *Companies Act 1985* (UK); s 83(5) of the *Companies Act 1989* (UK); ss 175(4) and 413 of the *Financial Services and Markets Act 2000* (UK); s 29(3) of the *Competition Act 1998* (UK); s 20C(4) of the *Taxes Management Act 1970* (UK); ss 8 and 10 of the *Police and Criminal Evidence Act 1984* (UK); and s 54 of the *Criminal Justice and Police Act 2001* (UK). In addition, Article 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (Rome, November 4, 1950) requires that there be respect for an individual's privacy and this article could restrict the United Kingdom regulators' and the police's power to search private property (see further at [2.2.3]). The literature indicates that the issue for the English courts in the future will be whether the provisions of the United Kingdom's legislation that prevent the seizure of privileged material or that ensure the return of privileged material that has been mistakenly seized, are sufficiently stringent to avoid being in violation of Article 8: see *The Law of Professional-Client Confidentiality: Regulating the Disclosure of Confidential Personal Information*, Update at [14.40] found at <http://www.uea.ac.uk/law/resources/14-19.htm>, viewed on 19 November 2004.

¹³⁸ *Antitrust Civil Process Act*; and 15 USC, ss 1312(c), 1312(i)(7)(A) and s 1314(c) cited in *Daniels v ACCC* 2002) 213 CLR 593; 77 ALJR 40; 192 ALR 561; [2002] HCA 49 at [110] by Kirby J.

protected by legal professional privilege but that such material cannot be seized when the regulators are executing a search warrant under the *Crimes Act*, the *Proceeds of Crime Act 2002* (Cth) or the *Trade Practices 1974* (Cth). This difficulty is exacerbated by the fact that the rationale for this privilege (to maintain client confidentiality and to encourage clients to seek legal advice) is a constant and does not change depending upon the regulator with which the individual is dealing. In contrast to the position in Australia, all of the foreign regulators' search warrant powers are subject to legal professional privilege.

There are complex arguments for, and against, the retention of the privilege in the context of the regulators' investigations. As suggested at [4.10.3.1] and [5.12.2.1], the preferable reform option, which balances competing public and private interests, is to abrogate legal professional privilege in all Australian investigations. This would promote the public interest by giving the regulators access to all relevant information. The private interest could be protected by giving the client "use" and "derivative use" evidential immunity so that the privileged documents seized by the regulators are inadmissible as evidence in all subsequent proceedings against that person. If this reform were adopted, the abrogation of the privilege should be expressly disclosed on the face of the warrant.

[6.7.6] *Privilege against self-incrimination and penalty privilege*

Where the regulators obtain search warrants under the *ASIC Act*, the *Superannuation Industry (Supervision) Act 1993* (Cth), or the *Retirement Savings Accounts Act 1997* (Cth), that legislation expressly provides that the privilege against self-incrimination or the penalty privilege are not "reasonable excuses" for a natural person or a corporation refusing to comply with the search warrant.¹³⁹ However, this legislation does

¹³⁹ See ss 68(1) of the *ASIC Act*; 287(1) of the *Superannuation Industry (Supervision) Act 1993* (Cth); and 117(1) of the *Retirement Savings Accounts Act 1997* (Cth). In the context of the *Companies (Qld) Code 1981* (now *ASIC Act*), it has been held that the phrase "reasonable excuse" includes "practical or physical difficulties" of complying with an investigative requirement but does not include legal or equitable excuses: see *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 (see further at [6.8.1]). Accordingly, the legislation simply restates the general law that these privileges do not fall within the concept of a "reasonable excuse" because they in fact legal excuses.

not expressly abrogate those privileges as legal excuses for refusing to comply with a search warrant. There are no express provisions in the *Corporations Act*, the *Crimes Act* or the *Proceeds of Crime Act 2002* (Cth) that abrogate those privileges in the context of the search warrant powers contained in those Acts. Accordingly, whether those privileges may be claimed as legal excuses for refusing to comply with such warrants must be answered by looking at the case law.

In *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs*¹⁴⁰ the High Court held that the privilege against self-incrimination had no application to the compulsory seizure of documents pursuant to a search warrant. In view of this decision, the privilege against self-incrimination, as a legal excuse, is probably impliedly abrogated by the search warrant powers contained in all of the above legislation. The penalty privilege is probably also impliedly abrogated, but this has not been judicially tested.

For the reasons discussed at [4.10.2] corporations could not claim those privileges as grounds for refusing to comply with any Australian search warrant.

In the context of the new search warrant powers in the *Trade Practices Act 1974* (Cth), there is no need to rely on the reasoning in the *Controlled Consultants* case because s 154R clearly provides that where a search warrant is being executed, an individual is not excused from answering a question or producing evidential material on the grounds of the privilege against self-incrimination or the penalty privilege.¹⁴¹

In the United States, Rule 41(b) of the *Federal Rules of Criminal Procedure* provides that a search warrant may be issued to search for, and to seize, any material that

¹⁴⁰ (1984-1985) 156 CLR 385 at 392-393 per Gibbs CJ, Mason and Dawson JJ. The High Court indicated that, apart from any statutory exclusion, the privilege against self-incrimination only protects a person from being required by a statutory notice to produce or to identify incriminating documents or reveal the location of those documents or explain the contents of those documents in an incriminating fashion.

¹⁴¹ Section 154R affords the individual a limited form of “use evidential immunity” and provides that the answer (as opposed to the evidential material) is not admissible in evidence against the individual in any subsequent criminal or penalty proceedings.

provides evidence of the commission of a criminal offence. In *Andresen v Maryland*¹⁴² the court held that a search warrant does not require defendants to personally assist in the production of self-incriminating material and therefore the seizure of such incriminating material did not violate their Fifth Amendment right that they not be compelled to incriminate themselves.¹⁴³

In the United Kingdom, in the context of the search warrant powers of the DTI, the FSA, the CC and HMRC, there are no express provisions that abrogate the operation of the privilege against self-incrimination or the penalty privilege. The legislation governing those regulators' search warrant powers provides that information relating to the suspected offence can be seized¹⁴⁴ and this suggests that search warrants are not subject to those privileges.¹⁴⁵ In *Saunders v United Kingdom*¹⁴⁶ the court indicated that Article 6 and the

¹⁴² 427 US 463 (1976).

¹⁴³ See United States Department of Justice, Title 6, Tax Resource Manual, 12, Brief Memorandum of Law Concerning Search Warrants, at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title6/tax00012.htm, viewed on 21 November 2004.

¹⁴⁴ Section 448(2) of the *Companies Act 1985* (UK); s 176(4) of the *Financial Services and Markets Act 2000* (UK); s 29 of the *Competition Act 1998* (Cth); and s 20C of the *Taxes Management Act 1970* (UK).

¹⁴⁵ In *Re London Investments Plc* [1992] 2 All ER 842; and *R v Saunders* [1996] Crim LR 420 the courts indicated that Parliament intended to override the privilege against self-incrimination in the areas of insolvency and corporate fraud. However, some English case law indicates that the affected person can claim the privilege against self-incrimination to prevent the seizure of documents that fall within that privilege but those cases concern court orders for the production of documents in civil proceedings or Anton Piller orders: see *Rank Film Distributors Limited v Video Information Centre* [1981] 2 All ER 76; *Tate Access Floors Inc v Boswell* [1990] 3 All ER 303; and *Universal City Studios Inc v Hubbard* [1984] Ch 225 cited in Fisher J, Bewsey J, Waters M, and Ovey E, "The Law of Investor Protection," (2nd ed, Thomson, Sweet & Maxwell, London, 2003) at p 593. The approach in these cases is inconsistent with the implied abrogation of the privilege against self-incrimination in the context of the DTI's and the FSA's oral examination powers (see [4.10.2]). However, the approach in these cases is consistent with Article 6(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (Rome, November 4, 1950) which provides that it is unlawful to demand the production of self-incriminating documents (see [5.12.1]). See also *Funke v Funke* [1993] 16 EHRR 297; and *Cremieux v France* [1993] 16 EHRR 357 cited in Fisher J, Bewsey J, Waters M, and Ovey E, at pp 590 and 596-597.

¹⁴⁶ Case no 43/1994/490/572, 17 December 1996 cited in The Law Commission, Consultation Papers, Discussion Forum Part VII, The Relationship Between Civil and

privilege against self-incrimination are concerned with respecting the will of the accused to remain silent. The court indicated (by way of *obiter dictum*) that the privilege against self-incrimination and Article 6 do not extend to the exercise of compulsory powers, such as search warrants, which have an existence which is independent of the will of the accused.¹⁴⁷ This approach appears to be consistent with the approach in both Australia and the United States.

The proposed uniform search warrant power should expressly provide that the privilege against self-incrimination and the penalty privilege are not reasonable excuses or legal excuses for refusing to comply with a search warrant. The legislation should also expressly provide that neither “use evidential immunity” nor “derivative use evidential immunity” is available in relation to the contents of compulsorily seized documents. This reform is consistent with the discussion at [5.12.1.1] in relation to notices to produce books. The legislation should also provide that self-incriminating material seized by a search warrant can only be used by the regulators in criminal or penalty proceedings or for other authorised purposes (see Chapter 7).

[6.8] Penalties

It is argued that where an individual’s contravening conduct is the same, and where the purpose of the relevant law that is contravened is the same, the principle of fairness (treating like cases alike – see [1.5.5]) requires that the minimum and maximum penalty range should be the same regardless of the legislation contravened. Fisse and Braithwaite¹⁴⁸ also emphasise the importance of ensuring “equal punishments for equal wrongs.” Of course, within the uniform range of minimum and maximum penalties, each individual penalty will vary according to the nature of the individual’s offending conduct and according to the particular mitigating circumstances.

Criminal Proceedings For Trade Secret Misuse at [8.25] at <http://www.lawcom.gov.uk/library/lccp150/pt8.htm>, viewed on 20 November 2004.

¹⁴⁷ *Saunders v United Kingdom* (1997) 23 EHRR 313, 338, at [68]-[69].

¹⁴⁸ Fisse B and Braithwaite J, *op cit* n 2, at pp 178 and 182.

There is some uniformity in the various Australian legislation in that the phrase “penalty units,” used in a number of the offence provisions, is given a uniform meaning under s 4AA of the *Crimes Act 1914* (Cth) and is currently \$110 per penalty unit. However, there is no uniformity across the various Australian legislation in relation to the number of penalty units that may be imposed even though the regulatory offence in each case is the same. In addition, in some cases, the phrase “penalty units” is not used and an exact dollar value is set as the maximum possible penalty. It is argued that the same offences in the different legislation should attract the same minimum and maximum penalty range regardless of the regulator with which the individual was dealing and that “penalty units” should be used as the common means of defining the relevant penalty.

It is also recognised that, in some cases, although the legislation imposes exactly the same obligation, it does not always mean that the same penalty should be imposed. The purpose of the regulatory obligation should also be considered when considering the appropriate level of penalty.¹⁴⁹ Where similar statutory obligations serve different purposes, the level of the pecuniary penalty should differ according to the seriousness or importance of the purpose which underpins the statutory obligation.

The uniform principles of criminal responsibility contained in the *Criminal Code Act 1995* (Cth) may apply to all of the regulatory offences and penalties discussed below. The *Criminal Code Act 1995* (Cth) also contains a uniform list of defences that could apply across the regulatory legislation.¹⁵⁰ However, the *Criminal Code Act 1995* (Cth) is residual in nature and it may be displaced by the specific offence and defence provisions of

¹⁴⁹ For example, in some cases, the statutory obligation to keep records may serve an evidentiary purpose which assists the regulator to determine whether there has been a contravention of the legislation. By contrast, in some cases, such as in the case of the *Corporations Act 2001* (Cth), the statutory obligation to keep records may have a wider purpose. The failure to keep proper records may detrimentally impact on the ability of investors and creditors to make informed decisions: see ALRC, DP 65, “Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation”, at [18.25], [18.28] and [18.29] at <http://kirra.austlii.edu.au>, viewed on 22 September 2005.

¹⁵⁰ See Part 2.3 of the *Criminal Code 1995* (Cth); and Leader-Elliott I, *The Commonwealth Criminal Code – A Guide for Practitioners*, Commonwealth Attorney-General’s Department, March 2002, at p 125.

specific regulatory legislation. It is argued that where the offence provisions under the various Acts are essentially the same, there should be uniform defences in relation to those offences.

Support for the reforms discussed in this section is found in the discussion paper issued by the Corporations and Markets Advisory Committee (CAMAC) where it recently stated that there should be a standardised and principled approach in relation to corporate criminal offences. According to CAMAC, such reforms would reduce complexity, aid understanding, and “promote effective corporate compliance and risk management while providing more certainty and predictability for the individuals concerned.”¹⁵¹

[6.8.1] Failure to produce books

The Australia legislation imposes inconsistent penalties for the offence of failing to comply with a notice to produce books. Where ASIC is acting under the *ASIC Act*, that Act imposes (subject to the “reasonable excuse” defence) a penalty of 100 penalty units or imprisonment for two years, or both, where a person fails to comply with a notice to produce books.¹⁵² Where ASIC, APRA or the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth); or where ASIC and APRA are acting under the *Retirement Savings Accounts Act 1997* (Cth); that legislation imposes a maximum penalty of 30 penalty units for the same offence.¹⁵³ In the case of the latter two Acts, the “reasonable

¹⁵¹ CAMAC, Discussion Paper (5 May 2005), at <http://www.camac.gov.au/CAMAC/camac.nsf/byHeadline/Whats+NewPersonal+Liability+for+Corporate+Fault+Discussion+Paper+May+2005?openDocument> cited in Australian Institute of Company Directors, Module 1, “The Practice of Directorship,” 2006 at pp 32-33; and CAMAC “REPORT ON PERSONAL LIABILITY FOR CORPORATE FAULT”, 26 September 2006, at <http://www.camac.gov.au/CAMAC/camac.nsf/byHeadline/Whats+NewPersonal+Liability+for+corporate+fault+Report?openDocument>, viewed on 2 October 2006.

¹⁵² Section 63(1) of the *ASIC Act*. The defence of “reasonable excuse” is contained in s 63(5) of the *ASIC Act*.

¹⁵³ See s 285 of the *Superannuation Industry (Supervision) Act 1993* (Cth); and s 115 of the *Retirement Savings Accounts Act 1997* (Cth).

excuse” defence was omitted on 15 December 2001 which probably means that the general defences in the *Criminal Code Act 1995* (Cth) apply.

The *Trade Practices Act 1974* (Cth) imposes a penalty not exceeding 20 penalty units or imprisonment for 12 months, or both for the same offence.¹⁵⁴ A person may defend the ACCC’s prosecution for such an offence by establishing that they were not “capable of complying” with the notice.¹⁵⁵

The taxation legislation imposes a penalty not exceeding \$2,200 for the same offence. However, where there has been a previous conviction for the same offence, the maximum fine is \$4,400, or where the offence is treated otherwise than as a “prescribed taxation offence,” and there has been a previous conviction for the same offence, the penalty increases to a maximum fine of \$5,500 for a natural person (or \$27,500 for a corporation) or 12 months imprisonment or both.¹⁵⁶ A person may defend the ATO’s prosecution for such an offence by establishing that they were not “capable of complying” with the notice.¹⁵⁷

It is not clear whether the “reasonable excuse” defence (adopted in the *ASIC Act*) equates with the “capable of complying” defence (adopted in the taxation and trade practices legislation). The “reasonable excuse” defence is also problematic because its meaning is not clear. In the context of ss 296(2) and 308 the *Companies (Qld) Code 1981* (now s 69 of the *ASIC Act*), and the United Kingdom’s legislation, the case law indicates that it is restricted to “physical or practical difficulties” of compliance and does not include legal or equitable excuses.¹⁵⁸ However, in the context of other Australian legislation, this defence has been held to include legal excuses such as the privilege against self-incrimination.¹⁵⁹

¹⁵⁴ Sections 155(5) and (6A) of the *Trade Practices Act 1974* (Cth).

¹⁵⁵ Section 155(5A) of the *Trade Practices Act 1974* (Cth).

¹⁵⁶ Sections 8D, 8E and 8F of the *Taxation Administration Act 1953* (Cth). See also *Hart v Deputy Commissioner of Taxation* [2005] FCA 1748 at [3].

¹⁵⁷ Sections 8D(1B) of the *Taxation Administration Act 1953* (Cth). See also *Hart v Deputy Commissioner of Taxation* [2005] FCA 1748 at [3].

¹⁵⁸ *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319; *R v Harz*; *R v Power* [1967] 1 AC 760 in the context of s 42(4) of the *Banking Act 1987* (UK) approved in *Bank of England v Riley* [1992] Ch 475; and *A v B Bank* [1993] QB 311 at 323.

¹⁵⁹ *Ganin v NSW Crime Commission* (1993) 32 NSWLR 423 at 436-437 per Kirby P in

In the United States, in the cases of the SEC, the ATD, and the IRS, where a person fails to comply with *any* investigative requirement, the legislation imposes a uniform penalty of a fine of not more than \$US 1,000, or imprisonment for one year, or both.¹⁶⁰ An individual is not liable to a penalty for non-compliance with the SEC's investigative requirement if that person can establish a "just cause" defence."¹⁶¹ In contrast to the complex range of penalties that exist in Australia, the approach of the legislation governing the SEC, the ATD and the IRS is to be preferred on the grounds of clarity, simplicity and uniformity of treatment of the individuals concerned.

In the United Kingdom, in the context of the DTI, the CC and HMRC there is no uniformity in the defences that may be claimed, or in the penalties that may be imposed, in relation to the offences for a failure to comply with a notice to produce books.¹⁶²

[6.8.2] *Concealment or destruction of books*

The regulators' power to require the production of books would be prejudiced if the recipient of the notice could simply alter, destroy or hide the books. For this reason, the *ASIC Act*, the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Retirement Savings Accounts Act 1997* (Cth) create offences and impose penalties to deter and punish such conduct. One problem with these statutes is that despite the essentially similar nature of the offences, there are no uniform statutory defences or penalties.¹⁶³

the context of s 18 of the *Crime Commission Act 1985* (NSW).

¹⁶⁰ Section 21c of the *Securities and Exchange Act 1934* (US); 15 USC, s 78u(c); and s 7210 of the *Internal Revenue Code* (US).

¹⁶¹ Section 21c of the *Securities Exchange Act 1934* (US).

¹⁶² Section 447(6) and (7) of the *Companies Act 1985* (UK); s 85(1) of the *Companies Act 1989* (UK); s 42 of the *Competition Act 1998* (UK); and s 97AA of the *Taxes Management Act 1970* (UK).

¹⁶³ The concealment, destruction, mutilation or alteration of books that relate to ASIC's investigation, or sending those books out of jurisdiction, may result in a penalty of 200 penalty units or imprisonment for five years, or both. There is a defence to prosecution if the defendants can establish that when they did the relevant act, they did not intend to defeat the purposes of the corporations legislation or delay or obstruct the investigation or proposed investigation of ASIC: see s 67(1) and (2) of the *ASIC Act*. Where ASIC, APRA and the

A further problem with all of this legislation is that the offence provisions are too narrow as they are limited to the concealment or destruction of books that fall within the ambit of the matter that the regulator is investigating or is about to investigate. The legislation gives no guidance as to the position in relation to books that fall outside the matter under investigation. However, there are other legislative provisions that operate outside investigations.

There are also general offences for concealing or destroying documents in the *Corporations Act*, and in the *Crimes Act*, which could apply irrespective of whether an Australian regulator was conducting an investigation. In the case of the *Corporations Act*, the penalty is 50 penalty units or imprisonment for 12 months or both, and, in the case of the *Crimes Act*, the penalty is imprisonment for a maximum of 5 years.¹⁶⁴ In some cases, the destruction of documentary evidence may constitute the common law offence of attempting to pervert the course of justice or contempt of court. Contempt of court may be established where a person destroys documents that they know might be required in litigation.¹⁶⁵

A more fundamental problem is that the offence provisions are simply penalty provisions which operate after the event and they do not protect documentary evidence.¹⁶⁶ To enable the Australian regulators to protect documentary evidence, the regulators should be given uniform powers to access premises to obtain or copy documents (see [6.6.3]), obtain search warrants without prior warning (see [6.7.2.1]) and obtain a search warrant

ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth), or where ASIC and APRA are acting under the *Retirement Savings Accounts Act 1997* (Cth), a penalty of two years imprisonment may be imposed under the former Act (s 286), or 6 months imprisonment may be imposed under the latter Act (s 116). There is no express defence in this legislation. By contrast, in the United Kingdom, there is express statutory defence based on the fact that the individual had no intention to conceal the state of affairs of the company or the facts disclosed by the documents or had no intention to defeat the law: see s 450 of the *Companies Act 1985* (UK); s 177(3) and (4) of the *Financial and Services Markets Act 2000* (UK); and s 43 of the *Competition Act 1998* (UK).

¹⁶⁴ Section 1101E of the *Corporations Act*; and s 39 of the *Crimes Act*.

¹⁶⁵ *Lane v Registrar of the Supreme Court of NSW* (1981) 35 ALR 322 at 331. See generally Sallmann PA, Crown Counsel for Victoria, "Report on Document Destruction and Civil Litigation in Victoria," Crown Counsel Victoria (May 2004) at p 8.

¹⁶⁶ Kluver J, *op cit* n 26, at p 43.

where there are reasonable grounds for believing that a notice to produce books would not be complied with (see [6.7.1]).

[6.8.3] Examinations

The Australia legislation imposes inconsistent penalties and defences where an individual fails to attend an oral examination, or fails to answer questions at that examination and the situation is almost the same as that discussed at [6.8.1] in the context of notices to produce books.¹⁶⁷

The positions in the United States and in the United Kingdom are also the same as described at [6.8.1].

[6.8.4] False information

The regulators depend upon the reliability of the information they obtain through the exercise of their investigative powers and, to maintain the integrity of their investigations, they will readily lay charges where a person gives them false information.¹⁶⁸ In the case of ASIC, the legislation imposes a penalty of 100 penalty units or imprisonment for two years, or both, where a person gives false and misleading information in the course of an investigation. The legislation provides a defence if the person believed, on reasonable grounds, that the information given was true and not misleading.¹⁶⁹

¹⁶⁷ See s 63 *ASIC Act* (penalty of 100 penalty units or imprisonment for two years, or both, subject to the “reasonable excuse” defence); s 285 of the *Superannuation Industry (Supervision) Act 1993* (Cth); and s 115 of the *Retirement Savings Accounts Act 1997* (Cth) (both Acts impose a maximum penalty of 30 penalty units for the same offence); s 155(5), (5A) and (6A) of the *Trade Practices Act 1974* (Cth) (penalty not exceeding 20 penalty units or 12 months imprisonment, or both, subject to the “capable of complying” defence); and ss 8D, 8D(1B), 8E and 8F of the *Taxation Administration Act 1953* (Cth) (penalties range from \$2,000-\$5,000 or 12 months imprisonment, or both, subject to the “capable of complying” defence).

¹⁶⁸ Chapman R, "Challenging The ASC - Section 19, ASC Law", Corporate Lawyers and Regulators Forum, Hyatt Coolum, 19-21 May, 1994, at 8. Also see *ASC v Lord* (1992) 10 ACLC 50.

¹⁶⁹ See s 64(1) and (3) of the *ASIC Act*; and *ASC v Lord* (1992) 10 ACLC 50 at 54 per

In the context of ASIC's, APRA's and the ATO's investigatory functions under the *Superannuation Industry (Supervision) Act 1993* (Cth), the provisions prohibiting false and misleading statements were repealed on 24 May 2001.¹⁷⁰ Similarly, in the context of ASIC's and APRA's investigations under the *Retirement Savings Accounts Act 1997* (Cth), the equivalent provisions under that Act¹⁷¹ were also repealed. Those provisions were repealed because they replaced by the equivalent offence found in s 137.1 of the *Criminal Code Act 1995* (Cth) which imposes a maximum penalty of imprisonment for one year. Section 137.1 provides a defence if the person did not know that the information given was false or misleading.

Section 137.1 promotes the principles discussed in this thesis. That is, it could be utilised by all Commonwealth regulators and promotes greater fairness or equality in the treatment of the regulated because the same offence, defence and penalty provisions apply irrespective of which regulator they gave the false information to. However, the problem is that, as noted at [6.8], the *Criminal Code Act 1995* (Cth) is residual legislation and presumably some Commonwealth regulators could still prosecute under their respective specific offence provisions (noted above) in preference to s 137.1.

The *Trade Practices Act 1974* (Cth) imposes a penalty not exceeding 20 penalty units or imprisonment for 12 months, or both, for the same offence.¹⁷² There is no express defence in the *Trade Practices Act 1974* (Cth) in respect of this offence but there may be an implied defence on the ground that the individual did know that the information was false.

The taxation legislation imposes a penalty not exceeding \$2,000 for the same offence. However, where there has been a previous conviction for the same offence, the maximum fine is \$4,000.¹⁷³ There is an express defence where persons can show that they

Davies J.

¹⁷⁰ Former s 302 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

¹⁷¹ Former s 150 of the *Retirement Savings Accounts Act 1997* (Cth).

¹⁷² Section 155(5) and (6A) of the *Trade Practices Act 1974* (Cth).

¹⁷³ Sections 8K, 8M, 8N and 8R of the *Taxation Administration Act 1953* (Cth).

did not know, and could not reasonably be expected to know, that the statement was false or misleading.¹⁷⁴

There are similar offence provisions both in the United States and the United Kingdom. The United Kingdom's legislation also imposes inconsistent penalties.¹⁷⁵

[6.8.5] *Obstruction or disruption*

The Australian legislation imposes inconsistent penalties for the offence of obstructing the investigation or examination or the execution of search warrants. Where ASIC is acting under the *ASIC Act*, that Act imposes (subject to a "reasonable excuse" defence) a penalty of five penalty units for obstructing an examination, and 100 penalty units or imprisonment for two years, or both, for obstructing the execution of search warrants.¹⁷⁶ In the United Kingdom, there are a range of offences where a person obstructs the execution of a search warrant and they are subject to different defences.¹⁷⁷

Where ASIC, APRA and the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth); or where ASIC and APRA are acting under the *Retirement Savings Accounts Act 1997* (Cth); the legislation provides that a person who obstructs the investigation may be liable to a maximum penalty of 6 months imprisonment. It could be argued from the terminology used in the legislation that there is an implied defence if the person can show that, at the time they engaged in the conduct, they did not know that the regulator was conducting or was about to conduct an investigation.¹⁷⁸

In the case of the ATO (when it is acting under the taxation legislation) and the

¹⁷⁴ Sections 8K(2) of the *Taxation Administration Act 1953* (Cth).

¹⁷⁵ Section 451 of the *Companies Act 1985* (UK); s 85(2) of the *Companies Act 1989* (UK); s 177(4) and (5) of the *Financial Services and Markets Act 2000* (UK); and s 44 of the *Competition Act 1998* (UK); and s 7206 of the *Internal Revenue Code* (US).

¹⁷⁶ Sections 63(4) and 65(1) of the *ASIC Act*.

¹⁷⁷ Section 448(7) of the *Companies Act 1985* (UK); s 177(6) of the *Financial Services and Markets Act 2000* (UK); and s 42 of the *Competition Act 1998* (UK).

¹⁷⁸ Section 286 of the *Superannuation Industry (Supervision) Act 1993* (Cth); and s 116 of

ACCC, the offence for obstruction is currently contained in s 149 of the *Criminal Code Act 1995* (Cth).¹⁷⁹ Under this legislation a person is guilty of an offence even if they did not know that the Commonwealth public official (such as the ATO's or the ACCC's officer) was conducting an investigation. Section 149 imposes a penalty of up to two years imprisonment. Once again, there is some uniformity in the treatment of the regulated because the obstruction offence in s 149 could be utilised by all Commonwealth regulators but, as noted at [6.8], the *Criminal Code Act 1995* (Cth) is residual in nature and may be overridden by the specific obstruction offence provisions.

[6.8.6] *Law reform*

In the context of the offences relating to non-compliance with a notice to produce books, or non-compliance with a requirement made at an examination, or obstruction, there should be a uniform “reasonable excuse” defence (with a uniform meaning based on “physical or practical difficulties” of compliance) that is equally available to all persons irrespective of the regulator with which they are dealing. Support for this uniform approach is found in the legislation governing the SEC, the ATD and the IRS, in the United States.

Braithwaite argues that penalties provide an effective general deterrent only if there is a capacity for the regulators to escalate the penalties for serious cases or for repeat offender cases.¹⁸⁰ The ATO's penalty regime appears to be the only one that expressly adopts this approach and it is suggested that it should be adopted for all of the regulators. The judiciary have an implied discretion to impose higher penalties in the more serious cases and in cases involving repeat offenders. However, it is argued that express provisions may ensure greater consistency in the treatment of similar cases and may send a more effective message of general and personal deterrence and compliance.

the *Retirement Savings Accounts Act 1997* (Cth).

¹⁷⁹ In the United States, s 7212 of the *Internal Revenue Code* (US) imposes a maximum penalty of \$US 5,000 or three years imprisonment, or both, in relation to offence of obstructing the due administration of the internal revenue laws.

¹⁸⁰ Braithwaite J, “Markets in Vice, Markets in Virtue”, op cit n 6, at p 181.

Braithwaite¹⁸¹ also argues that the regulators should be given express powers to guarantee an immunity from a penalty or a reduction in the penalty if the regulated immediately remedy their non-complying behaviour. This could be achieved by appropriately drafted express provisions in the legislation.

[6.9] Conclusion

A range of inconsistencies and inadequacies in the Australian regulators' enforcement powers have been highlighted in this chapter. Reforms have been suggested to address those problems. Those reforms are designed to achieve greater clarity in the law thereby promoting a range of public and private interest objectives including greater efficiencies and more effective regulation.

Those reforms include:

- (a) uniform powers to obtain freezing orders in relation to non-compliance with an investigative requirement;
- (b) uniform powers to certify non-compliance with an investigative requirement to the court (thereby remedying the ATO's and ACCC's lack of such a power);
- (c) uniform access powers thereby remedying existing weaknesses in those powers and remedying ASIC's lack of a statutory access power, in the context of performing its primary corporate regulation functions;
- (d) uniform search warrant powers thereby remedying the inconsistencies and inadequacies that exist between the regulators' individual search warrant powers and those contained in the *Crimes Act*;
- (e) uniform protections for the regulated particularly in relation to the issue and execution of search warrants; and
- (f) a uniform criminal penalty regime to deal with non-compliance with the regulators' investigative requirements including uniform offence,

¹⁸¹ Braithwaite J, "Markets in Vice, Markets in Virtue", op cit n 6, at p 134.

defence and penalty provisions so that like cases are treated alike regardless of the regulator with which the individual was dealing. This reform would promote greater fairness and consistency in the treatment of the regulated.

CHAPTER 7

RELEASE OF INFORMATION

by Tom Middleton

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CHAPTER 7

RELEASE OF INFORMATION

[7.1] Introduction

Given that all of the regulators share a common public interest concern of protecting the integrity and secrecy of their investigations, it is argued that they should have uniform statutory powers to maintain the confidentiality of investigative information (see [7.4.1]), to make authorised use and disclosure of such information (see [7.5]-[7.5.6]), and to impose conditions (which preserve secrecy) on the release of such information (see [4.7.2] and [7.5.3.1]). These reforms would not only give the regulators clear powers to protect the secrecy and integrity of their investigations but it would also mean that the privacy rights of the individuals, whose information the regulators possess, are clear and are subject to clearly understood and uniform exceptions.

Given that all individuals are concerned about protecting their privacy and obtaining information in the regulator's possession, it is argued that irrespective of the regulator with which they are dealing, they should have the same power to prevent regulators from releasing their personal or business information in particular cases or to access information in the regulator's possession (see [7.6] and [7.7]). This would also promote the principle of fairness by ensuring that "like cases are treated alike" (see [1.5.5]).

It is argued that clear and uniform duties of confidentiality and clear and uniform exceptions to those duties, will reduce the need to litigate on whether the information is confidential or on whether the information should be released thus producing a more cost-effective outcome thereby promoting more effective regulation.¹ In addition, clear powers to release information to private litigants (see [7.5.5]) and to professional disciplinary bodies (see [7.5.6]) shifts the costs of regulation from the "public purse" to

¹ Baldwin R and Cave M, "Understanding Regulation Theory Strategy, and Practice," Oxford University Press, Oxford, 1999 at pp 76, 314 and 316. See [1.5.1.2].

the private sector thereby, from the regulators' budgetary perspectives, producing more cost-effective regulatory outcomes.

[7.2] Public interest

The suggested reforms are designed to achieve a balance between the public interest in facilitating the efficient and legitimate use and exchange of investigative information and the private interests of the persons who are affected by that exchange of information.²

The suggested reforms may promote the public interest in the regulators obtaining greater public cooperation and more information during their investigations. That is, if the public are aware that the regulators have clear statutory obligations of confidence and that the regulators can only make authorised use or disclosure of information in clearly defined circumstances, then individuals may have greater confidence in making full disclosure to the regulator in the first place, thus promoting the public interest underpinning the regulators' investigative powers of quickly discovering the truth about whether the law has been contravened.

The present lack of clarity and uniformity in the Australian regulators' powers to release information means that individuals are able to delay the investigation and enforcement process by challenging the regulator's decision to release information on technical grounds that are unrelated to the public interest objectives underpinning that decision. The suggested reforms have some judicial support. For example, the case law indicates that it would make little sense if a lack of clarity in the law, and the consequent technical legal arguments, precluded a regulator or government agency from receiving information that is relevant, and vital to, the effective performance of their investigative or enforcement functions.³

² See generally Oberson X, "The OECD Model Agreement on Exchange of Information - a Shift to the Applicant State," Bulletin, Tax Treaty Monitor, International Bureau of Fiscal Documentation, January 2003, 14 at 17.

³ See generally *Australian Crime Commission v AA Pty Ltd* [2006] FCAFC 30 at [24]

[7.3] Private interest

The Australian common law does not recognise any general right to privacy. If the regulator releases information without the affected person's consent, that person may have to bring action against the regulator or other parties for breach of an equitable obligation of confidence or for defamation. However, such actions will only be successful in a limited range of circumstances. In addition, such litigation is slow and expensive and is not a realistic option for most people affected by privacy intrusions.⁴ Given the inadequacies of the common law in protecting privacy, it is argued that the Australian regulators should have clear and uniform statutory duties to protect the confidentiality of an individual's personal or business information that they have gathered through their investigative powers.

As noted at [1.5.1.2], Baldwin and Cave,⁵ also indicate that an effective regulatory regime is one that has fair, accessible and open procedures. Probably the most effective way to promote those principles is to ensure that the regime allows individuals to have access to relevant information that is held by the regulators, subject to the limitations discussed subsequently in this chapter. In some cases, it may be unclear to the individual why the regulator has reached a particular decision or how the regulator views a particular matter and how it weighed the evidence. The release of relevant information to the individual may clarify those matters and may promote not only the private interest in giving a person access to information, but may promote the public interest in avoiding delay by deterring individuals from making a formal application to review the regulator's decision. According to Baldwin and Cave, the advantage of the regulators releasing information, including the giving of reasons for a decision, is that it assists to explain and rationalise regulation.⁶

and [25].

⁴ Scollay M, "Information privacy in Australia A national scheme for fair information practices in the private sector", <http://www.austlii.edu.au/cgi-bin/disp.pl/au/journals/PLPR/1997/36.html?query=%22telstra%22+and+%22accc%22+and+%22public%22+and+%22interest%22+and+%22immunity%22>.

⁵ Baldwin R and Cave M, op cit n 1, at pp 76, 314 and 316.

⁶ Baldwin R and Cave M, op cit n 1, at p 316.

[7.4] The regulators' powers to refuse to release information

[7.4.1] *The regulators' duty of confidentiality*

The case law indicates that, subject to some exceptions discussed below, the regulator and the individual are not bound by any general equitable duty to keep investigative information confidential⁷ (see [4.10]). For this reason, they would only be required to keep the information confidential if they had a statutory obligation of confidentiality, if the information was already confidential (in equity) or privileged when they received it, if the regulator gave an undertaking to the provider to keep the information confidential, or if the information was protected from disclosure by public interest immunity (see [7.4.2]), or by the exemptions contained in the freedom of information legislation (see [7.4.3]), or by the regulator's legal professional privilege (see [7.4.4]).

As a general rule, the Australian legislation imposes a statutory obligation of confidence in relation to the investigative information received by the regulators.⁸ From the perspective of promoting the release or sharing of information, one advantage of the regulators' statutory duty of confidence is that it is subject to a list of exceptions (authorised uses or disclosures) where the information may be released without breaching that duty.⁹ By contrast, confidential information can only be released in equity if the requisite consent is obtained and such consent may not always be forthcoming. The statutory duty of confidence also creates a greater incentive for persons to keep the

⁷ *Barton v Csidei* [1979] 1 NSWLR 524; *Johns v ASC* (1993) 178 CLR 408 at 427 per Brennan J and at 436 per Dawson J; *Constantine v Trade Practices Commission* (1994) 48 FCR 141 at 148 per Jenkinson J; and *Trade Practices Commission v Ampol Petroleum (Vic) Pty Ltd* (1994) 54 FCR 316 at 323-324 per Davies J.

⁸ See s 127 of the *ASIC Act*; former s 346 of the *Superannuation Industry (Supervision) Act 1993* (Cth); former s 191 of the *Retirement Savings Accounts Act 1997* (Cth); ss 155AA and 155AB of the *Trade Practices Act 1974* (Cth); and s 3E of the *Taxation Administration Act 1953* (Cth). This obligation of confidence arises from the statute and not from equity: see *Johns v ASC* (1993) 178 CLR 408 at 427 per Brennan J and at 436 per Dawson J; and *Trade Practices Commission v Ampol Petroleum (Victoria) Pty Ltd* (1994) 54 FCR 316 at 323 per Davies J.

⁹ See generally ASIC Releases, Policy Statement 103: Confidentiality and release of information, [5] at 40,891.

information confidential because, unlike the equitable duty of confidence, the legislation can create a criminal offence for breach of the statutory duty.¹⁰ In some cases, the legislation gives the regulators the power to impose conditions when they release information which are designed to protect the secrecy of the information (see [4.10] and [7.5.3.1]). Individuals commit a criminal offence if they breached those conditions.

One of the problems with the Australian statutory duty of confidentiality is that the legislation adopts inconsistent terminology when imposing that duty in the case of each regulator. For example, s 127(1) of the *ASIC Act* provides that ASIC "shall take all reasonable measures to protect from unauthorised use or disclosure information given to it in confidence." Section 56 of the *Australian Prudential Regulation Authority Act 1998* (Cth) provides that APRA's members or employees commit an offence if they disclose "protected information" or "protected documents"¹¹ for a purpose other than that which is authorised by s 56. There is a similar statutory duty of confidentiality where ASIC, APRA or the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth).¹² Section 16 of the *Income Tax Assessment Act 1936* (Cth) provides that the ATO's officers shall not directly or indirectly, during or after leaving employment with the ATO, make a record of, or divulge or communicate to any person, any information acquired by them in the course of their duties.¹³

There is no express provision in the *Trade Practices Act 1974* (Cth) that imposes a general statutory duty of confidentiality on the ACCC in relation to the information it

¹⁰ Section 56(2) of the *Australian Prudential Regulation Authority Act 1998* (Cth); s 127(4E) and (4F) of the *ASIC Act*; s 449(2) of the *Companies Act 1985* (UK); s 352 of the *Financial Services and Markets Act* (UK); and s 19 of the *Commissioners for Revenue and Customs Act 1995* (UK). See also the Financial Services Authority, "The Protection of Regulatory Information under English Law" p 1, at <http://www.fsa.gov.uk/pubs/mou/equivalence/protection.pdf>.

¹¹ These terms are defined in defined in s 56(1) of the *Australian Prudential Regulation Authority Act 1998* (Cth).

¹² Section 252C of the *Superannuation Industry (Supervision) Act 1993* (Cth).

¹³ Section 16(6) imposes a maximum penalty of \$10,000 or two years imprisonment for a contravention of s 16. There is a similar provision in s 3C and s 8XB of the *Taxation Administration Act 1953* (Cth). See also *Lovell v Adjuk* (1991) 91 ATC 4358.

obtains during an investigation.¹⁴ Section 155AA prohibits the ACCC’s “officials” from disclosing “protected information”¹⁵ obtained from an investigation. The phrase “protected information” is defined differently in the *Trade Practices Act 1974* (Cth) on the one hand, and in the *Australian Prudential Regulation Authority Act 1998* (Cth) and the *Superannuation Industry (Supervision) Act 1993* (Cth), on the other.

ASIC’s statutory duty of confidence (described above) technically applies to the regulator (a body corporate), as opposed to ASIC’s employees. By contrast, in the case of the other regulators, the statutory duty of confidence is expressly imposed on members or employees of the regulator. It is suggested that the *ASIC Act* should also contain a provision that directly prohibits ASIC’s employees from divulging confidential information.

There is no sound legal reason why the different Australian legislation uses different terminology to achieve the common purpose of keeping investigative information confidential. Uniform terminology would reduce the possibility of gaps arising in the regulatory framework which are revealed by litigation. Examples of such “gaps” could include a finding that one regulator owes a duty to keep certain information confidential but, because of a drafting error or ambiguities or inconsistencies not foreseen by Parliament, the other regulators do not owe the same duty and have the power to release the relevant information. In such a case, the relevant information may be released through the “back door.” For example, it is possible that the regulator who possesses the information, but who has no power to release it directly to a particular person, may release it to another regulator who does have that power (see [7.5.5]).

A uniform statutory duty of confidentiality would also mean that any litigation concerning the scope of a particular regulator’s statutory duty of confidentiality or concerning the meaning of particular language used in creating that duty will resolve that matter “once and for all” for all of the regulators. This would avoid the problem of

¹⁴ ACCC, “Section 155 of the Trade Practices Act, Information gathering powers of the Australian Competition and Consumer Commission in relation to its enforcement function – Use of information, documents and evidence obtained under s 155,” October 2000 at p 19, at <http://www.accc.gov.au>, viewed on 25 September 2005.

repeated litigation being brought by, or against, each regulator concerning essentially the same issues but distinguished by the technical fact that the terminology used in the various legislation differs.

The United States' regulators¹⁶ and the United Kingdom's regulators¹⁷ have a statutory obligation of confidence but the legislation also permits those regulators to make authorised use and disclosure of information gathered from their investigations.

To encourage public cooperation in fraud investigations, the SEC and the ATD in the United States, and the FSA in the United Kingdom, have also entered into various confidentiality agreements whereby they have undertaken that the information delivered to them by corporations would remain confidential. In such cases, they are subject to an equitable obligation of confidence.¹⁸

The ACCC has indicated that it is prepared to receive information in confidence

¹⁵ Defined in s 155AA(3) of the *Trade Practices Act 1974* (Cth).

¹⁶ 17 CFR s 200.83 (Confidential treatment procedures under *Freedom of Information Act*); 17 CFR s 200.304 (Disclosure of requested records); 17 CFR s 200.408 (public access to Transcripts), 17 CFR ss 203.2, 203.5, and 203.6 (Transcript availability); *Code of Federal Regulations*, 17 CFR, Rule 122 of the *Securities Act 1933* (US), "Non-Disclosure of Information Obtained in the Course of Examinations and Investigations"; s 21h of the *Securities Exchange Act 1934* (US) (Access to records); and see generally the Securities and Exchange Commission, Washington DC 2059, Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena, "Principal Uses of Information" and "Routine Uses of Information", at p 3. See also generally *Freedom of Information Act 1966* (US), 5 USC, s 552(b)(7); 15 USC, ss 1312(i)(1), 1313, 1313(d)(1) and 1313(d)(2); and s 6103 of the *Internal Revenue Code* (US).

¹⁷ Sections 449 and 451A of the *Companies Act 1985* (UK); ss 86 and 87(1) and (2) of the *Companies Act 1989* (UK); ss 348-354 of the *Financial Services and Markets Act 2000* (UK); s 55 of the *Competition Act 1998* (UK); and s 18 of the *Commissioners for Revenue and Customs Act 1995* (UK).

¹⁸ *McKesson HBOC Inc v Superior Court of San Francisco County*, 115 Cal App 4th 1229; 9 Cal Rptr 3rd 812 (2004); 2004 Cal.App. LEXIS 201, A 103055, at www.courtinfo.ca.gov/opinions/documents/A_103055.PDF discussed in Farrell J and Shadab H, "California Court of Appeals Denies Any Protection to Document Shared With the Government," *Wall Street Lawyer*, March 2004 at 20-23. See also *The Financial Services Authority*, op cit n 10, at p 5.

except where the terms of the confidentiality agreement restrict it in performing its investigative or other regulatory functions.¹⁹

One problem with confidentiality agreements is that they can be overridden by a contrary statutory provision and they are subject to a number of general law exceptions. In addition, there are mixed views in the United States as to whether those confidentiality agreements preserve any legal professional privilege that may exist in relation to the information.²⁰ The case law in Australia indicates that the voluntary disclosure of privileged information to the regulator may mean that the informants have impliedly waived their legal professional privilege in relation to that information in related proceedings, as discussed at [3.4]. One way that informants could avoid the uncertainty in the law and retain the benefit of the privilege is if they simply provided the information to the regulators under compulsion. The problems with confidentiality agreements reinforce the need to give the Australian regulators uniform statutory duties of confidentiality that are clear and wide enough to render it unnecessary for the regulators to enter into such agreements. This reform would promote the public and private interests in keeping the information confidential and in encouraging persons (including voluntary informants) to provide information to the regulator.

¹⁹ The ACCC will not accept information in confidence where it needs to test the veracity or accuracy of the information with other parties or where the terms of the proposed confidentiality agreement place inappropriate or impractical limits on the use of that information by the ACCC: see generally ACCC, *op cit* n 14, at pp 8-9 and 16.

²⁰ See, Stein Sollod H, "Waiving the Privilege in an SEC Investigation," *The Colorado Lawyer*, 23(12) December 1994 at pp 2739-2741. However, in *In re McKesson HBOC, Inc Securities Litigation* Docket No C-99-20743 (2005) the court held that voluntary disclosure to the SEC pursuant to a confidentiality agreement did not result in any waiver of legal professional privilege attaching to the information because such disclosure is made to a government agency to enable it to perform its functions and is therefore different from voluntary disclosure to a private adversary. See also Skadden, "Recent Ruling Upholds Work Product Protection for Privileged Materials Shared with SEC and DOJ," April 2005, at <http://www.skadden.com/Index.cfm?contentID=51&itemID=1025> , viewed on 20 January 2007.

[7.4.1.1] *Scope of regulators' statutory duty of confidentiality*

The language used in some of the Australian legislation indicates that the regulator's statutory obligation of confidence applies to information that is received both in confidence and as the result of the regulator exercising its powers of compulsion. However, it is not clear whether the regulator's statutory obligation of confidence applies to confidential information received by the regulator when it has not exercised its power of compulsion, for example, where a person voluntarily provides it with information.²¹

It could be argued that equity provides adequate protection for confidential information that is voluntarily provided to the regulator. The case law in Australia and in the United Kingdom indicates that third parties (including the regulator) who receive confidential information could be restrained (by way of an injunction in equity) from disclosing confidential information upon receiving notice that the information is confidential.²² One problem is that the regulators are not required to notify affected persons of a proposed release of information, as discussed at [7.6]. Accordingly, those persons could not take timely steps to protect their rights. In addition, third parties (including the regulator) will not be restrained in equity from using the information if it is no longer confidential, for example, because confidentiality has been waived through voluntary disclosure.²³ To provide certainty in the law and to negate any suggestion of any waiver of confidentiality as the result of a voluntary disclosure, the Australian legislation should be amended so that the statutory obligation of confidence expressly applies to information that

²¹ There are suggestions that the regulator's statutory duty of confidence could apply to information voluntarily provided, but the position is not clear: see *Johns v ASC* (1993) 178 CLR 408.

²² *Fraser v Evans* [1969] 1 QB 349 at 361; *Butler v Board of Trade* [1971] Ch 680 at 690; *Malone v Metropolitan Police*; *G v Day* [1982] 1 NSWLR 24 at 35; *Wheatley v Bell* [1982] 2 NSWLR 544 at 550; and *Johns v ASC* (1993) 178 CLR 408 at 460 per Gaudron J. See also The Financial Services Authority, op cit n 10.

²³ See generally, waiver of legal professional privilege: *Goldberg v Ng* (1995) 185 CLR 83; *Mann v Carnell* (1999) 201 CLR 1; *Rio Tinto Ltd v Commissioner of Taxation* [2005] FCA 1336; and s 122 of the *Evidence Act 1995* (Cth). Where the information is in the public domain, no relief will be available in equity or under s 16(1)(d) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth): see *Johns v ASC* (1993) 178 CLR 408 at 432-434 per Brennan J and at 437 per Dawson J.

is voluntarily provided to the regulator.²⁴ In the context of the *Corporations Act*, such a reform is needed in view of the fact that Part 9.4AAA of that Act now protects voluntary informants from detrimental employment consequences for providing information to prescribed recipients, as discussed at [3.9.4]. The need for such an amendment in all of the Australian legislation is also highlighted by the fact that the statutory duty of confidentiality has a number of advantages over the general equitable obligation of confidence (see [7.4.1]).

Support for this suggested reform is found in the legislation governing the FSA in the United Kingdom. This legislation (unlike the Australian legislation) clearly defines the “confidential information” which is subject to the FSA’s statutory obligation of confidence and further deems that it is immaterial for the purposes of “confidentiality” whether the information was obtained pursuant to the FSA’s powers of compulsion.²⁵

[7.4.2] *Public interest immunity*

Irrespective of whether the regulators owe a statutory duty of confidentiality,²⁶ all of the Australian, United States’²⁷ and the United Kingdom’s²⁸ regulators could rely on the doctrine of public interest immunity to refuse to release information in the course of civil or criminal litigation where such release would be seriously harmful to the public interest.²⁹ The “general rule” is that a court will not order the production of documents in litigation

²⁴ See ASIC Releases, op cit n 9, [5]-[8] at 40,891.

²⁵ See s 348(2) and (3) of the *Financial Services and Markets Act 2000* (UK).

²⁶ See generally *Zarro v ASC* (1992) 36 FCR 40 at 45-46 cited in *ASIC v Muldoon* [2005] FCA 1432 at [31].

²⁷ See *McKinnon and Commissioner of Taxation* [2001] AATA 871 at [68].

²⁸ *Conway v Rimmer* [1968] AC 910 at 952 cited in *McKinnon and Commissioner of Taxation* [2001] AATA 871 at [67]; *R v Chief Constable of the West Midlands ex parte Wiley* (1994) 3 All ER 420; *Rowe and Davis v UK*, The Times 1st March 2000; and *R v Davis, Rowe and Johnson (No. 2)*, The Times, 24th April, 2000. See also the Financial Services Authority, op cit n 10, at pp 4-5.

²⁹ *Somerville v ASC* (1995) 13 ACLC 1527 at 1537 per Lockhart J citing *Maloney v NSW National Coursing Association Ltd* [1978] 1 NSWLR 60; *Spargos Mining NL v Standard Chartered Australia Ltd (No 1)* (1990) 8 ACLC 87; *Zarro v ASC* (1992) 10 ACLC 831 at 836 per Lockhart J; *Re Mann and Australian Taxation Office* (1985) 7 ALD 698; *McKinnon and Commissioner of Taxation* [2001] AATA 871; and *Telstra and ACCC* (2000) AATA 71. See also s 36(1)(a) of the *Freedom of Information Act 1982* (Cth).

even though they are relevant and otherwise admissible, if it would be injurious to the public interest to disclose them and their contents.³⁰

A clear and broad statutory duty of confidence which subsumed the doctrine of public interest immunity would have a number of advantages. For example, public interest immunity is only established as the result of a court order and generally requires the regulator to claim and to establish that immunity³¹ through costly litigation. The regulator must discharge a heavy onus of proof.³² By contrast, the regulators' statutory duty of confidence imposes an existing statutory duty which can be asserted by the regulator outside litigation as a ground for refusing to release information. If the legislation had a definition of the regulators' duty of confidentiality which clearly included matters which may be otherwise protected from disclosure by public interest immunity, then there would be no need, or a reduced need, to litigate the issue. In addition, unlike public interest immunity, the regulators' statutory duty of confidence gives greater flexibility and is more conducive to a negotiated, as opposed to a litigious, resolution of the problem. For example, the regulator's statutory duty of confidentiality contains "authorised use or disclosure" exceptions which allow the regulator to release some of the information (which could also fall within the scope of public interest immunity) to the affected person subject to conditions or subject to the regulator deleting certain parts of the document (see [7.7.2]) which assist to preserve the secrecy of the information. Such a restricted release of the information (not recognised by public interest immunity) may dissuade the affected person from commencing proceedings.

³⁰ *Somerville v ASC* (1995) 13 ACLC 1527 at 1537 Lockhart J.

³¹ *Zarro v ASC* (1992) 10 ACLC 831 at 836 per Lockhart J; *Sankey v Whitlam* (1978) 142 CLR 1 at 38; *CTC Resources NL v Australian Stock Exchange* [2000] WASCA 19 at [18]; and *Easterday v The Queen* [2001] WASCA 175 at [27]. The court also has a duty to consider whether the documents are protected by public interest immunity even if the regulator does not claim it: see *Zarro v ASC* (1992) 10 ACLC 831 at 836 per Lockhart J; *Sankey v Whitlam* (1978) 142 CLR 1 at 38; *CTC Resources NL v Australian Stock Exchange* [2000] WASCA 19 at [18]; *Easterday v The Queen* [2001] WASCA 175 at [27]; and *ASIC v Muldoon* [2005] FCA 1432 at [31].

³² *Somerville v ASC* (1995) 13 ACLC 1527 at 1546 per Lindgren J and at 1536 per Lockhart J.

The determination of a claim of public interest immunity generally involves the court undertaking a “weighing” or “balancing exercise” and the court must decide whether the public interest which requires that the document not be produced by the regulator outweighs the public interest (based on the administration of justice) that requires the court to have access to all relevant documents.³³ The problem with this approach is that, unlike a clearly defined statutory duty of confidentiality, there is no certainty or guarantee that the information will be protected from disclosure. That is, the regulator’s claim of public interest immunity may fail.

A further disadvantage of a claim of public interest immunity for the regulator is that it only provides a temporary ground for refusing to disclose the relevant information or documents.³⁴ Accordingly, where the regulator decides not to commence a prosecution or to conduct further investigations, the documents in its possession which were relevant to those matters would no longer be protected from disclosure by public interest immunity.³⁵

The same principle may operate in relation to the Australian regulator’s statutory duty of confidentiality, but the position is not clear. The statutory duty of confidentiality applies to the investigation phase and may extend up until the conclusion of the litigation phase. In the United States, the legislation expressly provides that investigative records may be made available for public disclosure where the regulatory enforcement action based on those records has been concluded.³⁶ In the context of the Australian regulators’ statutory duty of confidentiality, the legislation should contain similar, but more detailed, provisions including a proviso to the effect that the regulator has a discretion not to release the information even after the conclusion of final proceedings where such release would reveal

³³ *Sankey v Whitlam* (1978) 142 CLR 1 at 43 per Gibbs ACJ; *Jacobsen v Rogers* (1995) 182 CLR 572 at 590; *Lord v Commissioner of the Australian Federal Police* (1998) 47 ALD 301 at 326; *CTC Resources NL v Australian Stock Exchange* [2000] WASCA 19 at [16]; *Easterday v The Queen* [2001] WASCA 175 at [27]; *ASIC v Whitlam* [2002] NSWSC 526 at [12]; and *ASIC v Muldoon* [2005] FCA 1432 at [31].

³⁴ *Sankey v Whitlam* (1978) 142 CLR 1 at 41 and 43 per Gibbs ACJ cited in *Somerville v ASC* (1995) 13 ACLC 1527 at 1537 per Lockhart J.

³⁵ *National Australia Bank v Saunders* (1988) 12 NSWLR 623; and *Lord v Commissioner of the Australian Federal Police* (1998) 47 ALD 301 at 326.

³⁶ See, for example, 21 CFR, s 20.64.

the identity of informants or confidential sources of information or prejudice future sources of information or reveal other confidential information.

The regulators' statutory duty of confidentiality may be more effective (than public interest immunity) in protecting the privacy or secrecy of information because of its deterrent effect in that the legislation may impose sanctions or penalties where the regulator or its officers make an unauthorised disclosure of confidential information (see [7.4.1]) or where a person breaches the conditions imposed on the release of information (see [4.7.2], [4.7.2.1] and [7.5.3.1]). By contrast, it is not clear what the general law consequences are where a person publicly releases information which is otherwise protected by public interest immunity.³⁷

The case law description of the type of information protected by public interest immunity³⁸ could be adopted as a starting point when formulating a definition of the statutory duty of confidentiality. Such a reform would promote both public interests, such as preserving the secrecy of the investigation, and private interests, such as protecting the identity of informants and preserving the confidentiality of private information in the regulator's possession without the need to resort to litigation as would be the case with a claim based on public interest immunity.

³⁷ Arguably, a breach of a court order that information is protected by public interest immunity would constitute contempt of court.

³⁸ According to the case law, confidential documents within the possession of the regulator relating to possible offences or irregularities, or relating to information received in the course of the regulator's investigation, including the identity of informants, records of examination and books produced to the regulator, and confidential documents recording the actual or possible course of the investigation or particulars of evidence are in the public interest prima facie immune from compulsory disclosure. Public interest immunity applies where such disclosure would be likely to seriously impede the regulator's ability to effectively investigate possible offences and institute and carry on civil or criminal proceedings: see *Spargos Mining NL v Standard Chartered Australia Ltd (No 1)* (1990) 8 ACLC 87 at 87-88 per McClelland J cited in *Somerville v ASC* (1995) 13 ACLC 1527 at 1545 by Lindgren J. Also see *Zarro v ASC* (1992) 10 ACLC 831 at 836 per Lockhart J; *CTC Resources NL v Australian Stock Exchange* [2000] WASCA 19 at [31]; and *ASIC v Muldoon* [2005] FCA 1432 at [31]. The FSA would claim public interest immunity where the disclosure of the information would prejudice its ability to perform its functions or jeopardise its ability to receive information in the future from particular sources including

[7.4.3] *Exemptions under the freedom of information legislation*

The *FOIA* provides that the Australian regulators are not required to give an applicant access to "exempt" documents.³⁹ There appears to be general uniformity in relation to the type of exemptions that can be claimed by the Australian, United States' and United Kingdom's regulators.

One problem is that, with a few exceptions, it is not clear what the relationship is between those exemptions and the applicant's right of access to information conferred by the *FOIA* on the one hand, and the Australian regulators' statutory duty of confidence and the exceptions to that duty (the authorised use and disclosure provisions, discussed at [7.5.1]-[7.5.6]) on the other. It is arguable that the Commonwealth Parliament must have intended that the exempt documents listed in the *FOIA* would also be subject to the regulators' statutory duty of confidence. However, it is only in the context of APRA, where it is acting under the *Australian Prudential Regulation Authority Act 1998* (Cth);⁴⁰ or ASIC, APRA or the ATO where they are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth);⁴¹ that the legislation expressly equates the regulators' statutory duty of confidentiality with "exempt documents" under the *FOIA*. In the cases of ASIC (where it is acting under the *Corporations Act* or the *ASIC Act*), the ATO (where it is acting under the taxation legislation) and the ACCC, there are no express provisions that equate the statutory duty of confidentiality with the exempt documents under the *FOIA*. Only the Australian taxation legislation expressly recognises that information, subject to the ATO's statutory duty of confidentiality, may be released under the *FOIA*.⁴²

Following on from the discussion at [7.4.2], it is suggested that "confidential information" for the purpose of the regulators' statutory duty of confidence should be defined in a uniform way that is consistent with the list of exempt documents in the *FOIA*.

foreign regulators: see The Financial Services Authority, op cit n 10, at pp 4-5.

³⁹ Section 18(2) of the *FOIA* (Cth); and *Wallace v DPP* (Cth) [2003] AATA 119 at [22] and [105]. These exemptions are also preserved by s 34 of the *Privacy Act 1988* (Cth).

⁴⁰ Section 56(11) of the *Australian Prudential Regulation Authority Act 1998* (Cth).

⁴¹ Section 252C(11) of the *Superannuation Industry (Supervision) Act 1993* (Cth).

This suggestion may involve a complete re-writing of the exemptions in the *FOIA* so that, in substance, the same information is protected, but the language is simplified and is consistent with the regulators' statutory duty of confidentiality. The need to re-write the exemptions in the *FOIA* is reinforced by the fact that there have been difficulties in interpreting and in giving effect to those exemptions.⁴³ The proposed definition of "confidential information" should be drafted in a way that minimises those difficulties. For example, the definition should not replicate the detailed and technical language adopted in the *FOIA*'s current list of exempt documents but should be couched in more general language so it can apply to a broad range of information which, in the "regulators' view", should not be released in the interests of protecting the secrecy or integrity of the investigation, protecting the identity of informants or other confidential information, or promoting the proper administration and enforcement of the regulatory law. Generally, the regulator would be in the best position to determine whether the information should be treated as confidential and whether the release of the information would prejudice its investigative and enforcement functions. The court, unlike the regulator, has no investigatory agency and it would be difficult for the court to substitute its opinion for that of the regulator on the need to keep the information confidential.⁴⁴

The public interest in having a wide statutory duty of confidentiality could be balanced with the public and private interests in providing access to information by ensuring that there are clear and effective "authorised use or disclosure" provisions in the Australian legislation (see [7.5.1]-[7.5.6]). This wide duty of confidentiality would also be tempered by the fact that the "regulators' view" that the documents are confidential would have to be formed in "good faith and for a proper purpose." The affected persons could still apply for a

⁴² Section 8XA(c) of the *Taxation Administration Act 1953* (Cth).

⁴³ See, for example, the litigation in *Johnson Tiles Pty Ltd v Esso Australia Ltd* [2000] FCA 495 at [31] applying *Ryder v Booth* [1985] VR 869 at 877 and 879; *Sobh v Police Force of Victoria* [1994] 1 VR 41 at 60-61 and 64; *Harris v ABC* (1983) 50 ALR 551 at 560-561 per Beaumont J referring to *Environmental Protection Agency v Mink* 410 US 73 (1973); *News Corp Ltd v NCSC* (1984) 1 FCR 64 at 66; *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111; and *Jorgensen v ASIC* [2004] FCA 143 at [21] and [61].

⁴⁴ See generally *ASC v Ampolex Ltd* (1995) 38 NSWLR 504; 14 ACLC 80 at 91 per Kirby P.

judicial review of the regulator's decision to refuse to release the documents upon grounds such as abuse of power.⁴⁵ In many cases the statutory duty of confidentiality would cease to apply when the regulator's investigation was completed. However, there may be some types of information, such as the identity of informants, which should remain confidential for longer periods or which should only be disclosed under prescribed circumstances, as discussed at [3.9.3.1].

The *FOIA* provides that it does not prohibit the regulator from giving an applicant access to "exempt" documents.⁴⁶ However, it is not clear how this principle operates in relation to the regulators' statutory duty of confidentiality. In the cases of ASIC and the ACCC, the legislation contains a general provision that allows information to be released where such release is required by law.⁴⁷ It is difficult to see how ASIC's or the ACCC's decision to voluntarily release exempt documents (as permitted by the *FOIA*) could be authorised under the legislation, as such a release is not required by law. It is suggested that, under the current law, unless the particular regulatory legislation authorises the particular use or disclosure of the information (as an exception to the statutory duty of confidentiality), then the regulator cannot release the information despite the lack of prohibition on such release in the *FOIA*. Therefore, to give effect to the policy in the *FOIA* of not prohibiting access to exempt documents, the Australian regulatory legislation should give the regulators a clear discretionary power to release otherwise confidential information (that is, investigative information which is coextensive with the exempt documents contained in the *FOIA*). The policy of releasing information to affected persons may also be promoted by introducing reforms that permit all of the regulators to release otherwise confidential information subject to conditions which protect the secrecy of the information (see [4.9] and [7.5.3.1]).

The Australian regulators should also make greater use of the power in s 22 of the

⁴⁵ under s 5(1)(e) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

⁴⁶ See s 14 of the *FOIA* (Cth); *Wallace v DPP (Cth)* [2003] AATA 119 at [22] and [105]; and *Bennett v CEO of Customs* [2003] 53 at [15].

⁴⁷ See s 127(2) of the *ASIC Act*; and s 155AA(1)(b) of the *Trade Practices Act 1974* (Cth).

FOIA to delete relevant portions in an “otherwise” exempt document so that the document can be released to the applicant.⁴⁸ This suggestion is supported by both Australian and United States’ case law which indicate that a regulator cannot refuse to disclose an entire document simply on the ground that it contains some exempt material and non-exempt parts of a document must be disclosed unless they are “inextricably intertwined” with the exempt parts of the document.⁴⁹ However, in practical terms such disclosure would only be valuable if the document still contained sufficient information to assist the applicant.

Under the current law, applications for the release of information could be made under the differing provisions of the various regulatory laws or under the *FOIA*. Rather than attempt to align or standardise the *FOIA* and the different regulatory laws, an alternative reform option is to provide that all applications for the release of information are governed by the proposed *Investigation and Enforcement Powers Act* (Cth). This legislation would contain all of the major reforms suggested in this chapter. This reform would simplify applications for the release of information because such applications would be governed by the one uniform law.

[7.4.4] *Legal professional privilege*

The Australian and foreign regulators may be able to refuse to release documents to a person (irrespective of whether the request for access was made directly to the regulator or pursuant to the *FOIA* or within the context of litigation) on the ground that the documents are protected from disclosure by the regulator’s legal professional privilege.⁵⁰

⁴⁸ There is a similar provision in the United States legislation: see *FOIA* (US), s 552(b) (Supp V 1975) cited in *Harris v ABC (No 2)* (1983) 50 ALR 567 at 569.

⁴⁹ *Harris v ABC (No 2)* (1983) 50 ALR 567 at 569 citing *Environmental Protection Agency v Mink* 410 US 73 (1973) at 86; and *Mead Data Central Inc v United States Department of the Air Force* 566 (2d) 242 (1977) at 260 per Tamm J.

⁵⁰ See generally *Kelly v Commonwealth* (1980) 39 FLR 372; *Attorney-General (NT) v Kearney* (1985) 158 CLR 500, 61 ALR 55 at 60; *Waterford v The Commonwealth* (1987) 163 CLR 54 at 62; *Somerville v ASC* (1995) 13 ACLC 1527 at 1539; *Noonan v Commonwealth DPP* [2000] AATA 492 at [17]; *Southern Equities Corp (in liq) v Arthur Andersen & Co* [2001] SASC 398 at [20] and [24]; *Commissioner of Taxation (Cth) v*

Where the regulators conduct legal proceedings in the Federal Court or the High Court⁵¹ (which are governed by the *Evidence Act 1995* (Cth)) or where they conduct proceedings in the New South Wales or Tasmanian courts (which are governed by legislation modelled on the *Evidence Act 1995* (Cth)), their claim of privilege is governed by that legislation. By contrast, where individuals apply directly to the regulator for the release of information at the investigative stage, or where they apply pursuant to the *FOIA* for the release of information, the regulator's claim of legal professional privilege is governed by the common law, rather than by the *Evidence Act 1995* (Cth) or the equivalent State legislation.⁵² There are a number of inconsistencies between that legislation and the common law. For example, the *Evidence Act 1995* (Cth) (and the equivalent State legislation) deals with other matters concerning legal professional privilege including loss of the privilege through consent, voluntary disclosure or waiver⁵³ and loss of the privilege through the crime or fraud or deliberate abuse of power exceptions.⁵⁴ These matters are also dealt with at common law in those States that have not adopted legislation equivalent to the *Evidence Act 1995* (Cth). The differences in the language used in that legislation, in

Pratt Holdings Pty Ltd [2003] FCA 6 at [39]; and *ASIC v Rich* [2004] NSWSC 1017 at [5]. Section 9(11) of the *Director of Public Prosecutions Act 1983* (Cth) gives the Commonwealth DPP an express power to act as the lawyer for a Commonwealth authority where that authority is a party to a proceeding in respect of a matter which is connected with the performance of any of the functions of the Commonwealth DPP: see *ASIC v Rich* [2004] NSWSC 1089 at [36] and [47] per Austin J; and *Grofam Pty Ltd v Australian and New Zealand Banking Group Ltd* (1993) 45 FCR 445.

⁵¹ Section 4 of the *Evidence Act 1995* (Cth) lists the courts and proceedings to which the Act applies.

⁵² *Noonan v Commonwealth DPP* [2000] AATA 492 at [12]; and *Bennett v CEO Customs* [2003] FCA 53 at [20]. The *Evidence Act 1995* (Cth) and the equivalent State legislation adopt the “dominant purpose” test in relation to the regulator's claim of legal professional privilege: see ss 118 and 119 of the *Evidence Act 1995* (Cth); and *Esso Australia Resources Ltd v Commissioner of Taxation* [1999] HCA 67; [2000] ATC 4042 overruling *Grant v Downs* (1976) 135 CLR 674. The “dominant purpose” refers to “that purpose which is the ruling, prevailing or most influential purpose...the element of clear paramountcy should be the touchstone”: see *Mitsubishi Electric Australia Pty Ltd v Victorian Work Cover Authority* (2002) 4 VR 332 at 336-337 per Batt JA cited in *ASIC v Rich* [2004] NSWSC 1089 at [9] by Austin J.

⁵³ See s 122 of the *Evidence Act 1995* (Cth); s 122 of the *Evidence Act 1995* (NSW); *ASIC v Rich* [2004] NSWSC 923 at [12]; *ASIC v Rich* [2004] NSWSC 969 at [13]; and *ASIC v Rich* [2004] NSWSC 934 at [2] and [37].

⁵⁴ See s 125 of the *Evidence Act 1995* (Cth); s 125 of the *Evidence Act 1995* (NSW); and

comparison to the language used in the common law principles, has meant that the legislation is, in some cases, given an interpretation that departs from the established common law.⁵⁵ The problem of inconsistency could be partly resolved if all of the Australian States followed the lead of New South Wales and adopted legislation modelled on the *Evidence Act 1995* (Cth). The *FOIA* would also have to be amended to expressly provide that the exemption category in the *FOIA* relating to legal professional privilege is governed by the *Evidence Act 1995* (Cth). A simpler and more comprehensive approach may be to amend the relevant regulatory legislation by expressly providing that each regulator's claim of legal professional privilege, irrespective of whether it is made in response to a direct application to the regulator for the release of information, or in response to an *FOIA* application, or in any court proceedings, is governed by the *Evidence Act 1995* (Cth).

[7.5] The regulators' powers to release information

[7.5.1] *Exceptions to the regulators' statutory duty of confidentiality – authorised use and disclosure*

The statutory exceptions to the regulators' statutory duty of confidentiality allow the regulators to use, or to release, investigative information in their possession without breaching that statutory duty. Those authorised uses and disclosures represent the recognition by Parliament that, in some cases, the public interest in detecting and enforcing contraventions of the law outweighs the public and private interests of maintaining the confidentiality of the information concerned. One problem with the regime of authorised uses and disclosures is that there is no uniformity across the Australian legislation as to what constitutes an authorised use or disclosure.

ASIC v Rich [2004] NSWSC 970 at [40].

⁵⁵ The Australian Law Reform Commission (ALRC) has conducted a review of the *Evidence Act 1995* (Cth) that deals, among other things, with this problem: see ALRC, Issue Paper 28, Review of the *Evidence Act 1995* (Cth) at [11.16]-[11.45] found at <http://www.austlii.edu.au/au/other/alrc/publications/issues/28/11.html#Heading79>,

[7.5.2] *Release of information to perform regulatory functions*

The regulators' investigative powers enable them to gather evidence about whether there has been a contravention of the legislation which, in turn, assists them to decide whether they should perform a particular type of regulatory function, such as the commencement of legal proceedings. However, the Australian legislation is fairly general in its terms and it does not give the regulators any express powers to use the investigative information in their administrative, civil, civil penalty, criminal or penalty proceedings. In addition, there are no clear and uniform statutory provisions that set out the requirements (if any) that the regulators must observe before using the investigative information, or that clearly and uniformly set out the limitations on their powers to use the information. For example, the legislation broadly provides that ASIC, APRA, the ACCC and the ATO are authorised to use confidential information for the purpose of performing their statutory duties or functions.⁵⁶

The uncertainty in the law has resulted in the ACCC issuing a policy statement.⁵⁷ Some of the uncertainties in the law have been resolved through litigation. For example, the case law indicates that given that ASIC's functions include the commencement of legal proceedings, the use and disclosure of that information for the purpose of commencing those proceedings is impliedly authorised by s 127(3) of the *ASIC Act*. In the case of criminal proceedings, the case law indicates that s 127(3) impliedly authorises ASIC to disclose confidential information to the Commonwealth DPP.⁵⁸ It is likely that the litigation engaged in by ASIC to determine the scope of some of its powers to release information will have to be repeated for the other Australian regulators. In some cases, the absence of clear

viewed on 15 February 2005.

⁵⁶ Section 127(3) of the *ASIC Act*; s 56(3) and (5) of the *Australian Prudential Regulation Authority Act 1998* (Cth); s 155AA(1) of the *Trade Practices Act 1974* (Cth); and ss 3E(1) and (4) of the *Taxation Administration Act 1953* (Cth).

⁵⁷ The ACCC has indicated that it is entitled to use or to disclose investigative information where such use or disclosure is appropriate for the exercise of its statutory functions and is consistent with the purpose for which its notice to attend for oral examination or notice to produce books was issued: see ACCC, op cit n 14, at p 21.

⁵⁸ ASIC Releases, op cit n 9, at [11] and [24], at 40892 and 40,894; and *Johns v ASC* (1993) 178 CLR 408 at 467 per McHugh J.

statutory provisions has meant that it has been necessary for the Australian regulator and the Commonwealth DPP to enter into a Memorandum of Understanding (MoU) to clarify their relationship including issues relating to the practical problems involved in the sharing of information (see [9.10]). However, MoUs have no statutory backing, they do not have to be observed by either party and the arrangements for sharing information can be challenged by an applicant on a range of grounds including abuse of power (see [7.6.]).

In the United States, the SEC has clear and detailed powers governing the release of investigative information to prosecutors for use in criminal proceedings.⁵⁹ If the prosecutors want access to the SEC's investigative files, they must make a formal request for access.⁶⁰ The SEC will then usually grant access unless such access would interfere with an ongoing investigation, or would be adverse to the SEC's enforcement interests, or be contrary to the public interest.⁶¹

The ATD and the IRS have clear powers to use investigative information in administrative, civil or criminal proceedings.⁶²

⁵⁹ See generally the Securities and Exchange Commission, *op cit n 16*, at pp 3-5. See also s 21 (d) 1 of the *Securities Exchange Act 1934* (US). The legislation provides that investigative information gathered by the SEC is non-public and may not be disclosed without authorisation: see Rule 122 of the SEC's Rules Relating to Investigations, 17 CFR, s 230.122. See also Newkirk T and Brandriss I, "Speech by SEC Staff: The Advantages of a Dual System: Parallel Streams of Civil and Criminal Enforcement of the US Securities Laws," at fns 76 and 77, at <http://www.sec.gov/news/speech/speecharchive/1998/spch222.htm>, viewed on 15 March 2005. The SEC is authorised to refer potential criminal cases to the Department of Justice and it is authorised to discuss criminal cases with other government agencies: see Rule 2 of the SEC's Rules Relating to Investigations, 17 CFR, s 203.2.

⁶⁰ Section 24(c) of the *Securities Exchange Act 1934* (US), 15 USC, s 78x(c) and Rule 24c-1(b), 17 CFR, s 240.24c-1(b). See also Newkirk T and Brandriss I, *ibid*.

⁶¹ 17 CFR, s 200.30-4(b). The SEC may release information it has obtained through the civil discovery process to the prosecutors provided that there is no demonstrable harm to the defendant in doing so: see *US v Fields* 592 F.2d 638, 645-648 (2d Cir. 1979); and *US v Bloom* 450 F Supp. 323, 329 (E.D. pa. 1978). See also Newkirk T and Brandriss I, *op cit n 59*.

⁶² 15 USC, s 1313(c)(2); and s 1313(d)(1); and s 6103 of the *Internal Revenue Code* (US).

In the United Kingdom, in the case of the DTI,⁶³ the CC,⁶⁴ and HMRC,⁶⁵ the legislation expressly provides that they have the power to use the information in civil and criminal proceedings. The FSA is expressly given the power to use the information in “prescribed proceedings.” The regulations contain a list of such proceedings.⁶⁶

The Australian legislation should adopt the approach of some of the foreign legislation described above and expressly authorise the regulators to use, or to disclose, the investigative information for the purpose of enforcing relevant laws by way of administrative, civil, civil penalty, criminal or penalty proceedings, or a combination of those proceedings. The Australian regulators should also be given clear statutory powers to release information to the Commonwealth DPP for the purpose of enabling it to decide whether criminal proceedings for an indictable offence should be commenced. This could involve creating similar statutory procedures to those applicable to the SEC whereby the Commonwealth DPP is required to make a formal request for access to information held by the regulator.

[7.5.3] Release of information to assist other Australian regulators or agencies

The Australian regulators are authorised to release investigative information for the purpose of assisting other Australian regulators or other Australian government agencies to perform their functions. For example, ASIC may disclose confidential information to the Australian Federal Police (AFP) so that it can use that information in its investigation of particular offences.⁶⁷ ASIC is also authorised to disclose information when, to ASIC's satisfaction, it will enable a State or Territory government or their agencies to perform a

⁶³ Section 449(1)(a) and (ba) and (d) of the *Companies Act 1985* (UK); and s 87(1)(a) and 87(2)(a)-(c) of the *Companies Act 1989* (UK).

⁶⁴ Section 55 of the *Competition Act 1998* (UK).

⁶⁵ Section 18 of the *Commissioners for Revenue and Customs Act 2005* (UK).

⁶⁶ See ss 349(1) and (2)(d) of the *Financial Services and Markets Act 2000* (UK).

⁶⁷ See s 127(4)(a) of the *ASIC Act*; and *Lord v Commissioner of Australian Federal Police* (1998) 47 ALD 301 at 332 per Lindgren J. Also see *ACCC v Chats House Investments Pty Ltd* (1996) 142 ALR 177 at 186 where the ASC provided a record of examination to the ACCC.

function or to exercise a power.⁶⁸ In some cases, the release of information by ASIC to another body, such as the Australian Stock Exchange (ASX), will assist ASIC to fulfil its own regulatory objectives of promoting informed participation by investors and improving the performance of the financial system.⁶⁹

APRA is authorised to disclose information to the Reserve Bank of Australia and other prescribed authorities.⁷⁰

In the case of the ACCC, the legislation uses more general language and simply provides that the ACCC must disclose information when required by law to do so.⁷¹ There is also a similar general provision that applies to ASIC.⁷²

The taxation legislation provides that the ATO may disclose information to a range of Australian agencies or officers.⁷³

There is a MoU between ASIC and the ACCC, and a MoU between ASIC and APRA, which briefly set out some of the general principles to be observed by the regulators when sharing information.⁷⁴ ASIC has also issued a detailed policy statement governing its power to release information.⁷⁵

⁶⁸ Section 127(4)(b) of the *ASIC Act*; and *Johns v ASC* (1993) 178 CLR 408 at 468 per McHugh J.

⁶⁹ See ASIC's objectives in s 1(2) of the *ASIC Act*, as discussed at [2.5]; and Brown P and Tarca A, "Achieving High Quality, Comparable Financial Reporting: A comparison of Independent Enforcement Bodies in Australia and the United Kingdom, March 2005, at 12, at http://papers.ssrn.com/so13/papers.cfm?abstract_id=691702, viewed on 22 February 2006.

⁷⁰ Section 56(5B) of the *Australian Prudential Regulation Authority Act 1998* (Cth).

⁷¹ Section 155AA(1)(b) of the *Trade Practices Act 1974* (Cth).

⁷² Section 127(2) of the *ASIC Act*.

⁷³ Including an authorised law enforcement agency officer or an authorised eligible Royal Commission officer where the information is relevant to establishing whether a serious offence has been committed or is relevant to the prosecution of a taxation offence or to the making of a proceeds of crime order. The taxation legislation contains a list of various other agencies to which the ATO can disclose information, including ASIO, and Customs: see ss 3E(1) and (4), 3EA and 3F of the *Taxation Administration Act 1953* (Cth).

⁷⁴ Memorandum of Understanding Between ASIC and the ACCC, at [6], [7.1], [9.1] and

As noted at [7.5.2.1], one problem with the use of a MoU or a policy statement is that they have no statutory backing and therefore do not have to be observed by the regulators. A further problem is that those documents were all prepared before the recent major corporate collapses, such as HIH. There is a case for redrafting all of the MoUs and policy statements in light of the lessons learned from those collapses. The MoUs should also be made more inclusive to incorporate a wider range of regulators and agencies including the ASX. There have been calls for closer formal ties between ASIC, APRA and the ASX in relation to the sharing of information concerning corporate governance issues.⁷⁶

In the United States, the regulators have the power to release investigative information to a range of other agencies to enable those agencies to perform their functions.⁷⁷

In the United Kingdom, the legislation lists a broad range of agencies that the DTI may make disclosure to for the purpose of assisting those agencies to perform their functions.⁷⁸ Those agencies include foreign regulators.⁷⁹ The legislation provides that the

[12], signed 15 December 2004, at <http://www.asic.gov.au>, viewed 4 February 2006; and Memorandum of Understanding Between ASIC and the APRA, at [6] and [7.1] signed 30 June 2004, at <http://www.asic.gov.au>, viewed 4 February 2006.

⁷⁵ ASIC Releases, op cit n 9.

⁷⁶ Fagg S, "Calls for closer ties between ASX and ASIC, Lawyers Weekly, 4 March 2005 at <http://www.lawyersweekly.com.au/articles/7d/0c02d27d.asp>, viewed on 5 February 2006.

⁷⁷ The SEC has power to release information to other United States' enforcement agencies and to foreign agencies (see [7.5.4.2]), and specific powers to release information to a range of organisations including the national securities associations registered with the SEC, the Municipal Securities Rulemaking Board, the securities investor protection corporation, the Federal Banking Authorities Board of Governors of the federal reserve system, the Comptroller of Currency Federal Deposit Insurance Corporation, and members of the advisory committees created by Congress: see generally the Securities and Exchange Commission, op cit, n 16. The ATD may release information to Congress or to Congressional Committees: see 15 USC, s 1313(c)(3). The IRS has express powers to release information to State and local law enforcement agencies, Federal agencies, the State Audit Agency and to the various Congressional Committees: see s 6103 of the *Internal Revenue Code* (US).

⁷⁸ Section 449(1)(d) of the *Companies Act 1985* (UK); and s 87(1) of the *Companies Act*

FSA may make disclosure to “prescribed recipients” as listed in the regulations.⁸⁰ The CC has the power to release information to facilitate the performance of any relevant functions of a “designated person.” The legislation contains a comprehensive list of the various regulators and government agencies that are designated persons.⁸¹

[7.5.3.1] *Law reform*

The Australian legislation should adopt the approach of some of the foreign legislation described at [7.5.3] and simply provide that the Australian regulators may disclose information for the purpose of enabling “prescribed agencies” or “designated persons” to perform their functions, rather than the present practice of listing specific and different agencies for each regulator. There could be a separate statutory schedule applicable to all Australian regulators which lists the “prescribed agencies.” The present ad hoc and inconsistent lists of agencies could result in gaps in the law which means that there may be cases where a particular regulator is found to have no power to release information to a particular agency even though another regulator has such a power. There has been a number of successful challenges to the regulators’ attempts to release information in recent years on the ground that the regulator lacks a power to do a particular thing because of a gap or ambiguity in the legislation.⁸² In some cases, the courts have found that the gap in the law is attributable to Parliamentary oversight, as opposed to a deliberate omission.⁸³ The suggested reform would reduce the likelihood of similar challenges in the future.

1989 (UK).

⁷⁹ Section 449(1)(cd)(iii) of the *Companies Act 1985* (UK). See also the Financial Services Authority, *op cit n 10*, at p 3.

⁸⁰ Section 349(2)(a) of the *Financial Services and Markets Act 2000* (UK).

⁸¹ Section 55 and Schedule 11 of the *Competition Act 1998* (UK). HMRC is authorised to release information to a prosecuting authority, the police and other regulators or government agencies, where such disclosure is in the public interest. The legislation provides that disclosure is in the public interest where it will assist to detect or prevent crime or protect national security, or promote public safety or health: see ss 20 and 21 of the *Commissioners for Revenue and Customs Act 2005* (UK).

⁸² See, for example, *Australian Crime Commission v AA Pty Ltd* [2006] FCAFC 30 at [24] and [25].

⁸³ See generally *MacLeod v ASIC* [2002] HCA 37 at [43], [44], [63], [75], [77], [82] and [85].

The Australian legislation should also adopt the approach in the *ASIC Act*⁸⁴ and the *Superannuation Industry (Supervision) Act 1993 (Cth)*⁸⁵ by expressly providing that the regulator may impose conditions on the release of information to a “prescribed agency” such as a condition that the information is to be used by the recipient for a limited purpose. The condition may prohibit the receiving agency from releasing the information publicly and require that it only use that information internally. In this situation there would be no natural justice or procedural fairness requirement to notify any affected person because such a limited use of the information may not cause any detriment.⁸⁶ Such conditions should also be supported by strict penalties for breach of those conditions.

[7.5.4] *Release of information by Australian and foreign regulators for mutual investigative assistance*

According to Reiss, a major problem for sovereign States and their regulators is how to regulate businesses in transnational markets primarily through the exercise of their domestic powers.⁸⁷ It is argued that the trend towards globalisation of the economy (see [1.5.8]), coupled with the fact that the Australian regulators’ investigative and enforcement powers are restricted by domestic jurisdictional limitations, means that the effective regulation of transactions that occur between Australia and foreign jurisdictions can be best achieved if Australian and foreign regulators are given improved information sharing powers.⁸⁸

⁸⁴ See generally s 127(2C), 127(4A) and 127(4D) of the *ASIC Act*. See also *Johns v ASC* (1993) 178 CLR 408 at 428-429 per Brennan J.

⁸⁵ See s 252C(9) and (10) of the *Superannuation Industry (Supervision) Act 1993 (Cth)*.

⁸⁶ ASIC Releases, op cit n 9, at [34], [37] and [42] at 40,902.

⁸⁷ Reiss AJ, “Detecting, Investigating and Regulating Business Law-Breaking” at p 189 in Grabosky P and Braithwaite J (Editors), “Business Regulation and Australia’s Future,” Australia Institute of Criminology, Canberra 1993.

⁸⁸ Where legal proceedings have commenced, the *Foreign Evidence Act 1994 (Cth)* gives the Australian court the power to request a foreign court to assist it by collecting the evidence in the foreign jurisdiction and by releasing that evidence to the Australian court for use in legal proceedings in Australia. However, there is no guarantee that the foreign court will accede to the request: see generally ss 7(1)(c) of that Act; and *ASIC v Rich* [2004] NSWSC 467 at [49] per Austin J. The Australian regulator, with the assistance of the Attorney-General, could rely on the *Extradition Act 1988 (Cth)* and seek the

[7.5.4.1] *Australian regulators' powers to assist foreign regulators*

The Australian regulators have been receiving an increasing number of requests from foreign regulators for investigative assistance.⁸⁹ They could conduct an informal inquiry (an inquiry not supported by any statutory powers) on behalf of a foreign regulator and release the information obtained to the foreign regulator. However, there are a number of problems with relying on an informal inquiry, as discussed at [3.4].

None of the Australian regulators have a statutory power to commence an investigation solely for the purpose of assisting a foreign regulator. ASIC and APRA have power to release information gathered from an investigation that they are authorised to conduct (namely, an investigation of a suspected contravention of the relevant Australian legislation⁹⁰) to other Australian and foreign regulators.⁹¹ However, this does not overcome the problem of their lack of an independent power to commence an investigation solely for the purpose of assisting a foreign regulator. The ACCC has a

extradition of the witness from the foreign jurisdiction to Australia. However, there have been difficulties in the case law in interpreting and applying this legislation and not all countries have extradition treaties with Australia. The extradition process is both time-consuming and costly: see, for example, the litigation in *Oates v Attorney General (Cth)* [2002] FCAFC 80; *Oates v Attorney General (Cth)* [2002] HCA 21. The Australian courts also have power to assist foreign courts by collecting the relevant evidence in Australia and by releasing that evidence to the foreign court: see, for example, s 32 of the *Evidence on Commission Act 1995* (NSW); *Re Application of Nicholas Basil Cannar; re Sharon Y Eubanks* [2003] NSWSC 802 at [116] and [131]; Rule 28(b) of the *Federal Rules of Civil Procedure* and 28 U.S.C, ss 1781 and 1782; Articles 3 and 9 of the *Hague Evidence Convention*; and Middleton T, "ASIC Corporate Investigations and Hearings," Lawbook Co (Looseleaf subscription service), 1999 at [1.1170]-[1.1180].

⁸⁹ For example, in 2002-2003, ASIC managed 333 requests from foreign regulators for assistance, an 11 percent increase on the previous year: ASIC, *Annual Report, 2002-2003* at p 46.

⁹⁰ See generally ss 13, 14 and 15 of the *ASIC Act*.

⁹¹ Section 127(4)(c) of the *ASIC Act* gives ASIC the power to release information to a foreign regulator if such release will assist the foreign regulator to perform a function or exercise a power conferred by a law of that foreign country. See a similar provision in s 56(5) of the *Australian Prudential Regulation Authority Act 1998* (Cth). Some Commonwealth agencies, such as the Australian Crime Commission, also have power to release information to a foreign law enforcement agency: see *Australian Crime Commission v AA Pty Ltd* [2006] FCAFC 30 at [30]; and s 59(7) of the *Australian Crime*

specific power to receive information and documents on behalf of the New Zealand Commerce Commission⁹² but this falls far short of a general power to conduct an investigation to assist foreign regulators.

ASIC's and APRA's powers to release information to a foreign regulator are silent on the question of whether there must be a reciprocal offence under Australian law before they can release the information. By contrast, s 8(2)(a) of the *Mutual Assistance in Criminal Matters Act 1987* (Cth) requires the Attorney-General to consider the requirement of reciprocity of the offence before deciding whether to provide investigative assistance to a foreign country under that Act. In the United States, the SEC has power to provide investigative assistance, or to release information, to a foreign regulator irrespective of whether there is a reciprocal offence under United States law.⁹³ The Australian regulators should only have the power to release information to foreign regulators where there are equivalent civil or criminal laws, as the case may be, in Australia and in the relevant foreign country. This suggested reform promotes the private interest by preventing an affected person, who may be an Australian resident or citizen, from being subjected to the exercise of coercive powers by an Australian regulator in a situation where they could not have been made the subject of any proceedings under Australian law.⁹⁴

Commission Act 2002 (Cth).

⁹² Section 155B of the *Trade Practices Act 1974* (Cth); and s 98H of the *Commerce Act 1986* (NZ).

⁹³ Section 21(a)(2) of the *Securities Exchange Act 1934* (US). By contrast, the Swiss securities regulator is only able to give an Australian regulator information if there is a reciprocal offence under Swiss law: see Knott D, "ASIC Chairman reflects on Rivkin issues," <http://www.abc.net.au/insidebusiness/content/2003/s990037.htm>, viewed 17 November 2003; and Jeffrey Lucy (ASIC Chairman), "ASIC Chair says Offset Alpine Chase continues," at <http://www.abc.net.au/insidebusiness>, viewed on 15 March 2004. See also the secrecy provisions contained in Article 273 of the *Swiss Penal Code*; Article 47 of the *Swiss Banking Law*; Article 38 of the *Swiss Stock Exchange Act 1995*; *ASC v Bank Leumi Le-Israel* (1996) 14 ACLC 1576 at 1592 per Lehane J; *Bollag v Attorney-General (Cth)* (1997) 149 ALR 355; and *Kennedy v Wallace* [2004] FCA 332 at [13]. See also R Baxt, "Blunting the Powers of the Australian Securities Commission to Ensure a Fair and Fully Informed Market – International Comity or Subsistence of Australian Law," (1997) 15 *C&SLJ* 44 at 46.

⁹⁴ *Oberson X*, op cit, n 2, at 16.

Section 10 of the *Mutual Assistance in Business Regulation Act 1992* (Cth) gives Australian regulators power to obtain evidence for a foreign regulator (through the exercise of compulsory powers) and the Australian regulators may require a person to produce documents and to give oral evidence. An Australian regulator cannot provide investigative assistance to a foreign regulator under this Act unless the foreign regulator is in a position to give similar assistance to the Australian regulator.⁹⁵ However, this power can only be exercised with the Attorney-General's approval. The Act involves a two-stage process. Firstly, the Australian regulator must consider the foreign regulator's request for assistance. If it decides that the request for assistance should be accepted, then it must advise the Attorney-General that the request has been received.⁹⁶ Secondly, the Attorney-General must decide whether the request should be accepted.⁹⁷ The problem with this procedure is that it is slow as the request has to be dealt with by two bodies. The regulators should be given a clear statutory power (that can be exercised without the approval of the Attorney-General) to provide timely investigative assistance to foreign regulators.

A further problem with the *Mutual Assistance in Business Regulation Act 1992* (Cth) is that the Australian regulators can only provide investigative assistance under this Act where the foreign regulator intends to use the information (obtained from the Australian regulator) in civil or administrative proceedings. Before a request for assistance can be accepted by the Australian regulator, the foreign regulator must provide a written undertaking that the evidence obtained will not be used for the purpose of criminal proceedings or penalty proceedings.⁹⁸ The problem is that a foreign regulator

⁹⁵ Section 7(3)(d) and (e) of the *Mutual Assistance in Business Regulation Act 1992* (Cth). See also Action Group into the Law Enforcement Implications of Electronic Commerce (AGEC) Issues Paper, "Mutual Assistance and Electronic Crime," July 2001, at [1.6], <http://www.austrac.gov.au>, viewed on 10 March 2004.

⁹⁶ The regulator must consider the matters listed in s 7(3) of the *Mutual Assistance in Business Regulation Act 1992* (Cth). See also AGEC, *ibid*, at [1.6].

⁹⁷ In considering whether to approve the giving of assistance the Attorney-General is required to consider the matters contained in s 8 of the *Mutual Assistance in Business Regulation Act 1992* (Cth). See also AGEC, *op cit* n 95, at [1.6].

⁹⁸ Section 6(2) of the *Mutual Assistance in Business Regulation Act 1992* (Cth). See also AGEC, *op cit* n 95, at [1.6].

may not know at the commencement of an investigation whether that investigation may lead to the commencement of civil or criminal proceedings. The foreign regulator could not use the evidence obtained under the Act in subsequent criminal proceedings unless it makes a further request to the Australian regulator or to the Attorney-General for permission to use that evidence in those criminal proceedings.⁹⁹

In the context of criminal proceedings, the Attorney-General (not the Australian regulators) may also provide assistance to foreign countries (pursuant to ss 13 and 15 of the *Mutual Assistance in Criminal Matters Act 1987* (Cth)) in relation to the taking of evidence, the production of documents and search and seizure in Australia. However, this legislation does not provide a basis for providing investigative assistance and releasing information on a timely basis as requests for assistance have to be processed through the Attorney-General's office and such requests must then be approved by the Attorney-General or the Minister for Justice. If approved, the request is then referred to the AFP or appropriate prosecuting authority so that the request can be acted upon.¹⁰⁰

[7.5.4.2] *Foreign regulators' powers to assist Australian regulators*

The Australian regulators regulate businesses and investments that operate in world-wide markets but have regulatory powers that operate only within the Australian jurisdiction.¹⁰¹ Accordingly, it is essential that the Australian regulators are able to rely on foreign regulators to provide investigative assistance in foreign jurisdictions.

Australian regulators have made an increasing numbers of requests to foreign regulators in recent years for investigative assistance.¹⁰²

⁹⁹ See also AGEC, op cit n 95, at [1.6]; and s 9(2)(c) of the *Mutual Assistance in Business Regulation Act 1992* (Cth).

¹⁰⁰ See ss 8, 13 and 15 of the *Mutual Assistance in Criminal Matters Act 1987* (Cth). See also AGEC, op cit n 95, at [1.6].

¹⁰¹ Alan Cameron (former Chairman of ASIC), ASIC, 1996/1997, *Annual Report*, at pp 9 and 33.

¹⁰² In 2002-2003, ASIC made 102 requests for investigative assistance from foreign countries, a 7 percent increase on the previous year. In 2003, ASIC and APRA sought

The Australian regulators may make an informal request (at common law) of a foreign country to obtain testimony, or to seize or obtain documents, in that foreign country and to release that information to the Australian regulator.¹⁰³ However, the problem with an informal request is that, even if the foreign regulator wishes to accede to the request, the foreign regulator may not be able to exercise any powers of compulsion in the foreign jurisdiction to obtain the requested information.

As a general rule, powers of compulsion can only be exercised by foreign regulators where they:

- (a) have statutory powers to provide investigative assistance; or
- (b) are acting under the foreign equivalent of the *Mutual Assistance in Criminal Matters Act 1987* (Cth) (in criminal matters) or the foreign equivalent of the *Mutual Assistance in Business Regulation Act 1992* (Cth) (in civil matters);¹⁰⁴ or
- (c) are acting pursuant to a MoU.

In contrast to the Australian regulators, the FSA and the DTI, in the United Kingdom, have a specific and independent power to conduct an investigation for the sole purpose of assisting an overseas regulator. They can only conduct an investigation if they are satisfied that the assistance requested by the overseas regulator is for the purpose of performing its functions.¹⁰⁵ HMRC is also authorised to release information to foreign

investigative assistance from the FSA in the United Kingdom, and the SEC in the United States, to obtain testimony in those countries in relation to their investigation of the HIH collapse. ASIC also sought investigative assistance from the DTI, in the United Kingdom, to obtain testimony in that country in relation to ASIC's investigation of the One.Tel matter: see *ASIC Annual Report, 2002-2003*, at p 47.

¹⁰³ *Bollag v Attorney-General* (Cth) (1997) 149 ALR 355 at 366 per Merkel J.

¹⁰⁴ See also AGECC, op cit n 95, at [1.6].

¹⁰⁵ See ss 169 and 195 of the *Financial Services and Markets Act 2000* (UK); and ss 82 and 83(2)(b) of the *Companies Act 1989* (UK). In deciding whether to provide assistance, the FSA or the DTI may take into account whether the United Kingdom regulators could get reciprocal assistance, whether the inquiries relate to a possible breach of a law which has no close parallel in the United Kingdom or involves an assertion of jurisdiction not recognised in the United Kingdom, the seriousness of the matter, the importance of the matter in the United Kingdom, whether the assistance could be obtained by other means and whether it is in the public interest to give assistance: see s 169(4) of the *Financial Services and Markets Act 2000* (UK); and s 82(3) and s 82(4) of the *Companies Act 1989* (UK). They may decline to provide the assistance unless the

regulators where such disclosure is in the public interest and is made pursuant to an obligation under an agreement between the United Kingdom and the foreign country relating to the movement of persons, goods or services.¹⁰⁶

In the United States, the SEC has power to provide investigative assistance and to release information to foreign regulators.¹⁰⁷ The IRS also has power to release information to a foreign regulator if the foreign country has entered into a convention or a bilateral agreement with the United States relating to the exchange of tax information.¹⁰⁸

In the context of criminal matters, if the Australian regulator wants compulsory powers exercised in a foreign country, the request for such assistance must be made through the Attorney-General. The Attorney-General (not the Australian regulator) may then request (under ss 10, 12 and 14 of the *Mutual Assistance in Criminal Matters Act 1987* (Cth)) that a foreign country provide investigative assistance to Australia in relation to the taking of evidence, the production of documents and search and seizure in that

overseas regulatory authority agrees to contribute to the costs: see s 169(5) of the *Financial Services and Markets Act 2000* (UK); and s 82(6) of the *Companies Act 1989* (UK). Where the assistance is given to an Australian regulator, a representative of that regulator may attend and take part in oral examinations conducted by the FSA: see s 169(7) of the *Financial Services and Markets Act 2000* (UK). The FSA and the DTI have specific provisions which authorise them to release the results of the investigation to the Australian regulator: see s 349(1), (2) and (5) of the *Financial Services and Markets Act 2000* (UK); s 449(1)(cd)(iii) of the *Companies Act 1985* (UK); and s 87(1)(b) and (4)(e) of the *Companies Act 1989* (UK). These provisions apply where the Australian regulator is making a request for investigative assistance in relation to suspected civil contraventions of the Australian legislation. Requests for investigative assistance in criminal matters should be made by the Australian regulators to the United Kingdom's Judicial Co-operation Unit of the Home Office pursuant to the *Mutual Assistance in Criminal Matters Act 1987* (Cth): see *Muldoon v ASIC* [2005] FCA 1432 at [27] and [36].

¹⁰⁶ Section 20(2) of the *Commissioners for Revenue and Customs Act 2005* (UK).

¹⁰⁷ Section 21(a)(2) of the *Securities Exchange Act 1934* (US). When deciding whether to provide assistance, the SEC is required to consider whether the foreign regulator has agreed to provide reciprocal assistance to the SEC in securities matters and whether compliance with the request would prejudice the public interest of the United States. The SEC also has power to accept reimbursement of any expenses incurred: see s 4(f) of the *Securities Exchange Act 1934* (US).

¹⁰⁸ Section 6103(k)(4) of the *Internal Revenue Code* (US).

foreign country.¹⁰⁹ One problem with this legislation is that there has to be laws in force in the foreign country that authorise that country to provide the assistance which Australia has requested.¹¹⁰ Similarly, where Australia receives a request for assistance from a foreign country, there must be domestic laws in force in Australia that authorise Australia to provide that assistance.¹¹¹

A further problem is that s 7(2) of the *Mutual Assistance in Criminal Matters Act 1987* (Cth) indicates that the operation of the Act is subject the provisions of any treaty with the foreign country and such treaties may restrict the ability of the foreign country to provide assistance.¹¹²

Another problem is that s 43B of that Act provides that the Australian regulator is only permitted to use the information obtained for the purposes of investigating or enforcing a criminal breach of the Australian legislation administered by that regulator.¹¹³ If the Australian regulator receives information from the foreign regulator that relates to the functions of another Australian regulator, it cannot release that information to that other regulator¹¹⁴ (unless the Attorney-General has approved

¹⁰⁹ See generally *Kennedy v ASIC* [2005] FCAFC 32 at [10]; *Mutual Assistance in Criminal Matters (United Kingdom) Regulations 1999* (Cth); and *Muldoon v ASIC* [2005] FCA 1432 at [36].

¹¹⁰ For example, if Australia requests the execution of a search warrant in a foreign country, that foreign country can only comply with that request if its own laws authorise a search warrant to be issued for the purpose of fulfilling such a request: see s 7(3) of the *Mutual Assistance in Criminal Matters Act 1987* (Cth). See also AGECC, op cit n 95, at [2.5].

¹¹¹ See also s 8(2) (a) and (b) of the *Mutual Assistance in Criminal Matters Act 1987* (Cth).

¹¹² See, for example, the restrictions contained in the *Treaty between Australia and Switzerland on Mutual Assistance in Criminal Matters* (Berne Switzerland, 25 November 1991). See also *Kennedy v ASIC* [2005] FCAFC 32 at [9], [83], [84] and [98]; and Clause 4 of the *Mutual Assistance in Criminal Matters (Switzerland) Regulations 1994* (Cth).

¹¹³ See also generally Annexure A to the United States/Australia Antitrust Enforcement Agreement <http://www.ftc.gov/os/1997/9704annexa.htm>, viewed on 3 November 2003.

¹¹⁴ David Knott (former ASIC Chairman), “ASIC Chairman reflects on Rivkin issues,” <http://www.abc.net.au/insidebusiness/content/2003/s990037.htm>, viewed on 17 November 2003.

otherwise). In contrast to the position under the mutual assistance legislation, the Australian regulators have power under their regulatory legislation to release information obtained through the exercise of their own investigative powers to other Australian regulators to assist those regulators to perform their functions (see [7.5.3]).

Australian regulators may be able to request assistance from a foreign regulator and the foreign regulator may be able to exercise powers of compulsion to provide that assistance where the Australian regulator and the foreign regulator have entered into a MoU.¹¹⁵ At a more universal level, the Organisation for Economic Co-operation and Development has released a model agreement for the effective exchange of information in tax matters. The model is intended to be used as basis for various countries when entering into agreements or MoUs for the exchange of information.¹¹⁶ This model agreement has been criticised because it fails to set out any safeguards and protections for taxpayers when such information is exchanged.¹¹⁷

One problem with the MoUs is that they have all been developed on an ad hoc basis and there will be countries from which the Australian regulator requires information but there is no MoU.

¹¹⁵ ASIC and the DTI entered into a MoU on 28 October 1992 which deals with the procedure to be followed when dealing with requests from either body for investigative assistance: see *Muldoon v ASIC* [2005] FCA 1432 at [9]. ASIC depends on the co-operation of overseas regulators and for this reason ASIC participates in the International Organisation of Security Commissions (IOSCO). IOSCO members exchange information about surveillance activity including information concerning the success of such activity: see ASC, 1996/1997 Annual Report at pp 9 and 33.

¹¹⁶ Organisation for Economic Co-operation and Development, "OECD Releases Model Agreement on Exchange of Information in Tax Matters," 18 April, 2002 at http://www.oecd.org/document/4/0,2340,en_2649_33745_2082244_1_1_1_1,00.html.

¹¹⁷ See generally Branson CC QC, "The international exchange of information on tax matters and the rights of taxpayers," (2004) 33 AT Rev 71.

[7.5.4.3] *Law reform*

The present difficulties in exchanging information with foreign regulators do not promote a coordinated approach to law enforcement or timely investigations and will create regulatory difficulties including procedural challenges and delay that may exacerbate financial loss¹¹⁸ or that may jeopardise the recovery of compensation or taxes, as the case may be. There is a need to improve Australia's response to dealing with requests for international investigative assistance and Australia's contribution to international regulatory cooperation.¹¹⁹ The Australian regulators should have express and independent powers to commence an investigation for the purpose of assisting a foreign regulator and to release the information obtained from that investigation to that regulator. Braithwaite and Drahos¹²⁰ identify the principle of "reciprocity" as important in relation to the development and regulation of global financial markets. They indicate that "expectation of repayment of action lies at the heart of reciprocity." The suggested reforms are consistent with that principle. These reforms would set an example for other countries to follow, raise the levels of international awareness and cooperation¹²¹ and may mean that the Australian regulators will receive better investigative assistance from foreign countries in the future.

In addition, the suggested reforms would facilitate a more timely investigation and release of information,¹²² avoid the delays and difficulties in relation to the operation of the mutual assistance legislation and strengthen the Australian regulators' ability to provide investigative assistance to foreign regulators in cases involving major business

¹¹⁸ To promote the objectives, and to avoid the problems described above, the Australian federal government is currently considering the adoption of a model law on "Cross-border insolvency": see [1.5.8].

¹¹⁹ See also ASIC's outlook on "International relations and regional coordination" in ASIC, *Annual Report*, 2002-2003, at p 48.

¹²⁰ Braithwaite J and Drahos P, "Global Business Regulation," Cambridge University Press, New York, 2000, at pp 21-23 and 126. See also [1.5.8].

¹²¹ Argued by analogy from Corporate Law Economic Reform Programme: Paper No. 8 (CLERP 8) "Cross Border Insolvency - Promoting international cooperation and coordination," at p 21.

¹²² See also AGECC, op cit n 95, at [3.1].

fraud or taxation fraud and business collapses that have both Australian and international consequences.

The suggested reforms would also eliminate the need for a foreign regulator to conduct an investigation within Australia.¹²³ The SEC's recent investigation in Australia of the National Australia Bank and its auditor could be viewed as an infringement of Australia's sovereignty.¹²⁴

To overcome the difficulties associated with the mutual assistance legislation, the Australian legislation should expressly provide that the information obtained by the Australian regulators from their investigations (including investigations which were commenced specifically to assist a foreign regulator) may be released to the foreign regulator for the purpose of administrative proceedings, civil proceedings, criminal proceedings or penalty proceedings in the foreign country. This suggestion is subject to the requirement that there should be reciprocal or equivalent administrative, civil, or criminal laws, as the case may be, under the Australian and foreign legislation.

¹²³ The problems associated with the Australian regulators' lack of power to commence an investigation solely for the purpose of assisting a foreign regulator were highlighted by the fact that recently the SEC conducted an investigation in Australia of the National Australia Bank and its auditor for suspected breaches of the auditor's independence rules in ss 201-209 of the *Sarbanes-Oxley Act 2002* (US): see generally Kohler A and Campos R (Commissioner of the SEC), "US mulls NAB, KPMG criminal charges," <http://www.abc.net.au/insidebusiness/content/2004/s1055594.htm>, viewed on 1 March 2004. However, it could also be argued that the SEC is better equipped (than ASIC) to investigate suspected contraventions of United States law.

¹²⁴ Section 8(1)(e) of the *Mutual Assistance in Criminal Matters Act 1987* (Cth) requires the Attorney-General to consider whether a foreign country's request for investigative assistance would prejudice Australia's sovereignty before deciding whether to provide that assistance. Given the requirements of this legislation, it appears incongruous that issues relating to Australia's sovereignty were not raised by the federal government when the SEC unilaterally decided that it should conduct an investigation in Australia. It is unlikely that the Australian regulators could conduct a similar investigation in the United Kingdom on the ground that such an investigation would constitute an infringement of the sovereignty and proper jurisdiction of the United Kingdom: see *Re Westinghouse Uranium Contract* [1978] AC 547 at 615-617 per Lord Wilberforce, at 630-632 per Lord Diplock and at 650-651 per Lord Keith of Kinkel.

The private interest could be protected by giving the Australian regulators clearly defined grounds on which they could refuse to release information to a foreign regulator including an inability to lawfully obtain the information under Australian law, the fact that the information sought constitutes a trade secret¹²⁵ or is protected from disclosure by legal professional privilege.¹²⁶ The private interest could also be protected by requiring the Australian regulator to notify the affected persons of a proposed release of information so that they could take steps to protect their interests (see further at [4.7.3.1]).

[7.5.5] *Release of record of examination and any related books to the lawyer of a private litigant*

As a general common law rule, it would be an abuse of power for a regulator to voluntarily provide information or documents, obtained pursuant to its statutory powers, to a litigant in proceedings to which the regulator is not a party.¹²⁷ The common law provides that regulators conduct their investigations for public purposes and, accordingly, they have no power to disclose the investigative information for other purposes, such as civil proceedings by a private litigant.¹²⁸

Some Australian legislation modifies the common law by giving some regulators the discretionary power to release a record of examination and “any related book” to the lawyer of a private litigant where there is a “nexus” between the investigation and the private litigation.¹²⁹ This latter requirement protects the private interest of the affected person (the person to whom the information relates) by restricting the situations in which the information can be released and it means that the information cannot be released to the

¹²⁵ See, for example, s 56 of the *Competition Act 1998* (UK).

¹²⁶ See generally Branson CC QC, *op cit* n 117, at 83.

¹²⁷ *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission* (1982-1983) 152 CLR 460 at 468 per Gibbs CJ.

¹²⁸ *Marcel v Commissioner of Metropolitan Police* [1991] 2 WLR 1118.

¹²⁹ Section 25(1) of the *ASIC Act* (ASIC); s 281(1) of the *Superannuation Industry (Supervision) Act 1993* (Cth) (ASIC, APRA and the ATO); and s 111 of the *Retirement Savings Accounts Act 1997* (Cth) (ASIC and APRA).

lawyer of the private litigant simply because it would be useful to the litigant.¹³⁰

The private interest of the affected person is also protected by the fact that the information is released to the lawyer, rather than directly to the private litigant. Lawyers are officers of the court and they are subject to legal and ethical obligations which require them to use the information only for the purpose of the relevant litigation and not for collateral purposes.¹³¹

The private interest would be better promoted if the legislation expressly gave the affected person the right to make submissions to the regulator about why the information should not be released or why only certain portions of that information should be released.¹³² A range of safeguards could be included in the legislation to ensure that the information released does not prejudice the affected person's/defendant's right to a fair criminal trial. For example, there could be a prohibition on releasing information for use in private civil proceedings until the regulators' criminal proceedings have been concluded.

The Australian regulators' powers to release information to the lawyers of private litigants is a clear indication by Parliament that information obtained from an investigation may be used for public and private purposes.¹³³ This power is based on the federal government's philosophy that the laws described above are best enforced by way of a

¹³⁰ See generally Kluver J, "ASC Investigations - Conducting s 19 Examinations and Disclosing Transcripts and Documents," Corporate Lawyers and Regulators Forum, 20 May 1994, Hyatt Coolum, at 4.

¹³¹ *Bankers Trust Australia Ltd v NCSC* (1989) 15 ACLR 58 at 68 per Foster J; *NCSC v Bankers Trust Australia Ltd* (1989) 1 ACSR at 348-349 per Beaumont and Einfeld JJ; and *Re Emanuel Investments & Thomsons and EFG* (1996) 14 ACLC 315 at 319. However, where the lawyer receives the information from the regulator, the regulator should have clear powers to impose conditions in relation to the lawyer's use of that information (which are supported by penalties for breach of those conditions). The conditions may relate to the way the information is used such as that the information can only be used by the recipient for the purpose of the private litigation and cannot be used for collateral purposes: see *Johns v ASC* (1993) 178 CLR 408 at 429 per Brennan J. See further at [4.9].

¹³² See generally *Marcel v Commissioner of Police* [1992] Ch 225; 1 All ER 72 cited in ASIC Releases, op cit n 9, at [34], [36] and [42] at 40,902.

¹³³ *Boys v ASC* (1997) 15 ACLC 844 at 860 and 868 per Carr J; and *Boys v ASC* (1998) 16 ACLC 298 at 311 per Heerey J (French J concurring).

combination of litigation conducted by private plaintiffs and the public regulators. Some regulators have described litigation by private plaintiffs as a major part of the enforcement weaponry that is available to them.¹³⁴ The federal government's regulatory philosophy is also given statutory recognition by the fact that some of the Australian legislation expressly preserves private litigation in respect of matters that may be the subject of concurrent litigation by the regulator.¹³⁵ From the federal government's perspective, this approach has the advantage of shifting the costs of enforcing the laws from the "public purse" to the private litigant¹³⁶ and assists to deal with the problem identified at [3.6] that the regulators do not have sufficient resources to investigate and prosecute all matters that are brought to their attention. This approach promotes the efficient use of resources or public funds (which is an indicator of effective regulation).¹³⁷

The ACCC and the ATO (where it is acting under the taxation legislation), have no statutory power to assist private litigants.

In some cases, the ATO's investigation may reveal that the directors' breach of statutory or fiduciary duties or negligence has caused the corporation to fail to meet its tax obligations or has caused the corporation to engage in tax avoidance or tax evasion or other breaches of the taxation laws. In such a case, it may be that the corporation's accumulated tax debt and penalties puts the company in financial difficulties and it may face a winding up application.¹³⁸ The corporation's liquidity problems may mean that the corporation will breach its obligations to its creditors and shareholders. In such a

¹³⁴ Hartnell A, (former Chairman of the ASC), "Regulatory Enforcement by the ASC: an Interrelationship of Strategies" Australian Institute of Criminology Conference (March 1992) ASC Digest 1992 (Reports and Speeches 38 at 43-47); and Kluver J, "ASC Investigations and Enforcement: Issues and Initiatives" (1992) 15(1) UNSWLJ 31 at p 54.

¹³⁵ See, for example, ss 179, 185 and 230 of the *Corporations Act*; and ss 80, 82 and 87 of the *Trade Practices Act 1974* (Cth).

¹³⁶ Kluver J, op cit n 134, at p 54.

¹³⁷ Sparrow M, "The Regulatory Craft", Brookings Institution Press, 2000, at 119 cited in the Australian Law Reform Commission, Background Paper 7, "Review of Civil and Administrative Penalties in Federal Jurisdiction," at fn 60, <http://www.austlii.edu.au>, viewed on 3 March 2003.

¹³⁸ Such an application may be made by the ATO on the ground of insolvency. See, for example, *McDonald v Deputy Commissioner of Taxation* [2005] NSWSC 2.

case, the private plaintiffs could include the corporation, its creditors or the shareholders who are out of pocket. Those parties may be able to recover their losses/debts from the directors and they could be assisted in their civil cases by the information gathered by the ATO.

The ATO has recently indicated that it regards the corporation's duty to meet its taxation obligations as one of the major corporate governance obligations to be observed by directors.¹³⁹ When the directors' corporate governance obligations are viewed from this perspective, it appears incongruous that the ATO does not have any power under the taxation legislation to release information for use in private litigation that is related to alleged breaches of those governance obligations. In this context, private litigation assists to encourage compliance with corporate governance and coextensive taxation obligations, and sends a message of personal and general deterrence by making it clear to directors that contraventions of the taxation laws may not only result in proceedings by the ATO but could, with the ATO's assistance, result in private litigation concerning alleged breaches of concurrent governance obligations. Such a reform would, in turn, indirectly promote compliance with the taxation laws.

Under the current law, ASIC could also become involved in the ATO's investigation because of concurrent breaches of the *Corporations Act*,¹⁴⁰ and ASIC could release investigative information to the lawyer of the private litigant. By contrast, the ATO cannot release any information to that lawyer, even though it is investigating the same conduct. The ATO could release investigative information to ASIC which could then release that information to the private litigant's lawyer. The ATO should be given the power to release information obtained from a tax investigation directly to the lawyer of a private litigant. This may give the ATO greater control over preserving the secrecy

¹³⁹ Carmody M, "Corporate governance and its role in tax", addressed the 2005 Taxation Institute National Convention "Tax Unmasked," Perth, 17 March at <http://www.ato.gov.au/corporate/content.asp?doc=/content/56224.htm&pc=001/001/001/002/001&mnu=&mfpr=&st=&cy=1>, viewed on 14 November 2006; Australian Taxation Office, 2005-2006 Compliance Programme cited in Australian Institute of Company Directors, Module 1, "The Practice of Directorship," 2006, at p 42.

¹⁴⁰ See, for example, ss 180-184 and 588G of the *Corporations Act*.

or integrity of its investigation and the privacy of taxation information. Under this reform the ATO would have the clear power to decide when such information should be released to the lawyer of a private litigant and the clear power to release only selected parts of the information and to impose conditions on the release of such information.

It could be argued that if the ATO had the power to release a person's tax related information to private litigants, the taxpaying public would be reluctant (for personal and business/competitor reasons) to make any, or at least accurate, financial disclosures in their taxation returns¹⁴¹ thereby prejudicing the public interest in efficient and accurate revenue collection. However, the protections or safeguards discussed above would assist to negate any argument against giving the ATO a power to assist private litigation. Moreover, the information that could be released by the ATO would be information gathered from its investigation regarding suspected contraventions of the taxation laws that has relevance to private litigation and would not necessarily involve the release of information contained in taxation returns.

The suggestion that the ACCC should have the power to release investigative information to the lawyer of a private litigant is supported by the fact that the *Trade Practices Act 1974* (Cth) provides not only for the commencement of proceedings by the ACCC, but gives private litigants statutory rights to seek remedies for a breach of that Act including an injunction under s 80, damages under s 82 and remedial orders under s 87 of that Act. It appears incongruous that the ACCC has power to investigate suspected contraventions of the *Trade Practices Act 1974* (Cth), and to gather evidence directly relevant to the statutory remedies that may be claimed by private litigants, but has no power to assist those litigants. According to Tamblyn,¹⁴² private actions are encouraged by the ACCC as a "very cost-effective form of marketplace policing of competitive behaviour and of achieving improvements in compliance with the [Act] and in the general standard of competitive conduct." Tamblyn also emphasises the fact that the ACCC has limited

¹⁴¹ See generally *McKinnon and Commissioner of Taxation* [2001] AATA 871 at [34] and [54].

¹⁴² Tamblyn J, "Progress Towards a More Responsive Trade Practices Strategy," p 151 at 153 in Grabosky P and Braithwaite J, op cit n 87.

resources and must be selective in deciding which of the thousands of complaints it will pursue. Tamblyn's comments reinforce the need to give the ACCC a power to assist private litigation.

The legislation could contain guidelines outlining the circumstances in which the regulators may release information to private litigants (including plaintiffs and defendants) thereby informing the public and the legal profession of when they can approach the regulators for investigative assistance. Those guidelines could be modelled on those currently published by ASIC.¹⁴³

[7.5.6] Release of investigative information to professional disciplinary bodies

ASIC has a power to release information to a prescribed professional disciplinary body to enable that body to perform its functions.¹⁴⁴ Similarly, the SEC has power to release information gathered from its investigation to private disciplinary tribunals including the Bar Association and the American Institute of Certified Public Accountants.¹⁴⁵

APRA has a limited power under the *Retirement Savings Accounts Act 1997* (Cth) to release information to an auditor's professional association for the purpose of that association taking disciplinary action against the auditor.¹⁴⁶ APRA should have the power to release information to a wider range of professional bodies including those that regulate accountants and lawyers.

By contrast, the ATO and the ACCC do not have any power to release information gathered from their investigations to professional disciplinary bodies even

¹⁴³ See ASIC Releases, op cit n 9.

¹⁴⁴ Sections 25(3) and 127(4)(d) of the *ASIC Act*.

¹⁴⁵ See SEC, op cit n 16, "Routine Uses of Information", Item 8.

¹⁴⁶ APRA will release the relevant information where it is of the opinion that auditors have failed to adequately perform their duties as auditors or are otherwise not fit and proper persons to be approved auditors for the purposes of the Act: see s 68 of the *Retirement Savings Accounts Act 1997* (Cth).

though those bodies may be interested in the results of the ATO's and the ACCC's investigation of the conduct of persons who are regulated by those bodies.

It is argued that where the ATO's or the ACCC's investigations reveal information relating to suspected civil or criminal contraventions of the law, particularly contraventions involving dishonesty, which could impact on a person's fitness to practise in a profession, they should have power to release that information to the relevant professional disciplinary body. Support for this suggestion is found in the report by the Standing Committee on Legal and Constitutional Affairs which concluded that legislation should be introduced to allow the ATO to release bankruptcy and related information to professional bodies to create a significant disincentive for professionals to use bankruptcy to avoid their tax obligations.¹⁴⁷ This suggested reform is also supported by the fact that the ATO's counterpart in the United Kingdom, HMRC, has an express power to release tax related information to a professional regulatory body where such disclosure is in the public interest and the information relates to misconduct on the part of a member of a profession.¹⁴⁸ If a similar power were given to the ATO, it could assist to make some taxpayers (tax debtors who owe concurrent professional and ethical obligations) accountable for their breaches of concurrent taxation, professional and ethical obligations in a more timely manner.

Arguably, recent litigation involving disciplinary proceedings by the NSW Barristers' Board against barristers (who had not paid tax for 10-30 years) could have been resolved in a more timely manner if the ATO had the power to release information to the Barristers' Board.¹⁴⁹ Braithwaite¹⁵⁰ indicated that the ATO deliberately published the

¹⁴⁷ See Commonwealth, *Inquiry into the Exposure Draft of the Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004*, House of Representatives, Standing Committee on Legal and Constitutional Affairs (2004) at 35.

¹⁴⁸ Section 20(3) of the *Commissioners for Revenue and Customs Act 2005* (UK).

¹⁴⁹ See, for example, *Cameron v The NSW Bar Association* [2002] NSWSC 191. See generally *Cummins v The Trustees of the Property of John Daniel Cummins, A Bankrupt* [2004] FCAFC 191. In 2003 36% of barristers and 28% of solicitors failed to lodge a taxation return on time. In the past decade 102 barristers and 143 solicitors have been prosecuted for offences relating to the late filing of taxation returns. These proceedings have resulted in those persons paying \$400,000 in fines: see "Guilty: judges and lawyers fail

names of some barristers and identified them as serial bankrupts in its 2000 Annual Report in an attempt to encourage the media to place pressure on the Bar Association to take action. This approach does not promote a timely response and reinforces the need to give the ATO a power to release information to the relevant professional body. Section 38FB(3) of the *Legal Profession (Disciplinary Provisions) Act 2001* (NSW) now requires lawyers to notify the Barristers' Board if they have been found guilty of a taxation offence.¹⁵¹ Unfortunately, this legislation has not been adopted in all of the other States and Territories. Consequently, it is preferable to amend the taxation legislation so that the reforms apply Australia-wide.

The suggested reforms are consistent with Braithwaite's "responsive regulation" approach. That is, if all Australian regulators have a power to release the information to the relevant disciplinary body, that body may take appropriate action and require the relevant persons to show cause why they should not be disqualified from acting in the particular profession or industry. The relevant persons may agree to meet their regulatory obligations (for example, by paying their taxation debts) as part of a negotiated settlement with the disciplinary body in exchange for not being disqualified or in exchange for a reduced period of disqualification. If the disciplinary body takes no action, or if the relevant persons do not meet their regulatory obligations as a result of the disciplinary body's action, then the regulator may escalate its enforcement response by proceeding to a higher level on the enforcement pyramid.¹⁵²

Protections could be built into the legislation to ensure that the information is only used by the professional disciplinary bodies to perform their disciplinary functions. Those protections could include the power to impose various conditions on the release of

to lodge their returns," *The Australian*, Tuesday, 24 May, 2005, at pp 1 and 6.

¹⁵⁰ Braithwaite J, "Restorative Justice and Responsive Regulation," Oxford University Press, Oxford, 2002.

¹⁵¹ See, for example, *Murphy v The Bar Association of NSW* [2001] 1191 at [11]; and *Wardell v The Bar Association of NSW* [2002] NSWSC 548.

¹⁵² Braithwaite J, "Markets in Vice, Markets in Virtue," The Federation Press, Leichhardt, 2005, at pp 178-180.

the information which limit the purposes for which the information can be used. Breach of the conditions could be punishable by a pecuniary penalty, as discussed at [4.9].¹⁵³

[7.6] The affected person’s ability to challenge the regulator’s decision to release information

The private interest of the affected persons (the persons to whom the information relates) is protected in the sense that they could challenge any regulator’s attempt to release information or documents to third parties on the ground of abuse of statutory power¹⁵⁴ where such a release does not constitute an “authorised use or disclosure”, as discussed at [7.5.1]-[7.5.6]. However, none of the legislation requires the regulators to notify the affected person of a proposed release of information and, accordingly, any challenge may only be commenced after the information has been released and perhaps only after irreversible damage has been done to the reputation or other interests of the affected person.

The private interest of the affected persons may also be protected by the rules of natural justice or procedural fairness because those rules may require the regulator to give them an opportunity to be heard before the information is released¹⁵⁵ or that they be given prior notice before the information is released to enable them to take steps to protect their interests.¹⁵⁶ The problem is that there is uncertainty as to when the rules of natural justice or procedural fairness will operate in the regulators’ investigations and as to the exact requirements of those rules, as discussed at [4.7.3]. The uncertainty as to the operation of the rules of natural justice has meant that ASIC and the ACCC have issued policy statements where they have indicated that they are bound by those rules and that they will

¹⁵³ See, for example, s 26 of the *ASIC Act*.

¹⁵⁴ See generally *Boys v ASC* (1997) 15 ACLC 844; *Boys v ASC* (1998) 16 ACLC 298; and s 5(1)(e) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

¹⁵⁵ See generally *Kioa v West* (1985) 159 CLR 550 at 582-583; *Annetts v McCann* (1990) 170 CLR 596 at 608; 97 ALR 177 at 186 per Brennan J; *Ainsworth v Criminal Justice Commission* (1992) 106 ALR 11 at 19; and s 5(1)(a) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

¹⁵⁶ ASIC Releases, op cit n 9, at [53] at 40,911.

consult relevant parties before they disclose the investigative information in their possession.¹⁵⁷ However, these policy statements have no statutory backing.

The Australian legislation should require the regulator to give the affected person a right to be heard before a final decision is made to release information relating to that person to other regulators or to other authorised recipients. This is subject to the proviso that notification would not be required where it would prejudice the regulator's investigation. This reform could be supported by creating provisions which set out the procedures and rules that govern the affected person's right to make submissions including time limits for making the submissions and the right to legal representation when making the submissions. The legislation could also require the regulator to provide reasons for its final decision on whether to release the information.¹⁵⁸ The legislation could create offences where the regulators' officers fail to notify the affected person of a proposed release of information and give the affected person a statutory right to the recovery of compensation for any loss suffered as a result of the failure to notify. Those reforms would reduce challenges (by way of judicial review) to the regulators' decisions to release information on the grounds of abuse of power or denial of natural justice.

[7.7] The affected person's right to access information

[7.7.1] *The affected person's right to access information to correct errors*

There are no uniform provisions in the Australian legislation that give affected persons the right to correct any errors in information possessed by the regulator. There are various, ad hoc, existing ways to correct information. For example, in some cases, examinees have a statutory right to obtain a record of their oral examinations. This enables them to read the records of their evidence, and gives them the opportunity to point out errors before they sign those records (see [4.7.2]). The rules of natural justice or procedural fairness also provide that, before a regulator makes a final decision at the

¹⁵⁷ See generally ACCC, op cit n 14, at p 16.

¹⁵⁸ See generally Branson CC QC, op cit n 117, at 85.

end of the investigation (such as whether to commence proceedings), it should give the affected person a draft copy of its findings on the material questions of fact.¹⁵⁹ This gives the affected person an opportunity to correct errors in those findings as well as to make submissions on any critical issues or factors that may “otherwise” result in an adverse decision being made against that person (see [4.7.3]). However, the rules of natural justice may be expressly or impliedly overridden by the legislation.

Accordingly, it is suggested that affected persons should be given an express statutory right to correct any errors in information that is in the regulators’ possession.¹⁶⁰ Such a reform would not only promote the private interest of the individual, but may also promote the public interest. That is, the public interest requires that regulators make their decisions on whether to commence proceedings on the basis of accurate information. Any inaccuracies in the information may cause delays in the regulators’ subsequent legal proceedings as a result of objections to the admissibility of the evidence or, in some cases, those inaccuracies may cause those proceedings to fail.

[7.7.2] *Freedom of information legislation*

The freedom of information legislation promotes the private interests of the individual by providing a uniform mechanism by which persons can obtain information from the regulators. Any person interested in information in the possession of an Australian regulator could (subject to certain exemptions, see [7.4.3]) obtain that information pursuant to the *FOIA*.¹⁶¹ Unlike an informal request for information, the

¹⁵⁹ *Mahon v Air New Zealand* (1983) 50 ALR 193 at 206-207; *NCSC v News Corporation Ltd* (1984) 52 ALR 417 at 429-431; *Kioa v West* (1985) 159 CLR 550 at 629; *Bond v Australian Broadcasting Corporation (No 2)* (1988) 84 ALR 646 at 664; and *McLachlan v ASIC* (1999) 17 ACLC 656 at 667.

¹⁶⁰ See generally Scollay M, *op cit* n 4. Such applications are recognised by s 8XA(c) of the *Taxation Administration Act 1953* (Cth).

¹⁶¹ See s 3(1) and (2) of the *FOIA* (Cth). An applicant under the *FOIA* is not required to satisfy any “eligibility” requirement in order to obtain the relevant information: see ss 11, 14 and 15 of the *FOIA* (Cth). Similar applications can be made in the United Kingdom under the *Freedom of Information Act 2000* (UK) and in the United States under the *Freedom of Information Act 1966* (US); 5 USC 552. Rule 83 of the SEC’s Rules on Information and

advantage of making an *FOIA* application is that it creates a legally enforceable right of access to documents,¹⁶² except exempt documents.

One problem with the Australian legislation is that it requires the request to be made in writing¹⁶³ and it does not expressly recognise more timely request methods such as by email or fax. By contrast, the legislation in the United Kingdom expressly provides that a request in writing is satisfied where the request was transmitted by electronic means.¹⁶⁴ The Australian legislation could be amended to accommodate more timely electronic requests.

The Australian legislation may also result in delay in that whilst it provides that the regulators must respond to the request as soon as practicable, it also gives those regulators 30 days to comply (or not comply) with the request. There is also the possibility of the Australian regulators obtaining an extension of the response time by another 30 days.¹⁶⁵ By contrast, the legislation in the United Kingdom¹⁶⁶ and the United States¹⁶⁷ requires the regulators to comply with the request “promptly” and not later than 20 days after the receipt of the request. The United States’ legislation also contains provisions which allow applicants to apply for the expedited processing of their requests. In such cases, the requests should be complied with within 10 days of receipt.¹⁶⁸ The Australian legislation should be amended to reduce the response time and to allow for the expedited processing of requests in urgent cases.

Requests, 17 CFR 200.83 also provides a procedure whereby a written request that information submitted to the SEC not be disclosed under the *FOIA*.

¹⁶² Section 11(1) of the *FOIA* (Cth); *Harris v ABC* (1983) 50 ALR 551 at 555; and see generally *Jorgensen v ASIC* [2004] FCA 143 at [63].

¹⁶³ Section 15(2)(a) of the *FOIA* (Cth).

¹⁶⁴ Section 8(2)(a) of the *FOIA* (UK).

¹⁶⁵ Section 15(5)(b) and 15(6) of the *FOIA* (Cth). Section 552(a)(6)(B) *FOIA* (US) provides that in unusual circumstances the time for compliance can be extended by a further 10 days.

¹⁶⁶ Section 10 of the *FOIA* (UK).

¹⁶⁷ Section 552(6A) of the *FOIA* (US).

¹⁶⁸ Section 552(6E) of the *FOIA* (US).

The Australian, United States' and United Kingdom's legislation gives the applicant the right to request that they be given access to the information in a particular form.¹⁶⁹ Recent amendments indicate that the Australian regulator can comply with the request by providing computer disks or tapes, rather than hardcopy.¹⁷⁰ However, even with those more expeditious methods of access, the Australian regulator still has a maximum of 30 days to comply with the request. It is therefore suggested that the Australian legislation be amended to require the regulators to comply with the request in a shorter time period in those cases where the applicant simply requires inspection of the documents at the regulator's premises or where the information could be given to the applicant electronically or over the telephone.

[7.8] Conclusion

A range of inconsistencies and deficiencies in the current regulatory framework have been identified in this chapter. Reforms have been suggested to address those problems and to achieve greater uniformity and efficiencies in relation to the protection and release of investigative information thereby achieving a range of public and private interest objectives and more effective regulation.

Those reforms include:

- (a) uniform statutory provisions that govern the Australian regulators' statutory duty of confidentiality (including a uniform statutory definition of "confidential information" and uniform express powers to

¹⁶⁹ Section 20(2) of the *FOIA* (Cth); s 552(a)(3)(B) of the *FOIA* (US); and s 11 of the *FOIA* (UK). In some cases, it would be reasonable to expect that the applicant could have access to the requested information almost immediately either by personally attending the regulator's office and inspecting the information or by being emailed an electronic copy of the information or by being given a computer disk. Of course, where the applicant requests voluminous information in hardcopy form, the request may take longer to satisfy. The Australian legislation does recognise that the request for access to information can be complied with by allowing the applicant to inspect the documents.

¹⁷⁰ Sections 17(1) and 20 of the *FOIA* (Cth).

impose conditions on the release of information) thereby protecting the integrity and secrecy of their investigations;

- (b) greater uniformity between the regulators' statutory duty of confidentiality and the categories of exempt documents in the *FOIA*;
- (c) giving all Australian regulators uniform powers to release information to foreign regulators, to private litigants, and to professional disciplinary bodies; and
- (d) giving the regulated uniform protections and safeguards including clear and effective rights to challenge the regulators' decisions to release information and to access information in the regulators' possession.

CHAPTER 8
CIVIL PROCEEDINGS
by Tom Middleton

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CHAPTER 8

CIVIL PROCEEDINGS

[8.1] Introduction

The Australian legislation does not contain clear rules as to when the regulators may commence civil, civil penalty or criminal proceedings. The question of whether the Australian regulators would commence administrative, civil, civil penalty proceedings or criminal proceedings, or both, for contraventions of the regulatory legislation involves a consideration of a range of complex factors including the particular regulatory objective (see Chapter 2) being pursued by the regulator, the regulatory impact of the particular enforcement action (such as sending a compliance message), the different purposes of civil and criminal proceedings (see [8.4]), the different elements necessary to establish a civil or criminal contravention of the legislation (see [8.5]), the nature of the contravention (whether serious or technical), whether an appropriate civil remedy exists and the prospects of success. In the case of criminal proceedings for an indictable offence (see [9.7.1]), the Australian regulators would also consider the recommendation of the Commonwealth Director of Public Prosecutions (Commonwealth DPP) (see [9.10] and [9.10.1]). The case law also indicates that it is not an abuse of power for the regulator to pursue civil proceedings rather than criminal proceedings, even though this means that the defendant is denied the protections inherent in criminal proceedings (such as a higher standard of proof and a jury trial).¹

It is argued that given the different purposes served by civil and criminal proceedings (see [8.4]), and the different elements of civil and criminal contraventions of the regulatory laws (see [8.5]), the Australian legislation should be amended to provide greater legal certainty as to when each type of proceeding may commence.

¹ *ASIC v Sweeney* [2001] NSWSC 114 at [57] per Austin J; and *ASIC v Parkes* [2001] NSWSC 377 at [9] per Austin J.

The factors described above and the different elements and purposes of civil and criminal proceedings do not appear to have been adequately considered by Ayres and Braithwaite when formulating their “enforcement pyramid” model.²

It is also argued that a range of public and private interest factors require that the regulators’ civil and civil penalty proceedings be governed by clear and uniform evidential and procedural rules so that there is clear guidance for the regulators, the regulated and the judiciary on the applicable evidential and procedural rules.

Those suggested reforms would also promote greater fairness by assisting to ensure that like cases are treated alike (see [1.5.5]). The decision in *ASIC v Vizard*,³ indicates that any inconsistencies in the treatment of defendants may lead to the erosion in public confidence in the integrity of the regulatory system. According to Baldwin and Cave,⁴ clear statutory powers and provisions that promote greater fairness are two of the major benchmarks of good or effective regulation.

It is further argued that the Australian regulators’ should have a broader and a more uniform range of civil enforcement powers, including powers to commence public interest proceedings (see [8.7.1]) and to seek compensation orders (see [8.7.2]), statutory injunction and asset preservation orders (see [8.7.3]), and disqualification orders (see [8.8.3]). A broader range of civil enforcement options is consistent with Ayre’s and Braithwaite’s “enforcement pyramid” and with their views on “responsive regulation.”⁵ This would allow all regulators to adopt a less interventionist approach at first (for example, by way of a statutory asset preservation order) while still giving them the option of escalating their enforcement response and seek more serious, punitive and permanent sanctions, such as civil pecuniary penalties and disqualification orders before resorting to criminal penalties.

² Ayres I and Braithwaite J, “Responsive Regulation: Transcending the Deregulation Debate,” Oxford University Press, New York, 1992 at 35. See further at [1.5.4].

³ [2005] FCA 1037 at [42].

⁴ Baldwin R and Cave M, “Understanding Regulation Theory Strategy, and Practice,” Oxford University Press, Oxford, 1999 at p 77.

⁵ Ayres I and Braithwaite J, op cit n 2.

[8.2] Public interest

The public interest requires that those who have committed civil contraventions be brought to account as quickly and cheaply as possible.⁶

The regulators regard criminal proceedings as slow, expensive and frustrating processes that take as long as the original investigation and sometimes longer.⁷ They also regard criminal offences as difficult to prove.⁸ By contrast, from the regulators' public interest perspective, there is a greater likelihood of obtaining a successful and cost-effective litigious outcome in civil and civil penalty proceedings because such proceedings are subject to "civil evidential and procedural rules" and the lower standard of proof (see [8.6.5]). It is for these reasons that the regulators favour civil proceedings and, particularly, civil penalty proceedings (see [8.8]).⁹

However, recent case law indicates that there can be difficulties in applying the various evidential and procedural rules in civil penalty proceedings because it is not always clear what those rules are (see [8.6]-[8.6.8]). This difficulty is partly due to the special nature of civil penalties. The ALRC has defined a "civil penalty" as a penalty (such as a pecuniary penalty order (see [8.8.2]) and a disqualification order (see [8.8.3])) imposed by the courts using civil, rather than criminal, proceedings.¹⁰

⁶ *ASIC v Vizard* [2005] FCA 1037 at [42].

⁷ Hartnell AG, "Regulatory Enforcement by the Australian Securities Commission: an Inter-relationship of Strategies," p 25 at p 33 cited in Grabosky P and Braithwaite J (Editors), "Business Regulation and Australia's Future," Australia Institute of Criminology, Canberra 1993.

⁸ The complexities of regulatory criminal offences and, often, the jury's inability to understand complex business transactions have made it difficult for the prosecution to satisfy the criminal standard of proof of "beyond reasonable doubt": see Gething M, "Do We Really Need Criminal and Civil Penalties for Contraventions of Directors' Duties?" (1996) ABLR 375 at 386. See also [9.1].

⁹ See, for example, *ASIC v Petsas* [2005] FCA 88, discussed at [8.5].

¹⁰ ALRC, "Principled Regulation: Federal Civil & Administrative Penalties in Australia," (ALRC 95) 2002 at [2.45], at <http://www.austlii.edu.au>, cited in Rees A, "Civil Penalties: Emphasising the adjective or noun" (2006) 34 ABLR 139 at 141. The phrase "civil penalty" is also broadly defined in the *Evidence Act 1995* (Cth) as a penalty (other than a criminal penalty) arising under Australian law or a law of a foreign country: see Clause 3 of Pt 2 of the Dictionary to the *Evidence Act 1995* (Cth); and *Evidence Act 1995* (NSW) cited in ALRC, DP 69, "Review of the Uniform Evidence Acts," at [13.214],

The lack of certainty is also exacerbated by the fact that civil and civil penalty proceedings can be commenced in either the Federal Court or in the different States' courts which all have their own evidential and procedural rules (see [8.6.1]).

The present uncertainty may also give the courts greater latitude and they may treat such proceedings as quasi-criminal proceedings particularly in the punitive civil penalty proceedings for a pecuniary penalty order or a disqualification order (see [8.6.6] and [8.6.7]). This approach favours the private interests of the defendant because of the higher standard of proof and the greater evidential and procedural protections for the defendant in such proceedings.¹¹ By contrast, treating such proceedings as civil proceedings favours the public interest which underpins the regulator's enforcement action because of the lower standard of proof and the fewer evidential and procedural protections which are afforded to the defendants.¹²

It is argued that the public interest requires that the regulators should be given the option of pursuing civil penalty proceedings as a real alternative to criminal proceedings and that the courts should not treat civil penalty proceedings as quasi-criminal.¹³

[8.3] Private interest

The private interest requires that defendants know the circumstances in which they could be the subjects of civil or criminal proceedings, or both, for contraventions of the legislation (see [8.5]).

<http://www.austlii.edu.au/au/other/alrc/publications/dp/69/>, viewed on 18 February 2007. The phrase "civil penalty" is also used in the United States and refers to the pecuniary penalty that may be imposed in civil actions including civil actions relating to insider trading: see ss 21d.3 and 21A of the *Securities Exchange Act 1934* (US); and 15 USC, ss 78u(d)(3) and 78u-1(a).

¹¹ See generally ALRC, Discussion Paper 65: Civil and Administrative Penalties, Part E, "Options for Reform – The Criminal/Non-Criminal Distinction," at [17.57], [17.62], [17.71] and [17.73], at <http://www.austlii.edu.au>, viewed on 19 March 2003.

¹² See, for example, *ASIC v Petsas* [2005] FCA 88 at [2].

¹³ The civil penalty provisions serve a public interest function by establishing a standard "of behaviour that is necessary for the proper conduct of commercial life ... so that people will have confidence that the running of the market place is in safe hands": see *ASIC v Vizard* [2005] FCA 1037 at [29] per Finkelstein J in the context of s 183 of the *Corporations Act*.

Defendants should be able to claim clear evidential and procedural protections in the regulators' civil and civil penalty proceedings. In the case of punitive civil penalty proceedings, such as those for a pecuniary penalty order, and a disqualification order, the defendants need to know whether they can claim the penalty privilege or the privilege against self-incrimination (see [8.6.4]).

Public and private interests also demand that the regulators have clear powers to recover compensation for victims of contraventions of the legislation, particularly where the contraventions and resulting losses can be attributed to a regulatory failure and particularly where the victims are left without sufficient resources to commence private litigation (see [8.7.1] and [8.7.2]).

The private interest and the general principles of fairness (which requires that like cases be treated alike) dictate that the affected person and the courts have clear guidelines on the level of pecuniary penalty and/or period of disqualification that may be imposed for contraventions of the legislation (see [8.8.4]). Such reforms would also promote public and private interests by assisting to reduce the public's perception of selective enforcement, or of wealthy defendants receiving more lenient treatment.¹⁴

The suggested reforms also recognise and address the problem that access to the courts for many individuals to resolve the present ambiguities in the law and to argue various implied protections in civil proceedings is an unrealistic option.¹⁵

[8.4] The different purposes of civil, civil penalty and criminal proceedings

The regulator's decision to commence civil, civil penalty or criminal proceedings may be influenced by the regulatory purpose sought to be achieved. The purpose of civil proceedings and civil penalty proceedings is to enforce the statutory obligations of defendants, and to provide remedies (such as compensation) for wrongs done by them.¹⁶ In the United States, it is said that the civil law is concerned with

¹⁴ Compare *ASIC v Vizard* [2005] FCA 1037 at [42] and [45].

¹⁵ See generally Mayer E, "The Role of Regulatory Enforcement in the Australian Economy," p 97 at 98 in Grabosky P and Braithwaite J, op cit n 7.

¹⁶ *R v Adler* [2004] NSWSC 108 at [113] affirmed on appeal in *Adler v DPP* [2004]

objective liability and protecting legal rights and with assisting plaintiffs to obtain restitution for their losses. Civil law is compensatory and businesslike and is concerned with damages incurred by individuals.¹⁷

By contrast, criminal proceedings have punitive and deterrent purposes, as discussed at [9.4]. Civil penalty proceedings for pecuniary penalty orders (see [8.6.6] and [8.8.2]) and disqualification orders (see [8.6.7] and [8.8.3]) are punitive in nature and, accordingly, the distinction between their purpose and the purpose of criminal proceedings is not an easy one to make.

The different purposes of civil and criminal proceedings require that there be clear rules governing when each type of proceeding should be used. In addition, those different purposes and their different consequences dictate that there should be distinct evidential and procedural rules for each type of proceeding, as discussed at [8.6]-[8.6.8].

[8.5] The different elements of civil and criminal contraventions

The different elements required to prove civil or criminal contraventions of the regulatory legislation provide some guidance as to when the regulator will commence civil or criminal proceedings. But, in some cases, there is a blurring of the distinction between the elements necessary to establish civil or criminal contraventions of the regulatory laws.

Some uniformity, in relation to the elements of criminal offences, has been introduced by the *Criminal Code Act 1995* (Cth) which applies uniform principles of criminal responsibility in criminal proceedings relating to Commonwealth offences. It is implicit from this legislation that, as a general rule, a regulator would pursue civil proceedings including, civil penalty proceedings, where there is a contravention of the

NSWCCA 352 at [42]-[43]. See also *ASIC v Petsas* [2005] FCA 88 at [1].

¹⁷ Newkirk T and Brandriss I, “Speech by SEC Staff: The Advantages of a Dual System: Parallel Streams of Civil and Criminal Enforcement of the US Securities Laws,” at fns 10-11, at <http://www.sec.gov/news/speech/speecharchive/1998/spch222.htm>, viewed on 15 March 2005.

“physical elements” (as opposed to the “fault elements” of a criminal offence) of the relevant section of the regulatory legislation. Section 4.1 of the *Criminal Code Act 1995* (Cth) provides that the “physical elements” may include conduct, a result of conduct or a circumstance in which conduct occurs. For example, where there is a contravention of the director’s duty to act in the best interests of the corporation, or for a proper purpose (the “physical elements” of s 181 of the *Corporations Act*), without intentional dishonesty or recklessness (the “fault elements” of the criminal offence contained in s 184 of that Act), then it is appropriate for ASIC to commence civil proceedings for civil penalty orders under Part 9.4B of the *Corporations Act*.¹⁸

In contrast, the regulator, or the Commonwealth DPP, may decide to pursue criminal proceedings where there is a contravention of both the “physical elements” and the “fault elements” of the relevant section.¹⁹ Section 5.1 of the *Criminal Code Act 1995* (Cth) provides that the “fault elements” of the relevant section include intention, knowledge, negligence or recklessness. However, as noted at [6.8], the *Criminal Code Act 1995* (Cth) is residual in nature and its operation may be specifically excluded by the regulatory legislation. In some cases, the specific regulatory legislation has different “fault elements” to those contained in the *Criminal Code Act 1995* (Cth). For example, the concept of negligence is a “fault element” of a criminal offence under s 5.1(1) of the *Criminal Code 1995* (Cth) but has been excluded as a “fault element” in the *Corporations Act*. Accordingly, a breach of the director’s duty of due care and diligence under s 180 of the *Corporations Act* may result in the imposition of a civil penalty under Part 9.4B of that Act but does not constitute a criminal offence. It is suggested that the *Corporations Act* adopts the preferable approach because “mere” negligence is inconsistent with the “fault elements” (such as intention) and it is inappropriate to impose criminal liability in respect of “mere” negligence.²⁰ The definition of negligence in s 5.5 of the *Criminal Code Act 1995* (Cth) was intended to make it clear that only levels of negligence that are “gross or shocking” (in comparison to reasonable standards of behaviour) are intended to attract criminal liability. However, that definition does not make this

¹⁸ ALRC, DP 65, op cit n 11, at [4.49], [4.60] and [4.61].

¹⁹ Section 3.1 of the *Criminal Code Act 1995* (Cth) provides that an offence consists of “physical elements” and “fault elements.”

²⁰ Explanatory Memorandum, *Corporate Law Economic Reform Program Bill 1998* (Cth), at [6.76].

clear and s 5.5 should be amended to provide that only such levels of negligence attract criminal liability.²¹ In the context of other civil penalty provisions relating to directors' duties, some judges have added to the confusion by referring to those provisions as "offences."²²

In some cases, such as the insider trading provision in s 1043A of the *Corporations Act*, the legislation contains provisions which include "fault elements" for both the civil contravention and the criminal offence. This means that, in those cases, there is nothing that effectively distinguishes the civil contravention from the criminal contravention. The practical distinction lies in the fact that ASIC will prefer to pursue civil penalty proceedings for a contravention of sections such as s 1043A because such proceedings attract the lower standard of proof of "on the balance of probabilities" (see [8.6.5]). The difficulties of proving the mental element (fault element) in s 1043A, according to the criminal standard of proof, is the main reason why ASIC would elect, as it did in *ASIC v Petsas*,²³ to commence civil penalty proceedings.

The Australian legislation should contain clear and uniform distinctions between the elements necessary to establish civil or criminal contraventions. It is suggested that the "physical elements" of a civil contravention should be clearly defined so that they do not include any of the "fault elements" of a criminal offence or involve any blurring with criminal law concepts. The "fault elements" of a criminal offence should also be clearly defined in such a way as to ensure that they do not overlap with the definitions of the "physical elements." The legislation should also make it clear that where there is a contravention of the "physical elements" of the relevant law (including cases involving "mere" negligence) without the "fault elements" of a criminal offence, the regulators can only commence civil or civil penalty proceedings.

²¹ Leader-Elliott I, *The Commonwealth Criminal Code – A Guide for Practitioners* (Commonwealth Attorney-General's Department, March 2002) at pp 83 and 85.

²² See *ASIC v Vizard* [2005] FCA 1037 at [25] and [30] per Finkelstein J in the context of a civil contravention of the director's duty not to make an improper use of information in s 183 of the *Corporations Act*.

²³ [2005] FCA 88.

The legislation should also make it clear that where the contravention of the “physical elements” of the relevant law involves intention, knowledge, recklessness or “gross” negligence (the fault elements), then the regulator, or the Commonwealth DPP, may commence criminal proceedings.²⁴

Such mutually exclusive elements of civil and criminal contraventions would send a clear message to the regulators and the regulated about the situations in which civil or criminal proceedings, or both, should commence. Such a reform may also assist to reduce the perception that some members of the judiciary are treating some civil penalty proceedings as quasi-criminal (see [8.6.3]). This reform would also introduce greater certainty in the principles governing the regulators’ decisions to commence civil, civil penalty proceedings or criminal proceedings thereby promoting consistency and transparency in decision-making and assisting to ensure that like cases are treated alike.²⁵

[8.6] Civil evidence and procedure rules

[8.6.1] Jurisdiction of the courts

The *Judiciary Act 1903* (Cth) was amended in 1999 to provide that the Federal Court has jurisdiction in any matters arising under Commonwealth law except criminal matters.²⁶ Accordingly, all Australian Commonwealth regulators may commence civil proceedings (including civil penalty proceedings) in the Federal Court.²⁷

Where ASIC is acting under the *Corporations Act* or the *ASIC Act*; ASIC, APRA, or the ATO are acting under the *Superannuation Industry (Supervision) Act*

²⁴ Of course, where the regulator, or the Commonwealth DPP, has difficulty proving these fault elements, it could elect to pursue civil proceedings.

²⁵ ALRC DP 65, op cit n 11, at [4.51], [4.68], [4.69] and [4.70]. See also *ASIC v Petsas* [2005] FCA 88 at [12].

²⁶ Section 39B(1A)(c). See also ALRC, Review of the *Judiciary Act 1903* (Cth), DP 64: at [2.141], at <http://www.austlii.edu.au/au/other/alrc/publications/dp/64/ch2.html>, viewed on 15 February 2005.

²⁷ See also s 15C of the *Acts Interpretation Act 1901* (Cth); and ALRC, *ibid*, at [2.139].

1993 (Cth); or ASIC and APRA are acting under the *Retirement Savings Accounts Act 1997* (Cth); that legislation²⁸ provides that civil proceedings (including civil penalty proceedings) may be commenced in the Federal Court or in the States' courts or Territory courts (exercising vested federal jurisdiction²⁹). This situation creates problems in relation to the applicable rules of evidence and procedure. The differing State Evidence Acts (and in some States, such as Queensland, the common law rules of evidence plus the rules contained in the *Evidence Act 1977* (Qld)) apply to civil proceedings in the State courts.³⁰ By contrast, the *Evidence Act 1995* (Cth) applies to proceedings in the Federal Court and the courts in the Australian Capital Territory and the Northern Territory.³¹ At the time of writing, only New South Wales and Tasmania have Evidence Acts that are modelled on the *Evidence Act 1995* (Cth).

In the case of the ACCC, and the ATO (where it is acting under the taxation legislation), civil proceedings (including pecuniary penalty proceedings) in relation to contraventions of the legislation may be commenced in the Federal Court and in the States' courts or the Territory courts.³² Accordingly, the same problems, described above, would apply to civil proceedings conducted by the ACCC and the ATO.

There are similar jurisdictional and evidential and procedural problems in the United Kingdom.³³

²⁸ See ss 1337B and 1337E of the *Corporations Act*; ss 10(1), 196, 215 and 313 of the *Superannuation Industry (Supervision) Act 1993* (Cth); and ss 16, 161 and 163 of the *Retirement Savings Accounts Act 1997* (Cth).

²⁹ The vesting of federal jurisdiction in the State courts is effected by s 39(2) of the *Judiciary Act 1903* (Cth) enacted pursuant to s 77(iii) of the *Commonwealth of Australia Constitution Act 1900* (UK).

³⁰ Forbes JRS, "Evidence Law in Queensland," 5th Ed, Thomson Legal and Regulatory Group, Sydney, 2005, at p 5.

³¹ *R v Hughes* [2001] WASCA 300 at [59] and [99]-[100]; and s 1338C(1)(c) of the *Corporations Act*. Section 4 of the *Evidence Act 1995* (Cth) lists the courts and the proceedings to which the Act applies.

³² Section 86 of the *Trade Practices Act 1974* (Cth); and ss 8ZG and 8ZJ(3) of the *Taxation Administration Act 1953* (Cth). In *Forsyth v Deputy Commissioner of Taxation* [2007] HCA 8 at [45] it was held that the District Court has jurisdiction in taxation matters.

³³ The lack of uniformity in relation to the applicable evidential and procedural rules is exacerbated by the fact that the courts in which proceedings may commence differ under each of the regulatory laws and also differ depending on whether the proceedings are commenced in England, Wales, Scotland or Northern Ireland.

[8.6.2] Law reform

Under current Australian law, the applicable evidential and procedural rules vary depending upon which court the Australian regulator commences the civil proceedings in. Lawyers in those States that are not governed by the evidence laws modelled on the *Evidence Act 1995* (Cth) must be skilled in at least two different evidence regimes depending on whether they are appearing in the State court or the Federal Court. These two evidential regimes mean that the regulated must deal with different rules on matters such as client legal professional privilege and the storage and maintenance of corporate records.³⁴

The problems of inconsistency in the evidential and procedural rules could be partly resolved if all civil proceedings for regulatory contraventions were conducted in the Federal Court, rather than in the different States' courts. However, the Federal Court would need a significant increase in resources to cope with the increased caseload and a formal presence outside its current locations.³⁵

Disqualification proceedings must be commenced in the High Court (England, Wales and Northern Ireland), the Court of Session (Scotland), or in any court in which bankruptcy proceedings have commenced against the defendant or in which the relevant insolvency proceedings are being conducted: see ss 2(2)(a), 3(4), 4(2), 6(3), 8(3), 10, 11, 12 and 17 of the *Company Directors Disqualification Act 1986* (UK) cited in Walters A and Davis-White M, "Directors' Disqualification: Law and Practice," Sweet & Maxwell, London, 1999, at pp 168-169. HMRC commences civil proceedings for the recovery of tax owing in the Magistrates Court, the County Courts or the High Court depending on the amount that is owing and depending on whether those proceedings were commenced in England, Wales or Northern Ireland: see ss 65-68 of the *Taxes Management Act 1970* (UK). Proceedings for an injunction or an order for restitution are generally commenced in the High Court or the Court of Session: see ss 380, 380(4), 382 and 415 of the *Financial Services and Markets Act 2000* (UK); s 728 of the *Companies Act 1985* (UK); and s 59 of the *Competition Act 1998* (UK).

³⁴ Email from michelle.hauschild@alrc.gov.au dated 4 July 2005 quoting Professor David Weisbrot. See also ALRC, DP 69, op cit n 10; ALRC, Report 102, "Uniform Evidence Law," at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/alrc/publications/reports/102/07.html?query=Review%20of%20the%20Uniform%20Evidence%20Acts%20ALRC>, viewed on 18 February 2007.

³⁵ A similar reform has been suggested in the context of criminal proceedings. The ALRC has suggested that there should be an expansion of the original and appellate jurisdiction of the Federal Court to hear and determine criminal matters: see generally ALRC, DP 70, "Sentencing of Federal Offenders, Equality in the Treatment of Federal Offenders," at [3.31], at

Another reform option is for all Australian States to follow the lead of New South Wales and Tasmania and adopt legislation modelled on the *Evidence Act 1995* (Cth). This would also accord with the approach in the United States which has adopted uniform *Federal Rules of Civil Procedure*.³⁶

The ALRC's and the NSWLRC's recent reviews of the evidence laws have now become a national project and there is now unprecedented political and professional support for the harmonisation of Australia's evidence laws.³⁷ Accordingly, it is possible that the other States will enact evidence laws that are modelled on the *Evidence Act 1995* (Cth).

If State cooperation is not forthcoming, a simpler approach may be for the Commonwealth Parliament to amend the relevant regulatory legislation by expressly providing that all Commonwealth regulators' civil and civil penalty proceedings that are conducted in the States' courts (exercising vested federal jurisdiction) are governed by the provisions of the *Evidence Act 1995* (Cth) (which would include the reforms suggested in this chapter).

Even if all jurisdictions were to align their evidential rules with those in the *Evidence Act 1995* (Cth), this would not resolve the problem of which specific evidential and procedural rules should apply to civil penalty proceedings.

A new chapter could be included in the *Evidence Act 1995* (Cth) that sets out the evidential and procedural rules that apply to civil penalty proceedings (thereby resolving the uncertainty in the law discussed at [8.6.3.]-[8.6.8]) which could then be adopted by the States. This approach would resolve the common problems faced by

<http://www.austlii.edu.au/au/other/alrc/publications/dp/70/>, viewed on 5 December 2005.

³⁶ The uniform rules contained in the *Federal Rules of Civil Procedure* apply to all civil proceedings irrespective of the particular court in which they were commenced: see Newkirk T and Brandriss I, op cit n 17, at fns 19 and 20. In the United States, the regulators' civil proceedings are conducted in the District Court (see, for example, s 7402 of the *Internal Revenue Code* (US)). Section 21 of the *Securities Exchange Act 1934* (US) provides that the SEC's civil enforcement proceedings are conducted in the District Court and the Federal Court.

³⁷ Email from michelle.hauschild@alrc.gov.au, dated 4 July 2005 quoting Professor David Weisbrot.

the regulators and the regulated “once and for all”. The ATO has indicated that it favours a legislative approach and that an express statement in the legislation as to the procedures that should be applied by the courts would provide greater certainty.³⁸ This would assist to produce greater consistency in decision-making by judges in the different States’ courts and assist to ensure that from an evidential and procedural perspective, like cases are treated alike, even though they are heard in the different States’ courts or in the Federal Court.

The ALRC has also suggested that the procedural problems could be dealt with by enacting a “Regulatory Contraventions Statute.”³⁹

[8.6.3] *The meaning of civil evidence and procedure rules*

As a general rule, civil procedures allow the regulator and the defendant more liberal procedures (in comparison to criminal proceedings) to obtain relevant facts and to prove their cases. The civil rules of discovery allow for substantially more pre-trial gathering of evidence by each party than is the case in criminal proceedings.⁴⁰

While it is relatively easy to make general observations about the evidential and procedural differences between civil proceedings and criminal proceedings, it is more difficult to determine which specific rules are unique to the regulators’ civil and civil penalty proceedings and the legislation provides no clear guidance on those issues.

Where ASIC is acting under the *Corporations Act*, s 1317L requires the court to apply the “rules of evidence and procedure for civil matters” in proceedings for a

³⁸ ALRC, “Non-Monetary Penalties,” at [27.62], at <http://www.austlii.edu.au>, viewed on 15 March 2005.

³⁹ See ALRC, op cit n 10, recommendation 6-7, cited in Rees A, op cit n 10, at p 154.

⁴⁰ The regulator and the defendant can obtain statements from all relevant witnesses. They can submit written interrogatories and requests for admissions to the other party and they can require the other party to produce documents and other information relevant to the matter. This information must be provided subject to any claim of legal professional privilege and, perhaps, the penalty privilege and the privilege against self-incrimination (see [8.6.4]). See, for example, *Federal Rules of Civil Procedure*, Rule 26(b)(1) cited in Newkirk T and Brandriss I, op cit n 17, at fn 19.

declaration of a contravention or a pecuniary penalty order. Where ASIC, APRA or the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth), there is a similar provision in s 199 of that Act. Section 77 of the *Trade Practices Act 1974* (Cth) provides that the ACCC may commence a “civil action” for the recovery of a pecuniary penalty. The taxation legislation provides that a prosecution of a “prescribed taxation offence” is conducted in accordance with the “usual practice and procedure of the Supreme Court in civil cases.”⁴¹ The problem is that there is no clear body of case law or statute law that can be described as the “usual civil evidential and procedural rules.” ASIC and the ATO have expressed the concern that there is uncertainty about which procedural rules will apply in their civil penalty proceedings and have indicated that this has caused them litigation difficulties.⁴²

Similar problems exist in the United Kingdom and some commentators have indicated that there must be a framework which facilitates the efficient and expeditious conduct of civil proceedings.⁴³ The current United Kingdom rules of civil procedure have been described as having been created as the result of a “piecemeal approach” and as being the product of an “historical accident.”⁴⁴

In some Australian cases, such as in *Re Water Wheel Mills Pty Ltd*,⁴⁵ the lack of clarity is exacerbated by the fact that the rules of civil procedure have been modified by the courts. In that matter, Mandie J ordered ASIC to file its case against the defendants and treated the civil penalty proceedings more like criminal

⁴¹ Section 8ZJ(6) of the *Taxation Administration Act 1953* (Cth). See generally *Australian Crime Commission v AA Pty Ltd* [2006] FCAFC 30 at [34].

⁴² ALRC, op cit n 10, “The Purposes of Penalties” at [3.58]-[3.59]; ALRC, DP 65, op cit n 11, at [2.83]; and ALRC Background Paper 7 - Review of Civil and Administrative Penalties, In Federal Jurisdiction at Item 2 “Defining Penalties and Sanctions” and fn 113, at <http://www.austlii.edu.au>, viewed on 19 March 2003.

⁴³ Walters A and Davis-White M, op cit n 33, at pp 176-177 and fn 33, and 184.

⁴⁴ A Walters and M Davis-White, op cit n 33, at pp 168, 176-77 and 213. The courts in the United Kingdom have expressed concern about the costs of civil proceedings and, particularly, the burden that such proceedings can impose on a defendant when they are commenced by a public regulator: see *Re Moonlight Foods (UK) Ltd, Secretary of State for Trade and Industry v Hickling* [1996] BCC 678 at 690 per Weeks J cited in A Walters and M Davis-White, op cit n 33, at p 184.

⁴⁵ Unreported, Supreme Court of Victoria, 15 December, 2000. See also T Middleton, “The difficulties of applying civil evidence and procedure rules in ASIC’s civil penalty proceedings under the Corporations Act” (2003) 21 *C&SLJ* 507.

proceedings by refusing to grant ASIC's application that the defendants file an early defence. This decision highlights the flexibility of civil proceedings, the power of the courts to tailor civil procedures to ensure that justice is afforded in each case⁴⁶ and the difficulties of applying civil procedures in civil penalty proceedings. The flexibility of civil proceedings may blur the distinction between criminal proceedings and civil proceedings and may also produce a lack of consistency in the way various cases are treated by different courts and judges.⁴⁷

These problems are partly a product of the general concerns of judges that the regulators can commence civil penalty proceedings (particularly those that are punitive in nature) as civil proceedings. The judges' concerns are that such proceedings afford fewer procedural protections to defendants than criminal proceedings, involve a lower (albeit variable) civil standard of proof (on the balance of probabilities⁴⁸) in comparison to the higher criminal standard of proof (of beyond reasonable doubt⁴⁹), can be commenced by the regulators without being scrutinised by the Commonwealth DPP and may be tried by a judge, rather than by a judge and jury ("thereby evading the jury's ability to nullify an overly harsh law"⁵⁰). Those factors may also influence the courts to develop special or hybrid procedural rules (which are more applicable to criminal law) in civil penalty proceedings to protect defendants from the excessive exercise of State power.⁵¹ In some cases, in the United States, the courts have made the "imposition of punitive [civil] sanctions contingent upon heightened procedural protections."⁵² In contrast to the views of the writer,

⁴⁶ See also *One.Tel Limited (in liq) v Rich* [2005] NSWSC 226 at [77] per Bergin J.

⁴⁷ ALRC, DP 65, op cit n 11, at [17.73]; and ALRC, op cit n 10, "Purposes of Penalties," at [3.52].

⁴⁸ See generally Greenwood, AB "Corporate officers – Bounden duty and service...and reasonable and lively sacrifice?" [1992] 6 BCLB at [102].

⁴⁹ See s 13.2(1) of the *Criminal Code Act 1995* (Cth).

⁵⁰ Coffee JC, "Paradigms Lost: The Blurring of the Criminal and Civil Law Models – And What Can Be Done About It", (1992) 101 Yale Law Journal, 1875 at 1888.

⁵¹ In *ASIC v Rich* [2005] NSWSC 417 at [364]-[368] Austin J was of the view that the courts were not developing a special system of evidential and procedural rules for civil penalty proceedings.

⁵² See generally Mann K, "Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law", (1992) 101 Yale Law Journal, 1795 at pp 1799, 1800 and 1816-1817.

Rees argues that there is merit in adopting a hybrid set of rules to reflect the punitive nature of civil penalties.⁵³

This lack of clarity and consistency encourages procedural challenges and leads to additional delays and costs. For example, there has recently been a number of procedural challenges regarding whether the Australian regulators must observe the criminal law principle of “prosecutorial fairness”⁵⁴ in civil penalty proceedings and whether the rule in *Jones v Dunkel* applies in such proceedings. Similar issues have arisen in the United Kingdom.⁵⁵

It is argued that the language used in the Australian legislation, described above, is a clear indication that Parliament did not intend the criminal law concept of “prosecutorial fairness” to apply to civil penalty proceedings.⁵⁶ Even in the absence of a requirement of “prosecutorial fairness” in civil penalty proceedings, the court’s own inherent processes would ensure that defendants are afforded procedural fairness or natural justice and, as noted above, the courts have an inherent ability to tailor civil procedures to ensure that justice is afforded in each case. In the interests of certainty and uniformity, and to ensure that the regulators can pursue civil penalty proceedings as a real alternative to criminal proceedings, the legislation should expressly provide that the “prosecutorial fairness” does not apply to the regulators’ civil penalty proceedings.

The legislation should expressly provide that the rule in *Jones v Dunkel* applies to all Australian regulators’ civil penalty proceedings because the nature of

⁵³ Rees A, op cit n 10, at p 155.

⁵⁴ In *Adler v ASIC* [2003] NSWCA 131 at [678] and [681] the New South Wales Court of Appeal held that prosecutorial fairness or some analogous duty does not apply to ASIC’s civil penalty proceedings. In *ASIC v Plymin, Elliott & Harrison* [2003] VSC 123 at [544] and [547]-[550] Mandie J (of the Supreme Court of Victoria) left this question open. In *ASIC v Loiterton* [2004] NSWSC 172 at [38] ASIC accepted that it has a duty to act fairly in civil penalty proceedings. In *ASIC v Rich* [2005] NSWSC 417 at [357]-[359] Austin J held that ASIC did not owe the defendant any duty of prosecutorial fairness.

⁵⁵ *Re Moonlight Foods (UK) Ltd, Secretary of State for Trade and Industry v Hickling* [1996] BCC 678 at 690 per Weeks J cited in A Walters and M Davis-White, op cit n 33, at p 184.

⁵⁶ *Adler and Williams v ASIC* [2003] NSWCA 131 at [678].

those proceedings (namely, civil rather than criminal) is not such as to be regarded as a sufficient explanation for the defendants' failure to give evidence.⁵⁷ Similar principles operate in the United States.⁵⁸ This reform would mean that defendants and their lawyers are given clear guidelines and can make an informed choice about whether to give particular evidence in civil penalty proceedings (which may be self-incriminating or which could prematurely disclose that person's defence to any subsequent criminal proceedings relating to the same conduct) or refuse to give such evidence (thereby running the risk that the court may draw an adverse *Jones v Dunkel* inference).⁵⁹

[8.6.4] *Penalty privilege and the privilege against self-incrimination*

The ALRC is of the view that the courts may have treated certain civil penalty proceedings like criminal proceedings by affording defendants the protection of the penalty privilege and privilege against self-incrimination in those proceedings.⁶⁰ This view is disputable because those privileges are not exclusive to criminal matters but also operate in civil matters (although those privileges do not apply as broadly as they do in criminal law). Historically, the penalty privilege originated from the civil law rules of discovery.⁶¹ Recent case law involving ASIC indicates that the penalty privilege⁶² and the privilege against self-incrimination⁶³ may be claimed by defendants in civil penalty proceedings under the *Corporations Act* for a pecuniary penalty order and a disqualification order. This approach is supported by the fact that

⁵⁷ *Adler and Williams v ASIC* [2003] NSWCA 131 at [664].

⁵⁸ Federal Rules of Criminal Procedure, 16 (a)-(b) cited in Newkirk T and Brandriss I, op cit n 17, at fn 20.

⁵⁹ See generally *R v Adler* [2004] NSWSC 108 at [123].

⁶⁰ ALRC, op cit n 10, at [11.75]; and ALRC, DP 65, op cit n 11, at [17.57], [17.62], [17.71] and [17.73]. See also *Re Water Wheel Mills Pty Ltd* Unreported, Supreme Court of Victoria, 15 December, 2000; and *ASIC v Plymin* [2002] VSC 56 at [5] and [15] per Mandie J.

⁶¹ *Microsoft Corporation v CX Computer Pty Ltd* [2002] FCA 3 at [45], [48], [51] and [72]; *Adler v ASIC* [2003] NSWCA 131 at [660]; *ASIC v Rich* [2003] NSWSC 328 at [24], [26] and [29]; and *Rich v ASIC* [2004] HCA 42 at [19], [20], [24] and [25].

⁶² *ASIC v Plymin* [2002] VSC 56 [5] and [15]; *Adler v ASIC* [2003] NSWCA 131 at [660]; and *Rich v ASIC* [2004] HCA 42 at [19], [20], [24] and [25].

⁶³ *ASIC v Plymin* [2003] VSC 123 at [552] per Mandie J; and *ASIC v Australian Investors Forum Pty Ltd (No 2)* [2005] NSWSC 267 at [23] per Palmer J.

such proceedings are penal or punitive nature.⁶⁴ Section 128 of the *Evidence Act 1995* (Cth) and the equivalent State legislation expressly recognise that the privilege against self-incrimination may be claimed in civil penalty proceedings,⁶⁵ but it is not clear whether that legislation extends to the penalty privilege. Defendants may also be able to claim these privileges in non-punitive civil penalty proceedings for a statutory compensation order where there is a real risk that they may give evidence in those proceedings that could expose them to a penalty in subsequent punitive civil penalty proceedings or criminal proceedings.⁶⁶ Rather than have these issues repeatedly litigated in the context of each regulator's civil and civil penalty proceedings, the legislation should expressly state that both of these privileges may be claimed in such proceedings.

[8.6.5] *Standard of proof*

In Australia, the standard of proof in civil proceedings is “on the balance of probabilities.”⁶⁷ The standard of proof in both the United Kingdom⁶⁸ and the United States for civil proceedings is the same, although in the United States it is referred to as the “preponderance of evidence.”⁶⁹

⁶⁴ *Rich v ASIC* [2004] HCA 42 at [26], [29], [31] and [37]. In this case the High Court held that ASIC's proceedings under s 206C of the *Corporations Act* for an order disqualifying a director from managing corporations were punitive in nature.

⁶⁵ Section 128 provides that the judge can inform the defendants/witnesses that they may refuse to provide the relevant information on the ground of the privilege or they may choose to provide the information. In the latter case, the court can issue a certificate which provides the witness with “use” and “derivative use” evidential immunity in subsequent proceedings in relation to the self-incriminating information given in the current proceedings: see also [4.10.1]; and *Cornwell v The Queen* [2007] HCA 12 at [84] and [148]. By contrast, in the context of the regulators' oral examination powers, some of the Australian legislation, such as the *ASIC Act*, only affords examinees “use” evidential immunity whereas other legislation, such as the *Trade Practices Act 1974* (Cth) afford examinees “use” and “derivative use” immunity in exchange for the abrogation of the relevant privilege (see [4.10.2]). Consistent with the reforms discussed at [4.10.2.1], it is suggested that the legislation should only afford witnesses “use” evidential immunity where those privileges are claimed in court.

⁶⁶ *One.Tel (in liq) v Rich* [2005] NSWSC 226 at [77].

⁶⁷ See ss 1332 of the *Corporations Act*; and s 322(2) of the *Superannuation Industry (Supervision) Act 1993* (Cth).

⁶⁸ See Walters A and Davis-White M, op cit n 33, at p 156.

⁶⁹ *Addington v Texas*, 441 US 418 (1979) cited in Newkirk T and Brandriss I, op cit n 17, at fn 23. See also Wikipedia, “Burden of Proof” at

However, in more serious civil and civil penalty proceedings, such as pecuniary penalty proceedings,⁷⁰ disqualification proceedings,⁷¹ and compensation proceedings,⁷² some Australian courts have also adopted a flexible or variable standard of proof (the common law *Briginshaw*⁷³ standard of “reasonable satisfaction”). From the public interest perspective, it could be argued that a variable civil standard of proof is not desirable as, in more serious civil penalty proceedings, there is concern (as noted by the ALRC in the context of customs prosecutions⁷⁴ and perhaps in a wider regulatory context⁷⁵) that the court may treat the matter more like a criminal proceeding and require the Australian regulators to satisfy a higher standard of proof.⁷⁶

Some ASIC and ATO officers have commented that the judges have demanded an almost criminal standard of proof in some civil penalty proceedings even though the nominal standard of proof is “on the balance of probabilities”.⁷⁷ It

http://en.wikipedia.org/wiki/Burden_of_proof#Standard_of_proof, viewed on 19 February 2007.

⁷⁰ *ASIC v Adler* [2002] NSWSC 171 at [1] and [437]; *ASIC v Whitlam* (2002) 42 ACSR 407; *ASIC v Vines* [2002] NSWSC 1223 at [1] and [20]; *ASIC v Plymin, Elliott & Harrison* [2003] VSC 123 at [363]; and *Adler v ASIC* [2003] NSWCA 131 at [146]-[147].

⁷¹ *ASIC v Adler* [2002] NSWSC 171 at [1] and [437]; *ASIC v Whitlam* (2002) 42 ACSR 407; *ASIC v Plymin, Elliott & Harrison* [2003] VSC 123 at [363]; and *Adler v ASIC* [2003] NSWCA 131 at [146]-[147].

⁷² See *ASIC v RAC Cochrane* [1999] NSWSC 814.

⁷³ *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362 per Dixon J. See generally *ASIC v Reid* [2005] FCA 1275 at [13].

⁷⁴ ALRC, op cit n 10, at [3.50].

⁷⁵ ALRC, DP 65, op cit n 11, at [17.62] and [17.71].

⁷⁶ Caltex Australia Ltd made submissions to the Dawson Committee, and suggested that, given the size of the pecuniary penalties for breaches of Part IV of the *Trade Practices Act 1974* (Cth), consideration should be given to proof beyond reasonable doubt: see *Submission to the Review of the Trade Practices Act 1974*, http://tpareview.treasury.gov.au/content/subs/065_submission_caltex.pdf, 11 July 2002.

⁷⁷ ALRC, DP 65, op cit n 11, at [17.62] and fn 58 citing Gilligan G, Bird H and Ramsay I, *Regulating Directors' Duties – How Effective are the Civil Penalty Sanctions in the Australian Corporations Law?* (1999), Centre for Corporate Law and Securities Regulation, Melbourne. Such comments have some support in other areas of law. For example, Sulan J in *Noack v Adlam* [1998] 3803 SADC (a defamation case), and White J in *Sheldon v Sun Alliance Australia Limited* (1989) 53 SASR 97 at 101 (an insurance case), indicated that the trial judge made an error of law or fact by using the *Briginshaw* rule in such a way as to apply a criminal standard of proof in a

has been argued in the United Kingdom that the penal nature of certain civil proceedings, such as disqualification proceedings, means that the stricter criminal standard of proof should apply to such proceedings but this argument has been rejected. The courts in the United Kingdom have however recognised that, in punitive civil proceedings, some adjustment to the civil standard of proof may be required. They have therefore adopted the view that the more serious the allegation, the more cogent the evidence required to establish the contravention.⁷⁸

It is difficult to determine whether particular judges (using a variable civil standard of proof or the *Briginshaw* rule) have applied a “close to criminal standard of proof” in the regulators’ civil penalty cases unless the regulators argue those matters on appeal. One commentator in the United States⁷⁹ suggests that such an argument could be raised on appeal. However, given the subtleties involved in applying the variable civil standard of proof (including the judge’s own internal thought processes), it is unlikely that arguments that are based solely on whether the applicable standard of proof was adopted would determine the outcome of any appeal.

In some recent Australian civil penalty proceedings the judges have indicated that they required “exactness of proof”⁸⁰ and have expressly relied upon considerations such as the “public interest dimension in terms of prosecutorial fairness” (see [8.6.3]) and have commented that the court must have “proper regard for the seriousness of the civil penalties involved.”⁸¹ Comments of this nature raise questions as to the standard of proof adopted in such proceedings. At the other end of

civil case. There have also been a number of Privy Council and English decisions which have incorrectly applied a criminal standard of proof in civil cases: see, for example, *Lanford v General Medical Council* [1990] 1 AC 13 at 19-20; *Re Solicitor* [1992] 2 WLR 522 at 562 cited in *ASIC v Vines* [2005] NSWSC 738 at [1106].

⁷⁸ *Re Living Images Ltd* [1996] 1 BCLC 348 at 355, [1996] BCC 112 at 116 cited in Walters A and Davis-White M, op cit n 33, at p 156. See also *Hornal v Neuberger Products* [1957] 1 QB 247 at 266; and *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 at 586 cited in *ASIC v Vines* [2005] NSWSC 738 at [1106].

⁷⁹ See generally Mann K, op cit n 52, at p 1815.

⁸⁰ *ASIC v Vines* [2002] NSWSC 1223 at [13] per Austin J.

⁸¹ *ASIC v Adler* [2001] NSWSC 1168 at [9] per Santow J; *ASIC v Adler* [2002] NSWSC 171 at [1] per Santow J; *Adler and Williams v ASIC* [2003] NSWCA 131 at [678]; and *ASIC v Plymin, Elliott & Harrison* [2003] VSC 123 at [544]-[550].

the spectrum, some commentators have expressed concern that the civil penalty regime is essentially about lowering the standard of proof in penal proceedings.⁸²

In the context of the Australian regulators' civil penalty proceedings, the adoption of the *Briginshaw* or variable civil standard of proof creates a paradox. On the one hand, it affords greater protection to defendants by requiring the regulator to satisfy a higher standard of proof in serious civil penalty cases. The regulator must satisfy a greater certainty of proof or "exactness of proof" before the courts are willing to impose "punitive" orders, such as a pecuniary penalty order or a disqualification order. The variable civil standard of proof assists the accuracy of decision-making by the courts and safeguards the private interests of defendants by reducing the risk of an erroneous imposition of a civil penalty.⁸³

On the other hand, because the regulator is seeking to promote public and private interest objectives when pursuing disqualification proceedings or in assisting the victim to recover compensation, the variable civil standard of proof could make it more difficult to achieve those objectives. However, it could also be argued that the variable civil standard of proof promotes the public interest in that the regulator has to satisfy a less burdensome standard of proof (in comparison to criminal proceedings) in civil penalty proceedings that are designed (in part) to protect the public (as is the case with disqualification proceedings).⁸⁴

It is unlikely that the Australian judges in the civil penalty cases⁸⁵ have misapplied the variable civil standard of proof in such a way as to have adopted a criminal standard of proof. In fact, in recent cases, some judges have expressly stated that serious civil penalty proceedings are not criminal proceedings and that the civil standard of proof applies them.⁸⁶ Judges must perform a difficult balancing exercise

⁸² See generally Greenwood AB, op cit n 48, at [102].

⁸³ See generally Mann K, op cit n 52, at pp 1812, 1816 and 1820; and note the comments of Coffee JC, op cit n 50, at pp 1890-1891.

⁸⁴ See Kluver J, "Part 9.4B – Civil penalty provisions" [1992] 25 BCLB at [432].

⁸⁵ See, for example, *ASIC v Vines* [2002] NSWSC 1223; *ASIC v Adler* [2001] NSWSC 1168; [2002] NSWSC 171; [2002] NSWSC 483; *Adler and Williams v ASIC* [2003] NSWCA 131; *ASIC v Plymin, Elliott & Harrison* [2003] VSC 123; *ASIC v Whitlam* (2002) 42 ACSR 407; and *Whitlam v ASIC* [2003] NSWCA 183.

⁸⁶ *ASIC v Adler* [2002] NSWSC 171 at [1] and [437]; *ASIC v Whitlam* (2002) 42

in civil penalty proceedings in that they must be mindful of the public interest objectives that underpin the regulators' proceedings and, at the same time, they must ensure that the private interests of individual defendants are not unduly abrogated by the regulators' enforcement activities. It is suggested that *Briginshaw* or variable civil standard of proof (if correctly applied) assists the judges to maintain the balance between those competing interests.

Section 140 of the *Evidence Act 1995* (Cth) has statutorily adopted the *Briginshaw* approach and provides that when a court is deciding whether a party's case has been proved on the balance of probabilities, the court may take into account the nature of the cause of action or defence, the nature of the subject matter of the proceeding and the gravity of the matters alleged.⁸⁷ For the reasons discussed at [8.6.1] this provision does not apply Australia-wide. However, the "common law" *Briginshaw* standard of proof may apply to civil litigation (involving serious civil penalties) in those States' courts that are not yet subject to uniform evidence laws.

The Australian legislation should be amended to expressly provide that the statutory variable civil standard of proof applies in all regulators' serious civil and civil penalty proceedings (including pecuniary penalty and disqualification proceedings). This would make the position clearer in those States that have not adopted legislation equivalent to the *Evidence Act 1995* (Cth) and avoid the uncertainties in the law created by the present "case-by-case" and "jurisdiction-by-jurisdiction" approach.

[8.6.6] Pecuniary penalty orders

In this section the nature of pecuniary penalty orders is discussed with the view to understanding whether civil or criminal evidential and procedural rules should be applied to pecuniary penalty proceedings. Pecuniary penalties are also discussed at

ACSR 407; *ASIC v Plymin, Elliott & Harrison* [2003] VSC 123 at [363]; and *Adler v ASIC* [2003] NSWCA 131 at [146]-[147] and [664].

⁸⁷ See also ALRC, Background Paper 7, op cit n 42, at [2.81]. See also the ALRC, op cit n 10, at [2.82].

[8.8.2] where the emphasis is on how the existing pecuniary penalty order regime may be improved.

All Australian regulators have power to commence “civil penalty” proceedings for a pecuniary penalty order.⁸⁸ The common feature is that the legislation provides that “civil evidential and procedural rules” apply to such proceedings.⁸⁹ Despite this direction, there have been suggestions that, in some cases, the courts have treated such proceedings as quasi-criminal. Proceedings for a pecuniary penalty order, or a disqualification order, are like criminal proceedings because they have a punitive purpose; they involve a contest between the State (represented by a public regulator with vast resources) and the individual; they are concerned with public wrongs and moral culpability, and not merely conduct causing damage; and they probably attract the penalty privilege and the privilege against self-incrimination (see [8.6.4]).⁹⁰ In some cases, the courts have adopted criminal law principles in relation to the question of whether to impose a civil pecuniary penalty order or a disqualification order and those principles have also been used to determine the amount of the pecuniary penalty, or duration of the disqualification order, as the case may be.⁹¹

The question of whether proceedings for a pecuniary penalty order should be governed by “civil evidential and procedural rules” depends in part on the nature of such orders and on the intention of Parliament. It is recognised that there are obvious difficulties that arise when attempting to classify pecuniary penalty orders and disqualification orders as civil or criminal in that the distinction is not mutually

⁸⁸ Section 1317G of the *Corporations Act*; s 196(3) of the *Superannuation Industry (Supervision) Act 1993* (Cth); s 76 of the *Trade Practices Act 1974* (Cth); and s 8ZJ(1) of the *Taxation Administration Act 1953* (Cth). See also Australian Master Tax Guide, CCH, 2004 at [29.700].

⁸⁹ Section 1317L of the *Corporations Act*; s 199 of the *Superannuation Industry (Supervision) Act 1993* (Cth); s 77 of the *Trade Practices Act 1974* (Cth); and s 8ZJ(6) of the *Taxation Administration Act 1953* (Cth).

⁹⁰ See generally the submissions in *ASIC v Rich* [2005] NSWSC 417 at [351]-[353].

⁹¹ *Elliot v ASIC* (2004) 10 VR 369 at [137]; *Forge v ASIC* [2004] NSWCA 448 at [412]-[427]; *ASIC v Petsas* [2005] FCA 88 at [3], [14], [17] and [18] per Finkelstein J; *ASIC v Vizard* [2005] FCA 1037 at [25] and [30] per Finkelstein J; and *ASIC v White* [2006] VSC 239 at [21].

exclusive. They are both proceedings with civil (protective) and criminal (punitive) characteristics.⁹²

It has been held that the object of the civil pecuniary penalty in s 1317G of the *Corporations Act* is to punish the offender.⁹³ It is imposed irrespective of whether damage has been caused (in contrast to the position in relation to compensation orders, see [8.6.8]). The fine makes the contravention unprofitable and has a personal and general deterrent effect as well as a penal or punitive purpose. The pecuniary penalty also has a regulatory impact by sending a compliance message to both the defendant and the general public.⁹⁴ Greenwood has described the civil pecuniary penalty as a “noxious hybrid” and is of the view that its introduction into corporate law will be regretted.⁹⁵

There are conflicting views in relation to whether the pecuniary penalties under the *Trade Practices Act 1974* (Cth) have the purpose of deterrence or punishment.⁹⁶ On either view, deterrence and punishment are features of the criminal justice system and those factors, coupled with the fact that the proceedings are

⁹² *CEO of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 201 ALR 1 at [114]; and *Rich v ASIC* [2004] HCA 42 at [35] and [43]. See also *ASIC v Reid* [2005] FCA 1275 at [24]; and *Chapel Road Pty Ltd v ASIC* [2006] NSWSC 1014 at [73]. By contrast, in *Rich v ASIC* [2004] HCA 42 at [96]. Kirby J (dissenting) indicated that the *Corporations Act* made the clearest possible distinction between civil proceedings and criminal proceedings in relation to conduct which contravened the civil penalty provisions. See also *ASIC v Rich* [2005] NSWSC 417 at [363] per Austin J.

⁹³ *ASC v Donovan* (1998) 28 ACSR 583 at 608 per Cooper J; *ASIC v Whitlam* [2002] NSWSC 718 at [6] per Gzell J; *ASIC v Forge* [2002] NSWSC 760 at [155] per Foster AJ; *ASIC v Parker* [2003] FCA 262 at [134] and [139] per Drummond J; *ASIC v Plymin, Elliott and Harrison* [2003] VSC 230 at [14]; *Adler and Williams v ASIC* [2003] NSWCA 131 at [658]-[659]; and *ASIC v Vines* [2006] NSWSC 760 at [47]. See also ALRC, op cit n 10, at [2.48].

⁹⁴ *ASC v Donovan* (1998) 28 ACSR 583 at 608 per Cooper J; *ASIC v Adler* [2002] NSWSC 483 at [125]-[126] per Santow J; *ASIC v Whitlam* [2002] NSWSC 718 at [6] per Gzell J; *ASIC v Forge* [2002] NSWSC 760 at [155] per Foster AJ; *ASIC v Doyle* [2002] WASC 223 at [20], [22], [76] and [92]; *ASIC v Parker* [2003] FCA 262 at [134] and [139] per Drummond J; *ASIC v Plymin, Elliott & Harrison* [2003] VSC 123 at [366] per Mandie J; *ASIC v Plymin, Elliott and Harrison* [2003] VSC 230 at [14], [106] and [111] per Mandie J; and ALRC, op cit n 10, at [25.23].

⁹⁵ See generally Greenwood AB, op cit n 48, at [102].

⁹⁶ *Trade Practices Commission v CSR Ltd* (1991) 13 ATPR 41-076 at 52,152; and *Trade Practices Commission v Stihl Chain Saws (Aust) Pty Ltd* (1978) 2 ATPR 40-091 at 17,896. These cases were cited in ALRC, DP 65, op cit n 11, at [8.46].

commenced by a public regulator, may persuade the court to treat such proceedings as quasi-criminal. The courts have applied criminal law sentencing principles including deterrence and rehabilitation when imposing civil penalties under the *Trade Practices Act 1974* (Cth). These factors, coupled with the severity⁹⁷ of the penalties under that Act, highlight the difficulty in deciding whether such proceedings should be treated more like criminal proceedings.⁹⁸

In the United Kingdom, the FSA,⁹⁹ the CC,¹⁰⁰ and HMRC,¹⁰¹ have the power to commence “civil” proceedings for the recovery of pecuniary penalties. There is no clear guidance under the relevant legislation regarding the applicable evidential and procedural rules.

In the United States, there are differing views on the nature of civil pecuniary penalties and on the applicable procedural rules. In *United States v Halper*¹⁰² it was held that civil penalties are punitive in nature for the purpose of the double jeopardy provisions. However, that was overruled in *Hudson v United States*¹⁰³ where the court held that there was no clear indication that civil penalties were intended to be punitive to render them criminal in nature for the purpose of the double jeopardy provisions. To date, the Australian courts have not applied the protection of the common law double jeopardy rules to civil penalties.¹⁰⁴ It has been suggested in the United States that given the punitive nature of pecuniary penalties, they should only be imposed in proceedings where the defendant has the right to a jury trial.¹⁰⁵

There are also suggestions in the United States that the pecuniary penalty is not punitive but is to compensate the government for the costs of investigating and

⁹⁷ See, for example, the severe penalties imposed in *ACCC v Pioneer Concrete (Qld)* [1996] ATPR 41-457.

⁹⁸ Clough J and Mulhern C, “The Prosecution of Corporations,” Oxford University Press, Melbourne, 2002 at p 161.

⁹⁹ See ss 64, 66, 91, 123 and 206 of the *Financial Services and Markets Act 2000* (UK).

¹⁰⁰ Section 37 of the *Competition Act 1998* (UK).

¹⁰¹ See s 100D(3) of the *Taxes Management Act 1970* (UK).

¹⁰² 490 US 435 (1989), 448-449. See also ALRC DP 65, op cit n 11, at [8.46].

¹⁰³ 522 US 93 (1997), 95-99. See also ALRC DP 65, op cit n 11, at [8.46].

¹⁰⁴ See ALRC, DP 65, op cit n 11, at [11.38].

¹⁰⁵ Coffee JC, op cit n 50, at p 1891.

enforcing the particular case. Given that compensatory purpose, it is argued that there is no need to afford the defendant the protection of certain special procedural rules (which are more applicable to criminal proceedings). However, this compensatory approach cannot be supported in view of the level of civil pecuniary penalties that may be imposed.¹⁰⁶ A further problem with the compensatory approach is that, in Australia, the pecuniary penalty is not imposed to cover the Australian regulators' costs but is imposed to deter and punish. There is no connection between the amount of the pecuniary penalty awarded by the courts and the Australian regulators' enforcement costs.¹⁰⁷ The ALRC has indicated that the level of a pecuniary penalty should be based on profits made, or losses caused, by the contravention and that such an approach justifies the use of civil procedures to obtain such penalties.¹⁰⁸

Parliament has given the Australian regulators the power to commence civil proceedings for a pecuniary penalty order where there has been a contravention of the "physical elements" of the legislation (rather than the "fault elements" of a criminal offence, see [8.5]). Accordingly, it is suggested that the courts should observe Parliament's mandate in the Australian legislation¹⁰⁹ and treat pecuniary penalty proceedings as civil proceedings and apply civil evidential and procedural rules in such proceedings. This suggestion can be criticised on the grounds that conventional civil procedural rules should not apply to such an unconventional civil law¹¹⁰ and that it promotes form (Parliament's direction to apply civil evidential and procedural rules) over substance (the punitive nature of pecuniary penalties).¹¹¹ However, if the courts treat civil pecuniary penalty proceedings more like criminal proceedings by affording the defendants heightened evidential and procedural protections, the

¹⁰⁶ For example, in the cases of insider trading and securities fraud, the United States' legislation provides that the defendants may be required to pay up to three times the amount of the profits they made which indicates a punitive, rather than a compensatory, purpose: see s 20(d) of the *Securities Act 1933* (US); 15 USC, s 77t, s 78u(d)(3); s 21d.3 of the *Securities Exchange Act 1934* (US); and Newkirk T and Brandriss I, op cit n 17, at fns 76 and 77.

¹⁰⁷ See generally Mann K, op cit n 52, at pp 1823-1825 and 1837.

¹⁰⁸ ALRC, DP 65, op cit n 11, at [18.49], at <http://kirra.austlii.edu.au>, viewed on 22 September 2005.

¹⁰⁹ See s 1317L of the *Corporations Act*, s 199 of the *Superannuation Industry (Supervision) Act 1993* (Cth), s 77 of the *Trade Practices Act 1974* (Cth) and s 8ZJ(6) of the *Taxation Administration Act 1953* (Cth).

¹¹⁰ See generally Mann K, op cit n 52, at p 1798.

¹¹¹ See generally Mann K, op cit n 52, at p 1820.

regulators may find that such proceedings become as procedurally difficult, cumbersome, protracted and costly as criminal proceedings.¹¹² Such an approach is contrary to the public interest in giving the regulators a real alternative to criminal proceedings.¹¹³

It is suggested that pecuniary penalty proceedings should be governed by “civil evidential and procedural rules.” In addition, as suggested at [8.6.2], the legislation should specify the particular evidential and procedural rules that apply to civil penalty proceedings including pecuniary penalty proceedings and disqualification proceedings (discussed below).

[8.6.7] *Disqualification orders*

In this section the nature of disqualification orders is discussed with the view to understanding whether civil or criminal evidential and procedural rules should be applied to disqualification proceedings. Disqualification orders are also discussed at [8.8.3] where the emphasis is on how the disqualification order regime may be improved including the suggestion that all Australian regulators should have power to apply for such orders.

ASIC¹¹⁴ and the ACCC¹¹⁵ are the only Australian regulators that have power to apply to the court for an order disqualifying a person from managing corporations.

In *Rich v ASIC*¹¹⁶ the majority of the High Court held that civil penalty proceedings for disqualification orders under s 206C of the *Corporations Act* were proceedings that exposed a person to a penalty and therefore attracted the operation of the penalty privilege. Similarly, in the United States, it has been held that removal

¹¹² Coffee JC, op cit n 50, at pp 1890-1891.

¹¹³ Segal J (ASIC Deputy Chair), “ASIC’s civil penalties and enforceable undertakings: Segal speaks” [2001] 14 BCLB at [279].

¹¹⁴ Sections 206C and 206E of the *Corporations Act*.

¹¹⁵ Section 86E of the *Trade Practices Act 1974* (Cth) effective from 1 January 2007.

¹¹⁶ [2004] HCA 42 at [26], [28], [29], [31], [34], [37], [39] and [41] citing *Police Service Board v Morris* (1985) 156 CLR 397. See also *ASIC v Vines* [2006] NSWSC 760 at [35].

from office constitutes a punishment so as to attract the privilege against self-incrimination.¹¹⁷

Given that the High Court, in *Rich v ASIC*, has held that proceedings for a disqualification order are penal or punitive nature, defendants in future proceedings may argue that they should be afforded other evidential and procedural protections including the protection afforded by the criminal law principle of “prosecutorial fairness”¹¹⁸ (see [8.6.3]). Defendants may also seek to argue that, as in criminal proceedings, the rule in *Jones v Dunkel* should not apply to them in disqualification proceedings (see [8.6.3]).

However, despite the punitive or penal nature of disqualification orders, s 1317L of the *Corporations Act* requires the courts to apply civil evidence and procedure rules to proceedings for a declaration of a contravention of a civil penalty provision. The declaration is a prerequisite to a disqualification order under s 206C (but not under s 206E) of that Act. The use of civil rules can be supported by the fact that ASIC can obtain a disqualification order under the *Corporations Act* on the basis of a contravention of the “physical elements” of the relevant section of that Act and it does not have to prove that the defendant contravened the “fault elements” of a criminal offence.¹¹⁹ Kluver has commented that the fact that ASIC can protect the

¹¹⁷ See *Rich v ASIC* [2003] NSWCA 342 at [364]. The United Kingdom’s case law indicates that a disqualification order is an effective way of sending a message of personal and general deterrence and emphasises that such orders protect the public from future harm: see ALRC, “Non-Monetary Penalties,” at [27.50], at <http://www.austlii.edu.au>, viewed on 15 March 2005. The protective nature of disqualification orders was recognised in the United Kingdom in *Secretary of State for Trade and Industry v Bannister* [1996] 1 WLR 118; [1996] 2 BCLC 271, [1995] BCC 1027 where the court indicated that the protective nature of disqualification orders should outweigh the punitive effect of such an order on the defendant. See also *Re Atlantic Computers plc*, *Secretary of State for Trade and Industry v Ashman*, June 15 1998, Ch D, unreported cited in Walters A and Davis-White M, op cit n 33, at [5.47] and [11.23]. In the United Kingdom the Civil Procedure Rules, the Disqualification Rules and the *Civil Evidence Act 1995* (UK) govern the evidential and procedural matters in disqualification proceedings.

¹¹⁸ See, for example, *ASIC v Rich* [2006] NSWSC 826 at [13] where the defendants argued that criminal law principles relating to whether the prosecution can “split its case” apply to civil penalty proceedings.

¹¹⁹ Disqualification orders may be obtained under s 206E of the *Corporations Act* on the basis of a repeated contravention of the *Corporations Act* irrespective of whether

public interest by having persons disqualified from managing corporations without having to prove a criminal breach is one of the most significant outcomes of the civil penalty provisions.¹²⁰ By contrast, there are no express provisions in the *Trade Practices 1974* (Cth) that deal with the type of evidential and procedural rules (whether civil or criminal) that govern the ACCC's new disqualification power in s 86E of that Act.

Parliament gave ASIC and the ACCC power to apply to the court for disqualification orders so that they could remove a person from a particular industry without having to seek a term of imprisonment. Given this purpose and given that such orders are obtained on the basis of a contravention of the "physical elements" of the legislation, it is suggested that all disqualification proceedings should be governed by clearly defined "civil evidence and procedure rules," despite their punitive nature.

[8.6.8] Statutory compensation orders

In this section the nature of statutory compensation orders is discussed with the view to understanding what evidential and procedural rules should be applied to the proceedings for such orders. Compensation orders are also discussed at [8.7.2] where the emphasis is on how the compensation order regime may be improved.

The problem is that there appears to be no uniform agreement in the case law concerning the nature of statutory compensation orders (whether punitive or purely compensatory) and, therefore, on the applicable evidential and procedural rules.

Where ASIC is acting under the *Corporations Act*, it has power to recover compensation for a corporation and other persons under ss 1317H and 1317HA. The problem of determining the nature of compensation orders and the applicable

those contraventions are civil or criminal in nature: see *ASIC v Australian Investors Forum Pty Ltd (No 2)* [2005] NSWSC 267 at [17]-[22].

¹²⁰ Kluver J, *op cit* n 84, at [432]. From a public interest perspective, disqualification orders are a more timely and cost-effective way of protecting the public from future contraventions in comparison to criminal proceedings (which may prevent the person from operating in the relevant industry through a term of imprisonment) because of the lower standard of proof and the fewer evidential and procedural protections in disqualification proceedings.

evidential and procedural rules is complicated by the fact that compensation orders are included within the definition of “civil *penalty* orders” in s 9 of that Act. Only the *Corporations Act* includes proceedings for a compensation order within the definition of “civil *penalty* orders.”¹²¹ Sections 1317H and 1317HA are also contained in Part 9.4B of that Act which is headed “civil *penalty* provisions.” Those legislative descriptions may cause confusion and may lead courts into error when determining the nature of such proceedings and in applying the appropriate evidential and procedural rules.

In *ASIC v Rich*,¹²² Austin J indicated that a compensation order under s 1317H of the *Corporations Act* is “quintessentially a civil proceeding not involving the imposition of a *penalty*.” However, in *Rich v ASIC*¹²³ McColl J (dissenting) disagreed with Austin J on this point and indicated that while compensation orders resemble some of the features of the outcomes of civil proceedings, they are obtained in relation to contraventions of a public law. On appeal, in *Rich v ASIC*¹²⁴ Kirby J questioned whether the very large compensation orders sought by ASIC might be categorised as penal because of their size, but concluded that they were compensatory. In *One.Tel Limited (in liq) v Rich*¹²⁵ Bergin J held that proceedings for a compensation order under ss 1317H or 1317HA were not proceedings for the imposition of a *penalty*.

While s 1317L of the *Corporations Act* expressly provides that the court must apply the rules of evidence and procedure applicable to civil matters in proceedings for a declaration¹²⁶ of a contravention of a civil *penalty* provision or a pecuniary *penalty* order, this section is silent on the applicable rules for compensation orders under ss 1317H and 1317HA. Section 199 of the *Superannuation Industry*

¹²¹ See generally the definition of civil *penalty* orders in s 9 of the *Corporations Act*; and compare ss 10 and 196 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

¹²² [2003] NSWSC 328 at [7]. See also *ASIC v Plymin, Elliott & Harrison* [2003] VSC 123 at [366] per Mandie J.

¹²³ [2003] NSWCA 342 at [343].

¹²⁴ (2004) 220 CLR 129 at 169-170; [2004] HCA 42 at [28].

¹²⁵ [2005] NSWSC 226 at [70].

¹²⁶ A declaration is not a prerequisite to making a compensation order: see the explanatory notes to s 1317H(1) and s 1317J(2) of the *Corporations Act*.

(Supervision) Act 1993 (Cth) provides that the civil evidence and procedure rules are to be applied in all proceedings for a civil penalty order. At first glance, this appears broader than the equivalent provision in s 1317L of the *Corporations Act*. However, unlike the *Corporations Act*, the definition of a “civil penalty order” in the *Superannuation Industry (Supervision) Act 1993* (Cth) does not include a compensation order.¹²⁷ Accordingly, this latter Act also gives no guidance on which evidential and procedural rules apply to proceedings for compensation orders.

In the context of the *Trade Practices Act 1974* (Cth), the courts have emphasised the civil and compensatory nature of statutory compensation orders noting that civil liability for a breach of a statutory duty is imposed only where damage has been caused and is not imposed (irrespective of damage) as a punishment.¹²⁸ There is no provision in the *Trade Practice Act 1974* (Cth) that specifies the applicable evidential and procedural rules in proceedings for a compensation order under that Act.

It seems that while the matter has not been finally determined, the weight of judicial opinion is that proceedings for statutory compensation orders are more like traditional civil proceedings in that they are compensatory in nature and they are not punitive. The inclusion of compensation orders within the definition of “civil penalty orders” in the *Corporations Act* is undesirable as it does not reflect the civil or non-punitive nature of such orders. The regulatory legislation should expressly provide that all statutory compensation proceedings are governed by civil evidential and procedural rules.

[8.7] Civil proceedings

In this section the main civil enforcement powers available to the regulators are discussed. In some cases, those powers are not available to all the Australian regulators and it is suggested that, in most cases, they should be equally available to them all.

¹²⁷ See generally ss 10 and 196 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

¹²⁸ *ACCC v Chats House Investments Pty Ltd* (1996) 71 FCR 250; 142 ALR 177 at 186. See also the ALRC, op cit n 10, at [11.68].

[8.7.1] *Public interest action*

Where ASIC is acting under the *ASIC Act*; ASIC, APRA or the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth); or ASIC or APRA are acting under the *Retirement Savings Accounts Act 1997* (Cth); they may commence civil actions, in the public interest, in the name of a corporation (with or without the corporation's consent) or natural person (with that person's consent)¹²⁹ in relation to a cause of action that may be available to that corporation or natural person. The legislation expressly provides that the public interest action is commenced to recover "damages."

The regulators may commence public interest proceedings in the name of a private plaintiff (a corporation or a natural person) where the contraventions of the legislation have left that plaintiff without sufficient resources to commence and maintain expensive and complicated litigation or, in addition, in the case of a corporation, where the perpetrators are in control of the wronged corporation.¹³⁰ The regulators fund the litigation and provide their own lawyers. The private plaintiff, in whose name the action was commenced, recovers the proceeds of any judgment.

The ACCC and the ATO (where it is acting under the taxation legislation) do not have any power to commence a public interest action.

Public interest proceedings have rarely been commenced by Australian regulators with only three reported decisions to date.¹³¹ The public interest proceedings enforcement option has been described by some commentators as a

¹²⁹ Section 50 of the *ASIC Act*; s 298 of the *Superannuation Industry (Supervision) Act 1993* (Cth); and s 128 of the *Retirement Savings Accounts Act 1997* (Cth). In the United Kingdom, the DTI has a narrower power to commence public interest proceedings in that it may only commence such proceedings in the name of a corporation, not a natural person: see s 438 of the *Companies Act 1985* (UK).

¹³⁰ *ASC v Deloitte Touche Tohmatsu* (1996) 70 FCR 93; 14 ACLC 1486 at 1503; *Somerville v ASC* (1995) 60 FCR 319; 13 ACLC 1527 at 1532; *Deloitte Touche Tohmatsu v ASC* (1995) 54 FCR 562; 13 ACLC 161 at 175-176; and *EPAS Ltd v James* [2007] QSC 38 at [10].

¹³¹ *Deloitte Touche Tohmatsu v ASC* (1995) 54 FCR 562; 13 ACLC 161; *Somerville v ASC* (1995) 60 FCR 319; 13 ACLC 1527; and *EPAS Ltd v James* [2007] QSC 38.

“white elephant.”¹³² Given the recent high profile collapses where many thousands of victims suffered losses, it is difficult to see why this power has not been utilised more. It may be that the precondition of acting in the “public interest” is perceived by the regulators as too difficult to satisfy and, as a consequence, they have elected to commence other proceedings¹³³ which do not have a “public interest” precondition.

A clear statutory definition of “public interest”¹³⁴ may provide a greater incentive for regulators to commence such an action, would promote greater certainty about when the regulators should commence such proceedings and may also assist to reduce the possibility of challenges to the exercise of this power on the ground that there is no public interest behind the action.

An alternate reform option could be to omit the requirement of “public interest” and replace it with a simpler provision namely, that regulators can take a representative action on behalf of investors and creditors where those persons have been defrauded and have insufficient resources to maintain their own litigation, or where the corporation is controlled by the wrongdoers.

Where a person suffers losses as the result of contraventions of the *Trade Practices Act 1974* (Cth) and is left without sufficient resources to commence legal proceedings against the perpetrators, the ACCC should have power to bring a public interest action on behalf of that person. Such a reform is consistent with the strong consumer protection objectives which the ACCC was established to promote (see

¹³² Richardson D, “Section 50 of the Australian Securities Commission Act 1989: White Knight or White Elephant?” (1994) 12 *C&SLJ* 418.

¹³³ such as for a compensation order (see [8.7.2]), an injunction (see [8.7.3]), a pecuniary penalty order (see [8.8.2]) or a disqualification order (see [8.8.3]).

¹³⁴ The literature suggests that the public interest should include a consideration of the regulatory purpose behind the action, whether the action would send a compliance message in relation to offending conduct that is widespread throughout the community, and whether the action is a test case which would resolve an ambiguity in the law. In deciding whether to commence an action, the public interest would also require a consideration of the prospects of success and the costs of the action including the likelihood of recovering the litigation costs. These matters could be included in a statutory definition of “public interest”: see Thomson P, “Section 50 of the ASC Law – the Power and its Application”(1993) 3 *ASC Digest* SPCH 75; and D Richardson, op cit n 132, at 430.

[2.7]). The ACCC has recognised the problem of victims being left without sufficient resources to commence proceedings in cases involving a misuse of market power.¹³⁵ The ACCC should be able to send a compliance message to the public that not only will the law be enforced but the ACCC will, where the public interest dictates an intervention, protect impecunious victims by assisting them to recover their losses. This suggested reform would address the current problem of the ACCC's very narrow power to recover compensation for victims, as discussed at [8.7.2] and would also promote greater public confidence in the regulatory system.

There seems to be significantly less need for the ATO to have power to commence public interest proceedings under the taxation legislation because, in most cases, the entity suffering the loss that needs to be recovered (unpaid or unremitted taxes) will be the ATO.¹³⁶ There may be no need to give the ATO a power to commence a public interest action in the name of the bankrupt or insolvent taxpayer to recover (for the benefit of the unsecured creditors including the ATO) funds owing to that taxpayer. This is because the insolvency laws already recognise that a creditor (such as the ATO) may fund litigation to recover such funds.¹³⁷

¹³⁵ To prevent such catastrophic losses, the ACCC has argued that it should be given a "cease and desist power" (see [10.7.2]). In the absence of such a proactive power, the ACCC should at least be given a reactive power to assist the victims.

¹³⁶ The ATO may use its creditor status to commence bankruptcy or insolvency proceedings against the taxpayer (see ss 40(1)(g), s 43, 44 and 58 of the *Bankruptcy Act 1966* (Cth); *Cummins v The Trustees of the Property of John Daniel Cummins, A Bankrupt* [2004] FCAFC 191; and ss 459C, 459E, 459G and 459P of the *Corporations Act*). Where the ATO commences such proceedings, the recovery rights of other unsecured creditors (including employees of the taxpayer who are owed wages and other entitlements) could also be affected. In many cases, the limited pool of funds available in the bankrupt or insolvent taxpayer's estate may mean that trustee in bankruptcy or the liquidator decides not to pursue a meritorious claim which could result in the recovery of funds for the benefit of that estate. By contrast, the ATO has far greater resources to fund such litigation to recover those funds.

¹³⁷ See s 109(10) of the *Bankruptcy Act 1966* (Cth) and s 564 of the *Corporations Act*; *Re Connell* [2001] FCA 51; and Murray M, "ASIC's focus on insolvency – some issues tested," Australian Corporate News, Issue 17, 21 September 2005, at p 212.

[8.7.2] *Statutory compensation orders and account of profits*

Where ASIC is acting under the *Corporations Act*, ss 1317H and 1317HA provide that it may recover compensation on behalf of the corporation or registered scheme, or in some cases, “another person” for damage suffered by those victims as a result of a contravention of that Act. Both sections provide that the compensation order may include an order that the defendant pay an account of profits.¹³⁸

Where ASIC, APRA or the ATO have applied for a civil penalty order under the *Superannuation Industry (Supervision) Act 1993* (Cth), the court may also make a compensation order in favour of a superannuation entity where it is satisfied that a person has committed a contravention and that the entity has suffered loss or damage as a result of the contravention.¹³⁹ Unlike the provisions in the *Corporations Act*, this legislation does not make it clear whether the compensation order may include an account of profits and it should be amended to clarify this issue.

Section 216 of the *Superannuation Industry (Supervision) Act 1993* (Cth) gives the court power in criminal proceedings to make a compensation order against a defendant who had been found not guilty of criminal offence. By contrast, recent amendments to the *Corporations Act* mean that where a defendant is found not guilty of a criminal offence, ASIC will have to pursue fresh civil proceedings under s 1317H or s 1317HA seeking a compensation order against that person.¹⁴⁰ The taxation legislation provides that where a taxpayer is convicted of a taxation offence, the court, in addition to imposing a penalty, may order the taxpayer to pay the amount of taxation owing to the Commissioner.¹⁴¹

¹³⁸ See s 1317H(2) and s 1317HA(2) of the *Corporations Act*.

¹³⁹ Section 215 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

¹⁴⁰ Explanatory Memorandum, *Corporate Law Economic Reform Program Bill 1998*, at [6.128]. Former s 1317HB(2) of the *Corporations Law* gave the court power in criminal proceedings to make a compensation order against a defendant who had been found not guilty of criminal offence. On 13 March 2000 this power was removed from the *Corporations Act*.

¹⁴¹ Section 8ZG of the *Taxation Administration Act 1953* (Cth).

It is suggested that the *Corporations Act* adopts the preferable approach by making it clear that compensation orders can only be obtained in civil proceedings. This avoids the confusion that may exist under the *Superannuation Industry (Supervision) Act 1993* (Cth) and the taxation legislation concerning the applicable rules of evidence and procedure when the criminal court is given the power to order civil remedies. This approach also means that (unlike the position under the superannuation and taxation legislation described above) defendants are not subjected to the concurrent burdens of defending the criminal and civil matters in one proceeding.

In the case of the ACCC, the main compensation order provision is found in s 82 of the *Trade Practices Act 1974* (Cth) but the ACCC cannot enforce the remedies given to loss sufferers by that section. The ACCC's only right to apply for the recovery of compensation on behalf of the victims of a contravention of the Act is the very narrow right given by s 87(1A) and s 87(1B). Those sections provide that the ACCC can only recover compensation where it has commenced a proceeding for an offence under s 79 or a proceeding for an injunction under s 80.¹⁴² By contrast, in the United Kingdom, specified consumer bodies have a broad power to commence proceedings for damages on behalf of two or more consumers.¹⁴³

In the United States, the SEC and the ATD have a broad power to commence any equitable proceedings that are appropriate or necessary for the benefit of investors which could include proceedings for equitable compensation and an account of profits.¹⁴⁴ The United States' courts have also recognised the right of regulators, like the SEC or the ATD, to bring an equitable action called "disgorgement." The purpose of this remedy is to compel the defendant to give back, or disgorge, the profits made

¹⁴² *Australian Competition & Consumer Commission v Giraffe World Australia Pty Ltd* [1998] 819 FCA.

¹⁴³ Section 19 of the *Enterprise Act 2002* (UK); and s 47B of the *Competition Act 1998* (UK): see Department of Trade and Industry, "Claims on behalf of consumers, guidance for specified bodies," at <http://www.dti.gov.uk/ccp/enterpriseact/pdfs/claimsguide.pdf>, viewed on 30 March 2006.

¹⁴⁴ Section 21d 5 of the *Securities Exchange Act 1934* (US); and 15 USC, s 78U(d)(5).

from the unlawful conduct. The regulator will deposit those profits into a fund which is used to compensate victims of the fraud.¹⁴⁵

The SEC also has a new power under s 308 of the *Sarbannes-Oxley Act 2002* (US) which is referred to as the “fair fund provision.” As a general rule, civil pecuniary penalties are paid into government consolidated revenue.¹⁴⁶ However, the “fair fund provision” allows the SEC to add civil pecuniary penalties obtained against defendants to “disgorgement funds.” The consolidated amount may be paid to the investors who have been defrauded by those defendants. This provision is based on the regulatory objective of the SEC of taking care of innocent investors.¹⁴⁷

It is evident that the Australian regulators’ powers to recover compensation for victims is narrower than that of the United States’ regulators.

It is suggested that where Australian regulators have already commenced civil proceedings and have established contraventions of the legislation which are coextensive with a breach of a private law obligation, they should have power to ask the court for an order which compensates the victims of the contraventions of those laws, irrespective of whether the victims (the potential private plaintiffs) are impecunious (as in the case of a public interest action, see [8.7.1]) or have sufficient resources to commence their own proceedings (see [7.5.5]). An alternate, or complementary reform could be to give the victims a statutory right to become parties to the regulator’s action. If those reforms are not adopted, the victim (private plaintiff) has to commence separate legal proceedings for compensation in respect of

¹⁴⁵ Newkirk T and Brandriss I, op cit n 17, at fns 30-33, 76 and 77. The case law in the United States indicates that the disgorgement remedy is also designed to maintain market integrity and to deter unlawful actions by making such actions unprofitable: see ss 21B.e and 21C(e) of the *Securities Exchange Act 1934* (US); 15 USC s 78u-3(e); *SEC v Certain Unknown Purchasers* 817 F. 2d 1018 (2d Cir 1987); *SEC v Levine* 881 F.2d 1165 (2d Cir. 1989); *SEC v Courtois* [1984-1985 Transfer Binder] Fed Sec. L. Rep CCH [95,000] (S.D.N.Y.), 11 April 1985); *SEC v Commonwealth Chemical*, 574 F.2d 90, 95 (2d. Cir. 1978); *SEC v Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978); and *SEC v First City Finance Corp, Ltd*, 688 F. Supp. 705, 728 (D.D.C. 1988) aff’d, 890 F.2d 1215 (D.C. Cir. 1989).

¹⁴⁶ Section 21.C.3 i of the *Securities Exchange Act 1934* (US).

¹⁴⁷ ALRC, “The Purposes of Penalties,” at [32], at <http://www.austlii.edu.au>, viewed on 15 March 2005.

the same previously proven contravention. The regulators' power to seek such orders would promote public and private interests by avoiding (in the context of civil proceedings) a duplication of litigious effort thereby reducing the litigation costs and the caseloads that must be managed by the courts.

The Australian legislation should also be amended to authorise the payment of civil pecuniary penalties into a fund based on the United States' "fair fund provision." In the case of the "HIH collapse," the courts have imposed many pecuniary penalties in a series of cases involving Adler and Williams and the other defendants but none of those pecuniary penalties were used to compensate the many victims of the HIH collapse. Arguably, the federal government should be held accountable for APRA's regulatory failure¹⁴⁸ and, from a public policy perspective, it should pay the pecuniary penalties to the victims of the HIH collapse to assist in compensating them for their losses. Under the current law, the federal government is the beneficiary or the recipient of the pecuniary penalties. The United States' approach imposes greater accountability on the government for a regulatory failure that has harmed the public.

[8.7.3] *Injunctions and asset preservation orders*

All of the relevant Australian regulators (except the ATO when it is acting under the taxation legislation) have a statutory power to obtain both injunctions¹⁴⁹ and asset preservation orders¹⁵⁰ on an interim basis to restrain suspected contraventions of

¹⁴⁸ The regulatory failure relates to the fact that had APRA conducted a timely and thorough investigation of HIH it would have found that, as far back as 1995, HIH failed to meet the statutory capital adequacy requirements: Arnott Oppen A, "Ethics: for real or for show," CA Magazine at http://www.camagazine.com/index.cfm/ci_id/6733/la_id/1.htm, viewed on 8 June 2005.

¹⁴⁹ See s 1324 of the *Corporations Act*; s 12GD of the *ASIC Act*; s 315 of the *Superannuation Industry (Supervision) Act 1993* (Cth); s 163 the *Retirement Savings Accounts Act 1997* (Cth); and s 80 of the *Trade Practices Act*

¹⁵⁰ See s 1323 of the *Corporations Act*; s 313 of the *Superannuation Industry (Supervision) Act 1993* (Cth); s 161 of the *Retirement Savings Accounts Act 1997* (Cth); and s 87A of the *Trade Practices Act 1974* (Cth) (effective from 1 January 2007). The object of the statutory asset preservation order is to protect (on an interim basis) aggrieved persons, who may have claims against the person under investigation, by preventing the relevant assets from being dissipated or removed from jurisdiction, until the outcome of the investigation, or civil or criminal

the law until the outcome of legal proceedings are known. Unlike the statutory asset preservation order, the statutory injunction can also be used to implement the court's final or permanent orders.

The ATO has a statutory power to prevent the taxpayer from leaving jurisdiction,¹⁵¹ but has no statutory power to obtain an asset preservation order or injunction to prevent the taxpayer's assets from being removed from the jurisdiction or from being dissipated within jurisdiction.

Some of the foreign regulators have a statutory power to obtain an injunction and an asset preservation order.¹⁵²

In some cases, the ATO may obtain an order under the general law that is similar to the statutory asset preservation order, by way of a Mareva injunction.¹⁵³ But a clear statutory power would overcome some of the impediments to obtaining a Mareva injunction. For example, in some cases, the ATO has been concerned that taxpayers are dissipating their assets but has been unable to satisfy the equitable requirements for the grant of a Mareva injunction.¹⁵⁴ In some cases it has been held that the regulators do not have the required legal or equitable interest in the subject matter to obtain a Mareva injunction.¹⁵⁵ A statutory asset preservation order may be

proceedings are known: see *ASC v AS Nominees Ltd* (1995) 18 ACSR 459 at 511-512; *ASIC v Marshall Bell Hawkins Ltd* (2002) 43 ACSR 340; [2002] FCA 1511 at [13]; and *ASIC; In the matter of Richstar Enterprises Pty Ltd v Carey (No 3)* [2006] FCA 433 at [25].

¹⁵¹ Section 14S of the *Taxation Administration Act 1953* (Cth).

¹⁵² Sections 380(2) and (3) and 381(4) of the *Financial Services and Markets Act 2002* (UK); FSA ENF 6 cited in Fisher J, Bewsey J, Waters M, and Ovey E, "The Law of Investor Protection," (2nd ed, Thomson, Sweet & Maxwell, London, 2003), at 333; s 20(b) of the *Securities Act 1933* (US); 15 USC, s 78o(b), s 77t(b) and s 78U(d); s 15(b) and s 21d of the *Securities Exchange Act 1934* (US); and Newkirk T and Brandriss I, op cit n 17, at fns 62-67.

¹⁵³ See, for example, *Deputy Commissioner of Taxation v Advanced Communications Technologies (Australia) Pty Ltd* [2003] VSC 67.

¹⁵⁴ See, for example, *Deputy Commissioner of Taxation v Cumins* [2003] WASC 3 at [14].

¹⁵⁵ *ACCC v Chaste Corporation ACCC v Chaste Corporation* (2003) 127 FCR 418; [2003] FCA 180 at [22], [28], [29], [61], [62] and [63] per Spender J. This case was decided before the ACCC was given its new statutory power to obtain an asset preservation order.

easier to obtain than a Mareva injunction.¹⁵⁶ Statutory orders may therefore be more effective in promoting the public interest and the private interests of victims by maintaining the status quo until the outcome of the investigation and litigation. For these reasons the ATO (when acting under the taxation legislation) should be given powers to obtain statutory injunctions and asset preservation orders.

[8.8] Civil penalty proceedings

[8.8.1] *Rationale for civil penalties*

The proper rationale for civil penalty regimes is that they have a legitimate role in providing a more flexible and cost-effective response to contravening conduct (in comparison to criminal proceedings). They also protect individuals from over-enforcement of the criminal law and they protect the public and victims from under-enforcement of the law.

Over-enforcement of the criminal law may occur where the legislation specifies that the regulator may only commence criminal proceedings in relation to particular contravening conduct and does not give the regulator the option of pursuing civil penalty proceedings. This problem arose in relation to the former *Corporations Law* where, until recently, only criminal offences were available for market manipulation and, prior to 1993, the ASC (now ASIC) only had the option of commencing criminal proceedings for a breach of the directors' duties provisions. This meant that criminal proceedings could be pursued even though the conduct did not really justify a criminal sanction.¹⁵⁷

A regime that only imposes criminal consequences could also result in under-enforcement. For example, before the introduction of the civil penalty regime into the

¹⁵⁶ For example, it has been held that a suspicion that a person has contravened the regulatory laws or a general law obligation, that is unsupported by any evidence at all, is insufficient for the grant of a Mareva injunction but may be sufficient to obtain a statutory asset preservation order: see *In the matter of Richstar Enterprises Pty Ltd v Carey (No 3)* [2006] FCA 433 at [25]; and *ASIC v Burnard* [2006] NSWSC 611 at [22].

¹⁵⁷ Clough J and Mulhern C, op cit n 98, at pp 168 and 169 citing Longo J, "Civil Penalties Under the Corporations Act," at pp 2, 3 and 6.

corporations legislation in 1993, if a director's breach was not serious enough to warrant a criminal sanction, the ASC (ASIC) had no power to obtain any punitive orders and, accordingly, the director's conduct could go unpunished.¹⁵⁸ The civil penalty regime now means that even though the director's conduct may not warrant a criminal sanction, that director could still be punished by a pecuniary penalty order or a disqualification order. The introduction of civil penalty regimes now means that the criminal law should only be invoked when necessary to maintain the public threat of severe punishment for those who cause harm in the most blameworthy circumstances.¹⁵⁹

[8.8.2] *Pecuniary penalty orders*

Where ASIC is acting under the *Corporations Act*, s 1317G provides that to obtain a pecuniary penalty order, it must prove not only that there has been a contravention of the legislation, but that the contravention materially prejudiced the interests of the corporation or its members, or materially prejudiced the corporation's ability to pay its creditors, or is serious.¹⁶⁰ Where ASIC, APRA or the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth), s 196(4) provides that, to obtain a pecuniary penalty order, those regulators must prove not only that there has been a contravention of the legislation, but that the contravention is serious. These elements make it more difficult for those regulators to obtain a pecuniary penalty order and perhaps indicate that the pecuniary penalty is higher in Braithwaite's "enforcement pyramid" than a disqualification order.¹⁶¹ Accordingly, it could be argued that the regulators should have the power to seek disqualification orders (see [8.8.3]) before resorting to pecuniary penalties.

By contrast, the ACCC need only prove a contravention of Part IV of the *Trade Practices Act 1974* (Cth) to obtain a pecuniary penalty order¹⁶² and this makes it easier for the ACCC to obtain such an order in comparison to the regulators

¹⁵⁸ ASIC could only obtain civil remedial compensation orders against the director.

¹⁵⁹ Clough J and Mulhern C, op cit n 98, at pp 168 and 169 citing K Mann, op cit n 52, at p 1861; and Longo J, "Civil Penalties Under the Corporations Act," at p 2.

¹⁶⁰ See, for example, *ASIC v Vizard* [2005] FCA 1037 at [22].

¹⁶¹ *ASIC v Vines* [2006] NSWSC 760 at [49].

¹⁶² J Clough and C Mulhern, op cit n 98, at p 163.

described above. The Australian regulators' powers to obtain pecuniary penalty orders should be broadened so that (like the position under the *Trade Practices Act 1974* (Cth)), such orders could be obtained on the basis that there has been a contravention of the relevant law.

Section 79B of the *Trade Practices Act 1974* (Cth) contains a fairly unique provision (at least a Commonwealth level) which should be included in all of the other legislation. Section 79B provides that where a defendant does not have sufficient financial resources to pay both a fine (pecuniary penalty) and compensation to a victim, the court must give preference to making the compensation order.¹⁶³

[8.8.3] *Disqualification order*

ASIC has power to obtain a disqualification order from the court under s 206C or s 206E of the *Corporations Act*. ASIC's counterparts in the United States¹⁶⁴ and in the United Kingdom also have power to apply to the court for a disqualification order.¹⁶⁵

On 1 January 2007, the ACCC was given a power to obtain a disqualification order from the court under s 86E of the *Trade Practices Act 1974* (Cth). However, this new power only applies where a person has contravened the restrictive trade practices provisions in Part IV of that Act.¹⁶⁶ This reform gives the ACCC a similar power to that of the Office of Fair Trading and the CC in the United Kingdom.¹⁶⁷

¹⁶³ A similar provision is found in s 572D of the *Property Agents and Motor Dealers Act 2000* (Qld). Where ASIC is acting under the *Corporations Act*, the case law indicates that a similar principle impliedly operates: see *ASC v Forem Freeway Enterprises Pty Ltd* (1999) 17 ACLC 511 at 523; and *ASIC v Plymin* [2003] VSC 230 at [16].

¹⁶⁴ See ss 20(e) of the *Securities Act 1933* (US); 15 USC, 77t(e) and s 78u(d); and 21(d) of the *Securities Exchange Act 1934* (US).

¹⁶⁵ See ss 1, 2(1), 3, 6 and 8 of the *Company Directors Disqualification Act 1986* (UK). The court also has power to disqualify a director where a declaration has been made that a company has engaged in fraudulent or wrongful trading: see ss 10, 213 and 214 of the *Insolvency Act 1986* (UK) cited in Fisher J, Bewsey J, Waters M and Ovey E, *op cit* n 152, at pp 469-474.

¹⁶⁶ This amendment was introduced as the result of submissions made to the Dawson Committee that a disqualification power may be a more effective regulatory tool than the ACCC's powers to obtain pecuniary penalties or imprisonment: see Trade

Where ASIC, APRA or the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth), or where ASIC and APRA are acting under the *Retirement Savings Accounts Act 1997* (Cth), they have no power to apply to the court for a disqualification order. The ATO has no power to obtain a disqualification order under the taxation legislation.

In some cases, where directors contravene, or cause the corporation to contravene the above legislation, that conduct may concurrently involve a contravention of the *Corporations Act* (including the directors duties in that Act). In such cases, ASIC may be able to apply to the court for a disqualification order under the *Corporations Act*. A director may also be automatically disqualified from holding office under s 206B of the *Corporations Act* where they are convicted of an offence which is punishable by at least three months imprisonment. This may include offences under any of the legislation described above. However, section 206B is restricted to criminal offences and it would not apply to contraventions of Commonwealth laws where the regulator elected to proceed by way of civil proceedings for a pecuniary penalty.

All Australian regulators should have power to apply to the court for an order disqualifying a person from acting in the relevant industry for a particular period of time. Disqualification orders send a much more effective message of compliance and personal and general deterrence than a civil pecuniary penalty order particularly in those cases where the maximum potential civil pecuniary penalties are not substantial in comparison to the possible profits that may be derived from a contravention of the law.¹⁶⁸ Pecuniary penalties do not necessarily lead to any internal disciplinary action, such as suspension or removal from office, and do not result in the removal of the threat to the public in that the relevant person may continue to operate in the

Practices Act Review, Ch. 10: "Penalties and other remedies", at fns 32-34, <http://tpareview.treasury.gov.au/content/report/html/Chpt10.asp>, viewed on 19 February 2007.

¹⁶⁷ Section 204 of the *Enterprise Act 2002* (UK); s 9A of the *Company Directors Disqualification Act 1986* (UK); and ALRC, "The Purposes of Penalties," at [31], at <http://www.austlii.edu.au>, viewed on 15 March 2005 citing the *Enterprise Act 2002* (UK); and ALRC, "Non-Monetary Penalties," at [27.54], at <http://www.austlii.edu.au>, viewed on 15 March 2005.

¹⁶⁸ *ASIC v Vizard* [2005] FCA 1037 at [34]-[35].

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particular industry.¹⁶⁹ Pecuniary penalties are insufficient on their own to achieve the public interest objectives of remedying and preventing past harm and preventing future harm to the public.¹⁷⁰ According to Grabosky,¹⁷¹ and Fisse and Braithwaite,¹⁷² pecuniary penalties are regarded as a cost of business which can be absorbed or passed on to the customer and have little deterrent or rehabilitative impact on the contravenor.

At present, the only way some Australian regulators can attempt to disqualify a person from participating in the relevant industry is by pursuing criminal proceedings in which they seek a term of imprisonment. If all Australian regulators had the power to obtain disqualification orders, this would give them a more timely and cost-effective enforcement mechanism in comparison to criminal proceedings given the lower standard of proof and reduced procedural protections in civil disqualification proceedings. This suggested reform is consistent with Braithwaite's¹⁷³ "responsive regulation" approach as it would involve less interventionist civil proceedings, in comparison to criminal proceedings.

The ATO recently indicated that it regards the corporation's duty to meet its taxation obligations as one of the major corporate governance obligations to be observed by directors.¹⁷⁴ When the directors' corporate governance obligations are viewed from this perspective, it appears incongruous that the ATO does not have any power under the taxation legislation to disqualify directors where they have breached this governance obligation. Support for giving the ATO power to apply to the court for a disqualification order is found in the fact that its counterpart in the United

¹⁶⁹ See generally ALRC, DP 65, op cit n 11, at [18.76].

¹⁷⁰ See generally ALRC, "Non-Monetary Penalties," op cit n 167, at [27.53].

¹⁷¹ Grabosky P, "Australian Regulatory Enforcement in Comparative Perspective," p 9 at 18 in Grabosky P and Braithwaite J, op cit n 7.

¹⁷² Fisse B and Braithwaite J, "Corporations Crime and Accountability," Cambridge University Press, Cambridge, 1993 at p 41.

¹⁷³ Braithwaite J, "Restorative Justice and Responsive Regulation," Oxford University Press, Oxford, 2002, at p 29.

¹⁷⁴ Carmody M, "Corporate governance and its role in tax", addressed the 2005 Taxation Institute National Convention "Tax Unmasked," Perth, 17 March at <http://www.ato.gov.au/corporate/content.asp?doc=/content/56224.htm&pc=001/001/001/002/001&mnu=&mfp=&st=&cy=1>, viewed on 14 November 2006; Australian Taxation Office, 2005-2006 Compliance Programme cited in Australian Institute of Company Directors, Module 1, "The Practice of Directorship," 2006, at p 42.

Kingdom, HMRC, has such a power under s 16(2) of the *Company Directors Disqualification Act 1986* (UK). HMRC has regularly used its standing as a creditor of the corporation (in relation to unpaid tax debts) to seek disqualification of directors under this provision.¹⁷⁵

There appears to be no sound legal reason why the ACCC (in cases outside Part IV of the *Trade Practices Act 1974* (Cth)), the ATO when acting under the taxation legislation and the regulators when acting under the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Retirement Savings Accounts Act 1997* (Cth), should not have the power to commence civil disqualification proceedings against directors where they contravene, or where they cause the corporation to contravene, that legislation.

One problem with ASIC's and the ACCC's current powers to apply to the court for a disqualification order is that they are reactive and are only invoked after a proven contravention of the legislation has occurred and, in some cases, after substantial losses have been sustained and irreparable damage has been caused, as in the HIH collapse. In the United Kingdom, the DTI has broad and proactive powers to seek disqualification orders on the grounds that the directors are "unfit to act" or that it is in the "public interest" that such orders be made.¹⁷⁶ The Australian regulators should be given similar powers. There would have to be clear definitions of what is meant by "unfit to act"¹⁷⁷ and "public interest" (see also [8.7.1]). Under this reform the regulators would not have to prove to the court that there has been a contravention of the legislation before they could obtain a disqualification order. The regulators could simply certify to the court that the defendant is unfit to act or that the public interest justifies a disqualification order. The defendant would then have the

¹⁷⁵ HM Revenue and Customs, "INS9734 – Director disqualification," at <http://www.hmrc.gov.uk/manuals/insmanual/INS9734.htm>, viewed on 21 May 2006; and HM Revenue and Customs, "Jail Sentences for fraudsters in North West" at http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb, viewed on 21 May 2006.

¹⁷⁶ Sections 6 and 8 of the *Company Directors Disqualification Act 1986* (UK).

¹⁷⁷ See the definition of "unfitness to act" in Section 9 and Part I Schedule 1 of the *Company Directors Disqualification Act 1986* (UK) cited in Walters A and Davis-White M, op cit n 33, at pp 90-91.

opportunity in court to rebut the regulators' certification (see, for example, the certification procedure discussed at [6.5]).

This suggested reform would mean that the Australian regulators could proactively seek disqualification orders in those cases where the affected person has demonstrated a lack of capacity or competency to carry out the functions attaching to their position such as where they have not undertaken appropriate courses or levels of training. ASIC already has an administrative power to ban persons from acting in the financial services industry where they have not undertaken sufficient skills and competency training.¹⁷⁸ By contrast, ASIC has no power to apply to the court for an order disqualifying directors from managing corporations on the same general grounds.¹⁷⁹

The legislation could be amended so that the completion of certain training courses and demonstrated skills are a precondition to operating in a particular industry or to acting as directors of public companies. Support for this suggestion can be found in the "fit and proper person" standards introduced by APRA on 3 March 2004 which financial services corporations are required to use to assess the quality of their directors, officers, auditors and actuaries. These corporations are required to report annually to APRA and confirm that the corporation has adopted and applied those standards.¹⁸⁰ The problem with this reform is that it only applies to entities regulated

¹⁷⁸ See ss 912A(1)(f) and 920A of the *Corporations Act*; *Power v ASIC* [2005] AATA 338; and *ASIC v Elm Financial Services Pty Ltd* [2005] NSWSC 1065 at [24]. See further at [10.4].

¹⁷⁹ Section 206F of the *Corporations Act* only gives ASIC a narrow administrative power to disqualify directors, as discussed at [10.4].

¹⁸⁰ APRA's "fit and proper person" criteria include, among other things, a consideration of whether the person has appropriate knowledge, skills, experience, competence, judgment, character, honesty and integrity, and whether the person has demonstrated a willingness to comply with regulatory or professional requirements: see Goldstein A, "APRA Imposes New 'Fit and Proper' Standards," Findlaw, at <http://www.findlaw.com.au/articles/default.asp?task=read&id=11852&site=GN>, viewed on 8 June 2005. APRA has administrative powers to disqualify persons where they do not meet the "fit and proper" person requirements: see, for example, s 25A of the *Insurance Act 1973* (Cth). Support for this proposal is also found in a recent case where ASIC obtained an enforceable undertaking from a person that they complete a "Directors Essentials" course offered by the Australian Institute of Company Directors: see *Daws v ASIC* [2006] AATA 246 at [2.4] and [12]. See also *Donald v ASIC* [2001] AATA 622.

by APRA. The preferable approach is to adopt a uniform Australia-wide set of corporate or business governance guidelines (including fit and proper person requirements) that apply to all Australian businesses and which can be enforced by any of the relevant Australian regulators.

[8.8.4] *Pecuniary penalty order and disqualification order – guidelines*

Section 76 of the *Trade Practices Act 1974* (Cth) contains guidelines or factors which the court should take into account in setting the appropriate level of pecuniary penalty. The Australian taxation legislation also contains clear guidelines that indicate that differing levels of penalties should be imposed depending on whether the contravention was intentional, reckless or negligent.”¹⁸¹ This approach is consistent with Braithwaite’s “responsive regulation” approach (see [1.3.3]) and with his view that penalties provide an effective general deterrent only if there is a capacity for the regulators to escalate the penalties for serious cases or for repeat offender cases.¹⁸²

By contrast, the *Corporations Act* and the *Superannuation Industry (Supervision) Act 1993* (Cth) do not contain any guidelines to assist the court in setting the appropriate level of pecuniary penalty. Accordingly, the level of penalty must be determined on a case-by-case basis.

There are no clear statutory guidelines in Australia concerning whether a disqualification order should be made, and if so, the period of disqualification. Section 206C(2) and s 206E(2) of the *Corporations Act* and s 86E(2) of the *Trade Practices Act 1974* (Cth) contain some broad and unhelpful principles.¹⁸³ The case law involving ASIC¹⁸⁴ and the Tax Agents’ Board¹⁸⁵ also indicates that a number of

¹⁸¹ Section 284-90 of the *Taxation Administration Act 1953* (Cth).

¹⁸² Braithwaite J, “Markets in Vice, Markets in Virtue”, The Federation Press, Leichhardt, 2005, at p 181.

¹⁸³ They provide that in deciding whether a disqualification order is justified, the court should consider the person’s conduct in relation to the management, business or property of any corporation and any other matters that the court considers appropriate.

¹⁸⁴ See the summary in *ASIC v Adler* [2002] NSWSC 483 at [56] and [104] per Santow J.

¹⁸⁵ *Pappalardo v Tax Agents Board of Victoria* [2003] AATA 990 at [13] and [14].

principles should be considered. However, these principles have been developed on a case-by-case basis and this approach does not necessarily ensure consistency of treatment of defendants particularly given that such proceedings can be commenced in the Federal Court or in the different State's courts.

Sentencing guidelines have been adopted in the United States for setting pecuniary penalties in relation to contraventions of corporate, securities and taxation laws and for sentencing corporate defendants in relation to federal criminal offences including taxation, antitrust and environmental pollution offences.¹⁸⁶ The Office of Fair Trading, and the CC, in the United Kingdom, have also published some guidelines on the appropriate level of pecuniary penalty.¹⁸⁷

It is suggested that uniform statutory guidelines should be introduced into the Australian legislation which set out the factors that the court should consider in determining whether a pecuniary penalty order or disqualification order, or both, should be made, and if so, the level of that pecuniary penalty or period of disqualification.

One advantage of this approach is that guidelines may assist lawyers in giving clients advice about the level of pecuniary penalty or period of disqualification they could face if they contested the matter in court.¹⁸⁸ Guidelines may avoid protracted legal proceedings by encouraging defendants to negotiate a settlement with the regulator.¹⁸⁹ Defendants would be more confident in providing voluntary cooperation and in settling the matter if the guidelines were binding (within reasonable limits) on the court. Such a reform would also help avoid the problems evident in *ASIC v*

¹⁸⁶ Section 21B(c) of the *Securities Exchange Act 1934* (US); ss 6651 and 6673 of the *Internal Revenue Code* (US); and see ALRC DP 65, op cit n 11, at [18.118]-[18.120].

¹⁸⁷ UK Office of Fair Trading, *Competition Act 1998: Director of Fair Trading's Guidance as to the Appropriate Amount of a Penalty*, UK Office of Fair Trading, www.of.gov.uk, 21 march at [2.3] cited in ALRC DP 65, op cit n 11, at [18.90]. See also s 38 of the *Competition Act 1998* (UK).

¹⁸⁸ See generally Walters A and Davis-White M, op cit n 33, at p 159.

¹⁸⁹ That settlement may involve the defendant voluntarily agreeing to pay a certain pecuniary penalty or accept a period of disqualification (or both) and entering into enforceable undertakings with the regulator (see [10.4.2.2]).

Vizard.¹⁹⁰ In that case, the defendant agreed to make certain admissions to ASIC on the understanding that ASIC would seek a five-year period of disqualification but the court subsequently imposed a ten-year period of disqualification.

Such guidelines would promote public and private interests by producing greater fairness and consistency in decision making,¹⁹¹ and reducing the risk of an arbitrary decision¹⁹² thereby ensuring that within each Australian regulatory framework, like cases are treated alike (see [1.5.5]). Statutory guidelines may also send a more effective message of general deterrence and compliance and promote a more responsive approach to regulation.

One problem is for Parliament to reach a consensus on the factors that should be included in the guidelines. One approach could be to develop a comprehensive statutory summary of the principles contained in the existing legislation and case law described above.

Section 16A of the *Crimes Act 1914* (Cth) contains a check-list of matters that the court must take into account in the sentencing of Commonwealth offences.¹⁹³ These matters are very similar to those referred to in the existing case law and in the legislation described above in the context of pecuniary penalty orders and disqualification orders. Given the punitive nature of pecuniary penalty orders and disqualification orders, the matters listed in s 16A are also apt to such orders. Accordingly, a possible reform could be to amend s 16A so that it extends to civil pecuniary penalty orders and disqualification orders made under Commonwealth law.

In contrast to the reforms suggested above, the NSWLRC has indicated that sentencing guidelines could result in a strict literal approach to sentencing and a loss of flexibility which is essential to achieving justice in individual cases. Its view is that guidelines do not add anything to the common law principles and do not promote

¹⁹⁰ [2005] FCA 1037 at [46] and [49].

¹⁹¹ ALRC, DP 65, op cit n 11, at [18.2] and [18.57].

¹⁹² See generally *Norris v Norris* (1986) 161 CLR 513 at 519 cited in *Perry v Comcare* [2006] FCA 33 at [84].

¹⁹³ See generally at *R v Boulden* [2006] NSWSC 1274 at [42].

a more rational or consistent approach than the common law.¹⁹⁴ There is also some support for this view from the United States' experience where some lawyers have indicated that sentencing guidelines have produced a mechanistic approach, are too rigid and too complex, and have left little room for the exercise of judicial discretion.¹⁹⁵

In view of these concerns, it is suggested that the guidelines for the making of pecuniary penalty orders and disqualification orders should be treated as a general guide, rather than as mandatory rules which must be rigidly applied. Courts should be required to observe the guidelines but should also have an overriding discretion to make an order which achieves justice in the particular case.

[8.9] Conclusion

It has been demonstrated in this chapter that the current rules governing the regulators' civil and civil penalty proceedings and their civil enforcement powers are deficient. Both public and private interests would be best served if these matters were significantly reformed.

A number of reforms have been suggested. In summary they include:

- (a) uniform principles governing when civil or criminal proceedings should commence. This could be achieved by adopting clear definitions of the "physical elements" and the "fault elements" of regulatory contraventions;

¹⁹⁴ NSWLRC, DP 33, Sentencing, Chapter 5: Factors determining individual sentences, at [5.2], [5.3] and [5.4] at <http://www.austlii.edu.au/au/other/nswlrmdp33/chap5.html>, viewed on 10 August 2005.

¹⁹⁵ American College of Trial Lawyers, United States Sentencing Guidelines 2004: An Experiment That Has Failed," at pp 1, 12, 31 and 35, at http://www.actl.com/pdfs/SentencingGuidelines_3.pdf, viewed on 10 August 2005. See also Federal Sentencing Guideline Manual, US Sentencing Commission, at www.uscc.gov/2001guid/tabcon01_2.htm, 12 December 2001 cited in ALRC, DP 65, op cit n 11, at [18.118].

- (b) uniform evidential and procedural rules governing civil and civil penalty proceedings that operate in both the Federal Court and the States' courts;
- (c) greater uniformity in the regulators' civil enforcement powers (including statutory compensation orders, public interest actions and injunctions) to increase the ability of the regulators to assist victims of contraventions;
- (d) the payment of pecuniary penalties into a compensation fund to assist victims of contraventions and to provide greater government accountability or responsibility for regulatory failures;
- (e) greater protection for the public by giving all regulators the power to apply to the court for a civil disqualification order; and
- (f) uniform guidelines governing whether a pecuniary penalty order or disqualification order (or both) should be made and, the level of any such penalty or period of disqualification (thereby promoting greater fairness and ensuring that like cases are treated alike).

CHAPTER 9
CRIMINAL PROCEEDINGS
by Tom Middleton

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CHAPTER 9

CRIMINAL PROCEEDINGS

[9.1] Introduction

The analysis in this chapter highlights a range of inconsistencies and problems in relation to criminal proceedings for regulatory offences including the fact that some Australian regulatory laws use different or inconsistent, and in some cases, ambiguous terminology when defining the “fault elements” of a criminal offence (see [9.5.1]). As noted by Braithwaite,¹ “people are entitled to know with some precision, and in advance, what puts them at risk of losing their liberty.” The current definitional problems do not promote this objective. The analysis also indicates that proceedings for regulatory offences are primarily conducted in the different States’ courts. This means that there are no uniform evidential and procedural rules that govern such proceedings (see [9.10]-[9.10.4]).

There is also uncertainty and a lack of uniformity about a range of issues relating to prosecution decisions including the factors that govern the regulator’s or the Commonwealth Director of Public Prosecution’s (Commonwealth DPP’s) decision to commence criminal proceedings, the situations in which the regulator must refer a matter to the Commonwealth DPP, who makes the final decision on whether to prosecute indictable offences,² and the procedure to be followed where the regulator and the Commonwealth DPP disagree about whether a matter should be prosecuted (see [9.9]-[9.9.4] and [9.10]).

¹ Braithwaite J, “Markets in Vice, Markets in Virtue”, The Federation Press, Leichhardt, 2005, at pp 63 and 151.

² The Commonwealth legislation contains uniform definitions of indictable offences and summary offences. Section 4G of the *Crimes Act 1914* (Cth) provides that an indictable offence is one which is punishable by imprisonment for a period exceeding 12 months and s 4H provides that a summary offence is one which is punishable by imprisonment for a period not exceeding 12 months. There is some unnecessary duplication because the same definitions are found in s 8ZA of the *Taxation Administration Act 1953* (Cth).

The regulatory laws do not adequately address the range of problems that arise when the regulators pursue civil, civil penalty or criminal proceedings, or a combination of those proceedings, in respect of the same contravening conduct (see [9.11]-[9.11.5]).

The problems identified above, particularly the inconsistent and inadequate definitions of some regulatory offences, and, in some cases, the jury's inability to understand complex business transactions, contribute to the difficulty faced by the prosecution in satisfying the criminal standard of proof.³ Those problems create doubts as to whether criminal proceedings are an effective or adequate method of dealing with regulatory offences⁴ and whether they are an effective option, of last resort, in terms of Braithwaite's enforcement pyramid⁵ (see [1.5.4]).

The reforms suggested in this chapter would implement current best practice. The reforms are consistent with Baldwin and Cave's,⁶ benchmarks of "effective regulation" (see [1.5.1.2]) as they would assist to ensure that criminal proceedings for regulatory offences are supported by clear statutory provisions and that they produce more timely and cost-effective regulatory outcomes.

[9.2] Public interest

The regulators and the Commonwealth DPP should not have to deal with the problem of proving different "fault elements" of similar criminal offences under different regulatory laws. Uniform "fault elements" would promote greater accuracy and consistency in decision-making by ensuring that decisions about whether to prosecute

³ See generally *ASIC v Australian Investors Forum Pty Ltd (No 2)* [2005] NSWSC 267 at [19].

⁴ Fisher J Bewsey J Waters M and Ovey E, "The Law of Investor Protection" 2nd Edition, Sweet & Maxwell & Thomson, London, 2003, at p 371.

⁵ Ayres I and Braithwaite J, "Responsive Regulation: Transcending the Deregulation Debate," Oxford University Press, New York, 1992 at 35 cited in ALRC, "The Purposes of Monetary Penalties – The Enforcement Pyramid," at [12] at <http://www.austlii.edu.au>, viewed on 15 March 2005.

⁶ Baldwin R and Cave M, "Understanding Regulation Theory Strategy, and Practice," Oxford University Press, Oxford, 1999 at p 76.

essentially similar offences under different regulatory laws are not made more complex and more difficult by the confusing or inconsistent terminology which is currently used in defining some regulatory criminal offences (see [9.5.1]-[9.5.2]). This would also clarify for the regulators and the regulated the type of conduct that may result in criminal proceedings and promote the public interest by sending clearer messages of personal and general deterrence and therefore of compliance. Such reforms would also reduce any perception of selective enforcement and promote greater public confidence in the integrity of the criminal justice system (see [9.9.3]-[9.9.4]).

The public interest in ensuring effective criminal proceedings and effective regulation and the principles of fairness (including treating like cases alike) require clear and uniform rules of evidence and procedure to govern such proceedings. In particular, those rules should clearly specify what evidence, adduced by the defendant in civil proceedings, may be admissible in criminal proceedings for the same conduct. This would give the Commonwealth DPP or the regulator (and the accused) a clearer idea of what evidence may be relied upon in criminal proceedings which would assist them in deciding whether the matter is worth prosecuting (see [9.11.4] and [9.11.5]). There should also be clear rules governing both the criminal liability of corporations (see [9.7]-[9.7.4]) and the criminal liability of natural persons for corporate contraventions (see [9.8]).

The public interest in achieving compensatory and punitive objectives requires that the Australian legislation contain clear and uniform provisions dealing with the relationship between civil and criminal proceedings in respect of the same conduct. This would permit the regulators to efficiently pursue the full range of civil and criminal enforcement proceedings available to them without those proceedings being delayed by collateral litigation relating to issues such as whether the defendant can obtain a stay of particular proceedings or whether multiple proceedings would result in double punishment of the defendant for the same conduct (see [9.11]-[9.11.5]).

[9.3] Private interest

It is argued that clear statutory provisions dealing with the relationship between civil and criminal proceedings arising out of the same conduct should be introduced because they would provide greater protection for defendants in comparison to the protection afforded by the common law (see [9.11.2]).

The public and private interest in not requiring a person to incriminate themselves in penalty or criminal proceedings means that the Australian legislation should contain clear provisions that give defendants evidential immunity in such proceedings in relation to incriminating evidence given in previous civil proceedings (see [9.11.4] and [9.11.5]).

The private interest also requires that there should be uniform provisions that prevent double punishment for the same conduct irrespective of whether that punishment is imposed through civil penalties or criminal penalties (see [9.11.1]-[9.11.5]).

[9.4] Purpose of criminal proceedings

The criminal offences under the Australian regulatory legislation are commonly referred to as regulatory offences. They were enacted for the regulation of individual conduct in the interests of the general welfare of the public. Regulatory offences are not concerned with values but with achieving results such as promoting compliance with rules that benefit the public as a whole.⁷ Criminal proceedings for regulatory offences are commenced to protect the integrity of the Australian financial and business markets, to protect the integrity of the system of supervision and regulation established by the

⁷ *ASIC v Vizard* [2005] FCA 1037 at [26] and [28] citing *R v Pierce Fisheries Ltd* [1971] SCR 5 at 13.

regulatory legislation,⁸ to punish persons for the offences they have committed and to deter others from committing similar offences.⁹

The common purpose of criminal proceedings for regulatory offences dictates that there should be uniform evidential and procedural rules governing those proceedings irrespective of which regulator is involved and irrespective of the court in which those proceedings are commenced. In addition, the different purposes of civil proceedings (see [8.4]) and criminal proceedings, and the different consequences of each type of proceeding, dictate that the legislation should clearly specify which evidential and procedural rules are unique to each type of proceeding.¹⁰

[9.5] Commonwealth criminal offences

[9.5.1] Definition of a Commonwealth criminal offence

There is some uniformity in the Australian regulatory framework in that the *Criminal Code Act 1995* (Cth) applies uniform principles of criminal responsibility or “fault elements” in criminal proceedings relating to Commonwealth offences. The effect of this Act is that, as a general rule (that is, subject to the concepts of strict liability or absolute liability discussed at [9.6]), the regulator or the Commonwealth DPP, can only commence criminal proceedings where there is a contravention of both the “physical

⁸ See, for example, the object of the offence provisions in s 300 of the *Superannuation Industry (Supervision) Act 1993* (Cth); and s 148 of the *Retirement Savings Accounts Act 1997* (Cth).

⁹ *R v Adler* [2004] NSWSC 108 at [113]. Affirmed on appeal in *Adler v DPP* [2004] NSWCCA 352 at [42]-[43]. See also *ASIC v Petsas* [2005] FCA 88 at [1]. Similarly, in the United States, in the context of offences under the securities laws, it has been said that the criminal law is “retributive and non-utilitarian” and is concerned with punishing individuals for the menace that they have caused society: see Newkirk T and Brandriss I, “Speech by SEC Staff: The Advantages of a Dual System: Parallel Streams of Civil and Criminal Enforcement of the US Securities Laws,” at fns 10-11 at <http://www.sec.gov/news/speech/speecharchive/1998/spch222.htm>, viewed on 15 March 2005.

¹⁰ See, for example, the rule in *Jones v Dunkel* and “prosecutorial fairness,” as discussed at [8.6.3].

elements” and the “fault elements” of the relevant section of the regulatory legislation.¹¹ The “fault elements” are exhaustively listed in s 5.1 of that Act and include intention, knowledge, negligence or recklessness.¹²

There is also uniformity in that the accessorial criminal offence provisions contained in s 11 of the *Criminal Code Act 1995* (Cth) (for example, the offences of aiding and abetting, and conspiracy) operate in relation to all of the principal offences in the Australian regulatory legislation.¹³

The *Criminal Code Act 1995* (Cth) also contains a uniform list of defences that could apply across all regulatory legislation (unless they have been excluded by that legislation).¹⁴

The object of the *Criminal Code Act 1995* (Cth) is to provide a clear, unambiguous, integrated and coherent statement of the fundamental principles of criminal responsibility in relation to Commonwealth offences.¹⁵ However, for the reasons discussed below, this objective is not achieved in the case of all Australian regulatory criminal offences.

¹¹ See s 3.1 of the *Criminal Code 1995 Act* (Cth). The legislation in the United Kingdom also adopts the concepts of “physical elements” and “fault elements”: see, for example, s 723E of the *Companies Act 1985* (UK); ss 397 and 398 of the *Financial Services and Markets Act 2000* (UK); ss 42-44 of the *Competition Act 1998* (UK); and ss 95, 105 and 107 of the *Taxes Management Act 1970* (UK). See also ALRC, “The Purposes of Penalties,” at [30]-[31], at <http://www.austlii.edu.au>, viewed on 15 March 2005.

¹² The definitions of the “fault elements” of intention and knowledge in the *Criminal Code Act 1995* (Cth) were derived from the *Theft Act 1967* (UK): see Leader-Elliott I, *The Commonwealth Criminal Code – A Guide for Practitioners*, Commonwealth Attorney-General’s Department, March 2002, at pp 51, 69 and 85.

¹³ See *McGovern (FC of T) v Walter Cavill Pty Ltd and Walter Cavill* (1959) 12 ATD 31 in the context of former s 5 of the *Crimes Act 1914* (Cth).

¹⁴ See Part 2.3 of the *Criminal Code 1995* (Cth); and Leader-Elliott I, *op cit* n 12, at p 125.

¹⁵ See Chapter 2 – Part 2.1 of the *Criminal Code Act 1995* (Cth); and Leader-Elliott I, *op cit* n 12, at p 3.

The fault element of “intention” is defined to include those situations where a person means to cause a particular result. By contrast, the fault element of “recklessness” in the *Criminal Code Act 1995* (Cth) is designed to extend criminal liability to those cases where a person takes a conscious and unjustified risk that a consequence may occur, but did not intend that consequence.¹⁶ The extension of criminal liability to cases of “recklessness” may be controversial but, arguably, is apt for regulatory offences. The regulatory laws should not discourage persons from, or punish persons for, taking normal commercial risks. This is supported by the introduction of provisions such as the “business judgment rule” in s 180(2) of the *Corporations Act*. By contrast, the fault element of recklessness is appropriate because it is designed to ensure that individuals are deterred from, and punished for, taking unjustifiable commercial or business risks with public funds.

The concept of “fault elements” introduces greater uniformity in relation to the definitions of a Commonwealth criminal offence and promotes greater certainty in the law. For example, they assist to distinguish between punitive civil penalty proceedings, which are commenced where there is a contravention of the “physical elements” of the legislation, and criminal proceedings, which are commenced where there is a contravention of both the “physical elements” and the “fault elements” of the legislation. However, some problem areas still remain. For example, there are problems relating to the director’s duty of due care and diligence under s 180 of the *Corporations Act* and the “fault element” of negligence in s 5.1(1) of the *Criminal Code Act 1995* (Cth), as discussed at [8.5].

Greater certainty in the law is also created by the fact that where the *Criminal Code Act 1995* (Cth) applies to regulatory offences, the common law requirement of “mens rea” has been replaced by the fault elements contained in that Act. At common law, the difficulties of obtaining a successful prosecution are exacerbated by the fact that

¹⁶ See s 5.4 of the *Criminal Code Act 1995* (Cth). The fault element of “recklessness” was derived from s 2.02(2)(c) of the *Model Penal Code 1962* (US). See generally Leader-Elliott I, op cit n 12, at pp 57 and 73.

the meaning of “mens rea” is ambiguous and imprecise.¹⁷ Similar problems may arise in the United States because it uses general concepts (including mens rea) that are not clearly defined.¹⁸ By contrast, clearly defined “fault elements” may assist the Australian regulators, or the Commonwealth DPP, to prove the commission of the offence beyond a reasonable doubt.

One major problem with the *Criminal Code Act 1995* (Cth) is that it is residual in nature and may be overridden by specific Commonwealth legislation which contains differing definitions of criminal offences or differing fault elements or differing defences.¹⁹ Some commentators have indicated that the *Criminal Code Act 1995* (Cth) simply adds another layer of complexity to Commonwealth offences and, together with its erratic application, its effect is to act as a deterrent to prosecution.²⁰

Section 184 of the *Corporations Act* provides an example of a contrary provision, which overrides the provisions of the *Criminal Code Act 1995* (Cth). Section 184 provides that directors commit a criminal offence where they are “intentionally dishonest” or “reckless” when they breach one of their duties.²¹ The reference to “dishonesty” means that, in the context of directors’ duties, the *Corporations Act* uses

¹⁷ “Mens rea” may be satisfied where it is shown that a person had an evil intention or knowledge of the wrongfulness of the conduct or where the person engaged in intentional acts designed to produce a particular result: see *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 530 per Gibbs CJ cited in *Greer v King* [2002] FCA 1617 at [22]-[23].

¹⁸ The requirement of a “wilful violation” or “scienter” or “guilty knowledge” are the fundamental elements of most crimes in the United States: see s 24 of the *Securities Act 1933* (US); s 32(a) of the *Securities Exchange Act 1934* (US); 15 USC, ss 77x and 78ff(a); and ss 7201-7206 of the *Internal Revenue Code* (US). See generally the “Racketeer Influenced and Corrupt Organisations Statute”, 15 USC, ss 1343 and 1963; 18 USC, ss 2, 371, 1001, 1505, and 1621; and Newkirk T and Brandriss I, *op cit* n 9, at fns 23 and 91-98.

¹⁹ See generally Leader-Elliott I, *op cit* n 12, at p 3.

²⁰ Clough J and Mulhern C, “The Prosecution of Corporations,” Oxford University Press, Melbourne, 2002 at p 220.

²¹ There is also a proposal to introduce into the *Corporations Act* a more general “dishonesty” provision that extends to all corporate managers and not just to directors and other officers currently caught by s 184: see Ramsay I, “Corporate duties below board level – the CAMAC discussion paper,” Australian Corporate News, Issue 13, 27 July 2005, at pp 149 and 151.

“dishonesty” as a “fault element” and as the basis of choice between civil and criminal proceedings.²² In the United Kingdom, “dishonesty” has also been adopted as one of the “fault elements” of a criminal offence.²³ The problem is that “dishonesty” is not, of itself, a fault element under the *Criminal Code Act 1995* (Cth).²⁴ Perhaps the fault element of “knowledge” in that Act can be equated to “dishonesty” but the position is not clear.²⁵

Accordingly, the meaning of “dishonesty” for the purposes of other legislation, such as the *Corporations Act* or the *Superannuation Industry (Supervision) Act 1993* (Cth), must be established from the case law. The problem is that there is inconsistent case law on the meaning of dishonesty. Some cases indicate that the meaning of “dishonesty” is based on a subjective test and is only satisfied where defendants are conscious of the fact that their conduct is unlawful (common law fraud).²⁶ By contrast, other cases, give dishonesty a broader meaning to include situations where defendants subjectively believe that their conduct is lawful but on an objective basis they have breached an obligation that they are deemed by the court to have known (equitable or

²² ALRC, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95), 4 “Fault and the Criminal/Non-Criminal Distinction” at [4.52], at <http://austlii.edu.au/au/other/alrc/publications/reports/95/04>, viewed on 5 March February 2005. See also ss 307 and 308 of the *Superannuation Industry (Supervision) Act 1993* (Cth) which adopt the fault element of intention.

²³ See, for example, s 723E of the *Companies Act 1985* (UK); ss 397 and 398 of the *Financial Services and Markets Act 2000* (UK); ss 42-44 of the *Competition Act 1998* (UK); and ss 95, 105 and 107 of the *Taxes Management Act 1970* (UK). See also ALRC, “The Purposes of Penalties,” at [30]-[31], at <http://www.austlii.edu.au>, viewed on 15 March 2005.

²⁴ The word “dishonest” is defined in s 130.3 of that Act as “dishonest according to the standards of ordinary people; and known by the defendant to be dishonest according to the standards of ordinary people.” However, this definition is of limited application and is only relevant to the theft offences in ss 131-132 of that Act.

²⁵ The fault element of “knowledge” is designed to prevent the prosecution from relying on the common law concept of “willful blindness” or “constructive knowledge.” “Knowledge” requires that defendants were “conscious,” at the time, of the circumstances or of the anticipated results, of their conduct and this could include cases of conscious “dishonesty”: see *Leader-Elliott I*, op cit n 12, at p 65.

²⁶ *Marchesi v Barnes* [1970] VR 434 at 438; and *Spalla v St George Motor Finance Ltd (No 7)* [2006] FCA 1177 at [168] and the authorities cited therein.

constructive fraud).²⁷ In *Peters v The Queen*²⁸ Kirby J noted that the meaning of “dishonesty” is unclear despite the importance of the concept and the fact that this word is used in a large range of criminal offences.

A further example of contrary provision in the legislation, which overrides the provisions of the *Criminal Code Act 1995* (Cth), is found in s 202 of the *Superannuation Industry (Supervision) Act 1993* (Cth). Section 202 provides that a criminal offence is committed when a person contravenes a “civil penalty provision” with a “dishonest intent.” The reference to a “dishonest intent” means that the *Superannuation Industry (Supervision) Act 1993* (Cth) also uses “dishonesty” as a “fault element” and as the basis of choice between civil and criminal proceedings.²⁹ However, as noted above, there are problems in ascertaining the meaning of “dishonesty.”

In addition, as noted by Redmond, the use of the words “civil penalty provision” in the definition of the criminal offence contained in s 202 is inappropriate and is apt to mislead.³⁰ Section 202 is based on an identical provision in former s 1317FA of the *Corporations Law*. The inferior *Corporations Law* provisions were repealed and replaced in 1992 by the superior criminal offence provisions contained in s 184 of the *Corporations Law* (now s 184 of the *Corporations Act*) but, to date, the *Superannuation Industry (Supervision) Act 1993* (Cth) provisions remain unchanged. Section 184 is superior because it does not use civil law concepts in the definition of a criminal offence. Where ASIC, APRA or the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth), their criminal prosecutions are prejudiced from the outset by the confusing definition of a criminal offence under s 202.³¹ The definition of a criminal offence in s 202

²⁷ *Australian Growth Resources Corporation Pty Ltd (rec and mgr apptd) v Van Reesema* (1988) 13 ACLR 261 at 271-272; and *ASIC v Adler* [2002] NSWSC 171 at [738]. See also *Peters v The Queen* (1998) 192 CLR 493 at 504 per Toohey and Gaudron JJ (Kirby J agreeing); and *Macleod v The Queen* (2003) 197 ALR 333 at 342, 353 and 360.

²⁸ (1998) 192 CLR 493 at 534.

²⁹ ALRC, op cit n 22. See also ss 307 and 308 of the *Superannuation Industry (Supervision) Act 1993* (Cth) which adopt the fault element of intention.

³⁰ Redmond P, “The Reform of Directors’ Duties” (1991) 15(1) UNSWLJ 86 at p 116.

³¹ In such cases, ASIC endeavours, where possible, to bring the relevant prosecution under

of the *Superannuation Industry (Supervision) Act 1993* (Cth) should be amended by either adopting the “fault elements” contained in the *Criminal Code Act 1995* (Cth) or adopting the definition of a criminal offence in s 184 of the *Corporations Act*.

In the context of the *ASIC Act*, and the *Retirement Savings Accounts Act 1997* (Cth), intention or recklessness are the fundamental elements of most offences³² and this accords with the fault elements contained in the *Criminal Code Act 1995* (Cth), except negligence. However, the *ASIC Act* adopts its own defences to criminal proceedings and provides that a person may defend those proceedings by establishing that they have a “reasonable excuse” (see [6.8]). There was a “reasonable excuse” defence to criminal proceedings in the *Superannuation Industry (Supervision) Act 1993* (Cth) and in the *Retirement Savings Accounts Act 1997* (Cth), but these were repealed on 15 December 2001 (see [6.8]). Presumably the defences in the *Criminal Code Act 1995* (Cth) now apply to those Acts.

Intention, knowledge or recklessness are the fundamental fault elements of most offences under the taxation legislation³³ and this also accords with the fault elements contained in the *Criminal Code Act 1995* (Cth), except negligence. However, the taxation legislation adopts its own defence to criminal proceedings and provides that a person may defend criminal proceedings by establishing that they were not “capable of complying” with the requirement. There is a similar defence in the *Trade Practices Act 1974* (Cth) (see [6.8]).

In the context of the *Trade Practices Act 1974* (Cth), the federal government intends to introduce a new criminal offence where the corporation or its executives

the clearer provisions of the *Corporations Act*, rather than rely on the *Superannuation Industry (Supervision) Act 1993* (Cth). Conversation with Speirs J, Executive Director of ASIC, Brisbane, in Townsville 20 July 2004.

³² See for example ss 63, 64(3) and 67(2) of the *ASIC Act*, and ss 155, 156 and 162(4) of the *Retirement Savings Accounts Act 1997* (Cth).

³³ See, for example, ss 8K(2), 8L(2), 8N, 8P, 8Q, 8T and 8U of the *Taxation Administration Act 1953* (Cth).

“dishonestly” obtain a gain from customers who fall victim to a cartel.³⁴ At the time of writing, the draft legislation was not available. It will be interesting to see whether the final legislation adopts the fault elements of the *Criminal Code Act 1995* (Cth) or whether a specific fault element of “dishonesty” will be created and defined for the purposes of the proposed cartel offences in the *Trade Practices Act 1974* (Cth).

[9.5.2] *Law reform*

The Australian legislation in its present form creates uncertainty. The regulators, the regulated and the judiciary need clear rules as to the type of conduct that attracts criminal liability.³⁵ Accordingly, the differing “fault elements” contained in the various regulatory laws should be repealed and the “fault elements” contained in the *Criminal Code Act 1995* (Cth) should apply to all Commonwealth regulatory offences.

If “dishonesty” is retained as a “fault element” of some Commonwealth regulatory offences, there should be a uniform definition of that word. There are strong arguments for adopting the subjective test of dishonesty because it is more consistent with the common law principles of criminal responsibility which dictate that criminal consequences should only be imposed where defendants are conscious of their wrongdoing. However, it could also be argued that an objective test is preferable for regulatory offences because it would capture a wider range of conduct including conduct that is analogous to equitable fraud. A wider definition of “dishonesty” may better serve the public interests in protecting and promoting the confidence of investors and creditors and of promoting personal and general deterrence because it sends a message to the business community that a broader range of conduct may attract criminal consequences.

³⁴ Baxt B and McDonald P, “The new trade practices penalty regime: compliance is not a luxury but an essential ingredient!,” Freehills, at http://www.freehills.com.au/publications/publications_4758.asp, viewed 7 June 2005. This legislation has still not been enacted: see Freehills, “Amended Dawson Bill Passes Senate,” 20 October, 2006 at http://www.freehills.com.au/publications/publications_6205.asp, viewed 20 February 2007.

³⁵ Braithwaite J, op cit n 1, at pp 63 and 151.

[9.6] Strict liability or absolute liability offences

The *Criminal Code Act 1995* (Cth) provides that some criminal offences are strict liability or absolute liability offences. In such cases, the prosecution is not required to prove any of the “fault elements” described at [9.5]³⁶ and it need only prove a contravention of the physical elements of the relevant provision. The Act also provides that the difference between strict liability and absolute liability offences is that the defence of reasonable mistake of fact is available in the case of strict liability offences but not in the case of absolute liability offences.³⁷ The residual nature of the *Criminal Code Act 1995* (Cth) is highlighted by the fact that it provides that an offence will not be one of strict liability or absolute liability unless the particular regulatory legislation so provides.³⁸ This approach produces a plethora of inconsistencies in the regulatory framework. For example, s 8C of the *Taxation Administration Act 1953* (Cth) provides that a failure to comply with a requirement (including an investigative requirement) under a taxation law to provide information to the ATO is an offence of absolute liability. However, the taxation legislation also provides (contrary to the *Criminal Code Act 1995* (Cth)) that a person may claim a defence to the absolute liability offence based on the ground that they were “not capable of complying” with the ATO’s requirement (see further at [6.8.1]). By contrast, where a person fails to comply with ASIC’s investigative requirement to provide information, s 63 of the *ASIC Act*, as a general rule, does not create a strict liability or an absolute liability offence in respect of that failure despite the fact that the contravenor has engaged in exactly the same offending conduct as in the case of the taxation legislation. Section 63 also gives the individual a “reasonable excuse” defence (see further at [6.8.1]). Similarly, the *Superannuation Industry (Supervision) Act 1993* (Cth), the *Retirement Savings Accounts Act 1997* (Cth) and the *Trade Practices Act*

³⁶ See, for example, *ASIC v Edwards* [2004] NSWSC 1044 at [8].

³⁷ See ss 6.1 and 6.2 of the *Criminal Code Act 1995* (Cth); and Leader-Elliott I, op cit n 12, at pp 15 and 119.

³⁸ Examples of strict liability offences in the Australian regulatory legislation include ss 66(2) and 77(2) of the *ASIC Act*; Part VC of the *Trade Practices Act 1974* (Cth); ss 299L(7), 299M(5) and 303(1A) of the *Superannuation Industry (Supervision) Act 1993* (Cth); and s 182(5A) of the *Retirement Savings Accounts Act 1997* (Cth).

1974 (Cth) do not create a strict liability offence in respect of a failure to comply with an investigative requirement to provide information.³⁹

The principles of fairness and the desirability of treating like cases alike require that there should be uniformity across the Australian legislation in relation to strict liability and absolute liability offences and the defences that may operate in relation to those offences. Where the purpose of the regulatory law is the same (see [9.4]) and the contravening conduct is the same, an individual should not be faced with strict liability under one regulatory law and absolute liability under another regulatory law.

[9.7] Criminal liability of a corporation

[9.7.1] Common law

Given that the corporation is an inanimate legal fiction, it has a no ability to think for itself and, accordingly, there is a conceptual difficulty in attributing to a corporation the mental element (*mens rea*, at common law) necessary to establish certain criminal offences. However, it has been argued that if corporations were not liable for criminal offences but were only subject to civil liability or civil penalties, this would send a message that corporate wrongdoing is not as serious as a natural person's wrongdoing.⁴⁰ Accordingly, it is generally accepted that a corporation can be liable for a wide range of criminal offences.⁴¹

The case law in both the United Kingdom and Australia, indicates that, at common law, for the purposes of imposing criminal liability on a corporation, its directors and officers are viewed as an embodiment of the corporation. The guilty mind

³⁹ Section 285 of the *Superannuation Industry (Supervision) Act 1993* (Cth); s 115 of the *Retirement Savings Accounts Act 1997* (Cth); and ss 155(5)-(6A) of the *Trade Practices Act 1974* (Cth).

⁴⁰ ALRC, DP 65, *Securing Compliance: Civil and Administrative Penalties* at [16.12], at <http://www.austlii.edu.au>, viewed on 10 June 2005.

⁴¹ Legal and Constitutional Affairs Standing Committee, "Company Directors' Duties," (The Cooney Committee Report), November 1989, at [12.4].

of those who manage the corporation may render the corporation guilty of the criminal offence.⁴² However, whether the corporation is criminally liable for the acts or omissions of its directors and officers depends upon a range of complex factors including the nature of the charge, the position of the director or officer and all other relevant facts and circumstances of the case.⁴³ Fisse and Braithwaite⁴⁴ emphasise the difficulty, at common law, of attributing criminal liability to the corporation and indicate that corporations will often attempt to deflect criminal responsibility to a “select group of sacrificial personnel, often at a lower level than the actual source of skulduggery.” They also indicate that criminal penalties against corporations are generally inadequate as corporations cannot be sent to jail and any fine imposed tends to be treated by them as a relatively minor cost of doing business,⁴⁵ as discussed at [6.8].

⁴² *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159 at 172-173 per Lord Denning; *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 at 170 per Lord Reid; *Hamilton v Whitehead* (1988) 166 CLR 121; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1994) 68 ALJR 127; *ACCC v Black on White Pty Ltd* [2001] FCA 387 at [17] and [19]; and *ASIC v Maxwell* [2006] NSWSC 1052. By contrast, at common law, civil liability is attributed to a corporation for the acts or omissions of natural persons by reference to the law of agency. Where the evidence contained in the corporations book’s (see Chapter 5) or obtained from the oral examination of the corporation’s directors or officers or other agents (see Chapter 4) establishes that those persons were acting within their actual or ostensible authority when the contravention occurred, or when they had the relevant state of mind to attract civil liability, the corporation (as principal) is civilly liable for their acts or omissions: see generally *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 at 179 per Lord Morris; *Lloyd v Grace Smith and Co* [1912] AC 716 at 738; and *Beach Petroleum NL v Johnson* (1993) 11 ACSR 103 at 116-117. At common law, the law of agency is not used to impose criminal liability on a corporation because, as a general rule, criminal liability rests upon personal fault and the criminal law does not punish a person for the wrongs of others: see *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 at 179 per Lord Morris; and *Beach Petroleum NL v Johnson* (1993) 11 ACSR 103 at 116-117.

⁴³ *R v ICR Haulage Ltd* [1944] KB 551 at 559; *John Henshall (Quarries) Ltd v Harvey* [1965] 2 QB 233 at 241; and *Smorgan v ANZ Banking Group Ltd* (1976) 134 CLR 475 at 481-485 per Stephen J. See also The Cooney Committee Report, op cit n 41, at [12.1]-[12.10].

⁴⁴ Fisse B and Braithwaite J, *Corporations Crime and Accountability*, Cambridge University Press, Cambridge, 1993 at p 183.

⁴⁵ Fisse B and Braithwaite J, *ibid*, at pp 41-42.

The common law principles governing criminal responsibility of a corporation apply to criminal offences under State law unless excluded by specific State legislation.

[9.7.2] Specific regulatory legislation

Where ASIC is acting under the *ASIC Act* and the *Corporations Act*;⁴⁶ ASIC, APRA or the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth);⁴⁷ or ASIC and APRA are acting under the *Retirement Savings Accounts Act 1997* (Cth)⁴⁸ or the ACCC is acting under the *Trade Practices Act 1974* (Cth);⁴⁹ the general law difficulties of attributing civil or criminal liability to a corporation for the acts or omissions or state of mind of its directors and officers or other agents have been reduced by express provisions which attribute, in defined circumstances, civil and/or criminal liability to a corporation for the conduct or state of mind of its directors and officers or other agents. Those provisions merge and alter the common law principles of corporate civil liability and of corporate criminal liability by providing that the corporation's civil and/or criminal liability may be established where the corporation's directors or officers acted within their actual or ostensible authority when they engaged in the relevant conduct or where they acted within their actual or ostensible authority with the requisite state of mind.⁵⁰

The taxation legislation provides that where, in a prosecution of a corporation for a taxation offence, it is necessary to establish the intention of the corporation, it is sufficient to show that a servant or agent of the corporation by whom the act was done or omitted to be done, as the case may be, had the requisite intention.⁵¹ Unlike the provisions discussed above, there is no express requirement in the taxation legislation that the servant or agent must have acted within their actual or ostensible authority.

⁴⁶ See s 12GH of the *ASIC Act*; and ss 769A and 769B of the *Corporations Act*.

⁴⁷ Section 338 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

⁴⁸ Section 185 of the *Retirement Savings Accounts Act 1997* (Cth).

⁴⁹ See s 84 of the *Trade Practices Act 1974* (Cth).

⁵⁰ There are similar provisions under some State laws, see, for example, s 590 of the *Property Agents and Motor Dealers Act 2000* (Qld).

⁵¹ Section 8ZD(1) of the *Taxation Administration Act 1953* (Cth).

There are a number of problems with the specific provisions described above. For example, in the case of ASIC when it is acting under the *ASIC Act* and the *Corporations Act*, the provisions in that legislation governing the criminal responsibility of a corporation⁵² do not have general application to all relevant offences in that legislation, and they only apply to the offences relating to financial services and financial products. This means that the residual provisions contained in Part 2.5 of the *Criminal Code 1995* (Cth) will apply to all other offences in the *Corporations Act*. The additional problem is that these specific provisions have been developed by successive federal governments on an ad hoc basis and are inconsistent with, and, in some cases, inferior to, the general provisions contained in Part 2.5 of the *Criminal Code Act 1995* (Cth), as discussed below.

[9.7.3] *Criminal Code Act 1995* (Cth)

The specific provisions in the regulatory legislation that impose criminal liability on corporations for the acts of their human agents are not necessarily consistent with Part 2.5 of the *Criminal Code Act 1995* (Cth). Part 2.5 provides a default rule that applies to all Commonwealth regulatory legislation unless it is excluded by the specific provisions in the particular regulatory legislation.⁵³ Part 2.5 avoids the difficulties of the common law concept of mens rea and the difficulties of attributing that concept to a corporation by relying on the concept of “fault elements” (intention, knowledge or recklessness) of an offence to attach criminal responsibility to a corporation. Sections 12.3(1) and 12.3(2)(a) and (b) of the *Criminal Code Act 1995* (Cth) provide that the “fault elements” of an offence (except negligence) can be attributed to a corporation where the corporation’s board of directors or high managerial agents intentionally, knowingly or recklessly carried out the relevant conduct or expressly, tacitly or impliedly authorised or permitted

⁵² See s 12GH of the *ASIC Act*; and ss 769A and 769B of the *Corporations Act*.

⁵³ For example, Part 2.5 of the *Criminal Code 1995* (Cth) is excluded by s 769A of the *Corporations Act*; s 12GH(6) of the *ASIC Act*; s 338(12) of the *Superannuation Industry (Supervision) Act 1993* (Cth); s 185(12) of the *Retirement Savings Accounts Act 1997* (Cth); and s 8ZD(3) of the *Taxation Administration Act 1953* (Cth). See generally Clough J and Mulhern J, *op cit* n 20, at p 138.

the commission of the offence.⁵⁴ Sections 12.3(2)(c) and (d) provide that a corporation may have authorised or permitted the commission of an offence where a “corporate culture” existed within the corporation that directed, encouraged, tolerated or led to non-compliance with the relevant provision or where the corporation failed to maintain a “corporate culture”⁵⁵ that required compliance with the relevant provision. The purpose of the “corporate culture” provision is to apply criminal liability to a corporation in those cases where the corporation’s formal documents appear to require compliance with the relevant law but in reality non-compliance is expected or tolerated.⁵⁶ The concept of “corporate culture” is not recognised at common law (see [9.7.1]) or by the specific provisions described at [9.7.2]. It is argued that the concept of “corporate culture” more accurately reflects the modern day business operating environment. The “corporate culture” provisions are also consistent with the views of Fisse and Braithwaite⁵⁷ who indicate that while corporations lack the “capacity to entertain a cerebral mental state,” intentionality can be established by looking at “corporate policy” and “corporate strategy.”

[9.7.4] *Law reform*

It is incongruous that the corporation’s criminal liability for the actions of its human agents may be determined in some cases by common law principles and, in other cases, by statutory provisions. The question of whether common law or statutory principles of corporate criminal responsibility apply to a particular case is resolved on the arbitrary basis of whether the relevant prosecuting authority commenced the criminal proceedings under Commonwealth or State law.⁵⁸ All Commonwealth regulatory

⁵⁴ This provision has some similarities to the common law principles described at [9.7.1]. See generally Leader-Elliott I, op cit n 12, at p 307.

⁵⁵ “Corporate culture” is defined in s 12.3(6) as an attitude, policy, rule, course of conduct or practice existing within the corporation generally or in the part of the corporation in which the relevant activities take place.

⁵⁶ ALRC, DP 65, *Securing Compliance: Civil and Administrative Penalties* at [16.119], citing Hill G, “Is Your Corporate Culture Criminal?” (2000) 10(4) *Australasian Risk Management* 5, 6, at <http://www.austlii.edu.au>, viewed on 10 June 2005.

⁵⁷ Fisse B and Braithwaite J, op cit n 44, at p 26.

⁵⁸ For example, in *R v Macleod* [2001] NSWCCA 357 at [13] and [19] the

legislation should adopt the principles contained in Part 2.5 of the *Criminal Code Act 1995* (Cth).⁵⁹

[9.8] Criminal liability of natural persons for a corporation's contravention

There are very few provisions in the Australian regulatory legislation that impose criminal liability on natural persons for contraventions of that legislation by the corporation. However, one such provision is found in s 8Y(1) of the *Taxation Administration Act 1953* (Cth) which imposes criminal liability on directors for the taxation offences committed by corporations. According to the ALRC, this provision was introduced to overcome perceived problems in attributing criminal liability to a corporation's officers under the *Income Tax Assessment Act 1936* (Cth).⁶⁰ The corporations legislation also imposes criminal liability on directors where the corporation has traded while it was insolvent.⁶¹

Greater use could be made of such provisions in the Australian legislation as they provide a greater incentive for natural persons, who control the corporation, to ensure that the corporation complies with its statutory obligations in the first place.⁶² Such reforms would reduce the need to establish criminal liability of the corporation and, in such cases, thereby avoid the difficulties inherent in that process. These reforms would also reduce the problem identified by Fisse and Braithwaite⁶³ that any attempt to identify individual criminal responsibility within a corporation will often involve a lengthy and resource intensive investigation for the regulators that may ultimately prove inconclusive.

Commonwealth DPP commenced the prosecution under s 173 of the *Crimes Act 1900* (NSW), rather than under the directors' duties provisions contained in the corporations legislation.

⁵⁹ The ALRC has also suggested that where a civil penalty provision requires proof that a corporation had a particular state of mind, the principles contained in Part 2.5 should also be applied in establishing the corporation's state of mind for the purposes of a civil penalty provision: see ALRC, DP 65, op cit n 56, at [16.135], Proposal 16-2.

⁶⁰ ALRC, DP 65, op cit n 56, at [16.167]-[16.169].

⁶¹ Section 588G(3) of the *Corporations Act*.

⁶² See also CCH, *Federal Tax Reporter*, at [966-399].

⁶³ Fisse B and Braithwaite J, op cit n 44, at p 183.

The Corporations and Markets Advisory Committee (CAMAC) is currently considering whether criminal liability should be imposed on natural persons for the corporation's misconduct by reason of the formal positions or functions of those natural persons within the corporation without the need to establish any misconduct on the part of those natural persons.⁶⁴ CAMAC has indicated that any reforms should seek a balance between the need to promote compliance with the law by corporations and the rights of the corporation's officers. An unduly harsh reform could discourage natural persons from becoming directors or corporate managers.⁶⁵ CAMAC has stated that there should be a standardised and principled approach in relation to corporate criminal offences. According to CAMAC, such reforms would reduce complexity, aid understanding, and "promote effective corporate compliance and risk management while providing more certainty and predictability for the individuals concerned."⁶⁶

[9.9] The regulators' and prosecutors' powers to commence criminal proceedings

Section 1315 of the *Corporations Act* and s 49 of the *ASIC Act* give ASIC the power to commence a criminal prosecution but those sections also preserve the role of the Commonwealth DPP. The legislation does not expressly deal with a range of issues relating to prosecution decisions such as the type of criminal offences (summary and indictable) that ASIC or the Commonwealth DPP may prosecute or who makes the final decision on whether to prosecute such offences. There is a Memorandum of Understanding (MoU) between ASIC and the Commonwealth DPP, but it only deals with

⁶⁴ This type of liability would be separate from that of the corporation itself or of the natural person who was involved in the corporation's contravention of the law.

⁶⁵ CAMAC, Discussion Paper (5 May 2005), at <http://www.camac.gov.au/CAMAC/camac.nsf/byHeadline/Whats+NewPersonal+Liability+for+Corporate+Fault+Discussion+Paper+May+2005?openDocument>, viewed on 30 September, 2006, cited in Australian Institute of Company Directors, Module 1, "The Practice of Directorship," 2006, at pp 32-33.

⁶⁶ CAMAC, "Report on Personal Liability for Corporate Fault", 26 September 2006, at <http://www.camac.gov.au/CAMAC/camac.nsf/byHeadline/Whats+NewPersonal+Liability+for+corporate+fault+Report?openDocument>, viewed on 2 October 2006.

some of these issues.⁶⁷ The effect of the MoU, and the Commonwealth DPP's prosecution policy (see [9.9.3]), is that for all but minor prosecutions (summary offences), the Commonwealth DPP is the prosecuting authority and it will conduct prosecutions of indictable offences according to its prosecution policy.⁶⁸

The fact that this MoU has no statutory backing has produced problems and inconsistencies in prosecution decisions. For example, in 2003 ASIC and the Commonwealth DPP reached an agreement that ASIC could prosecute certain specific offences under the *Corporations Act*. However, ASIC has not paid due regard to this agreement and it has on 26 occasions between 2002 and 2006 prosecuted offences without obtaining the requisite permission from the Commonwealth DPP.⁶⁹ In some cases, ASIC has expressed concern at the Commonwealth DPP's decision not to prosecute. In *ASIC v Sweeney (No 3)*⁷⁰ Austin J held that ASIC has an independent power to prosecute and may prosecute despite the Commonwealth DPP's decision not to do so. However, ss 9(3) and (5) of the *Director of Public Prosecutions Act 1983* (Cth) give the Commonwealth DPP the power to take over a criminal proceeding commenced by a Commonwealth authority (such as ASIC) and then to decide to continue or discontinue that proceeding. In view of this legislation (which was not considered in *ASIC v Sweeney (No 3)*), it is suggested that ASIC's power to prosecute is subservient to that of the Commonwealth DPP. This problem seems to arise for all the Australian regulators and should be addressed by a uniform legislative solution.

⁶⁷ Memorandum of understanding between the Australian Securities and Investments Commission and the Commonwealth Director of Public Prosecutions," dated 1 March 2006 at http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=mou_dpp_mar_2006_pdf, viewed on 25 January 2007. See also *ASIC v Rich* [2004] NSWSC 1089 at [51]-[53].

⁶⁸ This means that ASIC will usually prosecute the summary offences involving "high volume matters of minimal complexity": see Australian National Audit Office, "ASIC's Processes for Receiving and Referring for Investigation Statutory Reports of Suspected Breaches of the Corporations Act 2001," The Auditor General, Audit Report No 18, 2006-2007.

⁶⁹ Australian National Audit Office, *ibid*.

⁷⁰ [2001] NSWSC 616 at [5]-[7].

The *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Retirement Savings Accounts Act 1997* (Cth) do not contain any express provisions that clearly deal with the power to commence criminal proceedings.⁷¹ Section 13 of the *Crimes Act 1914* (Cth) provides that committal proceedings for an indictable Commonwealth offence can be instituted by any person (the regulator or the Commonwealth DPP) and that proceedings for summary offences can be commenced by any person. However, this provision is too general and does not address the problem of the relationship between the regulators and the Commonwealth DPP including their respective prosecution responsibilities under the *Superannuation Industry (Supervision) Act 1993* (Cth) or the *Retirement Savings Accounts Act 1997* (Cth).

The ACCC may commence criminal proceedings for various contraventions of that Act including the consumer protection provisions in Part VC.⁷² There is no clear power for the Commonwealth DPP to commence criminal prosecutions in that s 163(4) of the *Trade Practices Act 1974* (Cth) provides that prosecutions may only be commenced by someone other than the ACCC if they are authorised in writing by the ACCC or if they have Ministerial consent. It is unclear whether this provision overrides the Commonwealth DPP's general prosecution power contained in s 9 of the *Director of Public Prosecutions Act 1983* (Cth). The specific provisions in the *Trade Practices Act 1974* (Cth) probably override the general provisions in the *Director of Public Prosecutions Act 1983* (Cth). This means that the Commonwealth DPP can only commence a prosecution under the *Trade Practices Act 1974* (Cth) with the ACCC's consent.⁷³

⁷¹ Section 197(1) of the *Superannuation Industry (Supervision) Act 1993* (Cth) only expressly provides that ASIC, APRA or the ATO have the power to commence proceedings for a civil penalty order. Section 197(3) expressly preserves the operation of the *Director of Public Prosecutions Act 1983* (Cth). Section 128 of the *Retirement Savings Accounts Act 1997* (Cth) only expressly provides that ASIC or APRA have power to commence civil proceedings.

⁷² See also s 79 of the *Trade Practices Act 1974* (Cth).

⁷³ There is an internal agreement between the ACCC and the Commonwealth DPP that deals with the referral of prosecutions to the Commonwealth DPP. This internal agreement is not publicly available: see ALRC, "Regulators and the DPP," at [9.28] and [9.50], at

The taxation legislation is generally silent on whether the ATO or the Commonwealth DPP may commence criminal proceedings in respect of taxation offences. For example, s 8ZB of the *Taxation Administration Act 1953* (Cth) and s 9 of the *Crimes (Taxation Offences) Act 1980* (Cth) simply provide that a prosecution for a taxation offence may be commenced at any time. They do not specify who is responsible for commencing those prosecutions or any division of responsibility for prosecuting summary and indictable offences. As noted above, s 13 of the *Crimes Act 1914* (Cth), does not effectively address these issues. By contrast, s 8ZJ(8) of the *Taxation Administration Act 1953* (Cth) provides that the Commissioner of Taxation, or a person who has written authority from the Commissioner, may commence a prosecution for a “prescribed taxation offence.”⁷⁴ The ATO has also published its own detailed prosecution policy⁷⁵ which provides that it is the ATO’s responsibility to identify and investigate cases warranting criminal prosecution.⁷⁶ The ATO’s prosecution policy lists the categories of offences that must be referred to the Commonwealth DPP.⁷⁷

The lack of certainty in the law governing the relationship between the ATO and the Commonwealth DPP is reflected in a number of practical examples. In one Victorian

http://www.austlii.edu.au/au/other/alrc/publications/reports/95/09.Regulators_and_the_DPP, viewed on 15 February 2005. In relation to the proposed criminal offences for serious cartel misconduct (discussed at [9.5.1]), the Commonwealth DPP and ACCC will enter a public MoU which will establish procedures for the investigation of cartel offences and the circumstances in which the ACCC will refer a matter to the Commonwealth DPP for a decision on whether to commence criminal proceedings. However, the MoU will not have statutory backing: see Baxt B and McDonald P, op cit n 34.

⁷⁴ See generally *Australian Crime Commission v AA Pty Ltd* [2006] FCAFC 30 at [34].

⁷⁵ Available at <http://law.ato.gov.au>.

⁷⁶ ATO, Prosecution Policy, 9 March 2001 cited in ALRC, Discussion Paper 65: Civil and Administrative Penalties, “Overview of Federal Regulators,” at [5.50] and fn 85, <http://www.austlii.edu.au>, viewed on 19 March 2003.

⁷⁷ They include all prosecutions for offences against the *Crimes Act 1914* (Cth) and the *Taxation Administration Act 1953* (Cth), all indictable offences and non-indictable offences where there is the possibility of imprisonment, all cases involving novel or difficult questions of law, and high profile cases likely to attract public attention. The policy provides that the ATO may commence proceedings for summary offences under the *Taxation Administration Act 1953* (Cth) and under the other taxation laws: see ALRC, op cit n 73, at [9.22] and [9.24]-[9.26].

case, the ATO negotiated a settlement with the taxpayer and indicated to that taxpayer that the matter had been finalised. Despite that assurance, the Commonwealth DPP subsequently charged that taxpayer with the criminal offence of fraud against the Commonwealth.⁷⁸

There are some ad hoc cases where the legislation does not provide for a sharing of the prosecutorial responsibilities between the Commonwealth DPP and the regulator. For example, s 11.5 of the *Criminal Code Act 1995* (Cth) provides that, in the case of the offence of conspiracy (to commit a Commonwealth offence), proceedings for such an offence cannot be commenced without the consent of the Commonwealth DPP.

In the United States, the SEC does not have an independent power to commence a criminal prosecution and its function is to provide the relevant evidence (gathered from its investigation) to the prosecutors (the Department of Justice - the United States Attorneys Office, or the Federal Bureau of Investigation) so that they may decide whether to commence criminal proceedings.⁷⁹ The ATD may commence criminal prosecutions where there are serious and wilful violations of the anti-trust laws.⁸⁰ The Tax Division of the United States Department of Justice, rather than the IRS, is responsible for commencing and supervising civil and criminal prosecutions in respect of the United States' Internal Revenue laws. It was given this responsibility to ensure the consistent, uniform and fair enforcement of those laws and to maintain confidence in the integrity of the tax system.⁸¹

⁷⁸ See *R v Morris* (1992) 61 A Crim R 233; and ALRC, op cit n 73, at [9.43].

⁷⁹ Section 21 (d) 1 of the *Securities Exchange Act 1934* (US). See also Newkirk T and Brandriss I, op cit n 9, at fns 76 and 77.

⁸⁰ Including the *Sherman Act*: s 1 horizontal price fixing, bid rigging, market or customer allocation conspiracies. The criminal proceedings in those matters may result in the imposition of a fine and/or imprisonment. See the United States Department of Justice - Anti-trust Division website, <https://www.usdoj.gov/atr/overview.html>; and the World Trade Organisation, "Permanent Mission of the United States - Procedural Fairness," 6 November 2002, fn 8, viewed on 8 July 2003.

⁸¹ 28 CFR, s 0.70; and Tax Division United States Department of Justice, at <http://www.usdoj.gov/tax/>, viewed on 6 April 2006. The United States Department of Justice Attorney's Manual specifies a range of factors that should be considered before deciding whether to commence a criminal prosecution: see s 162 of the United States

The predominant approach in the United States appears to be that criminal prosecutions are commenced by specialist prosecution agencies, rather than by the regulators and this may be the preferred approach for the Australian regulatory system, at least in the context of indictable offences, as discussed below.

Criminal proceedings in respect of contraventions of the United Kingdom's companies legislation are commenced by the Director of Public Prosecutions (UK) or, in some cases, the DTI.⁸² In addition, the Director of the Serious Fraud Office has the power to commence criminal proceedings in respect of serious or complex fraud.⁸³ There are some complex arrangements whereby, in some cases, only the FSA,⁸⁴ or the DTI or the Director of Public Prosecutions, as the case may be, is the appropriate prosecuting authority in relation to financial services offences.⁸⁵ The Revenue and Customs Prosecution Office (RCPO) was recently established to prosecute serious and complex tax matters in England and Wales.⁸⁶

Department of Justice Attorney's Manual cited in Clough J and Mulhern C, *op cit* n 20, at p 56.

⁸² Section 732 of the *Companies Act 1985* (UK). Section 449(1)(a) of the *Companies Act 1985* (UK) authorises the release of information from the DTI's investigation to the DPP (UK) for the purpose of commencing criminal proceedings. Criminal proceedings can be commenced in relation to offences under various legislation including the *Companies Act 1985* (UK); the insider dealing legislation (namely, the *Criminal Justice Act 1993* (UK), the *Insider Dealing (Securities and Regulated Markets) Order 1994* (UK) and the *Traded Securities (Disclosure) Regulations 1994* (UK)); the *Prevention of Fraud (Investments) Act 1958* (UK); the *Insolvency Act 1986* (UK); the *Companies Act 1989* (UK); and the *Financial Services and Markets Act 2000* (UK).

⁸³ Where such proceedings have already been commenced by another person, the Director may take over the conduct of such proceedings: see s 1(5) of the *Criminal Justice Act 1987* (UK).

⁸⁴ The FSA may commence criminal proceedings for various offences, for example, an offence under Part V of the *Criminal Justice Act 1993* (UK) for insider dealing.

⁸⁵ One reason for the complexity is that there are differing prosecuting authorities for the United Kingdom, Scotland and Northern Ireland. The FSA can prosecute offences in England, Wales and Northern Ireland, but not Scotland. The Crown Office is responsible for prosecutions in Scotland: see ss 401 and 402 of the *Financial Services and Markets Act 2000* (UK). See Financial Services Authority, Handbook of Rules and Guidance, Enforcement Manual, Prosecution of Criminal Offences at [15.1.2], [15.2.3], and [15.8.1]-[15.8.3] at <http://www.fsa.gov.uk/vhb/html/ENF/ENF15.3.html>, viewed on 15 February 2005.

⁸⁶ Sections 34-42 of the *Commissioners for Revenue and Customs Act 2005* (UK).

The position in the United Kingdom in relation to the regulators' powers to commence criminal proceedings is too complex and has nothing to offer in terms of options for law reform in Australia, except that it does adopt a uniform prosecution policy, as discussed below.

[9.9.1] *The regulators' and prosecutors' power to appeal*

The Australian legislation does not expressly deal with the regulators' power to conduct an appeal in relation to criminal proceedings. For example, in recent litigation it was held that while ASIC had a power to commence criminal proceedings, a legislative oversight meant that it had no power to appeal in those proceedings.⁸⁷ In contrast to the position for the regulators, the Commonwealth DPP has clear powers to lodge an appeal in criminal proceedings.⁸⁸

[9.9.2] *Law reform - power to commence criminal proceedings and to appeal*

There should be express provisions in the legislation that authorise the Australian regulators to prosecute, and to appeal, in relation to summary offences.

It could also be argued that the Australian regulators should be given full power to prosecute all indictable offences in their fields of regulation. However, it has been suggested that they could be too involved in their investigation to make an objective assessment about whether criminal proceedings should commence and that they may tend to over prosecute.⁸⁹

By contrast, if the Commonwealth DPP is given clear power to prosecute all indictable offences, the independence of the Commonwealth DPP may mean that it will be in a better position to make a proper objective assessment of whether a prosecution should commence or whether some other enforcement mechanism is more appropriate.

⁸⁷ *MacLeod v ASIC* (2002) 211 CLR 287; [2002] HCA 37.

⁸⁸ Section 9 of the *Director of Public Prosecutions Act 1983* (Cth).

There would be greater consistency in decision-making if one prosecutor, such as the Commonwealth DPP, has the responsibility for making all prosecution decisions in respect of indictable regulatory offences. The Commonwealth DPP, unlike the regulator, may be in a better position to make consistent prosecution decisions as it will always apply its prosecution policy (see below). The Commonwealth DPP is also more likely to take a broader overview of the full range of criminal penalties under the various regulatory legislation that may be utilised in reaching its decision as to whether to commence a prosecution. Uniform decision-making by the Commonwealth DPP will result in greater fairness in the treatment of offenders across different regulatory legislation particularly in those cases where there is commonality in the offences, such as those involving fraud⁹⁰ and reduce the perception of selective enforcement (see [9.9.3]-[9.9.4]). The referral of all indictable offences to the Commonwealth DPP will also provide an independent check and balance in relation to prosecution decisions.⁹¹ Ramsay has indicated that the referral of matters to the Commonwealth DDP provides a “healthy check on regulators which, for good reasons, have very extensive investigation powers.”⁹²

If the Commonwealth DPP was the central prosecuting agency for all indictable regulatory offences, this would also produce economies of scale and reduce inefficiencies by reducing the need to have separate criminal prosecution departments within each regulator, although a smaller department may be required to prosecute summary offences. This reform may also create greater impetus for the federal government to align all regulatory offences and defences in accordance with the reforms suggested in this chapter and in Chapter 6. This impetus may come from the Commonwealth DPP’s need for more uniform provisions across the different regulatory statutes in cases involving similar criminal conduct.

⁸⁹ ALRC, *op cit* n 73, at [9.32] and [9.42]-[9.45].

⁹⁰ ALRC, *op cit* n 73, at [9.32] and [9.42]-[9.45].

⁹¹ Lucy J (Chairman of ASIC) interview with Kohler A, *Inside Business*, “ASIC wanted criminal case against Vizard,” 21 August 2005, at <http://www.abc.net.au/insidebusiess/content/2005/s1442488.htm>.

⁹² Professor Ramsay I, “Steve Vizard, Insider trading and directors’ duties,” *Australian Corporate News*, CCH Issue 15, 26 August 2005 at p 183.

One problem with giving such power to the Commonwealth DPP could be a loss of flexibility because once the matter is referred by the regulator to the Commonwealth DPP, who decides to prosecute, the matter is taken out of the hands of the regulator thereby eliminating any possibility of the regulator resolving the matter through negotiation and settlement. The matter will then always be resolved by the prosecutors, lawyers and judges.⁹³ This would not be consistent with Braithwaite's "responsive regulation" approach.⁹⁴ However, it could be argued that there is plenty of scope for the regulators to adopt the "responsive regulation" approach within the context of summary offences and non-criminal contraventions and seek enforcement through various administrative or civil sanctions. It is suggested that where a person has contravened clearly defined "fault elements" of an indictable offence, the public interest in seeking punishment and in promoting personal and general deterrence should prevail over the public and private interests promoted by Braithwaite's "responsive regulation" approach.

In the case of indictable offences, there should be an express provision that requires the regulator to refer the matter, and to disclose all relevant information, to the Commonwealth DPP so that the Commonwealth DPP can decide whether it should commence criminal proceedings. The legislation should also expressly provide that the Commonwealth DPP, not the regulator, makes the final decision on whether to commence criminal proceedings for indictable offences. The legislation should also give the Commonwealth DPP the sole power to commence, and to appeal, in relation to proceedings for indictable offences.⁹⁵ This would assist to promote the consistency of treatment of offenders across the Australian regulatory legislation.⁹⁶ This objective was one of the reasons behind the establishment of the Commonwealth DPP and the legislation should be amended to ensure that this objective is achieved. These reforms could be implemented by amending both the *Director of Public Prosecutions Act 1983* (Cth) and the relevant regulatory legislation.

⁹³ ALRC, *op cit* 73, at [9.34].

⁹⁴ Braithwaite J, "Restorative Justice and Responsive Regulation," Oxford University Press, Oxford, 2002, at p 29.

⁹⁵ This would avoid the problems that arose in *ASIC v Sweeney (No 3)* [2001] NSWSC 616. See also s 9(3) and (5) of the *Director of Public Prosecutions Act 1983* (Cth).

[9.9.3] *Uniform prosecution policy*

A template prosecution policy could also be developed which is suitable for adoption by all Australian regulators and the Commonwealth DPP. This policy could deal with matters such as the factors to be considered in deciding whether to prosecute summary and indictable offences and in deciding whether and when to refer the matter to the Commonwealth DPP, the procedure to be followed where there is a disagreement between the regulator and the Commonwealth DPP as to the prosecution decision, the procedures governing liaison and coordination between them where an investigation is likely to have civil and criminal consequences, the practical procedures to be followed by them where there is the possibility of concurrent or subsequent civil, civil penalty or criminal proceedings in relation to the same conduct and the arrangements for the recovery of costs and expenses of the investigation and litigation.⁹⁷ The above problems are common to all Australian regulators and those common problems could be addressed by a uniform prosecution policy. Such an approach would promote greater consistency and therefore fairness and accountability in prosecution decisions.⁹⁸ This suggestion is consistent with the position in the United Kingdom where the regulators and other prosecution authorities are all governed by a uniform prosecution code (The Code for Crown Prosecutors).⁹⁹

As a starting point, the suggested uniform prosecution policy could be based on the Commonwealth DPP's current prosecution policy. That policy lists a range of criteria that should be considered in deciding whether to prosecute including the public interest in

⁹⁶ ALRC, *op cit* n 73, at [9.32].

⁹⁷ ALRC, DP 65: "Civil and Administrative Penalties Summary of Proposals and Questions 6. Regulators and the DPP;" and ALRC, *op cit* n 73, at [9.81].

⁹⁸ ALRC, "Background Paper 7 – Review of Civil and Administrative Penalties in Federal Jurisdiction 6," at <http://www.austlii.edu.au>, viewed on 15 February 2005.

⁹⁹ See also Financial Services Authority, Handbook of Rules and Guidance, Enforcement Manual, Prosecution of Criminal Offences at [15.5.2], <http://www.fsa.gov.uk/vhb/html/ENF/ENF15.5.html>, viewed on 15 February 2005; and Explanatory Notes to the *Commissioners for Revenue and Customs Act 2005* (UK) at [25], at <http://www.opsi.gov.uk/acts/en2005/2005en11.htm>, viewed on 6 April 2006.

commencing a prosecution.¹⁰⁰ The policy also provides that the prosecution decision should involve a consideration of the need to maintain public confidence in the criminal justice system; the need to promote fairness and consistency; the effective use of finite resources; the availability, admissibility and strength of reliable evidence; and the risk of prosecuting an innocent person.¹⁰¹ These factors are pragmatic, are based on best practice and encapsulate universal principles that could apply across all the regulatory legislation.¹⁰²

The suggested uniform Australian prosecution policy could also incorporate some of the key universal principles presently adopted under the regulators' individual policies. For example, the ACCC's prosecution policy provides that in deciding whether to prosecute, the ACCC should have regard to whether the contravention involves a blatant breach of the law, whether the accused has a history of contraventions, whether there is a significant public detriment or a significant number of complaints, and the potential for enforcement action to have an educative or deterrent effect.¹⁰³

In contrast to the above suggestion, some commentators are of the view that the individual regulatory objectives, varied culture and enforcement approaches of each regulator dictate that they should adopt their own prosecution policies and that a uniform

¹⁰⁰ The public interest requires a consideration of the seriousness of the offence (including whether the offence is of considerable public concern or merely a technical offence), alternative enforcement options, the prevalence of the offending conduct (including the need for personal and general deterrence), the length and expense of the trial, the interests of the victim, factors relating to the accused (including whether the accused has, or is, prepared to cooperate) and the general community.

¹⁰¹ ALRC, op cit n 73, at [9.3], [9.4] and [9.6].

¹⁰² The Commonwealth DPP's prosecution policy is based on a similar philosophy to that in the United Kingdom and, in fact, cites a Report by the United Kingdom Royal Commission on Criminal Procedure 1981 which says that an effective prosecution system should be judged by broad principles of fairness, openness, accountability and efficiency. These principles are expressly adopted by the Commonwealth DPP's prosecution policy: see ALRC, "Regulators Enforcement Policies," at [10.28], at

http://www.austlii.edu.au/au/other/alrc/publications/reports/95/09.Regulators_and_the_DPP, viewed on 15 February 2005.

¹⁰³ ALRC, op cit n 102, at [10.55].

approach would be too difficult to implement.¹⁰⁴ For example, ASIC is opposed to adopting a uniform prosecution policy and is of the view that there is too much emphasis on consistency. ASIC has indicated that greater emphasis should be placed on the individual factors that it should take into account when responding to corporate crime.¹⁰⁵ One problem with ASIC's view is that it fails to consider that the essential purpose of criminal proceedings is the same irrespective of the regulatory legislation under which such proceedings are commenced, as discussed at [9.4]. The suggestion that there should be greater uniformity in the fault elements of Commonwealth regulatory criminal offences (see [9.5.2]) was intended to provide greater clarity, consistency and fairness in the prosecution system. Those objectives would be better promoted if prosecution decisions were made by reference to a uniform prosecution policy.

[9.9.4] Publicly available prosecution policy

The ATO's and the Commonwealth DPP's existing prosecution policies are publicly available but many of the MoUs between the Commonwealth DPP and regulators are not. Publication would promote greater transparency in government processes, accountability and consistency in decision-making and in the regulators' or Commonwealth DPP's choice of enforcement response. Publication may also help to explain apparent inconsistencies in regulatory enforcement action and reduce any perception of unfairness, selective enforcement and distrust among the regulated. In the *Vizard* case¹⁰⁶ there was a public perception that Vizard had been given lenient treatment by ASIC and the Commonwealth DPP and that some "secret deal" had been entered into by the parties. This case provides an example of the public distrust that can be generated by a non-public resolution of the issues even if the non-public process was entirely proper and fair.

¹⁰⁴ ALRC, op cit n 102, at [10.91]-[10.93].

¹⁰⁵ ALRC, op cit n 102, at [10.80]-[10.82].

¹⁰⁶ See generally *ASIC v Vizard* [2005] FCA 1037. See also Speedy B, "Vizard employee alleges tax dodge," *The Australian*, Thursday, August 18, 2005 at p 3.

Publicly available prosecution policies and MoUs would also promote greater public awareness and understanding and may have a deterrent and educative effect.¹⁰⁷

By contrast, ASIC is concerned that publication encourages collateral challenges for tactical, rather than meritorious, reasons and it has indicated that any published guidelines should not be prescriptive or couched in mandatory language.¹⁰⁸ Even though these policies and MoUs have no legislative backing, ASIC is of the view that a breach of either could assist challenges based on a breach of the rules of natural justice or procedural fairness under s 5(1)(a) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). However, the ALRC is of the view that the objectives behind publication outweigh any delay caused by collateral challenges to enforcement decisions.¹⁰⁹

For the reasons outlined, it is suggested that the proposed uniform prosecution policy and relevant MoUs should be publicly available. The concerns of some regulators, like ASIC, could be addressed by permitting the regulators to develop more detailed guidelines for internal use, provided they are consistent with the general principles contained in the published guidelines. Detailed factors leading to a decision to prosecute or detailed factors governing investigation, compliance and enforcement activity should not be publicly available on the ground that publication could prejudice the investigation and enforcement activities of the regulators. It is recognised that if too much information

¹⁰⁷ ALRC, op cit n 73, at [9.80]; and ALRC, op cit n 102, at [10.4], [10.61], [10.63] and [10.64].

¹⁰⁸ ASIC is concerned that the arrangements for sharing information and liaison during the investigation and litigation processes under the MoU, or the arrangements for resolving prosecution responsibilities or making prosecution decisions under the prosecution policy, could be successfully challenged by an applicant on the ground of ultra vires or abuse of power: see ALRC, op cit n 102, at [10.85]; and *Bryant v Deputy Commissioner of Taxation* (1993) 25 ATR 419. There has been an increasing amount of litigation in recent years where applicants have successfully challenged the regulators' and the Commonwealth DPP's powers. See, for example, *Re Wakim* [1999] HCA 27; *Byrnes v The Queen*, *Hopwood v The Queen* [1999] HCA 38 at [58] and [88]; *Bond v The Queen* [2000] HCA 13; *R v Hughes* [2000] HCA 22; and *MacLeod v ASIC* (2002) 211 CLR 287; [2002] HCA 37 at [43], [44], [63], [75], [77], [82] and [85].

¹⁰⁹ ALRC, op cit n 73, at [9.80].

is published, some members of the public could use such detailed information to their advantage to make a calculated decision to plan or to continue illegal activities.¹¹⁰

[9.10] Jurisdiction of the courts and rules of evidence and procedure

[9.10.1] Australia

The ALRC is of the view that, in contrast to civil proceedings, criminal procedures are well known, clearly structured and strictly followed (to protect the accused).¹¹¹ However, in the context of regulatory offences, the ALRC's views on the clarity and uniformity of criminal proceedings are disputable as criminal proceedings are not without their difficulties, as discussed below.

In contrast to the position in relation to civil proceedings (see [8.6.1]), ASIC or the Commonwealth DPP may only commence criminal proceedings for *Corporations Act* or *ASIC Act* offences in the States' courts or the Territory courts (exercising vested federal jurisdiction¹¹²), not the Federal Court.¹¹³ Similarly, where APRA, ASIC or the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth), s 202(3) provides that criminal proceedings may only be commenced in the States' courts or the Territory courts, not the Federal Court. Even in the absence of those specific provisions, s 68 of the *Judiciary Act 1903* (Cth) vests jurisdiction in the States' and Territory courts in relation to proceedings for summary and indictable Commonwealth offences. This situation creates problems in relation to the applicable rules of evidence and procedure. It has been held that the differing State Evidence Acts apply to *Corporations Act* prosecutions, rather than the *Evidence Act 1995* (Cth).¹¹⁴ The same

¹¹⁰ ALRC, op cit n 73, at [9.80]; and ALRC, op cit n 102, at [10.103].

¹¹¹ ALRC, "Principled Regulation: Federal Civil & Administrative Penalties in Australia," (ALRC 95) 2002 at [11.75], at <http://www.austlii.edu.au>.

¹¹² The vesting of federal jurisdiction in State courts is effected by s 39(2) of the *Judiciary Act 1903* (Cth) enacted pursuant to s 77(iii) of the *Commonwealth of Australia Constitution Act 1900* (UK).

¹¹³ See s 1338B of the *Corporations Act*.

¹¹⁴ *R v Hughes* [2001] WASCA 300 at [59] and [99]-[100]; and s 1338C(1)(c) of the

reasoning would apply to prosecutions under the *Superannuation Industry (Supervision) Act 1993* (Cth).

Where APRA and ASIC are acting under the *Retirement Savings Accounts Act 1997* (Cth), it is not clear whether the Federal Court has any criminal jurisdiction. The definition of “court” in s 16 of that Act includes the Federal Court and the State courts or Territory courts. However, the word “court” is only expressly referred to in the context of civil proceedings under that Act. The provisions dealing with criminal prosecutions under that Act are expressed in general terms and do not refer to the court in which the criminal prosecution may be commenced. In view of the provisions of the *Judiciary Act 1903* (Cth),¹¹⁵ the better view is that the Federal Court has no criminal jurisdiction in relation to prosecutions under the *Retirement Savings Accounts Act 1997* (Cth).

The *Trade Practices Act 1974* (Cth) adopts a uniform approach and expressly provides that criminal proceedings in relation to offences under that Act may only be commenced in the Federal Court.¹¹⁶ This ensures that such proceedings are always governed by the uniform provisions of the *Evidence Act 1995* (Cth) and by the Federal Court’s rules of procedure.

Corporations Act. Section 4 of the *Evidence Act 1995* (Cth) lists the courts and the proceedings to which the Act applies.

¹¹⁵ The *Judiciary Act 1903* (Cth) was amended in 1999 to provide that the Federal Court has jurisdiction in any matters arising under Commonwealth law except criminal matters: see s 39B(1A)(c). This means that whether the Federal Court has jurisdiction to hear a matter relating to a criminal offence will depend on whether the particular regulatory legislation confers jurisdiction on the Federal Court. Section 15C of the *Acts Interpretation Act 1901* (Cth) provides some uniformity by providing that where a provision of a Commonwealth Act expressly, or by implication, authorises a civil or criminal proceeding to be instituted in a particular court (such as the Federal Court), that provision is deemed to also vest jurisdiction in that court in relation to that matter: see ALRC, Review of the *Judiciary Act 1903* (Cth), DP 64: at [2.139] and [2.141], at <http://www.austlii.edu.au/au/other/alrc/publications/dp/64/ch2.html>, viewed on 15 February 2005.

¹¹⁶ Sections 163(1) and 163(2) of the *Trade Practices Act 1974* (Cth).

In the case of the ATO, criminal proceedings may be commenced in the States' courts or Territory courts¹¹⁷ (exercising vested federal jurisdiction) which gives rise to the same problems described previously in relation to the lack of uniformity in the rules of evidence and procedure. If the criminal proceedings are commenced in the Supreme Court of the Australian Capital Territory or Northern Territory, an appeal lies to the Full Federal Court.¹¹⁸

The fact that the criminal proceedings for regulatory offences can be brought in the different State and Territory courts means that the problems of inconsistency in the evidential and procedural rules discussed in the context of civil proceedings (see [8.6.1]) equally apply to criminal proceedings. These inconsistencies cause practical problems for the regulators and the Commonwealth DPP (for example, in relation to the admissibility of signed examination records¹¹⁹) and impede the efficient conduct of criminal proceedings.

The problem of a lack of uniformity in criminal proceedings is also exacerbated by the fact that, in some cases, such as those involving fraud, the prosecution has been conducted under the offence provisions contained in the relevant State's Criminal Code, or other State law, rather than under the relevant Commonwealth regulatory

¹¹⁷ See ss 68 and 71A of the *Judiciary Act 1903* (Cth); and s 8ZJ(3) of the *Taxation Administration Act 1953* (Cth). See, for example, *Federal Commissioner of Taxation v Hagedimitriou* (1985) 16 ATR 839; *Buist v FCT* (1988) 19 ATR 1165; and *Smiles v FCT* (1992) 23 ATR 605.

¹¹⁸ *Federal Court of Australia Act 1976* (Cth); and CCH Commentary, ITAA 1936 and Others, "The trial and appeal process for offences under the Crimes (Taxation Offences) Act" at [942-100] at http://library2.cch.com.au/dynaweb/aft/aft/@CCH_BookView;pf=;cs=default;ts=default#X, viewed on 6 March 2006. See, for example, *R v Withnall* (1993) 42 FCR 512.

¹¹⁹ Some regulators have indicated that signed records of their examinations would not meet the varying requirements for admissibility in each jurisdiction and would not be admissible in some committal proceedings. They have called for the amendment of the relevant legislation in all jurisdictions to allow records of examination to be used in such proceedings: see Kluver J, "ASC Investigations – Conducting s 19 Examinations and Disclosing Transcripts and Documents" (Paper delivered at Corporate Lawyers and Regulators Forum, Hyatt Coolum, 20 May, 1994) at pp 17-18; and Kluver J, "Report on Review of the Derivative Use Immunity Reforms" (May 1997) at [3.142]-[3.152] and Recommendation 7.

legislation.¹²⁰ In some cases, this has occurred because the prosecution decided to use the State legislation because it contains more severe penalties for fraud than those contained in some Commonwealth legislation, such as the *Corporations Act*. The Commonwealth DPP has urged the federal government to address this problem by implementing general uniform fraud provisions in the *Corporations Act*.¹²¹

[9.10.2] *United States*

In the United States, criminal proceedings for contravention of the securities laws, the antitrust laws and the taxation laws are generally conducted in the United States' District Courts.¹²² Criminal proceedings for regulatory offences are governed by the uniform provisions of the *Federal Rules of Criminal Procedure* (US) which apply irrespective of the court in which those proceedings are commenced.¹²³ In addition, there are a number of constitutionally entrenched protections afforded to the accused that apply irrespective of the court in which the criminal proceedings are commenced.¹²⁴

¹²⁰ See, for example, *R v Macleod* [2001] NSWCCA 357 where the prosecution was commenced under s 173 of the *Crimes Act 1900* (NSW), rather than under the offence provision for a breach of the directors' duties contained in s 184 of the *Corporations Act*. See also *R v Kelly* [2006] NSWSC 1142.

¹²¹ See the Memorandum of understanding between the ASC and the Director of Public Prosecutions 1992, at [5.1] and [5.2] at http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=DPP_MOU_1992_pdf, viewed on 25 January 2007.

¹²² See, for example 15 USC, s 77v; and Federal Tax Law Research at <http://www.law.harvard.edu/library/services/research/guides/grfs/specialized/tax.php>, viewed on 10 April 2006.

¹²³ These rules impose substantial limits on the information that the prosecutor can obtain from the accused once an indictment has been issued: see *In re Winship*, 397 US 258 (1970) cited in Newkirk T and Brandriss I, op cit n 9, at fn 22.

¹²⁴ For example, the Fifth Amendment to the United States' Constitution provides that a person is not required to respond to an allegation of a capital or infamous crime unless they are served with a grand jury indictment. It also provides that an individual shall not be punished for the same offence twice (see [9.11.1]) and expressly affords the individual the privilege against self-incrimination: see Legal Information Institute, United States Constitution, found at <http://www.law.cornell.edu/constitution/constitution.billofrights.html>, viewed on 28 February 2005.

However, the United States' legal system is not without its problems. One commentator has described that system as a "crazy quilt pattern of overlapping duplicative, and even contradictory civil and criminal regulations [which] diminishes the coherence of regulatory efforts and impedes the achievement of government objectives."¹²⁵

[9.10.3] *United Kingdom*

In the United Kingdom, there are complex provisions dealing with which courts have jurisdiction and which procedures apply in civil and criminal matters. As discussed at [8.6.1], one reason for the complexity is that there are differing jurisdictions and procedural rules for the courts of England, Wales, Scotland or Northern Ireland.¹²⁶

[9.10.4] *Law reform*

The need to promote more effective regulation dictates that criminal proceedings for Commonwealth regulatory offences should be governed by uniform rules of evidence and procedure. The problems of inconsistency could be resolved if all criminal proceedings for such offences were conducted in the Federal Court, as currently occurs in the case of the ACCC. The ALRC has suggested that there should be an expansion of the original and appellate jurisdiction of the Federal Court to hear and determine criminal matters.¹²⁷ However, the Federal Court would need a significant increase in resources to cope with the increased case-load.

¹²⁵ "Corporate Crime: Regulating Corporate Behaviour Through Criminal Sanctions"(1979) 92 Har L Rev p 1227 at 1230 cited in Clough J and Mulhern J, *op cit* n 20, at p 52.

¹²⁶ See, for example, s 403 of the *Financial Services and Markets Act 2000* (UK); s 731 of the *Companies Act 1985* (UK); s 44 of the *Companies Act 1989* (UK); and Schedule 4 of the *Commissioners for Revenue and Customs Act 2005* (UK) (at <http://www.opsi.gov.uk/acts/acts2005/50011--f.htm>, viewed on 10 April 2006.

¹²⁷ See generally, ALRC, DP 70, "Sentencing of Federal Offenders, Equality in the Treatment of Federal Offenders," at [3.31], at <http://www.austlii.edu.au/au/other/alrc/publications/dp/70/>, viewed on 5 December 2005.

Alternately, greater uniformity could be achieved by adopting the reform mechanisms suggested at [8.6.2] in the context of civil penalty proceedings. One option is to include a new chapter in the *Evidence Act 1995* (Cth) that sets out the evidential and procedural rules that apply to the regulators' criminal proceedings which could then be adopted by the States. However, if State co-operation is not forthcoming, a "Regulatory Contraventions Statute" could be enacted that sets out the relevant evidential and procedural rules for all regulatory offences. The ALRC¹²⁸ has made a similar recommendation in relation to civil penalty proceedings, as discussed at [8.6.2]. This statute could provide that all criminal proceedings for regulatory offences conducted in the State or Territory courts (exercising vested federal jurisdiction), or in the Federal Court, are governed by this statute.

This suggested reform would reduce collateral challenges based on evidential or procedural grounds and would promote greater consistency and fairness in criminal proceedings and in judicial outcomes by assisting to ensure that like cases are treated alike.

[9.11] Civil, civil penalty and criminal proceedings in relation to the same conduct

There are some provisions in the Australian legislation, such as the directors' duties provisions¹²⁹ and the insider trading provisions,¹³⁰ in the corporations legislation; the civil penalty provisions in the *Superannuation Industry (Supervision) Act 1993* (Cth);¹³¹ some provisions of the *Trade Practices Act 1974* (Cth);¹³² and some provisions in the taxation legislation¹³³ that allow the regulator to commence civil, civil penalty

¹²⁸ See ALRC, op cit n 111, recommendation 6-7, cited in Rees A, "Civil Penalties: Emphasising the adjective or noun" (2006) 34 ABLR 139 at p 154.

¹²⁹ See ss 180-183 and 1317E of the *Corporations Act* (civil penalty proceedings) and s 184 of the *Corporations Act* (criminal proceedings).

¹³⁰ See ss 1043A and 1317E of the *Corporations Act* (civil penalty proceedings) and ss 1043A, 1043M and s 1311(1) of the *Corporations Act* (criminal proceedings).

¹³¹ See s 202 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

¹³² The possibility of civil penalty and criminal proceedings in relation to the same conduct is recognised by s 76B of the *Trade Practices Act 1974* (Cth).

¹³³ The possibility of civil penalty and criminal proceedings in relation to the same

proceedings, or criminal proceedings, or a combination of these, in respect of the same conduct.

Given the different purposes served by civil, civil penalty and criminal proceedings (see [8.4] and [9.4]), and the different elements necessary to establish civil and criminal contraventions ([8.5] and [9.5.1]), the general rule is that there is no reason why a person should not be subjected to civil, civil penalty and criminal proceedings in relation to the same conduct.¹³⁴

However, there are problems with that general rule which are not adequately dealt with by the current legislation including the potential problem of punishing a person twice, by way of a civil penalty and a criminal penalty, for the same conduct. The lower standard of proof and more liberal rules for discovery in civil proceedings (see [8.6.1] and [8.6.3]) also mean that a defendant could be severely disadvantaged if a criminal prosecution followed a civil proceeding because some of the evidence given in the civil proceeding may be used by the prosecution in the subsequent criminal proceedings.

[9.11.1] *General statutory provisions that prevent double punishment*

There is a range of Australian Commonwealth and State legislation, as well as legislation in the United States and United Kingdom, that is designed to prevent a person from being punished twice for the same offence.¹³⁵ There is also legislation designed to

conduct is recognised by s 8ZE of the *Taxation Administration Act 1953* (Cth).

¹³⁴ *R v Adler* [2004] NSWSC 108 at [113]-[115]; and affirmed in *Adler v Director of Public Prosecutions* (2004) 22 ACLC 1460; [2004] NSWCCA 352 at [39]-[43].

¹³⁵ See s 4C of the *Crimes Act 1914* (Cth); s 9 of the *Crimes (Taxation Offences) Act 1980* (Cth); s 51 of the *Interpretation of Legislation Act 1984* (Vic); s 33F of the *Interpretation Act 1967* (ACT); and cf s 11(3) of the *Sentencing Act 1995* (WA) cited in *Pearce v The Queen* (1998) 194 CLR 610 at 621; [1998] HCA 57 at [38]. See also s 18 of the *Interpretation Act 1889* (UK) (see *R v Thomas* [1950] 1 KB 26 at 31 cited in *Pearce v The Queen* (1998) 194 CLR 610; [1998] HCA 57 at [34]) and the Fifth Amendment to the United States Constitution which provides that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb” (cited in *Pearce v The Queen* (1998) 194 CLR 610; [1998] HCA 57 at [10]).

prevent a person from being punished twice by reason of overlapping Commonwealth and State legislation.¹³⁶

However, those statutes and the common law double jeopardy rule,¹³⁷ are restricted to criminal offences and do not deal with the relationship between criminal and civil penalty proceedings and the possibility of double punishment for the same conduct by way of criminal proceedings for an offence and punitive civil penalty proceedings for a pecuniary penalty order or a disqualification order.¹³⁸ There is a suggestion that civil disqualification proceedings in the United Kingdom may be stayed on the ground of double jeopardy¹³⁹ but the position is not clear in Australia.

In addition, the Australian legislation, described above, does not deal with the question of whether a person can claim any evidential immunity in criminal proceedings in relation to evidence previously given in civil or civil penalty proceedings.

In some cases, the gaps in the legislation concerning the relationship between civil and criminal proceedings and the possibility of concurrent proceedings is dealt with by the regulators and the prosecuting authorities in their individual prosecution policies or MoUs.¹⁴⁰ However, these arrangements do not have statutory backing and they do not necessarily prevent double punishment nor do they confer evidential immunity.

¹³⁶ See s 4C(2) of the *Crimes Act 1914* (Cth); s 57 of the *Interpretation Act 1987* (NSW); s 11(2) of the *Sentencing Act 1995* (WA); s 33F(2) of the *Interpretation Act 1967* (ACT) cited in *Pearce v The Queen* (1998) 194 CLR 610 at 621; [1998] HCA 57 at [38].

¹³⁷ See generally *Pearce v The Queen* (1998) 194 CLR 610.

¹³⁸ Section 76(3) of the *Trade Practices Act 1974* (Cth) provides that a person shall not be liable to more than one civil pecuniary penalty in respect of the same conduct but that section is silent on additional punishment by way of criminal proceedings.

¹³⁹ Walters A and Davis-White M, "Directors' Disqualification: Law and Practice," Sweet and Maxwell, 1999, at p 197.

¹⁴⁰ See, for example, Financial Services Authority, Handbook of Rules and Guidance, Enforcement Manual, Prosecution of Criminal Offences at [15.4.4], at <http://www.fsa.gov.uk/vhb/html/ENF/enf15.4.html>, viewed on 15 February 2005.

[9.11.2] *Stay of proceedings under general law*

Because some of the Australian, United States' and the United Kingdom's regulatory statutes do not clearly deal with the relationship between civil (including punitive civil penalty proceedings) and criminal proceedings in respect of the same conduct, the situation is often governed by the general law rules relating to "stay" of proceedings.¹⁴¹ In some cases, a defendant who faces concurrent civil and criminal proceedings may be able to obtain a stay of the civil or criminal proceedings, as the case may be, on general law grounds such as abuse of power, abuse of process¹⁴² or contempt of court. However, such a stay may only be of a temporary nature and may be difficult to obtain, particularly where Parliament has clearly given the regulator the option of commencing civil and criminal proceedings in relation to the same conduct.¹⁴³

The difficulty of obtaining a stay is exacerbated by the fact that the Australian case law indicates that it is not an abuse of process for the regulator to commence civil proceedings, rather than criminal proceedings, even though the defendant would have some protections in criminal proceedings (such as a jury trial and a higher standard of proof) not available in the civil proceedings (see [8.1]).¹⁴⁴

Australian case law indicates that in considering any application for a stay, the court will consider the public interest in allowing the regulator to continue both types of proceedings and weigh this against any detrimental affect on the defendant/accused in not granting the stay including the burden of having to prepare for two trials, the premature

¹⁴¹ By contrast, the *Corporations Act* and the *Trade Practices Act 1974* (Cth) deal with some of the problems relating to multiple proceedings in respect of the same conduct and those Acts contain express provisions that may reduce the need to rely on the general law rules relating to "stay" of proceedings.

¹⁴² *Pearce v The Queen* [1998] HCA 57; and *Rogers v The Queen* (1994) 181 CLR 251.

¹⁴³ Section 1331 of the *Corporations Act* provides that civil proceedings are not to be stayed merely because those proceedings disclose or arise out of the commission of an offence. There is a similar provision in s 321 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

¹⁴⁴ *ASIC v Sweeney* [2001] NSWSC 114 at [57] per Austin J; and *ASIC v Parkes* (2001) 38 ACSR 355; [2001] NSWSC 377 at [9].

disclosure during the civil proceedings of the accused's defence to the criminal proceedings, the publicity of the civil proceedings and its effect upon potential jurors in a criminal trial.¹⁴⁵

The difficulty of obtaining a stay in the United States is evident from the fact that the Supreme Court has held that it is constitutional to impose both civil and criminal consequences for the same conduct and for both civil and criminal proceedings to be commenced in the civil and criminal courts at the same time.¹⁴⁶ The United State's case law indicates that in some situations a party may obtain a stay of the civil proceedings on the ground of "special circumstances" of serious prejudice to the defendant or to the regulator, as the case may be.¹⁴⁷ The case law indicates that defendants are rarely successful in obtaining a stay on this ground. By contrast, the SEC is frequently successful in obtaining a stay of civil proceedings where the defendant uses the civil discovery process to obtain information that they could not get in criminal proceedings.¹⁴⁸

In the United Kingdom, the case law indicates that, in determining whether to order a stay of civil disqualification proceedings, the courts will consider any possible

¹⁴⁵ *Dwyer v NCSC* (1988) 13 ACLR 716 at 724-725; *Deputy Commissioner of Taxation v De Vonk* (1995) 133 ALR 303 at 313; *Golden City Car and Truck Centre Pty Ltd v Deputy Commissioner of Taxation* [1999] FCA 922; and *Silbermann v CGU Insurance Ltd* [2003] NSWSC 1127 at [46], [56] and [62].

¹⁴⁶ *Standard Sanitary Manufacturing Co v United States*, 226 US 20, 52 (1912) cited in *SEC v Dresser Industries Inc* 628 F.2d 1368, 1374 (1980); and *Newkirk T and Brandriss I*, op cit n 9, at fns 76 and 77. The literature indicates that for strategic reasons the SEC, the prosecutor or the defendant may want to obtain a stay of civil proceedings so as not to jeopardise their positions in the criminal case. The same strategic reasons would operate in Australia. If the SEC proceeds with a civil case, this may give the defendant the advantage of using the civil discovery rules to see everything the SEC has in terms of its claim and may also allow the defendant to better prepare for the criminal trial, thereby jeopardising the subsequent criminal proceedings. Conversely, the defendant may not want a civil case to commence before a criminal case because the SEC may release the investigative information and the information obtained through the civil discovery procedures to the prosecutor: see *Newkirk T and Brandriss I*, op cit n 9, at fns 116-123.

¹⁴⁷ *SEC v Dresser Industries Inc* 628 F. 2d 1368 at 1375 (DC Cir 1980); *United States v Kordel* 397 US at 11; and *Newkirk T and Brandriss I*, op cit n 9, at fns 116-123.

¹⁴⁸ *Newkirk T and Brandriss I*, op cit n 9, at fns 116-123.

unfairness flowing from any publicity associated with those proceedings and the effect of that publicity on any subsequent criminal proceedings and whether the defendant's position in the criminal trial would be prejudiced by the requirement to file evidence in the civil disqualification proceedings.¹⁴⁹

It is evident that the problems associated with multiple proceedings for the same conduct are not resolved by the general law rules relating to "stay" of proceedings because there is no guarantee that the defendant will obtain a stay of the relevant proceedings. It is preferable if these problems were addressed by uniform statutory provisions.

[9.11.3] *Civil proceedings after criminal proceedings*

The Australian legislation does not contain uniform provisions dealing with the regulators' powers to commence civil proceedings after criminal proceedings, or criminal proceedings after civil proceedings, in respect of the same contravention. There appears to be no principled reason for the inconsistencies in the law.

Where ASIC is acting under the *Corporations Act*, ss 1317M and 1317N provide that if criminal proceedings are successful, civil proceedings for a declaration of a contravention (under s 1317E), or a pecuniary penalty order (under s 1317G), in relation to conduct that is substantially the same as the conduct constituting the criminal offence cannot be commenced and any such civil proceedings already initiated are deemed to be dismissed. This is the preferred approach given the punitive nature of both proceedings and the objective of preventing double punishment for the same conduct. However, these provisions do not prevent civil penalty proceedings for a disqualification order (under Part 2D.6) despite the fact that such proceedings are now regarded as penal in nature¹⁵⁰ (see [8.6.7]). Disqualification proceedings may commence provided the declaration of a

¹⁴⁹ *Re Rex William Leisure plc* [1994] Ch 1 350; and *Jefferson Ltd v Bhetcha* [1979] 1 WLR 898, [1979] 2 All ER 1108 cited in Walters A and Davis-White M, op cit n 139, at pp 198-199.

¹⁵⁰ *Rich v ASIC* (2004) 220 CLR 129; [2004] HCA 42 at [28], [29], [39] and [41].

contravention is obtained before the criminal conviction. These provisions do not prevent the commencement of other “non-punitive” civil penalty proceedings, such as proceedings for compensation orders under s 1317H or s 1317HA (see [8.6.8]). The *Corporations Act* also provides that where criminal proceedings are unsuccessful, civil penalty proceedings for a pecuniary penalty order may proceed.¹⁵¹ There is also nothing to prevent ASIC from commencing other civil penalty proceedings, such as proceedings for compensation orders and disqualification orders, if the criminal proceedings are unsuccessful.

Where ASIC, APRA or the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth), there is a similar, but broader provision (in comparison to the *Corporations Act*), which bars all “civil penalty proceedings”¹⁵² where criminal proceedings are successful. This Act also contains a broader express provision that provides that where criminal proceedings are unsuccessful, any civil penalty order proceedings may proceed.¹⁵³

The *Retirement Savings Accounts Act 1997* (Cth) does not contain any detailed provisions dealing with the relationship between ASIC’s or APRA’s civil and criminal proceedings under that Act and simply provides that a person is not relieved from civil liability just because he/she is convicted of an offence.¹⁵⁴

The *Trade Practices Act 1974* (Cth) provides that where a person has been convicted of an offence against a particular provision of that Act, the court cannot make a civil pecuniary penalty order in respect of the same conduct.¹⁵⁵ It also provides that civil pecuniary penalty proceedings are stayed if criminal proceedings in respect of the same conduct are commenced. Those civil pecuniary penalty proceedings may only resume

¹⁵¹ Section 1317N(2) of the *Corporations Act*. See also Redmond P, “The Reform of Directors’ Duties” (1991) 15(1) UNSWLJ 86 at pp 116-117.

¹⁵² Section 206 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

¹⁵³ Section 207 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

¹⁵⁴ Section 186 of the *Retirement Savings Accounts Act 1997* (Cth).

¹⁵⁵ See ss 75AYA, 76, and 76B(3) of the *Trade Practices Act 1974* (Cth).

after the criminal proceedings are dismissed. If the criminal proceedings are successful, the civil pecuniary penalty proceedings are dismissed.¹⁵⁶

In the context of the proposed criminal offences in the *Trade Practices Act 1974* (Cth) for serious cartel misconduct, it is expected that the existing civil regime applicable to cartels will operate concurrently with the proposed criminal offence regime.¹⁵⁷ It will be interesting to see whether the final legislation adopts a comprehensive regime that deals with the relationship between civil and criminal proceedings for the same conduct, including provisions that prevent double punishment for the same conduct, and whether evidential immunity will be available in the criminal proceedings in relation to any self-incriminating evidence given in the civil proceedings.

[9.11.4] *Criminal proceedings after civil proceedings*

Section 1317P of the *Corporations Act* provides that criminal proceedings in relation to conduct that is substantially the same as the conduct alleged to have constituted a contravention of a civil penalty provision may be commenced after the civil penalty proceedings have been completed irrespective of whether those proceedings (for a declaration,¹⁵⁸ a pecuniary penalty order,¹⁵⁹ a compensation order,¹⁶⁰ a disqualification order,¹⁶¹ or a banning order¹⁶²) were successful.¹⁶³ Section 1317P promotes the public interest in permitting ASIC to pursue the full range of civil and criminal enforcement options available to it. Where the civil proceedings were successful, the court will take

¹⁵⁶ See s 76B(3) of the *Trade Practices Act 1974* (Cth).

¹⁵⁷ At the time of writing, the draft legislation was not available: see generally Baxt B and McDonald P, op cit 34.

¹⁵⁸ Section 1317E of the *Corporations Act*.

¹⁵⁹ Section 1317G of the *Corporations Act*.

¹⁶⁰ Section 1317H of the *Corporations Act*.

¹⁶¹ See ss 206C and s 206F of the *Corporations Act*.

¹⁶² In the case of a banning order, see 920A of the *Corporations Act*.

¹⁶³ See generally *R v Adler* [2004] NSWSC 108 at [103], [105] and [125]-[127]; and *Adler v DPP* [2004] NSWCCA 352.

the civil penalty order into account in sentencing.¹⁶⁴ This latter practice assists to reduce the possibility of double punishment for the same conduct.

Section 1317P may not necessarily promote a fair criminal trial because it means that the individual may have to give evidence in the civil penalty proceedings which could prematurely disclose that person's defence to the subsequent criminal proceedings or which may be used against that person in the criminal proceedings. However, the case law indicates that the fact that s 1317P may cause a person to face the dilemma of whether to give such evidence in the civil penalty proceedings or refuse to give such evidence in the civil penalty proceedings (thereby running the risk that the court may draw a *Jones v Dunkel*¹⁶⁵ inference against that defendant – see [8.6.3]), does not undermine public confidence in the administration of justice by the courts and does not invalidate that provision.¹⁶⁶

The private interest of the individual is protected to some extent by the limited evidential immunity afforded by s 1317Q of the *Corporations Act*. Section 1317Q provides that the evidence given by the defendant in civil proceedings for a pecuniary penalty order is not admissible in criminal proceedings against the same defendant where the conduct alleged to constitute the offence is substantially the same as the conduct alleged to have constituted a contravention of the civil penalty provision.¹⁶⁷ Section 1317Q is designed to prevent the evidence being used in the prosecution of any offence involving substantially the same conduct and not simply offences under the *Corporations Act*. According to the Explanatory Memorandum, the evidential immunity afforded by s

¹⁶⁴ ALRC, op cit n 111, at [11.41] and [11.53]. See also *R v Adler* [2005] NSWSC 274 at [56].

¹⁶⁵ (1959) 101 CLR 298; and *ASIC v Adler* [2002] NSWSC 171 at [447]-[450], [500], [576] and [728].

¹⁶⁶ *R v Adler* [2004] NSWSC 108 at [123] affirmed in *Adler v Director of Public Prosecutions* (2004) 22 ACLC 1460; [2004] NSWCCA 352.

¹⁶⁷ See generally *Westpac Banking Corporation v Hilliard* [2006] VSC 470 at [94] and [96].

1317Q allows subsequent criminal proceedings to commence without prejudicing the defendant's right to a fair trial.¹⁶⁸

However, s 1317Q is fairly narrow in its scope as it does not afford any evidential immunity in subsequent criminal proceedings in relation to evidence given in earlier proceedings for a declaration of a contravention of a civil penalty provision, a disqualification order or a compensation order. Section 1317Q was drafted at a time when proceedings for a disqualification order were regarded as protective, rather than penal, in nature. Given that proceedings for a disqualification order are now regarded as penal in nature¹⁶⁹ (see [8.6.7]), s 1317Q should be amended to extend the evidential immunity to the evidence adduced by the defendant in the previous disqualification proceedings.

Where ASIC, APRA or the ATO are performing their functions under the *Superannuation Industry (Supervision) Act 1993* (Cth), s 203 provides that criminal proceedings for an offence under that Act "constituted by a contravention of a civil penalty provision" cannot commence if the regulator has applied for a civil penalty order in relation to the same contravention (irrespective of the outcome of the civil proceedings). Section 203 is based on an identical provision in former s 1317FB of the *Corporations Law*. It was thought that these provisions were necessary because of the lower standard of proof and more liberal rules for discovery in civil proceedings and the fact that a defendant could be severely disadvantaged if a criminal prosecution followed a civil proceeding.¹⁷⁰ However, there are number of problems with these provisions. These provisions provide a significant disincentive for the regulators to commence civil penalty proceedings. From the perspective of the private interest, these provisions provide limited protection as they do not (unlike s 1317Q of the *Corporations Act*) operate as a bar to commencing criminal prosecutions in respect of the same conduct

¹⁶⁸ Explanatory Memorandum, *Corporate Law Economic Reform Program Bill 1998* at [6.129].

¹⁶⁹ *Rich v ASIC* (2004) 220 CLR 129; [2004] HCA 42 at [28], [29], [39] and [41].

¹⁷⁰ Gething M, "Do We Really Need Criminal and Civil Penalties for Contraventions of Directors' Duties?" (1996) 24 ABLR 375 at p 377.

under other legislation, such as the *Crimes Act 1914* (Cth).¹⁷¹ For these reasons, s 1317FB of the *Corporations Law* was repealed and replaced by ss 1317P and 1317Q of *Corporations Act*. From the perspective of the public interest in allowing the regulator to pursue a range of civil and criminal proceedings, the current *Corporations Act* provisions (which govern ASIC) are superior to those in the *Superannuation Industry (Supervision) Act 1993* (Cth). Given the common problems with former s 1317FB of the *Corporations Law* and current s 203 of the *Superannuation Industry (Supervision) Act 1993* (Cth), there is no principled reason why the Commonwealth Parliament should not repeal s 203 and amend that Act to align it with ss 1317P and 1317Q of the *Corporations Act*.

The *Trade Practices Act 1974* (Cth) provides that, in limited cases, criminal proceedings may be commenced in respect of conduct that is substantially the same as the conduct which gave rise to a civil pecuniary penalty order. The Act also gives the defendant evidential immunity and provides that certain evidence previously given by the defendant in the civil pecuniary penalty proceedings is not admissible in any subsequent criminal proceedings¹⁷² (not just criminal proceedings under the *Trade Practices Act 1974* (Cth)).

From the perspectives of the public and private interests of preventing double punishment, there is a superior provision in the taxation legislation which provides that a civil pecuniary penalty is not payable if a criminal proceeding for an offence is commenced for the same act or omission. The legislation also provides that if criminal proceedings have commenced and the civil pecuniary penalty has already been paid, it must be refunded to the taxpayer.¹⁷³

In the context of evidential immunity, there is some Australia-wide uniformity in that the Commonwealth DPP has power to give an undertaking to a person which affords that person the benefit of “use” and “derivative use” evidential immunity in civil or

¹⁷¹ Explanatory Memorandum, *Corporate Law Economic Reform Program Bill 1998*, at [6.129].

¹⁷² See s 76B(4) and (5) of the *Trade Practices Act 1974* (Cth).

¹⁷³ Section 8ZE of the *Taxation Administration Act 1953* (Cth).

criminal proceedings under a Commonwealth law in relation to evidence previously given by that person in “specified proceedings” or in “State or Territory” proceedings. However, the problem with this power is that it is very narrow because “specified proceedings” or “State or Territory proceedings” are narrowly defined.¹⁷⁴

In some cases the defendant may be afforded “use” and “derivative use” evidential immunity in subsequent criminal proceedings in relation to self-incriminating evidence given in current proceedings by s 128 of the *Evidence Act 1995* (Cth). However, as discussed at [9.10.1], equivalent provisions do not operate in all of the Australian States. In addition, as discussed at [8.6.4], the evidential immunity conferred by s 128 differs from that available in the context of oral examinations (see [4.10.2]).

[9.11.5] *Law reform*

From the perspective of the public interest in giving the Australian regulators effective civil and criminal enforcement options, uniform legislative provisions which facilitate the commencement of civil and criminal proceedings in respect of the same contravening conduct are desirable.

Where criminal proceedings have commenced, the Australian legislation should provide that punitive civil proceedings for a pecuniary penalty order or a disqualification order in relation to conduct that is substantially the same as that constituting the criminal offence cannot be commenced and any such civil proceedings already initiated are stayed until the outcome of the criminal proceedings. Where the criminal proceedings are successful, and result in the imposition of a fine and imprisonment, then the legislation should provide that the civil pecuniary penalty proceedings and disqualification order proceedings relating to the same conduct are permanently stayed or dismissed. This is the preferred approach given the punitive nature of both proceedings and the objective of preventing double punishment for the same conduct and the fact that a higher standard of

¹⁷⁴ Section 9(6), (6A), (6B) and (6C) of the *Director of Public Prosecutions Act 1983* (Cth).

proof has been satisfied in the criminal proceedings to obtain the relevant orders. These reforms would not prevent the commencement of other “non-punitive” civil proceedings, such as proceedings for compensation orders. Those reforms would not prevent the regulator from commencing punitive civil penalty proceedings if the criminal proceedings are unsuccessful.¹⁷⁵ Where the criminal proceedings were partly successful (that is, the defendant was convicted and fined, but the court decided not to impose a term of imprisonment), the legislation should provide that the regulator can commence punitive civil disqualification proceedings. This suggestion is supported by the fact that different elements must be proved to establish civil and criminal contraventions (see [8.5] and [9.5.1]) and by the fact that a disqualification order can protect the public by preventing a person from participating in the relevant industry whereas civil or criminal pecuniary penalties are insufficient on their own to achieve the public interest objectives of remedying and preventing past harm and preventing future harm, as discussed at [8.8.3].

The Australian legislation should also contain uniform provisions which provide that criminal proceedings in relation to conduct that is substantially the same as the conduct alleged to have constituted a contravention of a civil penalty provision may be commenced after the civil proceedings for a contravention of a civil penalty provision have been completed irrespective of whether those civil penalty proceedings were punitive or non-punitive in nature and irrespective of whether they were successful. This reform would promote the public interest in permitting the regulators to pursue the full range of civil and criminal enforcement options available to them. The private interest of the defendant would be protected by the fact that the regulator must satisfy a higher standard of proof in the criminal proceedings and by the evidential immunity afforded to the defendant in the criminal proceedings (see below). The private interest could also be protected by including a statutory requirement that where the civil proceedings were successful, the criminal court is required to take any punitive civil penalty order into account in sentencing.

¹⁷⁵ See generally ALRC, DP 65: Civil and Administrative Penalties Summary of Proposals and Questions Proposal 8-2, at <http://www.austlii.edu.au>, viewed on 13 June

Consistent with the reforms discussed at [4.10.2.1] and [8.6.4], the legislation should afford defendants the right to claim the privilege against self-incrimination and the penalty privilege in civil and civil penalty proceedings where there is a real risk that the self-incriminating evidence they give in those proceedings will be used against them in subsequent criminal proceedings relating to the same conduct. However, it is also suggested that if those defendants decided to give the self-incriminating evidence to defend the civil proceedings (rather than face the possibility of an adverse *Jones v Dunkel* inference being drawn against them), the legislation should give them “use evidential immunity” so that their oral self-incriminating evidence is not admissible in the subsequent criminal proceedings.¹⁷⁶ This reform is consistent with one of the rationales for the privilege against self-incrimination which is to prevent persons from “convicting themselves out of their own mouths”¹⁷⁷ in criminal proceedings. This reform is also consistent with the defendant’s right to silence¹⁷⁸ in criminal proceedings and with the fundamental principle that the onus is on the prosecution in criminal proceedings to prove its case.¹⁷⁹ This reform would also promote the defendant’s right to a fair criminal trial.

However, it is suggested that the public interest in achieving a successful criminal prosecution requires that any evidence that the prosecution may derive from the defendant’s direct self-incriminating evidence (given in the civil proceedings) should be admissible in the subsequent criminal proceedings. That is, the defendant should not be afforded “derivative use” evidential immunity as that would make a successful criminal

2003.

¹⁷⁶ See generally ALRC, *ibid*, at Proposal 8-3.

¹⁷⁷ *Hugall v McCusker* (1990) 2 ACSR 145; 8 ACLC 573 at 578; and *Hamilton v Oades* (1989) 166 CLR 486; 7 ACLC 381 at 388.

¹⁷⁸ *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 351; *Petty v The Queen* (1991) 173 CLR 95, 102 ALR 129 at 148; *Environment Protection Authority v Caltex Refining Co Australia Pty Ltd* (1994) 178 CLR 477, 68 ALJR 127 at 137-138; and *ACCC v The Daniels Corporation International Pty Ltd* (2001) 108 FCR 123; [2001] FCA 244 at [23].

¹⁷⁹ *Woolmington v The Director of Public Prosecutions* [1935] AC 462; cited in *Director of Public Prosecutions (NT) v WJI* (2004) 219 CLR 43 at 54; [2004] HCA 47 at [31].

prosecution very difficult.¹⁸⁰ This reform is also consistent with the reforms discussed at [4.10.2.1].

[9.12] Conclusion

A range of reforms have been suggested to introduce greater uniformity, clarity and certainty in relation to criminal proceedings under the Australian legislation. Those reforms would promote greater consistency in decision-making by both the regulators and the Commonwealth DPP and promote greater fairness in the regulatory system by assisting to ensure that like cases are treated alike thereby reducing any perception of unfairness, selective enforcement and distrust among the regulated. The suggested reforms would assist to create a more open or transparent, accountable, efficient and effective prosecution system thereby promoting more effective regulation when using criminal proceedings as an enforcement mechanism.

In summary those suggested reforms include:

- (a) defining criminal offences by reference to common “fault elements;”
- (b) amending the different regulatory statutes so that similar or like offence provisions are redrafted using the same language, defences and penalties (see also [6.8]-[6.8.7] and [9.6]);
- (c) giving the Commonwealth DPP a uniform and sole power across the regulatory legislation to prosecute and appeal in relation to indictable offences;
- (d) giving the regulators the sole power to prosecute and appeal in relation to summary offences;
- (e) introducing uniform rules of evidence and procedure that apply irrespective of the court in which the regulator, or the Commonwealth DPP, commences the criminal proceedings; and

¹⁸⁰ as evidenced by the ASC’s (now ASIC) experience prior to 1992 when “derivative use” evidential immunity was available under s 68 of the *ASC Law* (see [4.10.2]).

(f) introducing uniform provisions to deal with the relationship between civil, civil penalty and criminal proceedings in respect of the same conduct.

CHAPTER 10

ADMINISTRATIVE PROCEEDINGS AND POWERS

by Tom Middleton

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CHAPTER 10

ADMINISTRATIVE PROCEEDINGS AND POWERS

[10.1] Introduction

In contrast to both civil and criminal proceedings, the regulators' administrative proceedings involve proceedings before the regulator, rather than a judicial proceeding before the court. In some cases, the Australian regulators may unilaterally make certain administrative orders, that is, orders that do not involve court proceedings or a court order.

The analysis indicates that only some Australian regulators have the power to make administrative disqualification orders. Braithwaite's¹ "responsive regulation" approach supports giving all Australian regulators the power to make such orders (see [10.9.1]). The analysis also indicates that some existing powers to make administrative disqualification orders may be unconstitutional. Rather than deal with the potential constitutional problems on a case-by-case basis, reforms are suggested at [10.4.2]-[10.4.2.2] to address those potential problems "once and for all" and for all regulators. Braithwaite's² "responsive regulation approach" also supports giving the regulators a wider range of administrative enforcement remedies including a "cease and desist" power, as discussed at [10.9.2].

The analysis also indicates that the Australian legislation does not clearly specify the evidential and procedural rules that govern the regulators' administrative proceedings. Reforms are suggested at [10.6]-[10.6.6] to address this problem. Clear statutory provisions are consistent with the benchmarks of effective regulation identified by Baldwin and Cave³ (see [1.5.1.2]). These reforms will promote better decision-making by the regulators and reduce the need for affected persons to apply for administrative or judicial review.

¹ Braithwaite J, "Restorative Justice and Responsive Regulation," Oxford University Press, Oxford, 2002, at 29.

² Ibid.

³ Baldwin R and Cave M, "Understanding Regulation Theory Strategy, and Practice," Oxford University Press, Oxford, 1999, at pp 76-77.

The suggested reforms would also implement “best practice” and could be achieved by including them in the proposed *Administrative Powers and Proceedings Act* (Cth). This legislation would govern ASIC’s, APRA’s, the ACCC’s and the ATO’s administrative powers and would afford uniform protections to the regulated thereby promoting the principle of treating like cases alike (see [1.5.5]).

[10.2] Public interest

From the perspective of the public interest of protecting and promoting the confidence of Australian business participants (including investors, creditors and taxpayers), the advantages of giving regulators’ powers to make administrative orders are that they are procedurally less complex than court proceedings and they allow the regulators to respond in a more timely and cost-effective manner to contraventions of the legislation in comparison to court proceedings. Those administrative powers therefore assist to promote the express regulatory objectives of some of the regulators of enforcing the legislation with a minimum of procedural requirements and cost-effectively.⁴ Cost-effectiveness is also identified by Baldwin and Cave⁵ as one of the benchmarks of effective regulation.

The literature also indicates that Parliament gave some regulators control of certain regulatory matters, and the power to make timely administrative orders, partly to prevent the parties resorting to the courts, to take advantage of the delay inherent in court processes for tactical purposes.⁶

The power to make administrative “cease and desist orders” and disqualification orders enables regulators to quickly restrain particular conduct or to quickly prevent a person from operating in the relevant business sector thereby protecting the public from the potential harm that may otherwise be caused by

⁴ See, for example, ASIC’s regulatory objectives in s 1(2) of the *ASIC Act*, as discussed at [2.5].

⁵ Baldwin R and Cave M, *op cit* n 3, at p 76.

⁶ See generally B Frith, “Takeovers Panel will go into the lists for its life”, *The Australian*, Thursday, August 18, 2005, at p 22.

allowing continuation of that activity⁷ while evidence is gathered for possibly protracted court proceedings.⁸

The Tax Agents' Board's power to cancel the registration of tax agents protects the public by maintaining proper standards within the profession.⁹ This assists to ensure that taxpayers deal with competent and honest professionals in the preparation of their tax returns.¹⁰ The Tax Agents' Board's powers also serve the broader public interest objective of promoting greater voluntary compliance with the tax laws by taxpayers,¹¹ thereby protecting the revenue base.

[10.3] Private interest

The public interest in giving the regulators wide powers to make administrative orders must be balanced with the need to protect the private interests of persons who may be the subject of an administrative order. The private interest

⁷ *Sage v ASIC* [2005] FCA 1043 at [30].

⁸ In the context of corporate regulation, the importance of disqualification orders in protecting the public has been recognised in a long line of cases: see *Re Magna Alloys & Research Pty Ltd* (1975) ACLR 203 at 205; *Re Wolstencroft and Companies Auditors and Liquidators Disciplinary Board* (1998) 54 ALD 773 at 786; *ASC v Donovan* (1998) 28 ACSR 583 at 603; *ASC v Forem-Freeway Enterprises* (1999) 30 ACSR 339 at 349, 17 ACLC 511 at 521; *ASC v Roussi* (1999) 32 ACSR 568 at 570; *ASIC v S Papatto* (2000) 35 ACSR 107 at 112; *ASIC v Hutchings* (2001) 38 ACSR 387 at 395; *Donald v ASIC* (2001) 38 ACSR 10; [2001] AATA 366; *ASIC v Adler* (2002) 20 ACLC 1146, [2002] NSWSC 483 at [56] and [60]; *ASIC v Whitlam* (2003) 42 ACSR 515; 20 ACLC 1537; [2002] NSWSC 718 at [6]; *ASIC v Forge* [2002] NSWSC 760 at [150] – [151] and [154]; *ASIC v Rich* (2003) 21 ACLC 920; [2003] NSWSC 328 at [43]; *ASIC v Parker* (2003) 21 ACLC 888; [2003] FCA 262 at [124]; and *Jungstedt v ASIC* (2003) 73 ALD 105; [2003] AATA 159 at [334] – [335] and [336]. See also Middleton T, “HIH Collapse – civil penalty orders – case note on *ASIC v Adler* [2002] NSWSC 483” at

<http://www.au.findlaw.com/articles/default.asp?task=read&id=5756&site=LE>.

However, in *Rich v ASIC* (2004) 78 ALJR 1354; 209 ALR 271; [2004] HCA 42 at [28], [29], [39] and [41] the High Court held that disqualification orders have a penal or punitive purpose which has constitutional implications for the regulator's power to make disqualification orders, as discussed at [10.4.1].

⁹ through the removal of those tax agents who do not meet the relevant standards.

¹⁰ *Ray v Tax Agents Board of Queensland* [2005] AATA 657 at [64] citing *Budai v Tax Agents Board of New South Wales* [2002] AATA 1154 at [73], [94] and [96]; and *Pappalardo v Tax Agents Board of Victoria* [2003] AATA 990 at [13] and [14].

¹¹ See generally The Report of The National Review Of Standards For The Tax Profession, “Tax Services for the Public”, AGPS, Canberra, 1994, at p xxvi.

requires that those persons be given clear rights and protections in this administrative process (see [10.5]-[10.5.5]). The private interest can also be protected by introducing a range of evidential and procedural reforms discussed at [10.6]-[10.6.6]. In some cases, the affected persons should also have the right to seek judicial or administrative review of the regulators' final administrative decision or order (see [10.8] and Chapter 11).

[10.4] The regulators' powers to conduct administrative hearings

Where ASIC is acting under the *Corporations Act*, it must give the affected person an administrative hearing before it decides whether to disqualify a director or other person from managing a corporation,¹² or ban a person from providing financial services,¹³ and before it decides whether to make a range of other administrative decisions under that Act.¹⁴

In the United States, the SEC has a broader power than ASIC to make

¹² Section 206F of the *Corporations Act*. See also *Andrews v ASIC* [2006] AATA 25.

¹³ Section 920A(2) of the *Corporations Act*.

¹⁴ Including making an order to stop the offer, issue, sale or transfer of securities pursuant to a disclosure document (s 739(2)); refusing to register a person as an auditor or liquidator (ss 1280(8) and 1282(10)); compensating a person from a security lodged by a licensee or liquidator (*Corporations Regulations*, reg 9.205(5)); refusing to grant an applicant an Australian financial services licence (s 913B(5)); imposing conditions or additional conditions or vary the conditions on an Australian financial services licence (s 914A(3)); suspending or cancelling an Australian financial services licence (s 915C(4)); not varying or cancelling a banning order in relation to the provision of financial services (s 920D(3)); making a stop order in relation to the issue of financial products where there is a misleading or deceptive statement in, or omission from, a disclosure document (s 1020E); issuing an infringement notice in relation to alleged inadequate disclosure of materially price sensitive information by listed entities (see Pt 9.4AA of the *Corporations Act*. The infringement notice scheme was introduced to deal with contraventions of the continuous disclosure requirements in ss 674(2) or 675(2) of the *Corporations Act*. See also ALRC, Report No 95, *Principled Regulation: Federal, Civil and Administrative Penalties in Australia*, Ch 12, "Infringement Notices" at [12.32], issued March 2003, <http://www.ausitlii.edu.au>, viewed on 9 April 2004); or making a declaration that a person is disqualified from being involved in a licensed financial market operator or a licensed clearing and settlement facility operator on the ground of that person's unfitness to act (ss 853D(4)(b) and 853D(5)(a)).

administrative orders in that it may impose pecuniary penalties¹⁵ and it may make cease and desist orders.

Where ASIC, APRA or the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth), s 120A gives them the power to disqualify a person from acting as a trustee, custodian or investment manager of a superannuation entity if they are satisfied that the person has engaged in a serious contravention of that Act on one or more occasions. Section 120A also provides that they may disqualify a person from acting as a responsible officer of a corporation that is a trustee, investment manager or custodian of a superannuation entity where one of those regulators is satisfied that the relevant person is not a “fit and proper person.”¹⁶

Section 132 of that Act gives those regulators the power to suspend or remove trustees of a superannuation entity where those trustees have been disqualified from acting under s 120A or where the regulator is of the view that any proposed conduct of the trustees may produce an unsatisfactory financial position for the superannuation entity or where the regulator revokes the approval of the trustees to act because, for example, the trustees can no longer be relied upon to perform their duties in a proper manner.¹⁷

Section 131 of that Act gives those regulators the power to disqualify a person from acting as an approved auditor for the purposes of the Act.¹⁸

¹⁵ Section 21B(a) of the *Securities Exchange Act 1934* (US); 15 USC s 78u-2(a); and Newkirk T and Brandriss I, “Speech by SEC Staff: The Advantages of a Dual System: Parallel Streams of Civil and Criminal Enforcement of the US Securities Laws,” at fns 76 and 77, found at <http://www.sec.gov/news/speech/speecharchive/1998/spch222.htm>, viewed on 15 March 2005.

¹⁶ See generally *VBN v Australian Prudential Regulation Authority* [2006] AATA 710 at [517].

¹⁷ Also see s 28 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

¹⁸ Disqualification may occur where the auditor has failed to perform the duties of an auditor under the Act or where the regulator is of the view that the person is not a fit and proper person to be an auditor for the purposes of the Act: see s 131 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

APRA has power under s 33 of the *Retirement Savings Accounts Act 1997* (Cth) to suspend or revoke the approval of a retirement savings account provider to operate as an approved provider where there has been a contravention of any condition upon which approval was granted or where APRA forms the view that the provider can no longer be relied on to manage retirement savings accounts in accordance with the Act.

APRA has power under s 25A of the *Insurance Act 1973* (Cth) to disqualify a person from acting in the insurance industry where it is satisfied that the person is not a fit and proper person to act in that industry.¹⁹

The Tax Agents' Board has power to refuse to register or cancel the registration of a tax agent on a range of grounds.²⁰

The ACCC and the ATO (when acting under the taxation legislation) do not have any administrative power to make disqualification orders. It is suggested at [10.9.1] that they should have such a power.

[10.4.1] *Constitutional validity of the regulators' disqualification powers*

In *Rich v ASIC*,²¹ the majority of the High Court held that ASIC's proceedings for a court order, under s 206C of the *Corporations Act*, disqualifying a person from managing a corporation, are proceedings that expose a person to a penalty. Although the decision in *Rich v ASIC* concerned court proceedings for a disqualification order, it has implications for the regulators' powers (discussed at [10.4]) to make disqualification orders.

¹⁹ *Kamha v APRA* [2005] FCAFC 248 at [7]; and *X v APRA* [2007] HCA 4.

²⁰ See generally s 251C of the *Income Tax Assessment Act 1936* (Cth).

²¹ (2004) 78 ALJR 1354; 209 ALR 271; [2004] HCA 42 at [28], [29], [39] and [41] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ (Kirby J dissenting)). The High Court reversed the decisions of Austin J in *ASIC v Rich* (2003) 21 ACLC 920; [2003] NSWSC 328 and of the New South Wales Court of Appeal in *Rich v ASIC* (2003) 183 FLR 361; 203 ALR 671; [2003] NSWCA 342.

Section 71 of the *Commonwealth of Australia Constitution Act 1900* (UK) (the Constitution) (within Chapter III) requires “judicial power of the Commonwealth” to be vested in the courts. Judicial power cannot be vested in the Executive, which includes administrative bodies like ASIC, APRA, the ACCC or the ATO, because this would breach the doctrine of separation of powers.²² Section 71 would prevent the Australian regulators or other administrative bodies (or non-judicial officers) from considering, or deciding on, and imposing, penalties as those matters involve the exercise of judicial power.²³ Part of the rationale for this principle is that a person should not be punished or penalised without the safeguards of a judicial hearing.²⁴ In view of the decision in *Rich v ASIC*, it could be argued that the regulators’ powers to make disqualification orders are powers that impose a penalty and that therefore they may be unconstitutional.²⁵

However, the position is not certain because for the regulators’ powers to make disqualification orders to be unconstitutional, it would have to be established that they clearly involve the exercise of judicial power. The problem is that “judicial power” is difficult to define. The distinction between judicial power and executive power is blurred.²⁶ The exercise of judicial power traditionally includes “the

²² This doctrine provides that one branch of government (the Executive) cannot exercise the functions that are vested in another branch of government (in this case the Judiciary): see *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* (2004) 79 ALJR 43; [2004] HCA 49 at [49] – [50] citing *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 355; and *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254 at 270.

²³ ALRC, Report No 95, op cit n 14, at [12.19]; and *Al-Kateb v Godwin* (2004) 78 ALJR 1099; [2004] HCA 37 at [4], [44], [110], [134] and [153].

²⁴ *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* (2004) 79 ALJR 43; [2004] HCA 49 at [60].

²⁵ In *Rich v ASIC* (2003) 183 FLR 361; 203 ALR 671; [2003] NSWCA 342 at [108] Spigelman CJ suggested that there would be constitutional problems under Chapter III of the Constitution if ASIC’s administrative power to make a disqualification order under s 206F of the *Corporations Act* was punitive in nature. See also Samuel G (Chairman of the ACCC), speaking on *7.30 Report*, “Collapse of Henry Kaye’s National Investment Institute”, <http://www.abc.net.au/7.30/content/2003/s998037.htm>, viewed on 26 November 2003.

²⁶ *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* (2004) 79 ALJR 43; [2004] HCA 49 at [51].

adjudgment and punishment of criminal guilt under a law of the Commonwealth.”²⁷ On this view, the regulators’ powers to make disqualification orders do not involve the exercise of judicial power as their powers are not concerned with establishing or punishing criminal guilt.²⁸

Judicial power also includes power to make binding and authoritative decisions that resolve controversies between parties and that determine their rights and duties. There is an exercise of judicial power where those rights and duties are determined according to the law.²⁹

However, there may not be an exercise of judicial power if the power to make an authoritative decision can be properly characterised as an incident of executive power where those rights and duties are determined according to a policy or through the exercise of an administrative discretion.³⁰ It could be argued that the majority of the Australian regulators’ powers to make disqualification orders fall within this latter category. As a general rule, those powers are discretionary as the regulators can only make disqualification orders where they are satisfied that such orders are justified (see [10.4]). In *Visnic v ASIC*³¹ the High Court held that ASIC’s disqualification power under s 206F of the *Corporations Act* is exercised for the purpose of maintaining professional standards in the public interest and that because its decision about

²⁷ *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* (2004) 79 ALJR 43; [2004] HCA 49 at [54] citing *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 66-67.

²⁸ *Kamha v APRA* [2005] FCAFC 248 at [73]. In *Visnic v ASIC* [2007] HCA 24 at [16] the High Court held that ASIC’s power to make a disqualification order under s 206F of the *Corporations Act* did not involve the determination of guilt with respect to any offence provision.

²⁹ *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* (2004) 79 ALJR 43; [2004] HCA 49 at [52] citing *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 267-268. In *Visnic v ASIC* [2007] HCA 24 at [28] and [44] the High Court indicated that ASIC’s disqualification power under s 206F of the *Corporations Act* could not be characterised as determining basic legal rights of the kind that must be reserved to the court (citing *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* [2007] HCA 23 at [99]).

³⁰ *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* (2004) 79 ALJR 43; [2004] HCA 49 at [23], [44], [45], [52] and [65] citing *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 267-268.

³¹ [2007] HCA 24 at [15] citing *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 191.

whether to make a disqualification order is based on both policy and public interest considerations, that power did not involve an exercise of judicial power.

It could also be argued that the Australian regulators' powers to make disqualification orders do not have the requisite degree of finality to constitute the exercise of judicial power. That is, the decision is merely an administrative decision that could itself be subject to a legal challenge on administrative law grounds.³² There is nothing in the legislation that excludes the jurisdiction of the courts or which forbids collateral attack on the regulators' decisions by way of judicial review.³³ Accordingly, the regulators' powers to make such orders may not involve an exercise of judicial power because their orders may not finally resolve the controversy between the parties.

In addition, the regulators' decisions to make disqualification orders may not be a "conclusive and binding decision" in that, if their orders are not complied with, they would need to obtain a judicial order (an injunction) to obtain final enforcement of their original orders.³⁴ Before granting an injunction, the court would have to be satisfied that the requirements in the legislation for making an administrative disqualification order were satisfied.³⁵

³² See *Masu Financial Management Pty Ltd v FICS and Wong (No 1)* [2004] NSWSC 826 at [11]–[12] per Shaw J; and *Visnic v ASIC* [2007] HCA 24 at [46] per Kirby J.

³³ Section 1317C of the *Corporations Act* does not exclude ASIC's decisions to make a disqualification order or a banning order from review by the Administrative Appeals Tribunal. The Tax Agents' Board's decision to cancel a tax agent's registration is reviewable by the AAT: see s 251QA of the *Income Tax Assessment Act 1936* (Cth); and Woellner R, *Australian Taxation Law*, CCH, Sydney, 2005 at [35.550].

³⁴ The regulators' powers to obtain an injunction were discussed at [8.7.3]. See generally *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83; [1999] HCA 28 at [36], [45], [46], [86], [92]–[96] and [97] – [101]. The Tax Agents' Board's decision to cancel or suspend the registration of a tax agent is also enforceable in that unregistered tax agents cannot charge fees and, if they do so, they may be prosecuted under s 251L of the *Income Tax Assessment Act 1936* (Cth).

³⁵ See *ASIC v Keech* [1999] NSWSC 683.

The fact that ASIC³⁶ and the Tax Agents' Board³⁷ can make administrative disqualification orders on “non-blameworthy” grounds supports the view that those orders are not penal or punitive in nature, but are protective. However, some regulators can also disqualify persons on a range of “blameworthy grounds” (including a failure to perform obligations or a failure to meet the fit and proper person requirement)³⁸ which suggests that such orders may be punitive or penal in nature and potentially rendering those powers constitutionally invalid.

In addition, the fact that the Tax Agents' Board considers matters such as whether the tax agents demonstrated “contrition” or co-operated with the Board in deciding whether registration should be cancelled suggests that the Board's powers impose a punishment because “contrition” and “co-operation” are matters that are also taken into account in the criminal law sentencing process.³⁹

³⁶ Those non-blameworthy grounds are contained in ss 915B(1)(b) and (d) and 920A(1)(a) of the *Corporations Act* and include becoming insolvent or becoming incapable of managing one's affairs through physical or mental incapacity. See also *Rich v ASIC* (2003) 183 FLR 361; 203 ALR 671; [2003] NSWCA 342 at [74]–[80] citing *ASC v Kippe* (1996) 67 FCR 499 at 507G and 508A-B; 14 ACLC 1226. The High Court has indicated that orders made against a person on the ground of mental incapacity or mental illness are not penal or punitive in nature: see *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* (2004) 79 ALJR 43; [2004] HCA 49 at [58].

³⁷ A tax agent's registration is cancelled on a number of “non-blameworthy” grounds including bankruptcy or liquidation, or where the tax agent is a non-exempt company in which qualified directors cease to satisfy the voting power control requirement: see s 251JC of the *Income Tax Assessment Act 1936* (Cth); and Woellner R, op cit n 33, at [32-550].

³⁸ A tax agent's registration may be cancelled on a number of “blameworthy” grounds including making false or misleading statements to a taxation officer, incorrectly keeping records or falsifying a person's identity with the intention of misleading or deceiving (see ss 8N, 8T and 8U of the *Taxation Administration Act 1953* (Cth)); or where the tax agent is subject to accessorial criminal liability (see ss 11.2 and 11.4 of the *Criminal Code Act 1995* (Cth) and s 6 of the *Crimes Act 1914* (Cth)); or where tax agents intentionally prepare false taxation returns, neglect the client's business, have been guilty of misconduct as a tax agent; or where the tax agent is not a fit and proper person, or the member of the relevant partnership or company is not of good integrity, fame and character (s 251K(2) of the *Income Tax Assessment Act 1936* (Cth); and Woellner R, op cit n 33, at [32-550]–[32-570]).

³⁹ *Rich v ASIC* [2004] HCA 42 at [32], [35], [52], [56] and [58]. See also *R v Adler* [2005] NSWSC 274 at [47]–[48].

From a constitutional perspective, the regulators' powers to make disqualification orders are only valid if they can be properly characterised as an incident of their administrative (or executive) power to protect the public.⁴⁰ However, recent statements by some members of the High Court indicate that whether a law, which confers a power on the Executive, infringes Chapter III of the Constitution is not to be answered by looking at whether the law is reasonably necessary for the achievement of a non-punitive (or protective) purpose.⁴¹ Rather, the question to be asked in determining whether such a law infringes Chapter III is whether it imposes a punishment. The punitive purpose of the law is decisive.⁴² The High Court has also indicated that where a law has a punitive and a non-punitive purpose, that law will almost certainly infringe Chapter III.⁴³ Given this approach, and the decision in *Rich v ASIC*, it is difficult to avoid the conclusion that the regulators' powers to make disqualification orders on "blameworthy" grounds may be unconstitutional.⁴⁴

The High Court's decision in *Visnic v ASIC*⁴⁵ finally resolves the uncertainty concerning the constitutional validity of ASIC's disqualification power under s 206F of the *Corporations Act*. However, it does not necessarily resolve questions

⁴⁰ See generally *Masu Financial Management Pty Ltd v FICS and Wong (No 1)* [2004] NSWSC 826 at [16] per Shaw J.

⁴¹ *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* (2004) 79 ALJR 43; [2004] HCA 49 at [75]–[78] per McHugh J and the authorities cited therein.

⁴² *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* (2004) 79 ALJR 43; [2004] HCA 49 at [75], [76], [82] and [86] per McHugh J.

⁴³ *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* (2004) 79 ALJR 43; [2004] HCA 49 at [82] per McHugh J.

⁴⁴ Despite the High Court's decision in *Rich v ASIC*, in *Kamha v APRA* [2005] FCAFC 248 at [69] (citing *Re Woolley; Ex parte Applicants M276/2003* (2004) 210 ALR 369 at [17]) the Federal Court subsequently held that the fact that the exercise of a disqualification power may have a punitive effect, while not irrelevant, is not determinative of the character of the power exercised. According to the Federal Court, inflicting punishment, in the sense of involuntary hardship or detriment imposed by an administrative body (in this case APRA), is not an exclusively judicial function and does not necessarily offend Chapter III. It held that APRA's power of disqualification under s 25A of the *Insurance Act 1973* (Cth) was constitutionally valid.

⁴⁵ [2007] HCA 24. The constitutional issues are explored in more detail in Middleton T, "The High Court's decision in *Rich v ASIC* [2004] HCA 42 and its potential impact upon ASIC's disqualification orders, banning orders and oral examinations" (2005) 23 *C&SLJ* 248.

concerning the constitutional validity of ASIC's banning order powers under s 920A of the *Corporations Act* or the regulators' other disqualification powers discussed at [10.4] given the textual differences between that legislation and s 206F of the *Corporations Act*.

In *Australian Pipeline Ltd v Alinta Ltd*⁴⁶ the Full Federal Court indicated that s 657A(1) and s 657A(2)(b) of the *Corporations Act* purported to give an administrative body, the Takeovers Panel, the judicial power to decide disputes between parties about the application of the law, to declare that a party has engaged in a contravention of the *Corporations Act*, and to make orders to remedy that contravention. Accordingly, the Federal Court held that those sections were invalid as they purported to give the Takeovers Panel judicial power in contravention of Chapter III of the Constitution. In light of this decision it could be argued that the regulators' power under s 120A of the *Superannuation Industry (Supervision) Act 1993* (Cth) to disqualify persons from acting in a particular industry if they are satisfied that the person has engaged in a serious contravention of that Act involves an authoritative decision that determines the rights and duties of the affected person according to the law. Consequently, such a power may be constitutionally invalid.

[10.4.2] Suggested reforms to avoid potential constitutional problems

[10.4.2.1] *Voluntary compliance*

To avoid potential constitutional problems and the need to engage in repeated litigation concerning the same constitutional questions raised in cases like *Visnic v ASIC*,⁴⁷ the regulators various power's to make disqualification orders could be modelled on the legislation underpinning ASIC's new infringement notices power.⁴⁸ That is, if after conducting the disqualification hearing, the regulator forms the view that the affected person should be disqualified from participating in the relevant industry, the regulator could issue a disqualification notice specifying that the affected person has

⁴⁶ [2007] FCAFC 55 at [418] and [428].

⁴⁷ [2007] HCA 24.

⁴⁸ ASIC's infringement notices power is contained in Part 9.4AA of the *Corporations Act*.

the option of voluntarily complying with the period of disqualification specified in the notice.⁴⁹ No specific head of constitutional power is necessary for the regulator where the affected person voluntarily complies with the regulator's request that they submit to a period of disqualification. Questions of constitutional power only arise where the regulator seeks to use its statutory powers of compulsion.⁵⁰ If the affected person voluntarily complies with the notice, that could act as a bar to the regulator commencing court proceedings in relation to the matters specified in the notice.⁵¹ If the affected person does not voluntarily comply with the notice, the regulator could then commence court proceedings to enforce the matters specified in the notice. Those enforcement proceedings could then result in the court (not the regulator) making a final disqualification order.⁵² This would avoid any constitutional difficulties because the court, rather than the regulator, makes the final punitive or penal order.

This suggested reform is problematic because it involves a duplication of effort including an administrative hearing before the regulator as the result of which voluntary compliance is obtained and, in some cases, a further, possibly lengthy, court proceeding to obtain enforcement orders where the affected person refuses to voluntarily comply with the regulator's disqualification notice. Such reforms may not promote the objectives of giving the regulators administrative powers, which include the enforcement of the legislation cost-effectively and with a minimum of procedural requirements.⁵³

[10.4.2.2] *Enforceable undertaking*

Some Australian regulators have the administrative power to accept an enforceable undertaking from a person whereby that person undertakes to the regulator (rather than to the court) to cease engaging in conduct that may constitute a

⁴⁹ Argued by analogy from ss 1317DAC and 1317DAE of the *Corporations Act*.

⁵⁰ See generally *Richardson v Forestry Commission* (1988) 164 CLR 261 at 334-335 per Toohey J; and *Lockwood v Commonwealth* (1954) 90 CLR 177 at 182 per Fullagar J.

⁵¹ Argued by analogy from ss 1317DAF and 1317DAJ(2) of the *Corporations Act*.

⁵² Argued by analogy from s 1317DAG of the *Corporations Act*.

⁵³ See the regulatory objectives in s 1(2)(d) of the *ASIC Act*, as discussed at [2.5].

contravention of the legislation and not to engage in such conduct in the future.⁵⁴ However, where ASIC and APRA are acting under the *Retirement Savings Accounts Act 1997* (Cth), or the ATO or the Tax Agents' Board, are acting under the taxation legislation, they have no power to accept such undertakings.

Some of the regulators in the United States and in the United Kingdom have power to accept enforceable undertakings.⁵⁵

From the public interest perspective of obtaining a timely enforcement outcome, one advantage of an enforceable undertaking is that the regulators do not have to give the affected person a private hearing before obtaining such an undertaking. By contrast, ASIC is required to give the affected person the opportunity of a hearing before it can decide whether to make a disqualification order or a banning order.⁵⁶ However, if as a reform option, the regulators were required to routinely use their enforceable undertaking powers to obtain and enforce disqualification orders, the private interest dictates that the legislation be amended to give the affected persons the right to a private hearing with the regulator. This would

⁵⁴ On 1 July 1998 ASIC was given power under ss 93AA and 93A of the *ASIC Act* to accept enforceable undertakings from corporations, directors, licensed securities dealers and responsible entities. The ACCC (under s 87B of the *Trade Practices Act 1974* (Cth)) and ASIC, APRA (and their predecessors), and the ATO (under s 262A of the *Superannuation Industry (Supervision) Act 1993* (Cth)), have had the power to accept enforceable undertakings since 1993. See also ACCC, "Enforcement priorities – Formal administrative resolutions," at <http://www.accc.gov.au>, viewed on 24 September 2005; and *Glass v APRA* [2003] FCA 1105.

⁵⁵ ALRC, Background Paper 7 – Review of Civil and Administrative Penalties in Federal Jurisdiction 4, Role of Courts and Tribunals, Enforceable Undertakings, at fn 200, at <http://www.austlii.edu.au>, viewed on 19 March 2003. The CC, in the United Kingdom, also has the power to accept enforceable undertakings: see ss 71-76 of the *Fair Trading Act 1973* (UK); and Department of Trade and Industry, Consumer and Competition Policy, Mergers Guidance, at <http://www.dti.gov.uk/ccp/topics2/guide/ukmergerguide.htm#Acceptance%20of%20undertakings%20as%20an%20alternative%20to%20a%20merger%20reference>, viewed on 21 March 2006. By contrast, the DTI, in the United Kingdom, has no power to accept an enforceable undertaking that a person not manage a corporation. The DTI does not have any power to settle disqualification proceedings or to obtain disqualification orders by consent: see Walters A and Davis-White M, "Directors' Disqualification: Law and Practice," Sweet and Maxwell, London, 1999, at p 184.

⁵⁶ See ss 206F and 920A of the *Corporations Act*; *Saxby Bridge Financial Planning Pty Ltd v ASIC* (2003) 46 ACSR 286; [2003] AATA 480 at [313]; and *Chapel Road Pty Ltd v ASIC* (2003) 75 ALD 264; [2003] AATA 660 at [183].

ensure that they could make submissions about why they should not be disqualified before the regulator decided to proceed to the enforceable undertaking stage.

A major advantage of the enforceable undertaking power is that the regulator does not have to commence legal proceedings before it can accept an enforceable undertaking that a person not participate in the relevant industry. By contrast, a similar undertaking could only be given to the court after legal proceedings have commenced.⁵⁷ Accordingly, the regulators' power to accept undertakings is less costly and quicker than an undertaking obtained via the court's processes.

An undertaking to the court is given in lieu of an injunction and therefore, the principles which govern the grant of an injunction must determine whether the court should accept the undertaking. Accordingly, if the court has no power to grant an injunction to prevent a person from participating in the relevant industry, it has no power to accept an undertaking from the defendant in relation to those matters. The court cannot put itself in the position of accepting an undertaking where it has no capacity to enforce it by an injunction.⁵⁸ By contrast, the regulators' powers to accept enforceable undertakings are wider than the court's power to accept undertakings because the regulators' powers are not subject to the same constraints (relating to injunctions) that apply to the court's power.⁵⁹ Regulators may obtain and enforce undertakings given to them provided they promote their objectives and are consistent with their powers.

A further advantage of the regulators' enforceable undertaking power is that, unlike the reform option suggested at [10.4.2.1], a regulator can obtain a court order to compel compliance with the undertaking without having to establish a contravention of the legislation. This enforcement option enables the regulator to respond quickly to a breach of the undertaking and to obtain a court order without the costs and delay usually associated with a lengthy trial. Given that a breach of the

⁵⁷ See ASIC Practice Note 69, "Enforceable Undertakings" at [69.6].

⁵⁸ *ASIC v Edwards* (2004) 23 ACLC 37; 51 ACSR 320; [2004] NSWSC 1044 at [5] – [6] and [10]–[11] citing *Thomson Australian Holdings Pty Ltd v TPC* (1981) 148 CLR 150.

⁵⁹ *ASIC v Edwards* (2004) 23 ACLC 37; 51 ACSR 320; [2004] NSWSC 1044 at [13] and [16] and the authorities cited therein.

enforceable undertaking is enforced by a court order, this would avoid any potential constitutional difficulties because the court, rather than the regulator, makes the final punitive or penal order.

This reform is also consistent with Braithwaite's⁶⁰ "responsive regulation" approach as it provides the regulator with a broader range of enforcement options. If ASIC and APRA (when acting under the *Retirement Savings Accounts Act 1997* (Cth)) and the ATO and the Tax Agents Board were given power to accept enforceable undertakings, they could deal with the matter without the need to immediately escalate the enforcement response by commencing court proceedings.⁶¹

[10.5] Affected person's rights

[10.5.1] *Right to a hearing*

With the exception of the *ASIC Act*⁶² and the *Corporations Act*,⁶³ none of the Australian legislation expressly affords affected persons the right to a hearing so they can make submissions to persuade the regulator not to make the administrative order.

Arguably, the rules of natural justice or procedural fairness require that the affected person be given the right to a hearing to make submissions on the substance of the allegation or on the critical issues or factors on which the regulator's decision will turn.⁶⁴ However, with the exception of the *ASIC Act* (see [10.6.2]), it is unclear

⁶⁰ Braithwaite J, op cit n 1, at 29.

⁶¹ However, one problem with the enforceable undertaking option is that the case law indicates that it is not an appropriate enforcement mechanism where the relevant person has engaged in serious and recurrent contraventions of statutory duty or where the relevant person continues to demonstrate a disregard of applicable statutory standards of behaviour: see *Jungstedt v ASIC* (2003) 73 ALD 105; [2003] AATA 159 at [337].

⁶² See s 57 of the *ASIC Act*.

⁶³ ALRC, Report No 95, op cit n 14, at [12.33]; and see ss 206F(1)(b)(ii); and 1317DAD(1)(b) of the *Corporations Act*.

⁶⁴ *Ridge v Baldwin* [1964] AC 40 at 132; *Kioa v West* (1985) 159 CLR 550 at 587; *Hodgkinson v Companies Auditors and Liquidators Disciplinary Board* (1994) 50 FCR 504; 12 ACLC 648 at 650; and *McLachlan v ASC* (1999) 17 ACLC 656 at 666.

whether those rules operate under the current legislation as they are not expressly adopted by that legislation and they may be impliedly overridden.⁶⁵

The legislation should be amended to give affected persons a statutory right to a hearing. This will ensure that they are given an opportunity to make submissions to the regulator on matters that are relevant to the regulator's decision on whether to make the administrative order. Such an approach would ensure that the regulator can make an informed and fair decision on the matter and would reduce the risk of challenges to the decision based on grounds such as denial of natural justice or the regulator's failure to take into account relevant considerations.⁶⁶

[10.5.2] *Right to notice of the hearing*

With the exception of one provision in the *Corporations Act*,⁶⁷ none of the Australian legislation has a statutorily prescribed form for the notice of the administrative hearing. It is suggested that the statutory notice of an administrative hearing should be in a prescribed form.⁶⁸ This reform would not only promote the

⁶⁵ The Tax Agents' Board has indicated that in most cases it will give tax agents an opportunity to show cause why their registration should not be cancelled. It does not however usually give a tax agent the opportunity to be heard where cancellation of the tax agent's registration is mandatory: see Tax Agents' Board, "Powers of the Board," at <http://www.tabd.gov.au/content.asp?placement=TABD/ABOUT>, viewed on 26 August 2005.

⁶⁶ See ss 5(1)(a), (e) and 5(2)(g) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

⁶⁷ There is a prescribed form, Form 5249, which is used by ASIC when giving the affected person notice of a director's disqualification hearing conducted under s 206F of the *Corporations Act*. This form could be adapted for use by all of the Australian regulators.

⁶⁸ The prescribed form should require the regulators to disclose: the regulator's intention to hold the hearing in relation to a stated matter at a specified time, date and place (see, for example, s 57 of the *ASIC Act*); the critical issues or factors that should be addressed by the affected person at the hearing (see *Kioa v West* (1985) 159 CLR 550 at 587); the right of the affected person to present submissions before, or at the hearing, accompanied by an explanation of the form those submissions should take (whether oral or written or a combination of these forms); the fact that the regulator must consider any submissions prior to making a final decision; the time period within which the affected person must provide the submissions and the effect if no submission is made within that period; the right of the affected person to receive a copy of the final decision and written reasons for that decision (see [10.5.7]); the right of the affected person to obtain judicial or administrative review of the regulator's final decision (see [10.6]); the affected person's right to seek legal advice or be

private interests of the affected persons by providing them with the required information but would also promote the public interest by reducing any delays in the hearing process which may otherwise occur as the result of collateral litigation challenging the validity of the notices on the grounds of inadequate disclosure or defect in form (see also [4.5]).

[10.5.3] *Right to a private hearing*

With the exception of the *ASIC Act*⁶⁹ and the *Corporations Act*,⁷⁰ none of the Australian legislation expressly affords the affected person a private hearing. In the context of the other legislation, the question of whether the hearing must be held in public or private must be resolved by the common law. As a general rule, the common law favours the open administration of justice in the form of public hearings because such an approach promotes public confidence in the administration of justice.⁷¹

Given that administrative proceedings do not afford the affected person the same protections as judicial proceedings, a balance could be struck by providing that, as a general rule, all administrative hearings should be conducted in private. In particular, the hearing should be conducted in private where it involves allegations that the affected person has contravened the legislation, where the evidence to be given is of a confidential nature or where a public hearing may unfairly prejudice the reputation of the affected person.⁷²

legally represented at the hearing (see [10.5.4]); and contact details for further information. Some of the matters listed in (a)-(i) are discussed in the ALRC, Background Paper 7, op cit n 55, at Proposal 7-3.

⁶⁹ See ss 52-54 of the *ASIC Act*.

⁷⁰ See, for example, ss 920A(2); and 1317DAD(1)(b) of the *Corporations Act*.

⁷¹ *Harman v Secretary of State for the Home Department* [1983] AC 280 at 303; *ASIC v Adler* [2001] NSWSC 644 at [2]; *ASIC v Adler* [2001] NSWSC 777 at [7] and [9]; *ASIC v Rich* [2001] NSWSC 496 at [20]-[28], [31] and [58]; *ASIC v Rich* [2002] NSWSC 198 at [9] and [11]; and *Moage Ltd (in liq)* [2002] NSWSC 419 at [11]-[14]. At common law, proceedings are conducted in private only in exceptional circumstances, that is, where the interests of justice require a private hearing: see *Reid v Howard* (1995) 184 CLR 1; 69 ALJR 863 at 870-871 cited in *ASC v Ampolex* (1995) 38 NSWLR 504; 14 ACLC 80 at 96.

⁷² The legislation could also give the regulators a discretionary power to hold the hearing in public where the public interest dictates that such a hearing should be held. ASIC is given such a discretionary power by ss 52-54 of the *ASIC Act*.

[10.5.4] *Right to a lawyer*

With the exception of the *ASIC Act*,⁷³ none of the Australian legislation expressly provides that the affected person has a right to be represented by a lawyer at the regulators' hearings. All of the Australian legislation is silent on whether the regulator should be represented by a lawyer at the hearing. For the reasons discussed at [4.7.1], the legislation should provide that both affected persons and the regulators may be represented by a lawyer at the hearing. It should also provide that lawyers who appear at the hearings have the same protections and immunities as lawyers who appear in court.⁷⁴

[10.5.5] *Right to record of the hearing*

The secretary of the Tax Agents' Board is required to keep a record of all of the Board's proceedings.⁷⁵ None of the other Australian legislation expressly requires the regulators to make or to keep a record of their administrative hearings.

For the reasons discussed at [4.7.2], the legislation should expressly provide that the regulators are required to make a written record of the hearing and that the affected person has a right to a copy of it. Such express provisions would be consistent with the requirements imposed by the rules of natural justice⁷⁶ and remove any doubt as to the operation of this aspect of natural justice under the legislation.

[10.6] Rules of evidence and procedure

With the exception of the *ASIC Act*,⁷⁷ none of the Australian legislation contains any express provisions concerning the evidential or procedural rules that apply to the regulators' administrative hearings. The resulting uncertainty has meant

⁷³ Section 59(8) of the *ASIC Act*.

⁷⁴ Such a provision is only found in s 62(2) of the *ASIC Act*.

⁷⁵ Regulation 154(2) of the *Income Tax Regulations 1936* (Cth).

⁷⁶ See generally *NCSC v The News Corporation* (1984) 156 CLR 296; 52 ALR 417 at 439; *Wood v NCSC* (1990) 2 WAR 176; 8 ACLC 462 at 470; and *Boys v ASC* (1997) 24 ACSR 1; 15 ACLC 844 at 872.

⁷⁷ See ss 59(1), and (2)(a)-(c), 68 and 69 of the *ASIC Act*.

that, in some cases, those hearings have become more protracted and costly because of collateral litigation in which questions relating to the applicable rules have had to be determined.⁷⁸ From the perspective of achieving timely and cost-effective regulatory outcomes, this means that, in such cases, the regulators' administrative powers have provided little or no advantage over court proceedings.

The use of such rules in relation to high volume decision-making may involve a significant use of public resources and require increased staffing and funding for the regulators.⁷⁹ However, the benefit of clear rules may outweigh the resource issues if they produce better quality administrative decisions and reduce the need for administrative or judicial review of such decisions. Such a reform would also promote the public and private interests in ensuring that administrative hearings are conducted in a more timely, transparent, accountable and ethical manner.⁸⁰

[10.6.1] *Rules of evidence*

The *Evidence Act 1995* (Cth)⁸¹ and the various States' Evidence Acts are restricted to judicial proceedings and do not apply to the regulators' administrative hearings. The common law rules of evidence may apply to the regulators' administrative hearings in the absence of any express or implied abrogation of those rules.

With the exception of the *ASIC Act*, none of the legislation expressly deals with the operation of the rules of evidence in the regulators' administrative hearings.

⁷⁸ *Pochi v Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247 at 257; *R v War Pensions Entitlement Appeal Tribunal* (1933) 50 CLR 228 at 256; *Minister for Immigration and Ethnic Affairs v Arslan* (1984) 4 FCR 73; 55 ALR 361 at 364; *Bond v Australian Broadcasting Tribunal (No 2)* (1988) 19 FCR 494; 84 ALR 646 at 666-667; and *Boucher v ASC* (1996) 41 ALD 274 at 279; (1996) 71 FCR 122 at 127.

⁷⁹ See *Zhang De Yong v Minister for Immigration, Local Government and Ethnic Affairs* (1997) 151 ALR 515 at 551 per Wilcox J cited in Administrative Review Council, "The Scope of Judicial Review, Discussion Paper" 2003 at pp 80-81 at fn 40.

⁸⁰ See generally ACCC, "Collection and use of information – Introduction," October 2000 at p 1, at <http://www.accc.gov.au>, viewed on 25 September 2005; and Menzies S, "The Investigative Powers of the ASC", Australian Securities Commission Releases, October 1991, CCH, at [80028].

⁸¹ Section 4 of this Act lists the courts and proceedings to which the Act applies.

The legislation should at least contain an express provision on whether the rules of evidence apply to those hearings thereby avoiding the need to resolve this issue by repeated litigation for each regulator.

The *ASIC Act*⁸² provides that ASIC is not required to observe the rules of evidence when conducting its administrative hearings or proceedings but it does not exclude the operation of those rules and they may be relied upon in appropriate cases. From the public interest perspective of quickly ascertaining the truth, the advantage of not being bound by the rules of evidence is that the regulator can inform itself by whatever means it sees fit and is not restricted by the technical rules regarding admissibility of evidence.⁸³

To promote the public and private interests in making the “objectively correct or preferable decision,”⁸⁴ the legislation should not prevent either the regulators or the affected persons from relying on the rules of evidence where those rules are useful.⁸⁵ This is because the rules of evidence have been carefully developed over the years and provide “a method of inquiry best calculated to prevent error and elicit truth.”⁸⁶ The legislation should permit the regulator to rely on the rules of evidence in those cases where the legislation provides no guidance in resolving practical problems such as the sequence of receiving evidence or what the regulator should do if it cannot

⁸² Section 59(1)(b) of the *ASIC Act*. The position is the same for the Administrative Appeals Tribunal under s 33(1)(c) of the *Administrative Appeals Tribunal Act 1975* (Cth).

⁸³ *Re Delonga and ASC* (1994) 15 ACSR 450; 13 ACLC 246 at 250 citing *Cullen v CAC* (1988) 7 ACLC 121 at 124. See also *Marilec v Comcare* (1993) 121 ALR 114 at 119. For example, there is no reason why logically probative hearsay should not be used by the regulators to provide a springboard for further inquiry or to reach a final decision provided the affected person has been afforded natural justice or procedural fairness by being given the opportunity to address any critical issues or factors: see *Re Equiticorp Finance Ltd; Ex Parte Brock [No 2]* (1997) 27 NSWLR 391 at 396; and *Pochi v Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247 at 257.

⁸⁴ See generally *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409; 24 ALR 577 at 599.

⁸⁵ To promote a consistent approach, the legislation could provide that the evidential question is resolved by the *Evidence Act 1995* (Cth) or, if that Act does not resolve the problem, by the relevant common law evidential rule.

⁸⁶ *R v War Pensions Entitlement Appeal Tribunal* (1933) 50 CLR 228 at 256.

reach a clear conclusion on the issue.⁸⁷ The rules of evidence and the rules of natural justice promote the public and private interest in ensuring accurate decision-making because they both require the regulators to make their decisions on the basis of relevant and logically probative evidence.⁸⁸

[10.6.2] *Rules of natural justice*

With the exception of the *ASIC Act*,⁸⁹ none of the Australian legislation expressly requires the regulators to afford the affected person natural justice or procedural fairness when deciding whether to make an administrative order.⁹⁰

Rather than have a broad statement, such as that contained in s 59(2)(c) of the *ASIC Act*, that the regulator is bound to observe the rules of natural justice when deciding whether to make an administrative order, it may be preferable for the legislation to exhaustively list the natural justice requirements that must be observed. This suggestion is made because of the uncertainty as to the precise content of those rules. The details of this reform were discussed at [4.7.3.1].

In addition to the reforms discussed at [4.7.3.1], the legislation should give the affected person the right to a copy of the proposed final decision and the right to make submissions to correct any errors or to address any adverse findings before the

⁸⁷ *McDonald v Director-General of Social Security* (1984) 1 FCR 354 at 356. See, for example, the rule in *Jones v Dunkel* (1959) 101 CLR 298, as discussed at [8.6.3].

⁸⁸ *Mahon v Air New Zealand* (1983) 50 ALR 193; and *Dolan v Overseas Telecommunications Corporation* (1993) 42 FCR 206. However, in *Australian Broadcasting Tribunal v Bond* (1990) 94 ALR 11 at 38 and 45 the High Court held that want of logic in reaching the decision does not involve an error of law as long as the decision was reasonably open.

⁸⁹ Section 59(2)(c) of the *ASIC Act*.

⁹⁰ Arguably, the regulators' statutory power to make an administrative order is one that may destroy, defeat or prejudice a person's rights, interests or legitimate expectations, and accordingly, the exercise of that power is probably governed by the rules of natural justice (unless excluded by the relevant legislation): see *Annetts v McCann* (1990) 170 CLR 596; 97 ALR 177 at 178; *Johns v ASC* (1993) 178 CLR 408 at 455; and *Minister Aboriginal and Torres Strait Islander Affairs v Ombudsman (Cth)* (1995) 63 FCR 163; 134 ALR 238 at 246.

regulator makes the final decision.⁹¹ That would guarantee that the affected person has the protection of some of the more fundamental natural justice rights and, at the same time, it also gives certainty from the regulator's perspective. Such a reform would reduce the current number of challenges to the regulators' administrative decisions.⁹²

[10.6.3] *Rules relating to the general conduct of hearings*

Only the *ASIC Act* contains an express provision dealing with how the administrative hearing is conducted. It provides that the hearing is conducted informally and without technicality.⁹³ From the perspective of the public interest, the hearing power must be wide and involve informal procedures, as opposed to rigid court procedures. If the regulators were bound to observe rigid court procedures (including the rules governing pre-trial discovery) in administrative hearings, they could not respond to contraventions in a timely and cost-effective manner and such hearings would offer no advantages over judicial proceedings. The adoption of an informal approach to conducting the hearing would provide greater flexibility in the methods used to ascertain the true facts. It would also give the affected persons greater flexibility in relation to how to present their submissions, including presenting those submissions with, or without, the assistance of a lawyer.

All of the Australian regulators' administrative hearings should be governed by a provision that permits those hearings to be conducted informally and without technicality. This does not conflict with the suggested reform regarding the operation of the rules of evidence (see [10.6.1]) as, under that reform, those rules would not rigidly apply to every hearing and may only be adopted where the legislation provides no guidance on a particular issue. This suggested reform is subject to the proposal

⁹¹ Such a requirement would also be imposed under the rules of natural justice in the absence of an express or implied abrogation of those rules: see *Mahon v Air New Zealand* [1984] AC 808 at 821; (1983) 50 ALR 193 at 207; and *McLachlan v ASC* (1999) 17 ACLC 656 at 667.

⁹² Such challenges are made under s 5(1)(a) or s 6(1)(a) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) on the ground of a denial of natural justice (see further at [11.5.3]).

⁹³ Section 59(1)(a) of the *ASIC Act*. There is a similar provision in s 33(1)(b) of the *Administrative Appeals Tribunal Act 1975* (Cth).

that the affected person should be afforded a small number of specified protections drawn from the rules of natural justice.

[10.6.4] *The power to summon witnesses*

Where ASIC is conducting a hearing under the *Corporations Act*, it has power to summon witnesses to appear before ASIC and give oral evidence and produce documents.⁹⁴ The legislation expressly provides that the affected person (the person who may be the subject of the administrative order) cannot be summoned to appear as a witness and that person may make written submissions in lieu of a personal appearance before ASIC,⁹⁵ or make no submissions at all. From the perspective of the affected persons, the advantage of such a provision is that they cannot be required to give oral self-incriminating evidence at the hearing nor can they be cross-examined in relation to their evidence. However, if they decide to attend the hearing, they are deemed to be a “witness”⁹⁶ and they can be compelled to give self-incriminating evidence, as discussed below.

The Tax Agents’ Board has power to summon witnesses to appear before it and give oral evidence and produce documents.⁹⁷ However, the legislation does not clearly indicate whether the affected person can be summoned to appear as a witness or whether that person can make written submissions in lieu of personal attendance.⁹⁸ The Tax Agents’ Board’s broad power to summon “any person”⁹⁹ suggests that it has the power to summon the affected person (the tax agent) as well as other witnesses.

⁹⁴ Section 58(1) of the *ASIC Act*; and see *McLachlan v ASC* (1998) 28 ACSR 473; 16 ACLC 1488.

⁹⁵ Section 57(3) of the *ASIC Act*.

⁹⁶ See the definition of “witness” in s 5(1) of the *ASIC Act*.

⁹⁷ Section 251G of the *Income Tax Assessment Act 1936* (Cth); and Regulation 168(2) of the *Income Tax Regulations 1936* (Cth).

⁹⁸ The taxation legislation provides that evidence may be given by affidavit and the Tax Agents’ Board may also compel the deponent to attend before it for the purpose of cross-examination (see Regulation 168(1)(b) of the *Income Tax Regulations 1936* (Cth)). But the legislation does not make it clear whether this provision applies to the affected person (the tax agent) or whether it only applies to other witnesses.

⁹⁹ Regulation 168(2)(b) of the *Income Tax Regulations 1936* (Cth).

Where APRA, ASIC or the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth), or where ASIC and APRA are acting under the *Retirement Savings Accounts Act 1997* (Cth), there are no express provisions that empower the regulators to summon witnesses to attend hearings.

All of the Australian legislation should give the regulators express powers to summon witnesses (excluding the affected person). The power to compel witnesses to provide oral or documentary evidence assists the public interest in quickly ascertaining the true facts. Such powers also assist the regulator to make a more informed final decision. However, the regulators should not have the power to summon the affected person. The affected person should have the option of appearing before the regulator and giving oral evidence, or submitting written submissions in lieu of a personal appearance, or making no submissions at all. One main purpose of the regulator's administrative hearing is to afford the affected person the opportunity to make submissions to persuade the regulator not to make the particular administrative order. Provided the regulator has given the affected person proper notice of the hearing, the regulator has fulfilled its obligation. Whether the affected person takes advantage of this opportunity to be heard should be a matter that is left for that person to decide. The regulators do not need the power to summon the affected persons because self-interest will generally ensure that they make written or oral submissions. The failure by the affected person to make any submissions would mean that the regulator could draw a *Jones v Dunkel* inference (see [8.6.3]) and the regulator would be justified in making the relevant administrative order.¹⁰⁰

[10.6.5] *Privilege against self-incrimination and the penalty privilege*

The reforms discussed at [4.10.2.1] and [5.12.1.1] in relation to the operation of the privilege against self-incrimination and the penalty privilege should also be adopted for the regulators' administrative hearings.

¹⁰⁰ *Edensor Nominees Pty Ltd v ASIC* [2002] FCA 307 at [30]; *ASC v AS Nominees Ltd* (1995) 62 FCR 504; 133 1 ALR 1 at 11-12; *Trade Practices Commission v Nicholas Enterprises Pty Ltd* (1979) 26 ALR 609 at 639; and *ASIC v Adler* [2002] NSWSC 171 at [447]-[450], [500], [576] and [728].

[10.6.6] *Legal professional privilege*

The reforms discussed at [4.10.3.1] and [5.12.2.1] in relation to the operation of legal professional privilege should also be adopted for the regulators' administrative hearings.

[10.7] Guidelines on disqualification orders

In the context of disqualification proceedings conducted in court it was suggested at [8.8.4] that there should be express provisions in the legislation setting out guidelines, or the matters that the court should consider in deciding whether to make a disqualification order, and if so, the period of disqualification. Those guidelines could equally apply to the regulator's administrative powers to make disqualification orders.¹⁰¹

[10.8] Administrative or judicial review

ASIC has commented that the prospect of regular court challenges to administrative decisions would undermine the purpose of giving the regulators the power to make such decisions.¹⁰²

However, given that the administrative proceedings conducted by the regulators do not have all of the safeguards of a judicial hearing, it is important that, in appropriate cases, affected persons be given the right to apply for review of the regulator's final administrative decision. That need is particularly strong in those cases where the administrative order, such as a disqualification order, has a punitive effect on the individual.¹⁰³ Reforms relating to administrative or judicial review are discussed in Chapter 11.

¹⁰¹ See generally *Andrews v ASIC* [2006] AATA 25 at [60].

¹⁰² Trounson A, "ASIC hammers panel challenge" *The Australian*, Friday September 23, 2005.

¹⁰³ See generally the Parliamentary Joint Committee on Corporations and Financial Services, *Report on CLERP (Audit Reform and Corporate Disclosure) Bill 2003*, June 2004, Recommendation 3, at [6.115] at

[10.9] What further administrative powers should be given to the Australian regulators?

[10.9.1] *Disqualification orders*

Given the public interest objectives promoted by the regulators' administrative power to make disqualification orders (see [10.2]), the ACCC and the ATO (when acting under the taxation legislation) should be given an administrative power to disqualify a person from managing a corporation, or from participating in the relevant industry. As indicated at [8.8.4], a disqualification power may be a more effective regulatory tool than pecuniary penalties or imprisonment.

The legislation would need to make a distinction between when it is appropriate for the regulators (including the ATO and the ACCC) to apply to the court for a disqualification order (see [8.8.4]) and when it is appropriate for them to make administrative disqualification orders. The legislation could provide that the regulators may make an administrative disqualification order where they formed the view that, given the nature of the person's contraventions of the relevant legislation, that person is not a "fit and proper person" to manage a corporation or to participate in the relevant industry or that it is in the public interest that they make a disqualification order.¹⁰⁴

Given that the administrative disqualification power does not have the safeguards of a judicial proceeding, the private interest could be partly protected by limiting the maximum period of disqualification that can be imposed by an administrative order. For example, s 206F of the *Corporations Act* provides that ASIC's disqualification order cannot exceed five years. All administrative disqualification powers could be subject to a similar limitation.

The legislation could also provide that where a person engages in serious contraventions of the legislation that warrant a more lengthy period of

http://www.aph.gov.au/senate/committee/corporations_ctte/clerp9/clerp9p1.pdf, viewed on 8 June 2004.

¹⁰⁴ See generally *Visnic v ASIC* [2007] HCA 24.

disqualification, the regulators (including the ACCC and the ATO) can only seek disqualification by way of a court order.

These reforms also assist to protect individuals from “over enforcement” of the criminal law and protect the public and victims from under enforcement (see [8.8.1]).

The suggested reforms may also provide a more flexible and cost-effective response to contravening conduct in comparison to civil and criminal proceedings. They are also consistent with Braithwaite’s¹⁰⁵ “responsive regulation” approach as they give the regulators a broader range of enforcement options and the power to deal with the matter without needing to immediately escalate the enforcement response through court proceedings.

[10.9.2] *Cease and desist order*

A cease and desist order is an administrative order made by the regulators requiring a person to cease engaging in particular conduct. It is similar in effect to the court’s power to order an injunction but, because the assistance of the court is not required, it may be made in a more cost-effective and timely manner.

ASIC already has a limited administrative cease and desist power in that it can make stop orders to prevent persons from engaging in specified conduct relating to the issue of financial products.¹⁰⁶ ASIC has indicated that it would be useful to have a broader administrative cease and desist power in relation to all continuing conduct that contravenes the corporations legislation.¹⁰⁷

¹⁰⁵ Braithwaite J, op cit n 1, at 29.

¹⁰⁶ A stop order is made on the basis that there has been misleading or deceptive statements in, or omissions from, disclosure documents or advertisements of financial products or where the product issuer has not maintained approved internal and external dispute resolution mechanisms: see s 1020E of the *Corporations Act*. ASIC makes frequent use of its stop order power: see ASIC, *Annual Report*, 2002-2003, p 38.

¹⁰⁷ Tregillis S (ASIC) speaking with Richards C on *The Law Report* “Insider Trading – The case Against Fairness,” Radio National, 26 September 2000, at <http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s188636.htm>, viewed on 8 April

None of the other Australian regulators have the power to make cease and desist orders. The ACCC was unsuccessful in its attempt to obtain a cease and desist power. By contrast, the New Zealand Commerce Commission has recently been given such a power.¹⁰⁸

In the United States, the SEC has an express power to make a cease and desist order which bans directors from managing corporations if it forms the view that they are unfit to act as directors.¹⁰⁹

Whether the Australian regulators should be given a cease and desist power should be examined by considering the experience of the ACCC. The ACCC claimed that a cease and desist power would enable it to quickly deal with cases of misuse of market power. According to the ACCC, such a power would avoid irreversible damage to corporations including the fact that some competitors may be eliminated from the market and left without any remedy while those matters were being investigated to decide whether court proceedings should commence. The ACCC indicated that the processes involved in obtaining an interim injunction were cumbersome and it was difficult to satisfy the required standard of proof for an injunction at an early stage before the completion of the investigation.¹¹⁰ By contrast, the decision to make a cease and desist order may require a lesser showing of the likelihood of a future violation in comparison to the level of proof required to obtain

2004. ASIC has sought federal government and Parliamentary support for more flexible enforcement powers and remedies: see ASIC, *Annual Report*, 2002-2003, at p 31.

¹⁰⁸ See generally Baxt R, Submission to the Joint Parliamentary Committee, CLERP 9, "The proposed regulatory revolution," at [7] at http://www.aph.gov.au/Senate/committee/corporations_ctte/clerp9/submissions/sub006as.doc, viewed on 23 February 2004.

¹⁰⁹ Section 21C (f) of the *Securities Exchange Act 1934* (US). The SEC's cease and desist order provides a more timely and cost-effective procedure than the court procedures involved in the Australian regulator's application for an injunction. The private interests of the affected persons are protected because they are given the opportunity to be heard before the SEC decides whether to make the order. The SEC's "cease and desist" hearing process is also not as complex and does not involve the same formalities as court proceedings. The affected persons may also seek judicial review of the SEC's final decision: see s 21C (d) 2 of the *Securities Exchange Act 1934* (US).

¹¹⁰ Trade Practices Act Review, Ch 5: "Cease and desist powers", <http://tpareview.treasury.gov.au/content/report/html/Chpt5.asp>, viewed on 8 April 2004.

an injunction.¹¹¹ The Trade Practices Review Committee (the review committee) found that there was no evidence that the cease and desist order was speedier than an injunction and indicated that the ACCC could obtain an interim injunction in hours, rather than days. The review committee did not find any evidence that it was unduly burdensome to require the ACCC to establish that there is a serious question to be tried and that the balance of convenience was in its favour.¹¹²

According to the review committee, if a cease and desist order were made by the ACCC on the basis of something less than the tests of whether there is a serious question to be tried and the balance of convenience, there could be a risk of injustice if a contravention of the Act was not subsequently established.¹¹³

It could be argued that the review committee gave inadequate consideration to the regulatory objectives of the ACCC (see [2.7]), the public interest objectives promoted by the regulators' administrative powers (see [10.2]) and the inadequacies of the Australian regulators' existing injunction powers (see [8.7.3]). A cease and desist power administered by the regulators may improve their ability to meet public interest regulatory objectives including promoting certainty and efficiency and reducing enforcement and compliance costs.¹¹⁴ It would also avoid the litigation costs (for the regulator and the affected person) that are associated with court proceedings for an injunction.¹¹⁵ Cease and desist proceedings would also involve less formal procedures than those associated with court proceedings thereby promoting the public interest objective of enforcing the legislation with a minimum of procedural requirements.¹¹⁶

In contrast to the review committee's finding, it is evident that the Australian regulators' statutory power to obtain an injunction is inadequate because there are doubts about whether the court's power to grant a statutory injunction is restricted by

¹¹¹ Newkirk T and Brandriss I, *op cit* n 15, at fn 79.

¹¹² Trade Practices Act Review, *op cit* n 110.

¹¹³ Trade Practices Act Review, *op cit* n 110.

¹¹⁴ See s 1(2) of the *ASIC Act*.

¹¹⁵ Tamblyn J, "Progress Towards a More Responsive Trade Practices Strategy," p 151 at 152 in Grabosky P and Braithwaite J (Editors), "Business Regulation and Australia's Future," Australia Institute of Criminology, Canberra 1993.

¹¹⁶ See, for example, the objectives in s 1(2) and of the *ASIC Act*.

equitable considerations.¹¹⁷ The statutory injunction power is also inadequate because it does not extend to a range of third parties who may be liable as constructive trustees outside the “knowing assistance” rule in equity.¹¹⁸

The test for whether a statutory injunction under the Australian legislation should be granted may involve a consideration of whether it serves a purpose under that legislation, rather than the equitable considerations referred to by the review committee.¹¹⁹ Accordingly, the review committee’s concern that the making of a cease and desist order by the ACCC on the basis of something less than the equitable tests may cause an injustice may not be directly applicable to either the ACCC or the other regulators who have a statutory power to obtain an injunction. There is less risk of injustice if the regulator, in good faith, makes a cease and desist order to further the purpose(s) of the legislation. If the regulator did not satisfy the requirement of good faith, then it could not claim the defence to civil liability afforded by some of the legislation.¹²⁰ In such a case, the affected persons may be able to recover damages from the regulator for their loss. The risk of injustice is also reduced by the fact that the regulators’ exercise of any proposed cease and desist power would be subject to a merits review by the AAT or judicial review by the Federal Court if the exercise of power involved bad faith or an abuse of power.¹²¹

It is therefore suggested that the Australian regulators should have the power to make a cease and desist order subject to the resolution of any constitutional difficulties under Chapter III of the Constitution.¹²² The review committee indicated that if the ACCC’s power to make a cease and desist order were based on a decision that there had been a breach of the *Trade Practices Act 1974* (Cth), that could involve the exercise of judicial power and be invalid under Chapter III. This problem may be overcome by basing the regulators’ power to make a cease and desist order on the

¹¹⁷ Middleton T, “ASIC’s investigation and enforcement powers – Current issues and suggested reforms” (2004) 22 *C&SLJ* 503.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ See, for example, the defence contained in s 246 of the *ASIC Act*; and s 251F of the *Income Tax Assessment Act 1936* (Cth) (Tax Agents’ Board).

¹²¹ See s 5(1)(e) and s 5(2) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

¹²² See s 71 of the Constitution. Samuel G, op cit n 25.

regulator having formed a particular view of the relevant conduct, rather than on a finding by the regulator of a contravention of the legislation.¹²³ For the reasons discussed at [10.4.1], the legislation should only give the regulators power to make protective, rather than punitive, cease and desist orders. It is anticipated that the regulators would only make cease and desist orders, as an alternative to applying to the court for an injunction. Where the regulator seeks an injunction to promote a protective purpose within the contemplation of the legislation, the injunction is protective in nature.¹²⁴ Accordingly, where the regulator made a cease and desist order to promote a protective purpose of the legislation, such an order would also be protective in nature and there should be no constitutional problems. The constitutional problems may also be avoided by providing that a breach of a cease and desist order is enforced by a court-imposed civil penalty¹²⁵ so that the court, rather than the regulator, makes the final punitive order.

[10.9.3] *Administrative orders disqualifying persons from contracting with the government*

The ALRC has recommended that all Australian legislation should empower the regulators to make an order disqualifying persons from contracting with the government. Such a power already exists in the *Equal Opportunity for Women in the Workplace Act 1999* (Cth). The advantages of such a power are that it would provide law-abiding persons (natural persons and corporations) with a competitive advantage over non-complying persons thereby rewarding compliance with the legislation.¹²⁶

[10.10] Conclusion

A range of inconsistencies and deficiencies in the current regulatory framework have been identified in this chapter. Reforms have been suggested to

¹²³ Trade Practices Act Review, op cit n 110.

¹²⁴ See generally *ASIC v Triton Underwriting Insurance Agency* (2003) 22 ACLC 86; 48 ACSR 249; [2003] NSWSC 1145 at [24] per Barrett J citing *ASIC v Mauer-Swiss Securities Ltd* (2002) 20 ACLC 1637; 42 ACSR 605; [2002] NSWSC 741.

¹²⁵ Newkirk T and Brandriss I, op cit n 15, at fn 80.

¹²⁶ ALRC, “The Purposes of Penalties,” at [18], at <http://www.austlii.edu.au>, viewed on 15 March 2005.

address these problems and to achieve greater uniformity, timeliness and cost-effectiveness in relation to the use of administrative powers, thereby achieving a range of public and private interest objectives including promoting greater public confidence in the integrity and effectiveness of the regulatory system¹²⁷ and facilitating more effective regulation and the proper functioning of the economy.

Those reforms include:

- (a) the use of consent agreements or enforceable undertakings to overcome the potential constitutional problems associated with administrative disqualification orders;
- (b) giving affected persons and witnesses clear rights and protections in the hearing process;
- (c) introducing uniform evidential and procedural rules to govern the regulators' administrative proceedings;
- (d) giving the ACCC and the ATO the administrative power to make disqualification orders; and
- (e) giving all the Australian regulators the administrative power to make a "cease and desist order."

¹²⁷ See generally *R v Rivkin* (2004) 59 NSWLR 284; [2004] NSWCCA 7 at [412].

CHAPTER 11

REVIEW OF THE REGULATORS' ADMINISTRATIVE DECISIONS

by Tom Middleton

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CHAPTER 11

REVIEW OF THE REGULATORS' ADMINISTRATIVE DECISIONS

[11.1] Introduction

The regulators' administrative decisions which may be the subject of administrative or judicial review include investigative decisions in relation to oral examinations (Chapter 4), production of books (Chapter 5), enforcement decisions (Chapter 6), decisions to release information (Chapter 7) and decisions made by way of a final administrative order (Chapter 10).

The ideal review system is one that ensures that the regulators' decisions are lawful, rational and fair and that those decisions are implemented in a timely and cost-effective manner. However, there is a range of problems with the Australian system of external administrative (merits) or judicial review of the regulators' decisions. One problem is the complexity in the law which is reflected in the fact that the affected persons have to consider multiple avenues of review¹ (see, for example, [11.4.1]-[11.4.4]).

The existing external review processes also contribute to a considerable delay in implementing the regulators' decisions. A number of arguments are considered which support limiting and, in some cases excluding, the affected persons' right to obtain an external review of certain decisions (see [11.5]-[11.5.8] and [11.6]-[11.6.7]).

The suggested reforms should introduce greater simplicity, certainty and efficiency in the review process thereby saving time and costs for affected persons

¹ This problem is recognised by Morabito V and Barkoczy S, "Restricting the Judicial Review of Income Tax Assessments: The Scope and Purpose of Schedule 1(e) of the Administrative Decisions (Judicial Review) Act 1977 (Cth)," Sydney Law Review, 1999, at fns 204 and 205, at <http://www.austlii.edu.au>, viewed on 2 December 2006.

and regulators.² These reforms are consistent with the benchmarks of effective regulation identified by Baldwin and Cave,³ and would implement “best practice.”

[11.2] Public interest

The Australian regulatory framework should achieve a balance between the public interest in ensuring that the review process does not unreasonably frustrate the functions of the regulators and the private interest represented by the individual’s right to test the legality of the regulators’ administrative decisions by way of administrative or judicial review.⁴

There is a range of public interest benefits that flow from affording affected persons access to administrative or judicial review. External review serves a public interest function by providing an incentive for the regulators to become better decision-makers and makes them more accountable for their decisions. It also improves the transparency of the decision-making process. Those principles are identified by Baldwin and Cave⁵ as benchmarks of effective regulation. The availability of external review also promotes public confidence in the regulators and in the integrity of their decisions. The possibility of external review means that regulators are less likely to succumb to political pressure to decide a case in a particular way or to rigidly apply policy regardless of the merits of the case.⁶

The regulators’ delegates (who are appointed to make administrative decisions) are not bound by the administrative decisions of previous delegates and they may express different opinions on the interpretation of the relevant legislation. By contrast, access to external judicial review means that the rule of law will be applied consistently over time. Judicial review clarifies the meaning of the legislation so that it may be more uniformly interpreted and applied by those delegates.

² See generally Administrative Review Council, “The Scope of Judicial Review, Discussion Paper,” 2003 at p 20.

³ Baldwin R and Cave M, “Understanding Regulation Theory Strategy, and Practice,” Oxford University Press, Oxford, 1999 at p 77.

⁴ Administrative Review Council, op cit n 2, at pp 1, 8 and 25.

⁵ Baldwin R and Cave M, op cit n 3, at p 77.

⁶ See generally Administrative Review Council, op cit n 2, at pp 23-24.

Accordingly, judicial review serves a public interest function by creating greater consistency in the delivery of administrative justice over time.⁷ Judicial review serves public and private interest objectives by providing a public mechanism by which the rule of law is observed in administrative decision-making and by addressing departures from the rule of law in individual cases.⁸

Despite the public interest benefits of external review, there is a competing public interest which requires that the review process should not be used to frustrate or defeat the purpose behind investing regulators with the power to make administrative decisions or orders. It is argued that where the regulators' decisions involve an expression of governmental or regulatory policy, or where those decisions relate to investigative and enforcement action (civil and criminal), then those types of decisions should be protected from the possibility of an unmeritorious collateral attack by way of external review.

[11.3] Private interest

The regulatory legislation is a source of many rights or benefits for individuals. The private interest requires that such benefits or rights are afforded to deserving individuals and that they are not unreasonably suspended, revoked or withheld from deserving individuals. Accordingly, it is important from the perspective of the private interest, that individuals have the right to obtain a review of the regulators' decisions that deny these benefits or rights. External administrative or judicial review serves the private interest by protecting individual rights, ensuring that individuals are not subjected to abuse of power by the regulators, promoting consistency and predictability in decision-making and assisting to promote fairness by ensuring that like cases are treated alike⁹ (see [1.5.5]). The role of judicial review "is

⁷ See generally Administrative Review Council, *op cit n 2*, at p 25.

⁸ Justice RS French, "Judicial Review Rights" (March 2001) 28 AIAL Forum 30, 32 cited in Administrative Review Council, *op cit n 2*, at p 25.

⁹ See generally Administrative Review Council, *op cit n 2*, at pp 24, 25 and 70.

to stand between the State and the citizen...and to prevent arbitrary acts, bullying or the erosion of civil rights.”¹⁰

The private interest requires that the right of review be available quickly and cost-effectively. Access to judicial review for many individuals is a costly and therefore often an unrealistic option.¹¹ The review process should be accessible by all affected persons irrespective of their personal financial circumstances and irrespective of which regulator they are dealing with. This could be achieved by the establishment of an internal review process that can be utilised by the applicant without any cost, as discussed at [11.6.2].

Private and public interests also require that the legislation contain clear procedures and rules which govern the review process and that afford clear rights and protections to the applicants including provisions that give them the right to receive written notice of the regulators’ decisions and to obtain reasons for those decisions (see [11.4.5]).

[11.4] Current review procedures

The Australian legislation contains a range of inconsistent provisions that deal with review of the regulators’ decisions. In addition, the affected persons have to consider multiple avenues of review and they must weigh up a range of complex factors when determining which avenue of review to pursue, as discussed below.

[11.4.1] *When should an applicant apply for review by the AAT or the Federal Court?*

The nature of the complaint, the types of remedies that are available and the

¹⁰ Hill DG, “What Do We Expect from Judges in Tax Cases?” (1995) 69 ALJ 992 at 1005; and *Dorney v FC of T* [1980] 1 NSWLR 404 at 418 cited in *Morabito V and Barkoczy S*, op cit n 1, at fns 204 and 205.

¹¹ See generally Mayer, E “The Role of Regulatory Enforcement in the Australian Economy,” p 97 at 98 in Grabosky P and Braithwaite J, (Editors), “Business Regulation and Australia’s Future,” Australia Institute of Criminology, Canberra 1993.

nature of the AAT's and the Federal Court's proceedings may all influence the affected person's decision about whether to apply to the AAT or to the Federal Court.

Where the concern is that the regulator's decision involves a wrong finding of fact or that it does not accord with the merits of the case, the affected person may apply to the AAT for a review.

The application fee for a review by the AAT is generally cheaper than that applicable to the Federal Court. Review by the Federal Court also involves an additional setting down fee and a daily hearing fee.¹²

Unlike Federal Court proceedings, proceedings before the AAT are conducted with little formality and technicality.¹³ An applicant may appear in person before the AAT or they may be represented by a lawyer.¹⁴

The AAT is not bound by the rules of evidence¹⁵ but it must afford the parties natural justice or procedural fairness and act with detachment.¹⁶ Proceedings before the AAT are not adversarial, but are inquisitorial. Accordingly, there is no onus of proof on either party.¹⁷

The AAT can consider the matter afresh and conducts a review de novo (a full re-hearing) to ensure that the regulator's decision was objectively the right one to be

¹² Australian Master Tax Guide, CCH, 2007, at [28-085].

¹³ Section 33(1)(b) of the *AAT Act*.

¹⁴ Section 32 of the *AAT Act*; and *Delonga v ASC* (1995) 13 ACLC 246.

¹⁵ Section 33(1)(c) of the *AAT Act*; *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41, 31 ALR 666 at 686; *Blackman v Commissioner of Taxation* (1993) 43 FCR 449, 93 ATC 4538; and *Wallace v DPP (Cth)* [2003] AATA 119 at [92].

¹⁶ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, (1979) 24 ALR 577 at 589; *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41, 31 ALR 666 at 686; and *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 81 cited in *Perry v Comcare* [2006] FCA 33 at [77]. The AAT can call witnesses to give evidence and the veracity of the witness's testimony can be tested by cross-examination: see s 33(1)(c) of the *AAT Act*; *Delonga v ASC* (1995) 13 ACLC 246 at 251-252; and *Wallace v DPP (Cth)* [2003] AATA 119 at [92].

¹⁷ *Bushell v Repatriation Commission* (1992) 175 CLR 408 at 424-425; *Boucher v ASC* (1996) 71 FCR 122; (1996) 41 ALD 274 at 279-280; *Farley v ASC* [1998] AATA 495; and *Felden v ASIC* (2003) 45 ACSR 111; [2003] AATA 301 at [14].

made.¹⁸ The AAT can exercise all of the powers and discretions vested in the regulator. The AAT can affirm, vary or set aside the regulator's decision and substitute its decision for that of the regulator.¹⁹ The AAT must provide the applicant with reasons for its decision.²⁰

The regulator or the affected person may appeal from the AAT to the Federal Court where the AAT's decision involves an error of law.²¹ There is no appeal from the AAT to the Federal Court in relation to factual issues.²²

The review application fee may be refunded to the applicant where the AAT resolves the matter in favour of the applicant.²³ However, as a general rule, the AAT does not award costs to the successful party.²⁴

Alternately, a person may elect to challenge the regulator's decision in the Federal Court. Judicial review by the Federal Court guarantees the ultimate legal accuracy in decision-making. However, judicial review does not achieve the other

¹⁸ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, 24 ALR 577 at 599; and *Wharton v ASIC* [2002] AATA 443 at [28].

¹⁹ Section 43(1) of the *AAT Act*; *Birdseye v Companies Auditors and Liquidators Disciplinary Board* [2002] FCA 280 at [17]; *Otter Gold Mines Ltd v ASC* (1997) 26 AAR 99 at 106; *ASIC v Donald* [2002] FCA 1174 at [12]; *Centurion Trust Co Ltd v ASIC* [2003] AATA 1146 at [24]; and *Glebe Administration Board v ASIC* [2006] AATA 57 at [33]-[34]. The AAT may also order that the regulator re-hear or reconsider the matter, subject to such directions as the AAT thinks fit: see s 42D and 43(1)(c)(ii) of the *AAT Act*.

²⁰ Section 43(2) of the *AAT Act*.

²¹ Section 44(1) of the *AAT Act*; *ASC v Kippe* (1996) 67 FCR 499; *Sabatica Pty Ltd v Allstate Explorations NL* [2000] 104 FCR 126, [2000] FCA 1142; *Birdseye v Companies Auditors and Liquidators Disciplinary Board* [2002] FCA 280 at [1]; *Bennett v CEO Customs* [2003] FCA 53; and *Loevski v ASIC* [2003] FMCA 126 at [37]-[38].

²² *Kalwy v Secretary, Department of Social Security (No 2)* (1993) 32 ALD 451 at 458; *Industry Research and Development Board v Phai See Investments Pty Ltd* (2001) 112 FCR 24; [2001] FCA 532 at [42]; and *Perry v Comcare* [2006] FCA 33 at [29], [32] and [39].

²³ Australian Master Tax Guide, op cit n 12, at [28-085].

²⁴ It is inappropriate for the AAT to award costs (including court costs) to the successful party unless such an order is expressly authorised by the relevant regulatory legislation. The AAT has indicated that the power to award costs has the potential to reduce informality in its proceedings and would disadvantage persons who are not legally represented: see *Versus Capital Ltd as Manager of Benwood Property Trust v ASIC* [2001] AATA 864 at [57].

objectives, noted at [11.1]-[11.3], because the process is slow and expensive and may only be afforded by a small proportion of affected persons. Some commentators have indicated that it is good policy to commit certain primary decision-making, and the grievance procedures in relation to those decisions, to a relatively “judge proof environment” to achieve cost-effective and efficient administrative decisions.²⁵

A review of the regulator’s decision by the Federal Court involves formal court proceedings and is governed by the *Federal Court Rules*. The applicant should be represented by a lawyer. The Federal Court does not conduct a review de novo²⁶ and the review is generally limited to the grounds contained in the review application. The Federal Court is bound by the rules of evidence and the proceedings are adversarial in nature. The applicant bears the onus of proof.

In contrast to the AAT, the Federal Court has no power to provide relief simply because it may have reached a different conclusion on the merits of the case. The Federal Court may intervene and make an order where the regulator’s administrative discretion was not exercised in accordance with the relevant law.²⁷ Similar principles apply in the United States.²⁸

The Federal Court may make an order declaring the rights of the parties or make an order directing them to do (or refrain from doing) anything necessary to do

²⁵ Aronson M and Dyer B, “Judicial Review of Administrative Action,” 2000, at p 10 cited in Administrative Review Council, op cit n 2, at p 47 and fn 88.

²⁶ See *Neate v ASC* (1995) 60 FCR 518; (1995) 13 ACLC 1685 at 1689; (1995) 39 ALD 565.

²⁷ The Federal Court will not determine what decision should have been made in the exercise of an administrative discretion or adjudicate on the merits of the case: see *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 at 40-41; *TCN Channel Nine Pty Ltd v ABT* (1992) 28 ALD 829 at 861; and *Shulver v Sherry* (1992) 28 ALD 570 at 573.

²⁸ In the case of the IRS, the Tax Court will hear appeals from taxpayers that concern new areas of tax law or arguments concerning new interpretations of the *Internal Revenue Code* (US). The decisions of the Tax Court are generally final. However, the United States Court of Appeals may permit a review of those decisions where a question of law is involved with respect to which there is substantial ground for difference of opinion: see ss 7481 and 7482 of the *Internal Revenue Code* (US).

justice.²⁹ It also has a discretion to refuse relief even though an error of law has been established.³⁰

The Federal Court, unlike the AAT, has the power to order that the unsuccessful party pay the successful party's reasonable litigation costs.³¹

[11.4.2] *Jurisdiction of the AAT*

There are complex legislative provisions that must be considered in deciding whether the AAT has jurisdiction to hear an application for review. In many cases, the affected person may require legal advice to assist in determining whether the AAT has jurisdiction. This complexity appears to run counter to the purpose of establishing the AAT which was, in part, to provide a quick and informal merits-based review of administrative decisions where the affected person could appear in person without legal representation.

The complexity in determining whether the AAT has jurisdiction flows from the fact that the *AAT Act* does not confer jurisdiction on the AAT to hear applications for review of the regulators' decisions. Rather, the jurisdiction must be conferred by the particular regulatory statute.³² In addition, the AAT has no jurisdiction to hear an

²⁹ Section 16 of the *AD(JR) Act*.

³⁰ *Goodman v ASIC* (2004) 22 ACLC 1079; (2004) 50 ACSR 1, [2004] FCA 1000 at [13]; *Young v Wicks* (1986) 13 FCR 85; and *Reid v Australian Telecommunications Commission* (1988) 14 ALD 554.

³¹ See generally *ASIC v Whitlam* [2002] NSWSC 718 at [27]; *ASIC v Plymin* [2003] VSC 230 at [116]; and *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 88-89 cited in *Perry v Comcare* [2006] FCA 33 at [81] and [82]. In the case of an unmeritorious application for review (an application that is devoid of any merit or legal foundation and which was made for the purpose of delaying and creating difficulties for the regulator), the Federal Court may express its disapproval by ordering that the unsuccessful party pay the costs of the successful party on an indemnity basis: see *ASIC v Australian Investors Forum Pty Ltd* [2004] NSWSC 491 at [29]; and *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 89 cited in *Perry v Comcare* [2006] FCA 33 at [81]-[83].

³² Section 25 of the *AAT Act* provides that the AAT only has jurisdiction if it is conferred on the AAT by the regulatory statute. A directions hearing may be held under s 33 of the *AAT Act* to determine whether the AAT has jurisdiction to review a particular decision: see, for example, *Hakin v ASC* (1991) 5 ACSR 630; (1991) 9 ACLC 1427 at 1428.

application for review of the regulator’s decision unless that decision is a “reviewable decision” (see [11.4.3.1]).

[11.4.2.1] *ASIC – decisions made under the Corporations Act and the ASIC Act*

The *Corporations Act* confers jurisdiction on the AAT to hear applications for review of various decisions made by ASIC under that Act.³³ By contrast, the *ASIC Act* confers a very limited jurisdiction on the AAT to hear applications for review of decisions made by ASIC under that Act. Decisions made by ASIC under the *ASIC Act* relating to the issue of notices to attend oral examinations and the conduct of investigations and examinations (Chapter 4), the issue of notices to produce books (Chapter 5), or the conduct of administrative hearings (Chapter 10) are not reviewable by the AAT.³⁴ There have been a number of cases where it has been difficult to determine whether ASIC’s decision was made under a specific provision in the *Corporations Act* (and therefore reviewable by the AAT), or whether it was made under ASIC’s more general incidental power in s 11(4) of the *ASIC Act* (and therefore not reviewable by the AAT but perhaps reviewable by the Federal Court where there is an error of law).³⁵

The *Corporations Act* and the *ASIC Act* expressly require ASIC to notify affected persons of their right to apply to the AAT for a review of ASIC’s decision.³⁶

[11.4.2.2] *ASIC, APRA, or the ATO – decisions made under the Superannuation Industry (Supervision) Act 1993 (Cth) and the Retirement Savings Accounts Act 1997 (Cth)*

Where ASIC, APRA or the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth), or where ASIC and APRA are acting under the

³³ Section 1317B of the *Corporations Act*. Certain decisions are also excluded from review by the AAT under s 1317C of the *Corporations Act*.

³⁴ See s 244 of the *ASIC Act*.

³⁵ See, for example, *Morton v ASC* (1997) 23 ASR 454; *So Natural Foods Pty Ltd v ASIC* [1999] AATA 639; *ASIC v Donald* [2002] FCA 1174; *Centurion Trust Co Ltd v ASIC* (2003) 21 ACLC 275; [2003] AATA 129; and *Centurion Trust Co Ltd v ASIC* [2003] AATA 1146.

³⁶ Section 244A of the *ASIC Act*; and s 1317D of the *Corporations Act*.

Retirement Savings Accounts Act 1997 (Cth), there are express provisions that permit the affected person to request the regulator to reconsider its decision.³⁷ If the regulator confirms its original decision, the legislation further provides that the affected person may then apply to the AAT for a review³⁸ provided the decision is a “reviewable decision” as listed in that legislation.³⁹ Investigative decisions (including decisions relating to oral examinations and notices to produce books) are not expressly listed as reviewable decisions.⁴⁰ However, the position is not clear as it could be argued that, in some cases, particular investigative decisions are an integral or inextricable part of, or incidental to, a particular reviewable decision and may therefore be subject to review.

The *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Retirement Savings Accounts Act 1997* (Cth) also contain express provisions that require the regulator to notify the affected persons of their right to apply to the regulator for a reconsideration of the decision and of their right to subsequently apply to the AAT for a review of that decision.⁴¹ The legislation does not prevent the affected person from further delaying the implementation of the regulator’s original decision by seeking judicial review of that decision.

[11.4.2.3] *ATO – decisions made under the taxation legislation*

Despite the fact that disputes between taxpayers and the ATO can be dealt with by an objection and an internal review process within the ATO (see [11.6.2]), a taxpayer who is dissatisfied with the ATO’s ultimate decision, can still apply to the

³⁷ Section 344(1) of the *Superannuation Industry (Supervision) Act 1993* (Cth); and s 189(1) of the *Retirement Savings Accounts Act 1997* (Cth).

³⁸ Section 344(8) of the *Superannuation Industry (Supervision) Act 1993* (Cth); and s 189(7) of the *Retirement Savings Accounts Act 1997* (Cth).

³⁹ Section 10 of the *Superannuation Industry (Supervision) Act 1993* (Cth); and s 16 of the *Retirement Savings Accounts Act 1997* (Cth) list the decisions that are reviewable.

⁴⁰ It has also been held that investigative decisions, like decisions to issue a notices to produce books, have a sufficient quality of finality to be a reviewable decision for the purpose of judicial review by the Federal Court under the *AD(JR) Act*: see *Little River Goldfields NL v Moulds* (1991) 32 FCR 456; 10 ACLC 121 at 129; and *ASC v Lucas* (1992) 36 FCR 165; 7 ACSR 676 at 682.

⁴¹ Section 345 of the *Superannuation Industry (Supervision) Act 1993* (Cth); and s 190 of the *Retirement Savings Accounts Act 1997* (Cth).

AAT.⁴² For small taxation disputes, involving tax owing of \$5,000 or less, the taxpayer may elect for the dispute to be dealt with by the Small Taxation Claims Tribunal (within the AAT).⁴³ Tax agents also have a right to apply to the AAT for a review of the Tax Agents' Board's decision to cancel their registration.⁴⁴

There are no express provisions in the taxation legislation that give the AAT jurisdiction to review investigative decisions of the ATO.

[11.4.2.4] *ACCC - decisions made under the Trade Practices Act*

The *Trade Practices Act 1974* (Cth) does not give affected persons any general rights to apply for a merits review by the AAT of the ACCC's investigative or enforcement or other administrative decisions made under that Act.⁴⁵ This may be partly explained by the fact that there is an internal review mechanism established under that Act (see [11.6.2]).

[11.4.2.5] *Law reform*

One problem with the current law is that it is not always clear whether the regulator's decision is reviewable by the AAT. As noted by Braithwaite, wealthy defendants perceive an advantage in uncertain laws and deploy legal entrepreneurship

⁴² See s 14ZZ and Div 4 of Part IVC of the *Taxation Administration Act 1953* (Cth). In the context of review by the AAT, also see s 344 of *Superannuation Industry (Supervision) Act 1993* (Cth); and s 189 of the *Retirement Savings Accounts Act 1997* (Cth).

⁴³ Part IIIAA, s 24AC of the *AAT Act*; and Administrative Review Council, op cit n 2, at p 165.

⁴⁴ Section 251QA(d) of the *Income Tax Assessment Act 1936* (Cth); Tax Agents' Board, "Powers of the Board," at <http://www.tabd.gov.au/content.asp?placement=TABD/ABOUT>, viewed on 26 August 2005; and Woellner R, *Australian Taxation Law*, CCH, Sydney, 17th ed 2007 at [33-550] and [33-560].

⁴⁵ In *Lawson v ACCC* [2000] AATA 1167 at [5] the AAT held that the only jurisdiction conferred on the AAT by the *Trade Practices Act 1974* (Cth) is the review of reviewable decisions of the Registrar made under Part X of that Act, which relates to "International Liner Cargo Shipping". Decisions made pursuant to any section of the Act (other than those contained in Part X) are not reviewable by the AAT.

to exploit this uncertainty to advance their interests against the public interest.⁴⁶ The current ad hoc approach under the various regulatory laws of deeming that certain decisions are reviewable by the AAT, or of excluding certain decisions from review by the AAT, may also produce gaps in, or inconsistencies across, those frameworks. Such an ad hoc approach does not guarantee “like inclusions or exclusions” under each Act and does not ensure that like cases are treated alike.

It is suggested that there should be a clear legislative statement that all regulators’ investigative decisions are not reviewable by AAT. To permit such decisions to be reviewed by the AAT would unreasonably frustrate or delay and fragment the investigation process. In addition, the AAT has no investigatory agency and it may be difficult for it to substitute its opinion for that of the regulator in relation to whether the regulators’ objectives justify the making of a particular investigative decision.⁴⁷ This suggestion is already reflected in the *Jurisdiction of Courts Legislation Amendment Act 2000* (Cth) (discussed at [11.5.2]) which prevents defendants from delaying criminal trials by seeking collateral review of investigative decisions. However, this legislation does not prevent defendants from frustrating or delaying civil proceedings by challenging investigative decisions.

There should also be a clear legislative statement that the regulators’ administrative orders that are finally determinative of the affected persons’ rights, such as those discussed in Chapter 10, are subject to a merits review by the AAT. However, this suggestion is subject to the other reforms discussed in this chapter such as requiring the affected person to exhaust the internal review process before seeking an external review (see [11.6.2]).

⁴⁶ Braithwaite J, “Markets in Vice, Markets in Virtue,” The Federation Press, Leichhardt, 2005 at p 147; and Braithwaite J, “Restorative Justice and Responsive Regulation,” Oxford University Press, Oxford, 2002, at pp 239-240.

⁴⁷ Argued by analogy from the comments of Kirby P in *ASC v Ampolex Ltd* (1995) 38 NSWLR 504; 14 ACLC 80 at 91. See also *Artistic Builders Pty Ltd v Elliott & Tuthill (Mortgages) Pty Ltd* [2002] NSWSC 16 at [147]-[148].

[11.4.3] *Jurisdiction of the Federal Court*

The subsequent discussion demonstrates that there is a complex range of alternate methods by which the regulator's decision could be reviewed by the Federal Court. Each method has its own advantages and disadvantages.

[11.4.3.1] *Review under the AD(JR) Act*

For the decision to be reviewable by the Federal Court under the *AD(JR) Act*, the affected person must satisfy a number of legal requirements. First, the regulator's decision must have been made under an enactment, that is, the statute must have required or authorised the decision to be made. There has been a considerable volume of litigation on this issue.⁴⁸

Second, the Federal Court only has jurisdiction to hear an application for review under the *AD(JR) Act* where the regulator's decision is a "reviewable decision." There has also been a considerable volume of litigation on this issue.⁴⁹

In addition, the applicant must establish one of the grounds set out in ss 5 or 6 of the *AD(JR) Act* to obtain a review of the regulator's decision or conduct.⁵⁰ Reforms are discussed at [11.5.6]-[11.5.8] to restrict the availability of judicial review by eliminating or clarifying some of those grounds of judicial review.

⁴⁸ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 cited in *Dibben v ASIC* [2001] AATA 812; and *Gordon v ASIC* [2002] FCA 1157 at [19]. See also s 3(1) of the *AD(JR) Act*.

⁴⁹ A "reviewable decision" is a final, operative and determinative decision which finally resolves the controversy between the parties. A conclusion that is reached as a "stepping stone" to the final decision would not normally be a reviewable decision: see *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 336-337 and 378; 94 ALR 11 at 23; and *Wharton v ASIC* [2002] AATA 443 at [34]. See also 5(1) of the *AD(JR) Act*. In some cases, the applicant can apply to the Federal Court for a review of the conduct that led to the regulator's final decision: see s 6(1) of the *AD(JR) Act* (see [11.5.8]).

⁵⁰ Those grounds include a breach of the rules of natural justice, a failure to observe lawful procedures, want of jurisdiction, the decision was not authorised by the legislation, the decision involved an improper exercise of power, the decision involved an error of law, there was no evidence to justify the decision or the decision was otherwise contrary to law.

[11.4.3.2] *Review under the Judiciary Act 1903 (Cth)*

Section 39B of the *Judiciary Act 1903* (Cth) gives the Federal Court jurisdiction to review any action of an officer of the Commonwealth, including an officer of an Australian regulator.⁵¹ Section 39B was inserted in 1984 as the result of a concern that there was an inability to seek judicial review in the States' courts in relation to decisions that fell outside the scope of the *AD(JR) Act* and, therefore, the High Court could be “flooded” with applications for prerogative writs in relation to administrative decisions.⁵²

A wider range of decisions may be reviewable by the Federal Court under the *Judiciary Act 1903* (Cth) than under the *AD(JR) Act* because the restrictions on judicial review found in Schedule 1 of the *AD(JR) Act* do not apply to review under the *Judiciary Act 1903* (Cth). The Federal Court may review most of the decisions excluded by Schedule 1 of the *AD(JR) Act* under the *Judiciary Act 1903* (Cth).⁵³ However, applications for review under the *Judiciary Act 1903* (Cth) involve common law procedures and remedies. The statutory procedures and remedies under the *AAT Act* or the *AD(JR) Act* are superior to those that arise under the common law.⁵⁴ For example, unlike the position at common law, the affected person is entitled to reasons for the regulators' decisions under the *AAT Act* and under the *AD(JR) Act*, as discussed at [11.4.5].

[11.4.3.3] *Review under the taxation legislation*

The taxation legislation gives the Federal Court jurisdiction to review the Commissioner's decision on an objection or a private ruling. The broad language

⁵¹ See *Little River Goldfields NL v Moulds* (1992) 32 FCR 456; 10 ACLC 121 at 130.

⁵² *Morabito V and Barkoczy S*, op cit n 1, at fns 182-187.

⁵³ *Strathfield Group Wholesale Pty Ltd v Deputy Federal Commissioner of Taxation* (1997) 77 FCR 233; (1997) 97 ATC 4698 at 4709 cited in *Morabito V and Barkoczy S*, op cit n 1.

⁵⁴ *Kennedy v Baker* (2004) 207 ALR 247; [2004] FCA 562 at [7]-[11]. See also Douglas R and Jones M, *Administrative Law Commentary and Materials* (3rd ed, The Federation Press, Sydney, 1999) at p 54.

used in the taxation legislation suggests that the review may involve questions of fact and/or law. The review is conducted in accordance with the *Federal Court Rules*.⁵⁵

[11.4.3.4] *Review at common law*

The validity of the regulators' administrative decisions can also be challenged in the Federal Court on common law grounds and it may grant common law remedies.⁵⁶ Common law judicial review extends to some administrative decisions not covered by the *AD(JR) Act*, such as decisions not made under an enactment.⁵⁷ As noted at [11.4.3.2], the statutory procedures and remedies are superior to those that arise under the common law.

[11.4.3.5] *Law reform*

The federal government has failed to give any proper guidance as to relationship between the review regime established under *AD(JR) Act* and other legislative regimes, such as the *Judiciary Act 1903* (Cth) or the taxation legislation and judicial review at common law. This problem reflects the federal government's failure to adopt a coherent and consistent approach to judicial review and does not address the problem of multiple avenues of review. The current review processes do not promote clarity and efficiency in the law.⁵⁸ Morabito and Barkoczy have suggested that greater simplicity in the law and uniformity between the *Judiciary Act 1903* (Cth) and the *AD(JR) Act* could be achieved if Schedule 1 of the *AD(JR) Act*, and the exclusions therein, were repealed.⁵⁹ However, this would not address the problem of the different procedures and remedies available under each Act or at common law. In addition, as discussed at [11.6.1], some of the exclusions in the

⁵⁵ See s 14ZZ of the *Taxation Administration Act 1953* (Cth). See also the original jurisdiction of the Federal Court in s 19 of the *Federal Court of Australia Act 1976* (Cth); and Australian Master Tax Guide, op cit n 12, at [28-110].

⁵⁶ including the prerogative writs of prohibition, certiorari and mandamus and the equitable remedies of injunction or declaration.

⁵⁷ Administrative Review Council, op cit n 2, at pp 10 and 11. See also the original jurisdiction of the Federal Court in s 19 of the *Federal Court of Australia Act 1976* (Cth).

⁵⁸ Morabito V and Barkoczy S, op cit n 1, at fns 204 and 205.

⁵⁹ Morabito V and Barkoczy S, op cit n 1, at fns 204 and 205.

AD(JR) Act are justifiable on the grounds that they reduce abuse of the review process and promote the regulators' public interest objectives. Those exclusions should be retained and, in some cases, expanded. Given that the *AD(JR) Act* has superior procedures and remedies and that it promotes a range of public and private interest objectives, a simpler reform may be to provide that judicial review of the regulators' decisions is only available under the *AD(JR) Act*. This suggestion is consistent with the Administrative Review Council's view that the *AD(JR) Act* was introduced with the intention that it would become the predominant mechanism for judicial review in Australia.⁶⁰

[11.4.4] Other methods of scrutiny

The regulators' decisions are also subject to scrutiny by the Commonwealth Ombudsman and by Parliamentary Commissioners⁶¹ or by Parliamentary Committees. They may also be open to scrutiny by way of an application for the release of information under the *Freedom of Information Act 1982* (Cth), as discussed at [7.4.4] and [7.7.2].

[11.4.5] Reasons for the decision

The affected person can better prepare for any review of the regulator's decision if the regulator is required to provide reasons for that decision. However, at common law, the regulators have no obligation to provide such reasons.⁶² In addition, there is no uniform approach in the regulatory laws in relation to this matter, as discussed below.

Where ASIC makes a decision under the *Corporations Act*, there is a range of provisions that require it to provide reasons for its decision.⁶³

⁶⁰ Administrative Review Council, op cit n 2, at p 11.

⁶¹ It was proposed to establish an Inspector General of Taxation to strengthen the advice given to the federal government on tax administration and to act as an advocate for taxpayers: see Administrative Review Council, op cit n 2, at p 22.

⁶² *Public Service Board of NSW v Osmond* (1986) 159 CLR 656; 63 ALR 559 at 568 and 572-573.

⁶³ See, for example, ss 915G, 920F and 1280(9) of the *Corporations Act*.

Where ASIC, APRA or the ATO are acting under the *Superannuation Industry (Supervision) Act 1993* (Cth), or where ASIC and APRA are acting under the *Retirement Savings Accounts Act 1997* (Cth), there are no express provisions in that legislation that require the regulators to provide reasons for their decisions.

The Tax Agents' Board has indicated that it gives tax agents the reasons for its decisions.⁶⁴ However, the taxation legislation does not expressly require such reasons to be given. Taxpayers have no right to obtain reasons for an "objection decision" under the taxation legislation.⁶⁵ By contrast, where taxpayers have been refused remission of a penalty, they have the right to obtain written notice of both the decision and the reasons for it.⁶⁶

The ACCC has issued a policy statement indicating that it will issue reasons for the decisions that it makes to assist it to conduct its regulatory functions in a transparent, accountable and ethical manner.⁶⁷ The problem with this is that the policy statement has no statutory backing.

Baldwin and Cave⁶⁸ indicate that all regulators should have a legal duty to state the reasons for their decisions because that would assist to explain and rationalise regulation. The Australian legislation should require regulators to provide reasons for their final administrative decisions but not for their preliminary, intermediate or investigative decisions. If the affected person is given reasons for the final decision, this may assist in making any internal or external review application or deter unmeritorious review applications. The requirement to provide reasons may also assist to improve the quality of the regulators' decisions and promote greater government accountability.

There is some uniformity in that where the affected person applies for a review of the regulator's decision by the AAT, or by the Federal Court under the

⁶⁴ Tax Agents' Board, op cit n 44.

⁶⁵ Section 14ZZB(2) of the *Taxation Administration Act 1953* (Cth).

⁶⁶ Section 298-20(2) in Schedule 1 of the *Taxation Administration Act 1953* (Cth).

⁶⁷ See generally ACCC, "Collection and use of information – Introduction," October 2000 at p 1, at <http://www.accc.gov.au>, viewed on 25 September 2005.

⁶⁸ Baldwin R and Cave M, op cit n 3, at p 315.

AD(JR) Act, the legislation governing such a review contains provisions whereby the applicant can obtain reasons for the regulator's decision.⁶⁹

[11.5] Arguments for excluding or limiting external review of the regulators' decisions

[11.5.1] Consistency and predictability in the regulators' decision-making

The need to promote consistency and predictability in the regulators' decision-making could justify further limiting external review by the AAT.⁷⁰ However, it is also recognised that one should not argue consistency for consistency's sake. Sometimes, a too rigid application of the rules to achieve consistency in decision-making can produce unfairness.⁷¹

In a number of cases, the AAT has quashed disqualification or banning orders made by ASIC or reduced the period of disqualification or ban.⁷² It could be argued that ASIC has expert delegates who may be in the best position to determine whether a disqualification order or banning order should be made, and if so, the appropriate period of disqualification or ban. The same could be said for disqualification orders made by other specialist bodies like the Tax Agents' Board. This view is supported by the case law in the United Kingdom.⁷³

⁶⁹ See s 28 of the *AAT Act*; and s 13 of the *AD(JR) Act*. In the context of review by the AAT or the Federal Court, recent reforms have meant that the affected person is not entitled to be provided with reasons for the making of a "related criminal justice process decision": see ss 9A(4) and 13 of the *AD(JR) Act*; and see *Churche v ASIC (No 2)* [2006] FCA 923 at [19] and [27]. These reforms also mean that such decisions cannot be challenged by way of administrative or judicial review. The rationale for these reforms is discussed at [11.5.2].

⁷⁰ Administrative Review Council, op cit n 2, at p 3.

⁷¹ *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 645 per Brennan J cited in Administrative Review Council, op cit n 2, at p 73 and fn 18.

⁷² See generally *Donald v ASIC* [2000] FCA 1142; *Cardillo v ASIC* [2000] AATA 1053; *Wharton v ASIC* [2002] AATA 443; *Jungstedt v ASIC* [2003] AATA 159; *Felden v ASIC* [2003] AATA 301; *Saxby Bridge Financial Planning Pty Ltd v ASIC* [2003] AATA 480; and *Chapel Road Pty Ltd v ASIC* [2003] AATA 660.

⁷³ which indicates that where it is claimed that the DTI has acted unreasonably in determining that the public interest requires that a disqualification order should be made, the courts are reluctant to interfere by way of judicial review: see *R v Secretary*

There is a strong argument for excluding from review by the AAT those cases where the regulator has formed an independent, informed and professional view that the administrative order should be made or where the complaint concerns matters about which reasonable minds may differ, such as the period of disqualification or ban.⁷⁴

By contrast, the objective of promoting consistency in the regulators' decisions is promoted by retaining, in certain areas, judicial review by the Federal Court on the ground of error of law. The Federal Court is bound by precedent and judicial review promotes consistency in the meaning of the regulatory laws, as discussed at [11.2].

[11.5.2] *Abuse of the review process to achieve delay or tactical advantage*

Where there is evidence that the review process is being abused for the purpose of achieving tactical advantages or delay, that abuse could provide a justification for further limiting or excluding administrative or judicial review of the regulators' decisions.⁷⁵

The federal government enacted the *Jurisdiction of Courts Legislation Amendment Act 2000* (Cth) to remove a defendant's right to administrative or judicial review of various "related criminal justice process decisions." This means that the

of State for Trade and Industry; ex parte Lonrho plc [1992] BCC 325; *Re Blackspur Group plc*, *Re Atlantic Computer Systems plc* [1998] 1 WLR 422; *Re Barings plc (No. 3)*, *Secretary of State for Trade and Industry v Baker* [1999] 1 All ER 311 cited in Walters A and Davis-White M, *Directors' Disqualification Law and Practice*, Sweet & Maxwell, London, 1999, at p 189.

⁷⁴ It was suggested at [8.8.4] and [10.7] that statutory guidelines governing when a disqualification order should be made and the period of disqualification should be introduced. Such guidelines would inform the regulator and the regulated as to when such orders are likely to be made and of the likely period of disqualification. They would promote greater consistency in decision-making and may deter unmeritorious review applications.

⁷⁵ According to the Administrative Review Council, there has been the concern that review under the *AD(JR) Act* may have been abused in trade practices and taxation areas and in relation to committal proceedings and prosecution decisions. However, the Administrative Review Council did not find any clear evidence of such abuse: see Administrative Review Council, op cit n 2, at pp 3, 18 (at fn 42), and 41.

defendant cannot delay the criminal trial by seeking a review of collateral matters such as the regulators' decisions to:

- (a) commence an investigation;
- (b) issue notices to attend for an oral examination or notices to produce books;
- (c) prosecute or commit the defendant to trial, or appeal such a prosecution; or
- (d) obtain and execute search warrants.⁷⁶

Those reforms do not prevent the affected person from seeking a judicial review (on the ground of an error of law) of the regulators' investigative decisions if the review application is lodged before the commencement of the criminal trial.⁷⁷

The Attorney General noted that prior to the introduction of this legislation, the judicial review process was usually abused by "defendants with deep pockets."⁷⁸ However, according to the Administrative Review Council, the federal government provided no statistics or examples to support this claim.⁷⁹ The Administrative Review Council's findings predate many of the recent cases involving ASIC and those cases provide evidence of defendants "with deep pockets" who have been prepared to abuse the system. For example, there have been over 40 interlocutory applications involving *Rich v ASIC* between 2003-2005, and over 14 cases involving *Adler v ASIC* between 2002-2005. These cases indicate that the federal government's concern was probably justified.

One problem with the provisions introduced by the *Jurisdiction of Courts Legislation Amendment Act 2000* (Cth) is that they only apply to criminal investigations and to criminal enforcement action and have no application to investigations of suspected civil contraventions of the regulatory laws or to civil enforcement action.

⁷⁶ See ss 9A(1), (2), and (4) and paragraph (xa) of Schedule 1 of the *AD(JR) Act*. Identical reforms were introduced by ss 39(1B)-(1F) and 39B(3) of the *Judiciary Act 1903* (Cth). See also *Gant v Commissioner Australian Federal Police* [2006] FCA 1475 at [54].

⁷⁷ The reforms only apply where a prosecution for an offence, or an appeal arising out of such prosecution is before any court: see s 9A(1) of the *AD(JR) Act*.

⁷⁸ Administrative Review Council, op cit n 2, at pp 74, 75 and 95.

⁷⁹ Administrative Review Council, op cit n 2, at p 77.

The Administrative Review Council has commented that decisions relating to criminal investigations should not be subject to merits or judicial review because the review process could jeopardise the investigation and subsequent enforcement action.⁸⁰ It is suggested that this concern should not be restricted to criminal investigations and to criminal enforcement action and should equally apply to investigations of suspected civil contraventions and to enforcement action by way of civil and civil penalty proceedings. For the same reasons discussed above, where civil or civil penalty proceedings involving the regulator and the affected person are before the court, the defendant should not be able to delay those proceedings by seeking judicial review of the various investigative decisions that preceded those proceedings.⁸¹

Under this suggested reform the court could deal with the validity of the regulator's investigative decisions at the civil trial. This approach is supported by the Australian⁸² and United Kingdom's⁸³ case law. Even if such decisions were excluded from judicial review, the affected person may still be protected at the civil trial by the rules of evidence. For example, if it is determined at the civil trial that the regulators'

⁸⁰ Administrative Review Council, *op cit n 2*, at p 98 fn 114 citing Administrative Review Council, "What Decisions Should be Subject to Merits Review?," 1999, at [4.31].

⁸¹ Those investigative decisions include decisions to issue an oral examination notice or a notice to produce books and decisions to issue and execute search warrants under the *ASIC Act*, the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Retirement Savings Accounts Act 1997* (Cth). It will be recalled from the discussion at [6.7.1] that these search warrant powers are used to enforce non-compliance with a notice to produce books and they can be utilised in a civil context (unlike the search warrant power contained in the *Crimes Act 1914* (Cth)). The ACCC's new search warrant power can also be used to investigate suspected civil or criminal contraventions (see [6.7.1]).

⁸² which indicates that although a defendant cannot seek judicial review of the regulator's decision to issue a notice to produce books on natural justice grounds, the defendant is protected at any subsequent trial by the fact that the court will ensure that the defendant is afforded natural justice during the trial process: see *Norwest Holst Ltd v Secretary of State for Trade* [1978] 1 Ch 201; *Sixth Ravini Pty Ltd v DC of T (Cth)* (1985) 85 ATC 4307; *Allen Allen & Hemsley v DC of T* (1988) 19 ATR 1462; 81 ALR 617 at 632; and *Minosea v ASC* (1994) 14 ACSR 642 at 648-651.

⁸³ which indicates that if there is a claim that the DTI's existing proceedings are bound to fail, or constitute an abuse of power, that claim should be dealt with in the course of those existing proceedings, rather than by way of a separate application for judicial review: see *Re Blackspur Group plc*, *Re Atlantic Computer Systems plc* [1998] 1 WLR 422 cited in Walters A and Davis-White M, *op cit n 73*, at p 189.

oral examination notice or notice to produce books or search warrant (some search warrants can be used in a civil context⁸⁴) was invalid, then the admissibility of the evidence obtained pursuant to those investigative powers is governed by the rule in *Bunning v Cross*.⁸⁵

One problem with this suggested reform is that if questions relating to the validity of the regulators' investigative decisions are left to be determined at the civil trial, it may result in increased interlocutory applications during that trial in which defendants seek to challenge the admissibility of certain evidence. However, at least the trial judge has the power to control the court's processes and determine whether the interlocutory application should be granted and to set a time-frame for compliance with any interlocutory orders. By contrast, where the applicant is permitted to apply for external administrative or judicial review of the regulator's various administrative decisions during the trial process, the trial judge has no control over those external review processes.

The reforms suggested above are not without precedent. For example, concerns of abuse of the review process have already led to limitations being placed on judicial review in relation to some areas of civil law, such as in relation to the assessment of income tax,⁸⁶ as discussed below at [11.6.1].

[11.5.3] *Volume and cost of review cases*

The volume and cost of review cases may justify further limiting or excluding administrative or judicial review of certain types of administrative or investigative decisions.⁸⁷ This ground is partly related to the ground of abuse, discussed above.

⁸⁴ *Ibid.*

⁸⁵ (1978) 141 CLR 54. This rule provides that the court has a discretion to exclude evidence that has been illegally obtained. The court weighs the public interest in convicting those who commit criminal offences against the public interest in protecting persons from unlawful or unfair treatment. The operation of the discretion to exclude the evidence depends on the illegal acts being shocking, wilful and warranting a criminal sanction: Heydon JD, *Cross on Evidence* (Butterworths, Sydney, 1996) at [27295]. See also *Allit v Sullivan* [1988] VR 621.

⁸⁶ Administrative Review Council, op cit n 2, at pp 3 and 41.

⁸⁷ Administrative Review Council, op cit n 2, at pp 4 and 18.

There are many cases involving a review of the decision to issue and execute search warrants.⁸⁸ This problem has been partly addressed by the reforms introduced by the *Jurisdiction of Courts Legislation Amendment Act 2000* (Cth) but they do not necessarily apply to all of the regulators' search warrant powers as some of those powers can be utilised in a civil context (see [6.7.1] and [11.5.2]).

There are also many cases involving a review of the regulators' conduct and decisions made at the regulators' administrative hearings.⁸⁹

If the volume of cases going to review is a product of poor primary decision-making by the regulators, efforts should be made to improve the quality of that decision-making, rather than spending public and private funds on external administrative or judicial review. Reforms were suggested at [10.6]-[10.6.6] to improve the quality of primary decision-making by introducing clear evidential and procedural rules to govern the conduct of the regulators' administrative hearings. Some regulators could also adopt the ATO's approach and develop a comprehensive internal review process which may, in turn, reduce the need for external review,⁹⁰ as discussed at [11.6.2].

[11.5.4] *Urgent situations*

It could be argued that restrictions should be placed on the availability of administrative or judicial review in certain urgent situations.⁹¹

The public interest requires that the regulators' disqualification or banning order hearings, be conducted expeditiously particularly in view of the potential harm that can be caused by allowing the relevant person to continue to operate in a certain

⁸⁸ See, for example, the cases discussed in Middleton T, "ASIC Corporate Investigations and Hearings," Lawbook Co, Subscription Service, Sydney, 1999, at [16.2050].

⁸⁹ For example, there are numerous review applications in relation to ASIC's and the Tax Agents' Board's decisions to make disqualification or banning orders: see, for example, the cases discussed in Middleton T, *ibid*, at [16.600] and [16.650] and [16.3100]-[16.3300].

⁹⁰ Administrative Review Council, *op cit n 2*, at pp 4, 41 and 83.

⁹¹ Administrative Review Council, *op cit n 2*, at pp 4 and 18.

industry (see [10.2]). The review process should not be used to defeat the policy underlying the regulators' powers to make timely and cost-effective administrative orders.

[11.5.5] *Policy grounds*

It could be argued that where a regulator bases its decision on a particular governmental or regulatory policy, that decision should be immune from review where the relevant policy has been formulated after extensive consultation or parliamentary debate or where the policy has been endorsed by Cabinet or where it has been formulated at a very senior level.⁹² The regulator's adherence to a particular policy may diminish inconsistencies which might otherwise appear in a series of decisions and enhance continuity and fairness within the decision-making process.⁹³

[11.5.6] *Vagaries of natural justice as a ground of review*

Some grounds of judicial review, such as those relating to an alleged denial of natural justice,⁹⁴ have been criticised because they place too much focus on the procedures by which a decision is arrived at even though the decision, is otherwise fair, reasonable and rational.⁹⁵ Allegations of a denial of natural justice are

⁹² Administrative Review Council, *op cit n 2*, at pp 4 and 18; and see generally *Hawker De Havilland Ltd v ASC* (1991) 6 ACSR 579 at 588-589; *Re Australian Metal Holdings Pty Ltd & ASC* (1995) 573 15 ACSR at 587; *Winpar Holdings Ltd v ASIC* [2000] AATA 980 at [33]; *Bennett v CEO of Customs* [2003] FCA 53 at [50]; *Lofthouse v ASIC* (2004) 22 ACLC 685; [2004] AATA 327 at [66].

⁹³ See generally *Versus Capital Ltd as Manager of Benwood Property Trust v ASIC* [2001] AATA 864 at [45] citing *Drake v Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 640-641. See also *Lofthouse v ASIC* (2004) 22 ACLC 685; [2004] AATA 327 at [64]. The AAT has indicated that a regulator's decision is not immune from review on the ground that it is an expression of policy. However, the AAT will usually observe the policy unless it is unlawful or its application would cause injustice or there is good reason for departing from it: see generally *Drake v Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 645; *Re Australian Metal Holdings Pty Ltd & ASC* (1995) 15 ACSR 573 at 587; *Felden v ASIC* [2003] 301 at [85]; *Campbell v ASIC* [2001] AATA 205 at [41]; *Saxby Bridge Financial Planning Pty Ltd v ASIC* [2003] AATA 480 at [14]; and *Glebe Administration Board v ASIC* [2006] AATA 57 at [20].

⁹⁴ This ground of review is contained in s 5(1)(a) and s 6(1)(a) of the *AD(JR) Act*.

⁹⁵ See generally Administrative Review Council, *op cit n 2*, at p 51.

problematic because the legislation does not clearly specify what natural justice requirements the regulators are required to observe (see [4.7.3] and [10.6.2]). Questions such as whether the applicants were actually provided with a sufficient opportunity to present their cases or whether the decision-maker was actually biased, or in the case of apprehended bias, whether the decision-maker engaged in conduct that might undermine public confidence in the administrative process, involve a high degree of subjectivity, are therefore difficult to resolve, and require a considerable amount of time to deal with.⁹⁶ These problems could be partly dealt with by clearly specifying in the legislation what aspects of the natural justice hearing rules apply in the regulators' investigations and hearings. This reform would automatically reduce the range of natural justice grounds that could be relied upon as a basis for external review.⁹⁷

[11.5.7] *Vagaries of unreasonableness as a ground of review*

Other grounds of review under the *AD(JR) Act*, such as “unreasonableness,”⁹⁸ are also problematic because “unreasonableness” has been given a wide interpretation in the case law thereby making it easier for applicants to challenge a wide range of the regulators' decisions on this ground.⁹⁹ “Unreasonableness” has been widely interpreted partly to fill gaps caused by the fact that the *AD(JR) Act* predominantly uses specific grounds of review.¹⁰⁰ In response to this problem, the *Migration Act 1958* (Cth) was amended to exclude “unreasonableness” as a ground of review under

⁹⁶ See generally Administrative Review Council, op cit n 2, at pp 5 and 20.

⁹⁷ A similar reform was introduced into the *Migration Act 1958* (Cth), as discussed at [4.7.3.1].

⁹⁸ See s 5(2)(g) and s 6(2)(g) of the *AD(JR) Act*.

⁹⁹ Unreasonable decisions include decisions devoid of any plausible justification, that give inadequate or excessive weight to a particular matter, that involve a wrong finding of fact on a material issue or involve a failure to adequately inquire into the facts, that fail to consider policy, that are unnecessarily harsh, that are inconsistent with previous decisions on similar matters, or that involve discrimination: see generally Administrative Review Council, op cit n 2, at pp 52-53 and the authorities cited therein.

¹⁰⁰ Empirical evidence indicates that this ground is one that is most frequently used by applicants and that it is upheld by the courts in 21% of applications: see Creyke R and McMillan J, “Success in Judicial Review – An Empirical Study,” cited in Administrative Review Council, op cit n 2, at p 53.

that Act.¹⁰¹

Similar amendments could be made under the regulatory legislation to exclude “unreasonableness” as a ground of review. The present lack of clarity does not promote cost-effective and consistent or predictable regulatory decisions.

[11.5.8] *Reviewable conduct*

The *AD(JR) Act* permits the affected person to apply for a review of conduct leading up to the regulator’s final decision.¹⁰² The purpose of this ground of review is to allow the affected person to challenge conduct before the final decision is made. If the application is successful, the Federal Court may declare the conduct unlawful or make an order to do justice between the parties. The *AD(JR) Act* does not authorise the Federal Court to provide final relief by quashing the final decision where the review is based on unlawful conduct.¹⁰³

Review based on “reviewable conduct” is complicated because while the strict legal definitions of “reviewable decisions” and “reviewable conduct” appear to be relatively clear, there have been practical difficulties in applying those definitions to factual situations.¹⁰⁴ Such problems add to the complexity and delay in the judicial review process.

The fact that persons may seek a review of the regulator’s conduct leading up to a “reviewable decision” means that they can intervene at a very early stage of the regulator’s decision-making process. The review application may therefore result in a

¹⁰¹ Administrative Review Council, *op cit n 2*, at pp 53 and 158.

¹⁰² See s 6 of the *AD(JR) Act*.

¹⁰³ See s 16(2) of the *AD(JR) Act*.

¹⁰⁴ A “reviewable decision” is one that generally, but not always, involves a final or operative and determinative decision: see *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 336-337 and 378; 94 ALR 11 at 23. See also *Wharton v ASIC* [2002] AATA 443 at [34]. By contrast, “reviewable conduct” is a procedural determination that may lead to a final reviewable decision: see *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321; 94 ALR 11 at 24; *Edelsten v Health Insurance Commission* (1990) 96 ALR 673 at 682; and *Brierley Investments v ASC* (1997) 148 ALR 158 at 169-170.

fragmentation of the regulator's decision-making process and may be detrimental to the efficiency of that process.¹⁰⁵

In view of the above problems, judicial review on the ground of the regulator's conduct, which precedes the final "reviewable decision," should be abolished. The interests of the affected person would be protected under such a reform because they could still apply for review of the regulator's final decision. Where the application for review seeks the review of a "reviewable decision" (as opposed to "reviewable conduct"), the Federal Court already has the power to quash that final decision if appropriate.¹⁰⁶

[11.6] Reforms to exclude or limit external review of the regulators' decisions

In view of the arguments considered at [11.5]-[11.5.8], it is suggested that there is a good case for excluding or limiting administrative and judicial review of some of the regulators' administrative decisions. The question is whether the exclusion or limitation should be determined at a legislative level or whether it should be left to the courts to determine on a case-by-case basis.¹⁰⁷ It is argued that the express exclusion of certain categories of decisions from all forms of external review, or express limitations on the right of external review, would ensure that a person's rights and obligations are clearly apparent on the face of the regulatory legislation, is consistent with the practice of drafting legislation in plain English, and assists to ensure greater transparency in the regulatory framework. This approach also avoids the need for the courts to engage in the difficult, time consuming and costly task of reconciling the inconsistencies between the regulators' powers and the affected person's general law rights.¹⁰⁸

¹⁰⁵ See *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 336-337 per Mason CJ.

¹⁰⁶ See s 16(1) of the *AD(JR) Act*.

¹⁰⁷ Administrative Review Council, op cit n 2, at p 99.

¹⁰⁸ See generally Administrative Review Council, op cit n 2, at p 152.

[11.6.1] *Exclude certain decisions from external review*

Decisions affecting the assessment or collection of taxation are expressly excluded from judicial review under the *AD(JR) Act* by Schedule 1.¹⁰⁹ Part of the rationale for this exclusion was the concern that taxpayers could abuse the review process to delay paying tax until they exhausted the judicial review process. Such a delay would seriously undermine or impede the federal government's ability to collect revenue and detrimentally impact on a wide range of government programmes.¹¹⁰ The existence of alternate review processes under the tax legislation is also partly the reason why decisions affecting the assessment or collection of taxation are excluded from judicial review under the *AD(JR) Act*, as discussed at [11.4.3.3] and [11.6.2].

Morabito and Barkoczy have indicated that the exclusions from judicial review in Schedule 1 of the *AD(JR) Act* are ineffective because most of those excluded decisions can be reviewed by the Federal Court under s 39B of the *Judiciary Act 1903* (Cth), as discussed at [11.4.3.3]. They also indicate that the federal government's policy goal (underpinning some of the exclusions from judicial review contained in Schedule 1) of denying access to judicial review where alternate remedies are available (such as internal review) has not been achieved in practice partly because the Federal Court has given a narrow interpretation to those exclusions.¹¹¹

¹⁰⁹ The exclusion is contained in paragraphs (e) and (g) Schedule 1 of the *AD(JR) Act*.

¹¹⁰ The exclusion is also justified on the ground that a substantial amount of resources would have to be devoted to defending judicial review proceedings: see Administrative Review Council, *op cit n 2*, at p 166. The potential problem of taxpayers abusing the review process to delay paying tax is also addressed by the fact that the Australian taxation legislation provides that the taxpayer's liability to pay tax is not suspended pending the outcome of any review or appeal: see ss 14ZZM and 14ZZR of the *Taxation Administration Act 1953* (Cth). By contrast, in the United States, the taxpayer need not pay the disputed taxes before appealing to the Tax Court Federal Tax Law Research, "The United States Tax Court," at <http://www.law.harvard.edu/library/services/research/guides/grfs/specialized/tax.php>, viewed on 15 May 2006.

¹¹¹ *Morabito V and Barkoczy S*, *op cit n 1*, at fns 204 and 205, at <http://www.austlii.edu.au>, viewed on 2 December 2006.

In light of the previous discussion in this chapter, it is argued that external review of the regulators' decisions should be excluded:

- (a) where the review process could prejudice the success of investigative and enforcement action (whether civil or criminal, see [11.5.2]);
- (b) in those areas where there is currently a high volume of review cases (see [11.5.3]);
- (c) where the decisions are an expression of governmental or regulatory policy (see [11.5.5]); and
- (d) where the regulators' decisions should be implemented immediately for the public good (see also [11.5.1] and [11.5.4]).

A balance could be struck between the competing public and private interests by giving the affected person the right to apply for an internal review of the regulator's decision (see [11.6.2]).

The exclusion of certain decisions from external review could be implemented by including a clear and exhaustive statement in the proposed *Administrative Powers and Proceedings Act* (Cth) (which would apply to all of the relevant Commonwealth regulators) of the types of decisions that are excluded from either, or both, administrative review and common law or statutory judicial review.

[11.6.2] *Wider discretion for the court and the AAT to refuse a review application*

The problem with excluding certain types of decisions from external review is that it may unfairly penalise those who are not abusing the system and who are genuinely aggrieved by the regulators' decisions. A preferable approach may be not to exclude any of the regulators' decisions from external review but to require the affected person to apply to the courts or the AAT, as the case may be, for leave to make a review application. This would involve giving the courts¹¹² and the AAT

¹¹² The Federal Court has a discretionary power to refuse a review application under s 10 of the *AD(JR) Act* but that provision does not expressly refer to "abuse of the review process" as a ground for refusing the review application. However, such a

express powers to refuse the review application where they are of the view that the application constitutes an abuse of the review process.¹¹³ This approach would involve a substantial increase in the workload of the courts and of the AAT and would require them to spend a large amount of time and resources considering applications for leave. This reform would also add to the costs and delay in implementing, varying or quashing the regulators' decisions. By contrast, excluding certain rights of review and, in some cases replacing those rights with the right to an internal review would reduce the workload of the AAT and the courts, eliminate the need for affected persons to consider multiple avenues of review and introduce greater simplicity and efficiency in the review process.¹¹⁴

[11.6.3] *Internal review*

Internal review processes exist under the bankruptcy legislation,¹¹⁵ the trade practices legislation¹¹⁶ and the taxation legislation.

The *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Retirement Savings Accounts Act 1997* (Cth) provide that affected persons must exhaust the internal review process before they can apply to the AAT for an external merits review. However, this legislation does not prevent them from immediately seeking judicial review of the regulator's original decision. This legislation fails to specify how the reconsideration or internal review is to be conducted or the rules and procedures that govern such a review. The legislation does not impose any time limits within which the applicant must request the regulator to reconsider its decision

power may be implied. Similarly, the AAT has no express power to refuse the review application on the ground of "abuse of the review process."

¹¹³ See generally Administrative Review Council, op cit n 2, at pp 76 and 77.

¹¹⁴ Administrative Review Council, op cit n 2, at p 20.

¹¹⁵ The bankrupt can seek an internal review of the decision to extend the bankruptcy. The bankrupt can subsequently seek an external review by the AAT of the internal review decision: see ss 149K and 149Q of the *Bankruptcy Act 1966* (Cth).

¹¹⁶ A person may seek an internal review by the Australian Competition Tribunal of decisions made by the ACCC in relation to grants of immunity from the *Trade Practices Act 1974* (Cth) and arbitration decisions in cases involving access to essential services: see s 103 of the *Trade Practices Act 1974* (Cth); and see ACCC, "Decision-making processes," at <http://www.accc.gov.au>, viewed on 24 September 2005.

or within which the regulator must issue its decision concerning such an application. The legislation is silent on the rights of the affected person during the internal review process. For example, there is no guidance on questions such as whether the affected person may make written or oral submissions on the critical issues or factors.

The ATO's internal review procedures under the taxation legislation enjoy governmental and judicial support because they assist to produce a fair and timely outcome in comparison to cases where an applicant simply commences an external administrative or judicial review.¹¹⁷ Despite the fact that disputes between a taxpayer and the ATO can be dealt with by an objection process within the ATO, a taxpayer who is dissatisfied with the ATO's decision on the objection, can still apply to the AAT¹¹⁸ (heard by the taxation division of the AAT) or appeal to the Federal Court.¹¹⁹

A system of public and private rulings was introduced on 1 July 1992 which may also provide a further internal mechanism for resolving a taxation matter without recourse to external review.¹²⁰ There are similar procedures available in the case of the IRS, in the United States.¹²¹ The advantage of these procedures is that taxpayers can obtain the regulator's views on a particular matter without cost. Accordingly, taxpayers can make an informed decision about whether to challenge the regulator's decision by way of external review.

¹¹⁷ Administrative Review Council, op cit n 2, at pp 4 and 135. Under this scheme the taxpayer is required to lodge an objection against the assessment with the Commissioner within a prescribed time: see ss 160AL and 175A of the *Income Tax Assessment Act 1936* (Cth); and ss 14ZU, 14ZW, 260-145(5) and 359-60 of the *Taxation Administration Act 1953* (Cth). The Commissioner is then required to make a decision on the objection within 60 days, or if no decision is made, the taxpayer can require the Commissioner to make a decision on the objection within a further 60 days: see ss 14ZY and 14ZYA of the *Taxation Administration Act 1953* (Cth).

¹¹⁸ See s 14ZZ of the *Taxation Administration Act 1953* (Cth). In the context of review by the AAT, also see s 344 of the *Superannuation Industry (Supervision) Act 1993* (Cth); and s 189 of the *Retirement Savings Accounts Act 1997* (Cth).

¹¹⁹ Administrative Review Council, op cit n 2, at p 165.

¹²⁰ Administrative Review Council, op cit n 2, at p 165.

¹²¹ These rulings only represent the ATO's or the IRS's views on how the relevant law should be interpreted. Accordingly, they may be affirmed or overruled by the court: see Federal Tax Law Research, "Revenue Rulings," at <http://www.law.harvard.edu/library/services/research/guides/grfs/specialized/tax.php>, viewed on 15 May 2006.

The Australian taxation internal review system also discourages unmeritorious review applications by requiring the taxpayer to prove, on the balance of probabilities, that the assessment is excessive, as opposed to requiring the ATO to justify its particular decision.¹²²

Internal review mechanisms have also been adopted in the United States¹²³ and in the United Kingdom.¹²⁴

Some Australian judges have indicated that, in dealing with review applications, the main consideration is what is in the best interests of the parties and the public interest in reaching a cost-effective and timely final decision.¹²⁵ An internal review process may assist to promote these objectives and also ensure that the regulators remain accountable and that individual rights are still protected.¹²⁶

¹²² The taxpayer is also required to establish what changes need to be made to correct the assessment. It is not sufficient for the purposes of review to show that the assessment is wrong: see ss 14ZZK and 14ZZO of the *Taxation Administration Act 1953* (Cth); *Trautwein v FC of T (No 1)* (1936) 56 CLR 63; and *McCauley v FC of T* (1996) 39 ATR 1 cited in Administrative Review Council, op cit n 2, at p 166.

¹²³ Where the SEC makes a temporary “cease and desist order” without giving the affected person a hearing, that person may apply to the SEC for an internal review of that decision. The affected person may then apply to the court for judicial review of the SEC’s decision: see s 21C(d) 2 and s 25 of the *Securities Exchange Act 1934* (US).

¹²⁴ Decisions made by the CC or by the Director General of Fair Trading as to whether there has been a contravention of the competition legislation or whether a person should be granted an exemption from complying with that legislation may be subject to internal review by the Appeal Tribunal. Decisions of the Appeal Tribunal may then be externally reviewed by the court on a point of law or in relation to the amount of a pecuniary penalty (see ss 46, 48 and 49 of the *Competition Act 1998* (UK)). In the case of HMRC, the legislation provides that taxpayers may seek an internal review of a tax related decision by the General Commissioners. Where the matter is complex, or is likely to involve a lengthy hearing, taxpayers may also seek an internal review by the Special Commissioners (see ss 44 and 46B of the *Taxes Management Act 1970* (UK)). The decision of either of these bodies is final and conclusive except that an appeal may be made to a court on a point of law (see ss 46 and 56A of the *Taxes Management Act 1970* (UK)). The Special Commissioners have power to award costs where they are of the view that a party has “acted wholly unreasonably” in connection with the hearing of the review application (see s 56C of the *Taxes Management Act 1970* (UK)).

¹²⁵ *Graham v Commissioner of Superannuation* (1981) 3 ALN N86 per Fox ACJ cited in Administrative Review Council, op cit n 2, at pp 133-134.

¹²⁶ Administrative Review Council, op cit n 2, at p 84.

Some Australian judges have indicated that they support the use of internal review mechanisms particularly if the applicant is required to exhaust the internal rights of review before seeking an external review. They have also indicated that one advantage of the internal review process is that it gives the court, in the context of a subsequent application for judicial review, the benefit of specialist opinions before making its final decision on the application.¹²⁷ There are also judicial comments to the effect that the regulator's internal review process may offer more expeditious and cost-effective remedies and superior or more flexible remedies than those that can be ordered by a court.¹²⁸ The case law indicates that where such an alternative internal review mechanism is established, the court will generally exercise its discretion to refuse the application for judicial review.¹²⁹

In view of the above, internal review mechanisms should be established under all Australian regulatory legislation. The legislation should also ensure that the internal review process provides an adequate alternative to the external review process. Accordingly, the legislation should:

- (a) give the affected person the right to immediately obtain written reasons for the regulator's original decision and a copy of the material on which that decision was based;
- (b) give the affected person the right to immediately seek an internal review of the regulator's original decision. This right should expire within a specified time;
- (c) provide that there are no costs associated with submitting the internal review application;

¹²⁷ See generally *Boral Gas (NSW) Pty Ltd v Magrill* (1933) 32 NSWLR 501 cited in Administrative Review Council, op cit n 2, at pp 168-169.

¹²⁸ *Boral Gas (NSW) Pty Ltd v Magrill* (1933) 32 NSWLR 501 cited in Administrative Review Council, op cit n 2, at p 168. See also *Brag v Secretary, Department of Employment, Education and Training* (1995) 38 ALD 251, 253 per Davies J cited in Administrative Review Council, op cit n 2, at p 138.

¹²⁹ *Swan Portland Cement Ltd v Comptroller General of Customs* (1989) 25 FCR 523 at 530. The same approach has been adopted in the United Kingdom: see *Harley Development v CIR* [1996] 1 WLR 727 cited in Administrative Review Council, op cit n 2, at p 138.

- (d) give the affected person the right to make additional submissions during the internal review process to correct errors or to address any adverse findings contained in the original decision;
- (e) give the person conducting the internal review the power to conduct a full re-hearing, if required, and the power to quash, vary or affirm the regulator’s original decision; and
- (f) ensure that there is a separation of those persons who made the original decision and those persons who consider the internal review application¹³⁰ so as to avoid any suggestion of bias in relation to the final decision on the internal review application.¹³¹

[11.6.4] *Confer wider jurisdiction on the regulators to make administrative decisions*

The availability of judicial review of certain regulatory decisions could be limited by giving the regulators a wide jurisdiction to make their administrative decisions and by requiring the regulator to form a view as to the existence of a state of facts as a pre-condition to making the administrative order. For, example, as discussed at [10.9.1], the Australian regulators could be given the power to disqualify a person from acting in an industry where the regulator forms the view that a person is not a “fit and proper” person. The subjective and broad nature of such a power means that it is less likely that its limits will be breached. The broad nature of such a power means that grounds of review such as unreasonableness, the failure to take into

¹³⁰ See generally Baxt R, Submission to the Joint Parliamentary Committee, CLERP 9, “The proposed regulatory revolution”, http://www.aph.gov.au/Senate/committee/corporations_ctte/clerp9/submissions/sub006as.doc, viewed on 23 February 2004.

¹³¹ The bias rule is based on the principle that judges should not hear their own cause: *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 350 per Mason J cited in *Allen v CAC (NSW)* (1988) 14 ACLR 632 at 636 by Mahoney JA. The regulators should publish an Internal Review Guide which outlines the procedures involved in conducting the internal review and that outlines the processes adopted by the regulator to ensure that the person conducting the internal review is independent of the original decision-maker: see generally the Parliamentary Joint Committee on Corporations and Financial Services, *Report on CLERP (Audit Reform and Corporate Disclosure) Bill 2003*, June 2004, Recommendation 3 at [6.108], [6.111] and Recommendation 17 at [6.112], http://www.aph.gov.au/senate/committee/corporations_ctte/clerp9/clerp9p1.pdf, viewed on 8 June 2004.

account relevant considerations, or taking into account irrelevant considerations, remain available only in theory and fraud or improper purpose are difficult to prove.¹³²

Such a reform may be unacceptable as it adversely affects private rights. However, this reform would only apply to a limited range of decisions such as those involving disqualification orders. This suggested reform could be tempered by giving the affected person a right to internal review.

[11.6.5] *Statutorily protect the regulator's decision*

A further way to limit the availability of judicial review of the regulators' decisions is to statutorily protect those decisions by including provisions that deem that they are valid despite any allegations that a provision of the legislation has not been complied with. Such an approach has been adopted in s 175 of the *Income Tax Assessment Act 1936* (Cth). Section 175 provides that the validity of the ATO's assessment is not affected by reason that any of the provisions of the *Income Tax Assessment Act 1936* (Cth) have not been complied with.¹³³

The availability of judicial review could also be restricted by including provisions in the legislation that state that the regulator's decision is valid where the regulator has issued a certificate or document deeming that all necessary things for the making of the decision have been done. For example, s 177(1) of the *Income Tax Assessment Act 1936* (Cth) limits the availability of review of the ATO's decision to issue the notice of assessment by deeming that all necessary things for the making of

¹³² See, for example, s 14 of the *Financial Sector Shareholdings Act 1998* (Cth) cited in Administrative Review Council, op cit n 2, at p 159.

¹³³ Section 175 prevents taxpayers from challenging the validity of assessments on grounds such as ultra vires or that they were defective because of a failure to comply with the Act. However, s 175 does not prevent taxpayers from challenging the accuracy of assessments through the objection and appeal process: see s 175A of the *Income Tax Assessment Act 1936* (Cth). A similar provision to s 175 is found in s 16 of the *National Crime Authority Act 1984* (Cth). See generally Administrative Review Council, op cit n 2, at p 160.

the decision to issue the notice of assessment have been done.¹³⁴

The policy behind ss 175 and 177(1) is to prevent taxpayers delaying the assessment of tax and the collection of revenue. Those provisions mean that taxpayers cannot require the Commissioner to prove the validity of the assessment or justify the assessment process.¹³⁵

The approaches described above could be readily adopted for a broad range of regulatory statutes.

[11.6.6] *Self-executing decisions*

The legislation could also be amended by making greater use of self-executing decisions. These are decisions that automatically follow compliance with certain requirements. For example, the *Corporations Act* provides that where ASIC has granted an application by a person for registration as an auditor or liquidator, and the applicant has complied with the statutory requirements, ASIC must issue a certificate of registration.¹³⁶ Such provisions may mean that there is no “decision of an administrative character” made “under an enactment”.¹³⁷ For the decision to be made under an enactment, it must be decision that the statute required or authorised the

¹³⁴ Section 177(1) provides that the issue of notice of assessment by the Commissioner is conclusive evidence of the making of that assessment and, except in the context of an appeal under Part IVC of the *Taxation Administration Act 1953* (Cth) (see [11.4.3.3]), that the amount and all particulars relating to the assessment, are correct. See generally Administrative Review Council, op cit n 2, at p 160.

¹³⁵ See the comments in *Kordan Pty Ltd v Commissioner of Taxation* 46 ATR 191 cited in Administrative Review Council, op cit n 2, at p 44 and fn 79. Section 177(1) does not prevent a person from seeking a review where it is alleged that the decision involves bad faith or a lack of power to make an assessment or from seeking declaratory relief where no assessment has been made: see *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598; *Deputy Commissioner of Taxation (Cth) v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 199. See also Woellner, op cit n 44, at [2-467]; and Administrative Review Council, op cit n 2, at p 167.

¹³⁶ See ss 1282(5) and (6) of the *Corporations Act*; and Administrative Review Council, op cit n 2, at p 162.

¹³⁷ There is conflicting authority on this issue: see *Buck v Comcare* (1996) 137 ALR 335; and cf *Sash Trajkovski v Telstra Corporation* (1998) 153 ALR 248 at 257; and Administrative Review Council, op cit n 2, at p 162.

regulator to make.¹³⁸ Self-executing decisions are decisions that follow automatically and do not involve the regulator making the decision. Accordingly, because the statute does not require the regulator to make the decision, it is not reviewable under the *AD(JR) Act* but may be reviewable by the AAT (on the merits), or by the court on common law grounds (see [11.4.3.4]). Accordingly, to achieve uniformity and consistency, there would have to be an amendment to ensure that such decisions are not reviewable by the court at common law or by the AAT.

[11.6.7] *Costs penalty*

In cases where there is evidence that the review process is being abused, it is suggested that the regulatory framework should deter individuals from commencing unmeritorious applications for review by giving the AAT the same power as the Federal Court to impose a costs penalty for unmeritorious review applications.¹³⁹

In the United States, the legislation expressly provides that where the decision of the Tax Court is affirmed, the United States Court of Appeals has the power to order that the taxpayer pay a fine (payable to government consolidated revenue) where it is of the view that the review application was instituted primarily for the purpose of delay or that the taxpayer's position was groundless.¹⁴⁰ Similar provisions could be introduced in the Australian legislation to deter unmeritorious applications.

[11.7] Conclusion

A of range inconsistencies and deficiencies in the current regulatory framework have been identified in this chapter. Reforms have been suggested to address those problems and to achieve greater uniformity, timeliness and cost-

¹³⁸ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 cited in *Dibben v ASIC* [2001] AATA 812; and *Gordon v ASIC* [2002] FCA 1157 at [19].

¹³⁹ Each party normally bears their own costs in AAT proceedings. The AAT has no clear power to award costs against an applicant who has an unmeritorious claim: see generally *Versus Capital Ltd as Manager of Benwood Property Trust v ASIC* [2001] AATA 864 at [57]; and proposed s 69C of the *AAT Act* contained in the *Law and Justice Amendment Bill (No 2) 1995* (Cth); and Administrative Review Council, op cit n 2, at p 78.

¹⁴⁰ Section 7482(4) of the *Internal Revenue Code* (US).

effectiveness in relation to review of the regulators' decisions thereby achieving a range of public and private interest objectives including more effective regulation.

Those reforms include:

- (a) establishing a legislative framework that gives affected persons clear choices as to alternate forms of review;
- (b) introducing clear and uniform rules and procedures that govern both internal and external review;
- (c) giving affected persons uniform rights to require the regulator to reconsider its decision by way of an internal review; and
- (d) limiting and, in some cases, excluding the affected person's right to obtain external review of certain types decisions.

CHAPTER 12

CONCLUSION

by Tom Middleton

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CHAPTER 12

CONCLUSION

[12.1] Introduction

In this concluding chapter the major findings and the major suggested reforms are summarised. A range of options is also considered in relation to how those suggested reforms could be implemented. They include the adoption of the single regulator model, retaining the current multiple regulator model, or adopting some form of hybrid regulatory model.

[12.2] Summary of findings

ASIC, APRA, the ACCC and the ATO are each governed by their own legislation which provides them with their own investigative and enforcement powers. While those powers are designed to resolve similar regulatory issues or problems, they are not uniform. The analysis indicates that there is a lack of clarity, consistency and uniformity in the Australian regulatory legislation in relation to:

- (a) the adoption of statutory regulatory objectives;
- (b) the threshold test that triggers a formal investigation;
- (c) the “protection and remedies” regime for informants;
- (d) the regulators’ powers to issue oral examination notices and notices to produce books;
- (e) the procedures governing the conduct of oral examinations and administrative hearings;
- (f) the regulators’ powers to use books that are produced or seized, or to obtain books when they are not produced;
- (g) the formal requirements of oral examination notices, notices to produce books and notices to attend administrative hearings;
- (h) the obligations, rights and protections (including the penalty privilege, the privilege against self-incrimination, legal professional privilege and evidential immunity) that may be imposed on, or afforded to, examinees, recipients of notices to produce books and affected persons and witnesses at administrative hearings;

- (i) the regulators' powers to enforce non-compliance with their investigative requirements and the criminal penalties that may be imposed for non-compliance;
- (j) the provisions that govern the regulators' statutory duties of confidentiality and the exceptions to those duties;
- (k) the principles governing when civil or criminal proceedings should commence;
- (l) the "fault elements," defences and penalties applicable to similar criminal offences;
- (m) the evidential and procedural rules governing administrative, civil, civil penalty, and criminal proceedings;
- (n) whether the regulator or the Commonwealth DPP should prosecute indictable offences;
- (o) the regulators' powers to make administrative orders; and
- (p) internal and external review of the regulators' decisions.

Those inconsistencies are unwarranted and seem to be the product of successive federal governments' "ad hoc" and reactive approach to the development of the regulatory laws. Further, as problems with a particular regulator's powers or processes have been identified, usually as the result of litigation, they have been rectified by legislative amendments, but those amendments have not been made uniformly or consistently across all regulatory legislation, even though the problems may be universal. It will be recalled from the discussion at [1.1.1] that Baxt¹ describes the federal government's approach to regulatory reforms as involving "knee-jerk reactions to particular pressures." Pearson describes the Australian financial laws as the product of a "piecemeal" approach.² Braithwaite describes the regulatory laws as the product of a "myopic" and "tunnel-visioned" approach.³ This approach has resulted in some regulators having superior investigative and enforcement powers in

¹ Baxt R, "Thinking about Regulatory Mix – Companies and Securities, Tax and Trade Practices," 117 at p 119 in Grabosky P and Braithwaite J (Editors), "Business Regulation and Australia's Future," Australia Institute of Criminology, Canberra 1993.

² Pearson G, "Risk and the Consumer in Australian Financial Services Reform," 2006 SydLRev, at 7, at <http://www.austlii.edu.au>, viewed on 23 September 2006.

³ See generally Braithwaite J, "Responsive Regulation for Australia," at p 81 in Grabosky P and Braithwaite J, op cit n 1.

comparison to other regulators. In some cases, the problems are not rectified by express provisions and the matter is governed by common law or equitable principles that do not always provide a clear solution to the problem.

Those inconsistencies and ambiguities have meant that in Australia, the regulators, the regulated and the judiciary do not have clear guidance in relation to a range of common regulatory issues which, in turn, has resulted in collateral litigation concerning evidential and procedural issues that are unrelated to the substantive merits of the case. The lack of clarity in the law has not promoted better decision-making in regulatory matters because similar regulatory issues have not been resolved on a consistent basis in the context of the different regulators and like cases have not been treated alike. This has not promoted the primary goal of achieving effective regulation because compliance is not being achieved in a timely, cost-effective and efficient manner. Those problems have also adversely impacted on the effectiveness and efficiency of the Australian regulatory framework taken as a whole and therefore have impacted on the effectiveness and efficiency with which governments, businesses and individuals in the economy can operate. This may, in turn, have an adverse impact on Australia's economic growth and on the prosperity of all Australians.

[12.3] Summary of suggested reforms

It will be recalled from the discussion at [1.3] that the theoretical approaches to analysing regulatory regimes and to regulatory reform included “regulatory formalism”, the “command and control” approach, “responsive regulation” and a “principles and actors” approach. The technique adopted in this thesis has been to select the advantageous features of each approach and to incorporate those features into the suggested reforms, rather than strictly adhere to one particular approach. The most influential theoretical principles that have shaped the suggested reforms include “smart regulation” (Braithwaite⁴) or “good regulation” or “effective regulation”

⁴ Braithwaite J, “Markets in Vice, Markets in Virtue,” The Federation Press, Leichhardt, 2005 at p 14 citing Gunningham N and Grabosky P, “Smart Regulation: Designing Environmental Policy,” Clarendon Press, Oxford, 1998.

(Baldwin and Cave⁵ - see [1.5.1.2]) and “world’s best practice” (Braithwaite and Drahos⁶ - see [1.3.4]).

The analysis in Chapter 2 indicates that there should be a clear statutory statement of regulatory objectives for each of the Australian regulators. Objectives promote public and private interests by defining the jurisdictional or operational limits of the regulators’ investigation and enforcement powers. Baldwin and Cave⁷ indicate that a good or effective regulatory regime is one that is supported by clear statutory powers and that promotes government accountability (see [1.5.1.2]). Statutory regulatory objectives assist to promote effective regulation because they provide clear guidance when interpreting the scope of the regulator’s powers and they provide benchmarks for measuring the success or otherwise and the accountability of the regulators in relation to the use of public funds.

The discussion in Chapter 3 highlights the need for uniform guidelines and a uniform threshold test in relation to the regulators’ decisions on whether to commence a formal investigation, uniform guidelines on selecting the “lead investigator” and a uniform “protection and remedies” regime for informants. Those reforms would promote a more timely and cost-effective investigative and enforcement response. These principles have also been identified by the ALRC as key indicators of “effective regulation”.⁸

It was suggested in Chapter 4 and Chapter 5 that the regulators should have uniform powers governing when oral examination notices and notices to produce books can be issued. They should also have uniform powers to conduct oral examinations, to use books that are produced or seized and to obtain books when they are not produced. The legislation should contain prescribed forms that set out the information that must be specified in all oral examination notices and notices to

⁵ Baldwin R and Cave M, “Understanding Regulation Theory Strategy, and Practice,” Oxford University Press, Oxford, 1999, at p 76.

⁶ Braithwaite J and Drahos P, “Global Business Regulation,” Cambridge University Press, New York, 2000, at pp 77, 130-131, 167, 208, 518 and 527.

⁷ Baldwin R and Cave M, op cit n 5, at pp 77 and 81.

⁸ ALRC, Background Paper 7 – Review of Civil and Administrative Penalties in Federal Jurisdiction, at Item 2, “What is Effective Regulation?”, at <http://www.austlii.edu.au>, viewed on 17 June 2006.

produce books. There should also be uniform provisions that set out the obligations, rights and protections (including the privileges) that may be imposed on, or claimed by, examinees and recipients of notices to produce books. Those suggested reforms are consistent with a number of the indicators of effective regulation identified by Baldwin and Cave⁹ because they ensure that the regulatory regime is supported by clear statutory powers and they promote greater fairness by ensuring that like cases are treated alike (see [1.5.5]). The suggested reforms also promote procedural clarity, cost-effectiveness and timeliness in the regulators' investigations. Mayer,¹⁰ Schoer¹¹ and Braithwaite¹² identified these factors as important in developing an effective regulatory regime (see [1.3.4]). Those reforms also attempt to balance competing public and private interests. A number of scholars have emphasised the importance of adopting a balanced approach (see [1.5.2]).

It was recommended in Chapter 6 that the regulators should have uniform powers to enforce non-compliance with their investigative requirements including "freezing order" powers, certification powers, access powers and search warrant powers. It was also argued that there should be uniform protections for the regulated, particularly in relation to the issue and execution of search warrants. There should also be a uniform criminal penalty regime for non-compliance with investigative requirements including a uniform "reasonable excuse defence" to ensure that like contravening conduct is treated alike. The range of enforcement options suggested in Chapter 6 allows the regulators to adopt a less interventionist approach at first (such as a freezing order) but also gives them the option of escalating their enforcement response by seeking more serious sanctions, such as criminal penalties. The suggested reforms are consistent with both Braithwaite's enforcement pyramid and with his views on "responsive regulation," as discussed at [1.3.3].¹³ They also adopt the "command and

⁹ Baldwin R and Cave M, op cit n 5, at pp 77 and 81.

¹⁰ Mayer, E, "The Role of Regulatory Enforcement in the Australian Economy," at p 97 in Grabosky P and Braithwaite J, op cit n 1.

¹¹ Schoer R, "Self-Regulation and the Australian Stock Exchange," at pp 108-109 in Grabosky P and Braithwaite J, op cit n 1.

¹² Braithwaite J, op cit n 4, at pp 160 and 184.

¹³ See generally Fisse B and Braithwaite J, "Corporations, Crime and Accountability," Cambridge University Press, New York, 1993, at p 88; and Braithwaite J, op cit n 3, at pp 93-94 in Grabosky P and Braithwaite J op cit n 1.

control” approach identified by Baldwin and Cave¹⁴ and have the advantage that the sanctions for non-compliance are backed by law and can be immediately enforced.

It was argued in Chapter 7 that there should be uniform statutory provisions that govern the regulators’ statutory duty of confidentiality and the exceptions to that duty, including uniform powers to release information to foreign regulators, private litigants and professional disciplinary bodies. The reforms relating to releasing information to foreign regulators would also promote the principle of reciprocity that has been identified by Braithwaite and Drahos¹⁵ as important in relation to the development of regulatory regimes (see [1.5.8]). It was also argued that there should be uniform protections and safeguards for individuals including clear and effective rights to challenge the regulators’ decisions to release information and to access information in the regulators’ possession. Those reforms are also consistent with the benchmarks of effective regulation as they ensure that the regulatory regime is accountable and that it has fair, accessible, open and transparent procedures (see [1.5.1.2]).

It was suggested in Chapter 8 and Chapter 9 that there should be uniform principles governing when civil or criminal proceedings should commence. This could be achieved by adopting clear definitions of the “physical elements” and the “fault elements” of regulatory contraventions. There should also be uniform evidential and procedural rules governing civil, civil penalty and criminal proceedings that apply in both the Federal Court and the States’ courts. It was also suggested that there should be uniform provisions to deal with the relationship between civil, civil penalty and criminal proceedings in respect of the same conduct. Those reforms partly reflect “regulatory formalism” because they involve “black letter” law responses to identified problems (see [1.3.1]). They also promote more effective regulation by ensuring greater procedural clarity, cost-effectiveness, timeliness and fairness in litigation (by ensuring that like cases are treated alike and by preventing

¹⁴ Ibid.

¹⁵ Braithwaite J and Drahos P, op cit n 6, at pp 21 and 126. They define “reciprocity” at pp 21-22 as the “contingent exchange of actions between two actors” or the “exchange and recognition of rights and obligations between two sovereigns.” They emphasise that the “expectation of repayment of action lies at the heart of reciprocity.”

double punishment for the same conduct).¹⁶

It was argued in Chapter 8 that the regulators should have a similar range of statutory civil enforcement powers including powers to commence public interest actions and to apply to the court for statutory compensation orders, statutory injunctions and disqualification orders. Those reforms are supported by Braithwaite's "responsive regulation," approach.¹⁷ For example, if all regulators have the power to apply for disqualification orders, that would give them a more flexible and cost-effective response to contravening conduct (in comparison to criminal proceedings), would protect individuals from over-enforcement of the criminal law and would also protect the public and victims from under-enforcement of the law, as discussed at [8.8.1]. It was also suggested that pecuniary penalties should be paid into a compensation fund (rather than into government consolidated revenue) to assist victims of contraventions. This would impose greater accountability on the government for a regulatory failure that harmed the public (see [8.7.2]). It was also argued that there should be uniform guidelines governing whether a pecuniary penalty order or disqualification order (or both) should be made and the level of any such penalty or period of disqualification. This would promote greater fairness and consistency in decision-making and would reduce any perception of selective enforcement or a more lenient treatment of wealthy defendants.

The analysis in Chapter 9 indicates that the existing similar or like criminal offence provisions under the different statutes should be redrafted using the same language, defences and penalties. This approach is supported by Fisse and Braithwaite¹⁸ who emphasise the importance of ensuring "equal punishments for equal wrongs." It was also recommended that the Commonwealth DPP should be given a uniform and sole power across the regulatory legislation to prosecute and appeal in relation to indictable offences and that the regulators should have the sole power to prosecute and appeal in relation to summary offences. This would assist to

¹⁶ See Mayer, E, op cit n 10, at p 97 in Grabosky P and Braithwaite J, op cit n 1; Schoer R, op cit n 11, at pp 108-109 in Grabosky P and Braithwaite J, op cit n 1; and Braithwaite J, op cit n 4, at pp 160 and 184.

¹⁷ See generally Fisse B and Braithwaite J, op cit n 13, at p 88; and Braithwaite J, op cit n 3, 81 at pp 93-94 in Grabosky P and Braithwaite J, op cit n 1.

¹⁸ Fisse B and Braithwaite J, op cit n 13, at pp 178 and 182.

create a clearer, more efficient and fairer prosecution system thereby ensuring that criminal proceedings are a more effective option of last resort in terms of Braithwaite's enforcement pyramid. The proposal to introduce a more effective prosecution system was also influenced by the views of those scholars who regard the regulated as "rational actors." They view the regulated as persons who carefully assess opportunities and risks and who breach the law if the anticipated profits greatly exceed the anticipated fine and probability of being caught. Consequently, they argue that regulatory models should contain an effective prosecution system that produces a deterrent effect and that contains harsh penalties.¹⁹

A range of reforms were suggested in Chapter 10 to improve the regulator's powers to make administrative orders, including the use of consent agreements or enforceable undertakings to overcome the potential constitutional problems associated with administrative disqualification orders. It was argued that there should be uniform evidential and procedural rules governing the regulators' administrative proceedings including clear rights and protections for affected persons and witnesses. The suggestions that the ACCC and the ATO should be given an administrative power to make disqualification orders and that all the Australian regulators should have power to make "cease and desist" orders are supported by Braithwaite's "responsive regulation" approach.²⁰

It was argued in Chapter 11 that a legislative framework should be established that gives affected persons clear choices as to alternate forms of internal and external review of the regulators' decisions. This framework should include clear and uniform rules and procedures that govern both internal and external review. It was also argued that reforms should be introduced to limit and, in some cases, exclude the affected persons' rights to obtain external review of certain types of decisions. Those reforms should introduce greater simplicity, certainty and efficiency in the review process thereby saving time and costs for both the affected persons and the regulators and

¹⁹ Attorney-General's Department, Commonwealth Treasury, "Review of Sanctions in Corporate Law", at [1.11], 2007 at http://www.treasury.gov.au/documents/1182/PDF/Review_of_Sanctions.pdf, viewed on 19 March 2007.

²⁰ See generally Fisse B and Braithwaite J, op cit n 13, at p 88; and Braithwaite J, op cit n 3, 81 at pp 93-94 in Grabosky P and Braithwaite J, op cit n 1.

promoting more effective regulation. They would also improve the transparency of the decision-making process, make the regulators more accountable for their decisions and promote public confidence in the regulators and in the integrity of their decisions. “Transparency” and “accountability” are identified by Baldwin and Cave²¹ as benchmarks of effective regulation.

[12.4] Alternate methods of implementing suggested reforms

[12.4.1] *Single regulator model*

As noted at [2.3], a number of organisations were merged in the United Kingdom to form the FSA to provide a single legal framework to replace the several different frameworks that previously existed and which were administered by several different organisations.²² The FSA is an example of the single regulator model. The literature indicates that some members of the European Union are also moving towards a single regulator model.²³ Tunstall has suggested that, in the context of the global regulation of the securities markets, the individual securities regulators of each country should be replaced by a single regulatory body.²⁴

Under this option the federal government could establish one “super regulator” involving a complete merger of a number of regulators such as ASIC, APRA and the ACCC thereby improving the coordination of consumer protection, corporate and prudential regulation.

Tunstall²⁵ indicates that the major advantage of the single regulator model is that market participants need only know one set of standards or laws that are applied consistently across different business and financial sectors. Tunstall’s comments were made in the context of international securities regulation but the advantage that he identifies is equally applicable to the adoption of single regulator model within

²¹ Baldwin R and Cave M, op cit n 5, at p 77.

²² Tunstall I, “International Securities Regulation,” Lawbook Co, Sydney, 2005 at 195.

²³ Ibid, at p 204.

²⁴ Ibid.

²⁵ Ibid, at p 206.

Australia. Under this model the single or “super regulator” would be governed by one set of laws containing the reforms suggested in this thesis. It is argued that this model is a more efficient approach to regulation as the regulators and the regulated will need to spend less time and money in ascertaining the rules that govern them. The single regulator model would eliminate the present confusion (discussed at [3.8]-[3.8.4]) in Australia as to which regulator has jurisdiction to deal with the matter in cases involving overlapping investigative responsibilities. This model recognises and addresses the investigation and enforcement problems that occur where businesses engage in transactions that have impacts across various sectors of the economy that would otherwise (as in Australia) fall within the regulatory domains of two or more regulators.

However, there are also a number of problems inherent in the single regulator model. For example, the increased range of regulatory responsibilities and the consequent increased workload imposed on a single regulator may impact on its enforcement priorities and a larger number of matters may never be brought to trial. This problem could be reduced if clear powers were given to the single regulator to assist private litigation (see [7.5.5]).

[12.4.2] *Multiple regulator model*

The Australian Financial System Inquiry of 1997 considered the adoption of a single regulator model but rejected it in favour of the present multiple regulator model. According to Wallis, the present multiple regulator model was preferred because multiple regulators that are formed for separate purposes “will function best with their own distinct cultures,” the separate functions of the existing regulators “may be too extensive to be combined in one agency with full efficiency” and “a single regulator might become excessively powerful.”²⁶ By contrast, Braithwaite has indicated that “tax office culture” has, in the past, impeded the effective regulation of aggressive tax planning schemes.²⁷

²⁶ Wallis S, *Financial System Inquiry Final Report*, (AGPS, Canberra, 1997) p 545 cited in Tunstall I, op cit, n 22, at p 205.

²⁷ Braithwaite J, op cit n 4, at p 170.

The HIH Royal Commission, in its Final Report issued in 2003, also favoured the retention of the current multiple regulator model. The HIH Royal Commission did not recommend a merger of APRA and ASIC on the grounds that the financial services and insurance industries had been through a series of substantial changes and such a merger would involve further disruption, costs and risk.²⁸

As evident from the discussion in this thesis, one primary problem with the current multiple regulator model is that it is governed by numerous individual statutes. These statutes have been enacted and amended on an “ad hoc” basis without any regard to whether a more comprehensive or holistic approach should be adopted in relation to common regulatory problems.

[12.4.3] *Hybrid regulatory model*

As an alternative to the single and multiple regulator models, the federal government could introduce a hybrid regulatory model which contains some of the most advantageous features of both the single and multiple regulator models.

Each Australian regulator currently has its own investigation and enforcement division. It could be argued that this involves unnecessary duplication and puts the regulator in a dual role of investigator and prosecutor. This could lead to a lack of objectivity in prosecution decisions. The current investigation and enforcement frameworks have evolved over time on an ad hoc basis without any regard to whether they are the most effective and efficient systems for administering and enforcing the regulatory legislation²⁹ (see [1.1.1]).

Under a hybrid model the Australian regulatory system could be reformed by introducing a single investigative and enforcement agency to take over the current investigation and enforcement functions of ASIC, APRA, the ACCC and the ATO. This single agency could be governed by one piece of legislation such as the proposed

²⁸ HIH Royal Commission, Final Report, “Regulation of General Insurance,” 2003, at [8.3], <http://www.hihroyalcom.gov.au/finalreport/Chapter%208.HTM>, viewed on 22 February 2004.

²⁹ Clough J and Mulhern C, “The Prosecution of Corporations,” Oxford University Press, Melbourne, 2002 at p 219.

Investigation and Enforcement Powers Act (Cth). This single agency could conduct investigations on behalf of all regulators and then refer the findings to the relevant regulator so that the regulator could then decide whether to commence the relevant civil and civil penalty proceedings, or summary criminal proceedings, or a combination of these proceedings. In the case of suspected indictable offences, this single agency would refer the relevant information to the Commonwealth DPP which would make a prosecution decision according to its prosecution policy.

The advantage of a hybrid system is that it would reduce the current duplication of investigative effort and the waste of scarce public resources and eliminate the problems of overlapping investigative responsibilities, as discussed at [3.8]-[3.8.4]. Arguably, a single investigatory agency which is given the specialised tasks of investigation and enforcement of the investigative requirements would carry out those tasks more effectively in comparison to the current regulators who are burdened with the responsibility of performing investigative, enforcement, litigation, administrative and other functions. The introduction of a single agency would “free up” the resources of ASIC, APRA, the ACCC and the ATO so that they could focus on their other primary regulatory functions and better perform those functions. Of course, the establishment of single investigatory agency would involve some initial disruption and would require separate funding.

The single investigatory agency could, in one investigation, detect a range of contraventions across the various Australian regulatory legislation and quickly release the information to the relevant regulator(s), other government agencies or to the relevant person, such as the lawyer of a private litigant. At present, the separate regulators can only exercise their statutory investigative powers in respect of suspected contraventions that fall within their respective regulatory domains³⁰ and they do not necessarily have clear powers to release the results of their investigations to the most appropriate or relevant recipient, as discussed in Chapter 7.

However, one problem with a single investigatory agency, and the separation between that agency and the regulators, is that it could be more difficult to convince

³⁰ Ibid, at p 219.

the regulator to commence the relevant administrative, civil, civil penalty or criminal proceedings. By contrast, those involved in the existing investigation divisions within each regulator may also make the final decision on whether to commence such proceedings. As the same people are involved in the investigation and the final decision on whether to commence proceedings, there is no additional administrative problem of convincing another administrative body to commence proceedings. However, some may view the separation between the single investigatory agency and the regulators as an advantage as it means that the decision about whether to commence legal proceedings is subject to a second impartial review. This could safeguard against a waste of public funds that may otherwise occur where the regulator pursued a weak or unmeritorious case.

[12.4.4] *Preferred method of implementing suggested reforms*

It is suggested that the preferred approach is to retain the current multiple regulator model, including the current separate investigation and enforcement divisions within each regulator, but enact Commonwealth laws that would apply universally to all regulators. This could be achieved in part by enacting the *Investigation and Enforcement Powers Act* (Cth) and the *Administrative Powers and Proceedings Act* (Cth) to govern the investigative, enforcement and administrative functions of ASIC, APRA, the ACCC and the ATO. The existing statutes (containing the present inconsistent and poorly drafted investigation, enforcement and administrative powers) could simply be repealed and replaced by this legislation. The advantage of this approach is that it could be implemented in a timely and cost-effective manner. This approach would not require substantial parliamentary drafting resources to implement because it only involves the enactment of a few new Commonwealth statutes and the amendment of a small number of existing statutes. In addition, it would not involve any disruption to the existing investigation and enforcement divisions of each regulator and would not require the additional funding involved in establishing a separate investigation agency. This reform option would also avoid the major costs and disruption associated with adopting a single regulator model. Whether Australia should ultimately adopt a single regulator model involves a much larger issue which is beyond the scope of this thesis. This question is certainly worthy of separate detailed study and debate.

The approach of enacting central or template Commonwealth laws that apply universally to all regulators has already been partly adopted in some areas. For example, as discussed at [6.7.1], all of the Australian regulators, with the assistance of the Australian Federal Police, may apply for a search warrant under s 3E of the *Crimes Act 1914* (Cth). A further example is found in the *Criminal Code Act 1995* (Cth) which applies to all Commonwealth regulatory offences (unless specifically excluded by the regulatory legislation), as discussed at [8.5].

The proposed *Investigation and Enforcement Powers Act* (Cth) would incorporate all of the relevant reforms discussed in this thesis in relation to both the regulators' investigative powers and their powers to enforce non-compliance with their investigative requirements. Each regulator could conduct its own investigation and enforcement action by relying on the uniform powers contained in this legislation. This reform would mean that all Australian regulators would equally have at their disposal the public interest advantages inherent in this legislation. This legislation would contain provisions dealing with the regulators':

- (a) powers to commence investigations (including the power to commence an investigation for the purpose of assisting foreign regulators) (see Chapter 3);
- (b) powers to conduct oral examinations (see Chapter 4);
- (c) powers to issue notices to produce books (see Chapter 5);
- (d) powers to compel compliance with their investigative requirements (including freezing orders, certification powers, access powers and search warrant powers (see Chapter 6); and
- (e) statutory duty of confidentiality and the exceptions to that duty (authorised uses and disclosures - including the powers to release information to foreign regulators, lawyers of private litigants and professional disciplinary bodies) (see Chapter 7).

The proposed *Investigation and Enforcement Powers Act* (Cth) would also afford uniform protections and rights to the regulated that are superior to those found in the current regulatory laws. This legislation would provide:

- (a) protections and remedies for both voluntary informants and informants who act under compulsion (see Chapter 3);
- (b) protections and rights for examinees including, for example, the right to legal representation, the right to a copy of a record of examination and “use” evidential immunity in relation to incriminating statements (see Chapter 4);
- (c) rights to inspect and copy books that have been produced to the regulator (see Chapter 5);
- (d) rights and protections where the regulator exercises its enforcement powers including access powers and search warrant powers (see Chapter 6); and
- (e) rights to apply to the regulator for the release of information in the regulator’s possession (see Chapter 7).

The suggested reforms in relation to greater uniformity in civil and criminal proceedings could be achieved, in the context of the current multiple regulator model, if all Australian States followed the lead of New South Wales and Tasmania and adopt legislation modelled on the *Evidence Act 1995* (Cth). If State cooperation is not forthcoming, a simpler approach may be for the Commonwealth Parliament to amend the relevant regulatory legislation by expressly providing that all Commonwealth regulators’ civil, civil penalty and criminal proceedings that are conducted in the States’ courts (exercising vested federal jurisdiction) are governed by the provisions of the *Evidence Act 1995* (Cth) (which would include the reforms suggested in Chapter 8 and Chapter 9). A new chapter would also have to be included in the *Evidence Act 1995* (Cth) which sets out the evidential and procedural rules that apply to civil penalty proceedings, as suggested in Chapter 8. As noted at [8.6.2], the ALRC has made a similar suggestion and has indicated that the procedural problems could be dealt with by enacting a “Regulatory Contraventions Statute.”³¹ In addition, as suggested at [8.5] and [9.5.2], the regulatory legislation and the relevant residual legislation, like the *Criminal Code Act 1995* (Cth), should be amended so that there is a clear and

³¹ See ALRC, “Principled Regulation: Federal Civil & Administrative Penalties in Australia,” (ALRC 95) 2002, recommendation 6-7, at <http://www.austlii.edu.au>, cited in Rees A, “Civil Penalties: Emphasising the adjective or noun” (2006) 34 ABLR 139 at p 154.

uniform distinction between the elements necessary to establish a civil or criminal contravention of the regulatory legislation. These reforms would promote greater efficiencies and fairness in enforcing the regulatory laws whilst retaining the advantages of the current multiple regulator model.

In the context of the regulators' administrative powers and proceedings, it is suggested that greater uniformity, efficiencies and fairness would be achieved if the Commonwealth Parliament enacted the *Administrative Powers and Proceedings Act* (Cth). This legislation would operate in the same way as the *Investigation and Enforcement Powers Act* (Cth), described above. This legislation would set out all of the evidential and procedural rules that are applicable to the regulators' administrative proceedings, as discussed at [10.6]-[10.6.6]. It would also contain the regulators' powers to make administrative disqualification orders (see [10.9.1]), as well as the reforms to avoid the potential constitutional problems associated with those powers (see [10.4.2]-[10.4.2.2]), and the regulators' administrative powers to make cease and desist orders (see [10.9.2]).

In the case of administrative and judicial review, many of the reforms discussed in Chapter 11 could be made applicable to all regulators and affected persons by simply amending the *Administrative Appeal Tribunal Act 1975* (Cth) and the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

[12.5] Conclusion

The federal government should adopt a more consistent, informed, principled and proactive approach to the formulation of the Australian regulatory laws. The laws governing the core investigative and enforcement powers of ASIC, APRA, the ACCC and the ATO should be made more consistent or, where practicable, uniform. The suggested reforms could be implemented cost-effectively and with minimal disruption by amending the existing "multiple regulator" legislative framework and by introducing a relatively small number of new Commonwealth statutes. Many of the suggested reforms could be achieved by enacting the proposed *Investigation and Enforcement Powers Act* (Cth) and the proposed *Administrative Powers and Proceedings Act* (Cth) to govern the investigative, enforcement and administrative

functions of ASIC, APRA, the ACCC and the ATO. This legislation would also afford uniform protections to the regulated.

The suggested reforms would, at least substantially, eliminate the present confusion and ambiguity in the law and produce better decision-making and assist to ensure fairer and more accurate and cost-effective regulatory outcomes because the regulators, the judiciary and the regulated would be governed by one set of standards that would be applied consistently to common regulatory problems across all Australian business and financial sectors and regulatory jurisdictions. Such a framework would assist the regulators, the judiciary and the regulated to focus their resources on the substantive matters involved in the case and would reduce the problem of time and resources being consumed by collateral evidential or procedural issues that are not related to the substantive elements or merits of the case.

The suggested reforms represent world's best practice as observed both within the existing Australian regulatory frameworks and in comparable foreign regulatory frameworks and they attempt to balance competing public and private interests. If adopted, the suggested reforms would promote the principles discussed in Chapter 1 including the primary goal of achieving more effective regulation thereby facilitating the proper functioning of the economy and encouraging domestic and foreign investment. They would also assist to improve the economic prosperity of all Australians.

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