Submission in relation to the Aboriginal Cultural Heritage Bill 2020

22 September 2020

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1. Introduction

Dr Elise Bant is Professor of Private Law and Commercial Regulation at the University of Western Australia Law School and Professorial Fellow at the University of Melbourne. Dr Jeannie Paterson is Professor of Law at the University of Melbourne and Co-Director of its Centre for AI and Digital Ethics. This submission builds on their joint research into the regulation of misleading conduct pursuant to Australia Research Council DP180100932 and DP140100767. Professor Bant is also the recipient of a Future Fellowship FT190100475, which aims to examine and model reforms of the laws that inhibit corporate responsibility for serious civil misconduct. In developing these submission, we draw in particular on our work in JM Paterson and E Bant, 'Intuitive Synthesis and Fidelity to Purpose?: Judicial Interpretation of the Discretionary Power to award Civil Penalties under the Australian Consumer Law' in Prue Vines and M Scott Donald (eds), *Statutory Interpretation in Private Law* (Federation Press, Leichhardt, 2019) 154 ('Intuitive Synthesis') and E Bant and JM Paterson, 'Effecting Deterrence through Proportionate Punishment: An Assessment of Statutory and General Law Principles' in E Bant, W Courtney, J Goudkamp and J Paterson (eds), *Punishment and Private Law* (Hart Publishing, Oxford 2021) ('Effecting Deterrence', forthcoming, available on request).

We welcome the opportunity to contribute to the effective and appropriate reform of this major legislative initiative. Relevantly, a particular focus of our work has been on the roles of punishment and deterrence in civil law, and the design of civil penalties for serious commercial misconduct. More broadly, our work considers how legislative design in the regulation of commercial conduct may promote or, conversely, undermine its protective or remedial purposes. Drawing on this research, our considered opinion is that the penalty provisions in the proposed Bill are poorly designed to achieve the Bill's important and meritorious aims and, accordingly, require amendment. Our submissions contain recommendations about how that should be done. Throughout, our particular concern is with regulation of harmful and profitable business activities, often run through corporations. However, the recommendations are also relevant for natural wrongdoers.

2. Legislative Design and Purpose

Our starting point is the declaration in s4(1) of the Bill that it is 'about valuing and protecting Aboriginal cultural heritage and managing activities that may harm that heritage'. This 'accessible' version of the legislative purpose is repeated in s8, which states the Objects of the Act to include (b) 'to recognise, protect and preserve Aboriginal cultural heritage.' Both indicate that the Bill is intended to have strong expressive force: to declare to our First Nations people, to the broader public, to individuals and to corporations, the value of indigenous heritage and the esteem in which it is held. This is affirmed separately in s8(1)(iii): 'the value of Aboriginal cultural heritage to Aboriginal people and the wider Western Australian community'.

Additionally, the stated Objects' separate emphasis on 'protection' necessarily points to the Bill's capacity to denounce, deter and even punish egregious activities that harm that heritage. Consistently, its prohibitions are supported by a range of civil and even criminal pecuniary penalty provisions. Unfortunately, however, we consider that these are inherently inapt to support the proclaimed goals of

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the Bill, when it comes to corporate wrongdoers. In particular, they; (1) afford no discretion in the setting of penalty levels to respond to varying degrees of harm and culpability; (2) are set at levels that are unlikely to deter highly profitable activities that result in great harm; (3) relatedly, the low levels of penalty appear to express that relatively little value is placed on the indigenous interests and cultures they purport to protect; and (4) the penalty mechanisms are inconsistent with the trend of judicial decisions in areas of civil law deterrence, as well as law reform in the fields of pecuniary and non-monetary penalties. These developments identify key criteria for the award of pecuniary penalties and the importance of a range of non-monetary responses. The only conclusion must be that the proposed mechanisms must be replaced with ones that are 'fit for purpose'. We conclude with our specific recommendations for reform.

3. Current penalties design

(a) Set penalties

The proposed use of set penalties for each named prohibition has the single merit of clarity. However, we consider that this benefit is vastly outweighed by a range of considerations. These include that the penalties will remain unchanged until legislative intervention and may soon become unfit for purpose. However, the primary danger is that they offer no tailored mechanism for adjusting the level of penalty to reflect the degree of culpability and harm involved in the contravention, and to ensure that the penalties operate to effect appropriate deterrence and, if necessary, punishment, in the case of corporate wrongdoers. Here we note that, in some cases, the penalties are subject to a multiplier linked to the duration of the contravention (the penalty increasing for each day of the contravention). But this does not take into account whether, for example, the delay was excusable or, conversely, culpable. Nor does that sort of multiplier address the case of a single, catastrophic and highly blameworthy breach.

We submit that, unless a more responsive penalty mechanism is adopted, the proposed penalties will be unable to be applied in a way that is 'fit for purpose': in particular, fit to denounce egregious wrongdoing, deter the particular wrongdoer from engaging in the activity (specific deterrence), deter others from similar misconduct (general deterrence), and administer just and proportionate punishment. Rather, in our considered view, there is a very real risk that the use of set penalties, disconnected to matters such as the financial advantages generated from the breach and the degree of defendant culpability, will ensure that the penalties become merely part of the 'cost of doing business'. Ironically, the merit of clarity, identified earlier, here transforms into a very significant detriment, as it largely removes any element of expansive and unknown financial risk that may serve to encourage ethical and lawful conduct.

(b) Level of Penalties

We observe that the levels of prescribed penalties are set very low, considering the sorts of priceless and irreplaceable forms of cultural heritage they aim to protect. If we take the recent example of the shameful destruction by Rio Tinto of the Juukan Gorge caves, we can see the disparity. At its highest, this activity might attract penalties under s83 of the proposed Bill of $10 million. However, Rio Tinto's act reportedly gave the corporation access to ore estimated to be worth $135 million. The prospect of receiving the sort of fine anticipated by the Bill would be likely to have little or no deterrent effect, whether specific or general, on corporate behaviour of this sort. It could be safely absorbed into the corporation's business model, without a pause.

4. Preferred Model of Penalties

(a) Overview of recommendation

We consider that penalties can be effective to deter misconduct but, in order to do so, they must be sufficient to avoid being dismissed as a cost of doing business, or discounted by a calculation about not being caught or sanctioned. Here, there are a variety of models that should be considered in substitution of the existing provisions. We recommend that the existing penalty provisions be removed and, instead, courts be vested (possibly in Part 12 Legal Proceedings) with a discretionary jurisdiction to award penalties, consistently with the Australian Law Reform Commission's recent recommendations (Final Report No 136, April 2020, into *Corporate Criminal Responsibility*), to which we return below. If considered necessary, statutory ceilings to these penalties may be set, which we suggest again could be usefully done consistently with the approach taken in recent federal reforms (see, for example, the new 12GBCA in the Australian Securities Investment Commission Act 2001 (Cth). These set the ceiling by reference to multipliers of the advantage enjoyed as a result of the wrongdoing or as a percentage of operating revenue. The objective here is to ensure that the fines strip the wrongdoer of any advantage, removing any incentive to repeated misconduct and serving as a salutary and public warning to all that this form of wrongdoing does not pay. In making these recommendations, we also draw on insights offered by the general law (in particular, the courts' ancient equity jurisdiction) into the optimal conditions for pecuniary deterrence.

We also suggest that it would be valuable to consider including in this scheme further, non-monetary penalties (such as community service and internal reform orders) that are well-adapted and appropriate to the promoting the protective aims of the legislation.

These amendments, if adopted, would enable this regime to form part of a potent and nation-wide reform movement to hold powerful corporate wrongdoers to account. It would sit alongside and interact appropriately with the WA government's important, proposed procurement and debarment regime initiative. Together, these mechanisms would take significant steps towards appropriate denunciation, punishment and deterrence of corporate misconduct involving our fragile and priceless indigenous cultural heritage.

(b) Penalties, denunciation, punishment and deterrence

It is undeniable that civil and criminal pecuniary penalty provisions have become a core feature of Australia's system of corporate regulation. They operate as prime mechanisms for achieving what Commissioner Hayne in the Financial Services Royal Commission identified as the need for public denunciation and punishment of egregious commercial wrongdoing, as well as deterrence. All these aims will certainly be relevant for criminal conduct, such as that contemplated by s83 of the Bill, where criminal penalties are accordingly highly appropriate.

As the ALRC further explains (see discussion to Recommendation 2), civil penalties may also be effective and appropriate for all but the most egregious forms of corporate misconduct. In general, the aims of civil penalty provisions are specific and general deterrence, rather than punishment. While Australian courts do regularly take into account ideas of punishment and retribution in the civil penalties context, this is generally only as exculpatory factors (for example, through general law conceptions of proportionality, repentance, contrition and cooperation.)

Yet punishment may also be relevant in a civil context, provided that we distinguish between punitive aims and effects: K Barker, 'Punishment in Private Law: No Such Thing (Any More)?' in E Bant, W Courtney, J Goudkamp and J Paterson (eds), *Punishment and Private Law* (Hart Publishing, Oxford 2021) (forthcoming, available on request). Adopting that insight, it is clear that civil pecuniary

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penalties must be set at a level that requires the corporation to internalise the full cost of the harms caused, and also to disgorge any profits obtained by the wrongdoing. This way the penalty cannot be subsumed as a mere cost of doing business. That is, even in relation to civil offences, a penalty must do more than act as a *mere fine*, in order achieve the civil aim of deterrence.

(c) Factors relevant to setting penalties

In considering how to set penalties at this optimum level, we consider that it is unlikely to be met through a set penalty or formula-driven approach. Rather, courts should be vested with the discretion to set penalties at a level that is necessary and appropriate to achieve the desired regulatory objectives, as stated in s8 of the Bill. Australia's courts have developed a rich jurisprudence concerning the relevant considerations that should guide the award of penalties. However, in the interests of greater transparency and predictability, and in order to ensure that factors that have only recently emerged as relevant considerations are included, the ALRC has recommended (in Recommendation 11) a list of guiding and non-exhaustive criteria for the award of civil penalties. We think these are highly instructive, both to courts and to defendants engaged in risk assessment, and could relatively easily be inserted into the Bill, in Part 12 (Legal Proceedings). We consider that they are suitable for both criminal and civil proceedings. Relevant factors include:

a) the nature and circumstances of the contravention;

b) the deterrent effect that any order under consideration may have on the corporation or other corporations;

c) any injury, loss, or damage resulting from the contravention;

d) any advantage realised by the corporation as a result of the contravention;

e) the personal circumstances of any victim of the contravention;

f) the type, size, and financial circumstances of the corporation;

g) whether the corporation has previously been found to have engaged in any related or similar conduct;

h) whether the corporation had a corporate culture conducive to compliance at the time of the offence;

i) the extent to which the contravention or its consequences ought to have been foreseen by the corporation;

j) the involvement in, or tolerance of, the contravening conduct by management;

k) the degree of voluntary cooperation with the authorities, including whether the contravention was self-reported;

l) whether the corporation admitted liability for the contravention;

m) the extent of any efforts by the corporation to compensate victims and repair harm;

n) the effect of the penalty on third parties; and

o) any measures that the corporation has taken to reduce the likelihood of its committing a subsequent contravention, including:

i. any internal investigation into the causes of the contravention;

ii. internal disciplinary action; and

iii. measures to implement or improve a compliance program.

We draw attention to factor (o) which is of particular value when considering claims of 'systems errors' of the sort presented by Rio Tinto's *Board Review of Cultural Heritage Management* (24 August 2020) and which may be usefully combined with 'corrective' orders (discussed further below) that demand the corporation address those failings. This sort of combination can powerfully promote conscientious reform by a corporation and reflect a truly remorseful corporate state of mind. Consideration (h) is also highly relevant where there have been admitted 'systemic failures' of cultural heritage protection, again as in that case.

We observe that factor (d) refers to the nature of any 'advantage' that has been obtained from the contravention. Here, it is helpful to consider the insights that might be drawn from the neighbouring general law context (explored fully in 'Effecting Deterrence'). Not only does this take advantage of the body of learning developed over extended periods in analogous contexts: it also helps to promote a more coherent legal system in which misconduct is treated consistently and according to well-defined principles. There is a sophisticated 'disgorgement' jurisdiction in equity, by which defendants may be required to account for and pay over the value of advantages enjoyed as a result of wrongdoing. It offers lessons that are of particular interest and relevance here. While equity's aim is avowedly deterrent only, it employs a number of legal strategies that have the undeniable consequence of making the deterrent remedy sting in a manner strongly reflective of the degree of defendant culpability and functionally consistent with proportionate punishment. It is possible to draw on these principles to give further guidance to the statutory criteria that could be employed in the Bill to achieve its objectives, particularly around the calculation of 'advantage' and the causal connection that must be shown between the contravening conduct and that advantage.

(d) Stripping 'Advantage' from wrongdoers: Lessons from the equitable remedy of account (and disgorgement) of profits

Causation

Turning first to the causal question, the High Court's most recent contribution to this jurisprudence is in *Ancient Order of Foresters in Victoria Friendly Society Limited v Lifeplan Australia Friendly Society Limited* (2018) 265 CLR 1, a case involving corporate accessorial liability for 'knowing assistance'. As Kiefel CJ, Keane and Edelman JJ explained at [7], the equitable 'liability to account and to disgorge benefits encompasses "any benefit" received by the knowing participant in a breach of fiduciary duty "as a result of" that participation'. The requirement that the profit be of 'as a result of' wrongful participation raises a question of 'causation or contribution' (at [9]). Importantly, while a 'but for' cause will suffice, the plurality considered that it is also the case that (at least where dishonest conduct is involved) it will be sufficient that the misconduct was 'an inducement' (or a factor) in bringing about the profits, even if there are other factors. This 'a factor' test is more generally appropriate in profit-stripping cases than the 'but for' test, as explained in 'Intuitive Synthesis' at 167-169: see also Bant and JM Paterson, 'Statutory Causation in Cases of Misleading Conduct: Lessons from and for the Common Law' (2017) 24 *Torts Law Journal* 1. It removes the opportunity for wrongdoers to allege wholly speculative iterations of 'but for reasoning' that plaintiffs, here bearing the onus, must negate as a condition of recovery. A further benefit of the 'a factor' test is that it reflects the approach taken for recovery of compensation for loss or damage suffered 'because of' misleading conduct under statute (*Henville v Walker* (2001) 206 CLR 459) and for economic torts such as deceit (*Edgington v Fitzmaurice* (1885) 29 Ch D 459, 483; *Gould v Vaggelas* (1984) 157 CLR 215, 236, 250-51). On this approach, compensatory and profit-stripping principles align.

Setting a ceiling on the award: onus and remoteness principles for profit-stripping

Causation is not the exhaustive criterion for an award of disgorgement of profits. A ceiling must be found so that the award does not stray from deterrence into disproportionate punishment. On the other

hand, we have seen that the award must sting to be effective. Equity manages this delicate balance through onus and remoteness or scope of liability considerations.

As the plurality in *Lifeplan* explain (at [13]):

> While it is true that equity will not require an errant fiduciary or a participant in a breach of fiduciary duty to account for an advantage which the breach of fiduciary duty has not caused or to which it has not sufficiently contributed, where causation is sufficiently established the onus is upon the errant fiduciary or participant to show that he or she should not account for the full value of the advantage.

That is, there is a reversal of onus, onto the defendant wrongdoer, to explain why all the profit attributable to the breach should not be disgorged. This is a useful and interesting strategy, from the perspective of broader regulation of egregious corporate wrongdoing. The plurality further state (at [13]-[15]):

> That onus is not discharged by mere conjecture or supposition giving the benefit of the doubt to a proven wrongdoer. The requirement of proof conforms with the obligation of a party charged with a breach of fiduciary duty to show why the full value of an advantage obtained in a situation of conflict of duty should not be disgorged**.**
> There are two ways in which the wrongdoer might discharge that onus and reduce the extent of the liability to disgorge profits. The first way, which can involve notorious difficulties in attribution of costs, is by proving his or her entitlement to an allowance for costs incurred, and labour and skill employed**…**
> The second way, which was the focus of this appeal, is by demonstrating that the benefit or advantage is beyond the scope of the liability for which the wrongdoer should account for profits. A wrongdoer might prove that some profit or benefit is beyond the scope of liability for which he or she should account if the profit or benefit has no reasonable connection with the wrongdoing.

In determining whether the profit had 'no reasonable connection', the plurality considered that *intended* profit could not be too remote (at [16]), a view we note that is again consistent with the remoteness principles applicable in deceit, where the plaintiff may recover all intended and direct losses caused by the misconduct.

Moreover, their Honours held (at [23]) that profits could and, in that case, should extend to those *yet to be made*, citing (among others) Millett LJ in *Potton Ltd v Yorkclose Ltd* [1990] FSR 11, 15**:**

> Unrealised profits are actual profits. Profits are made when they are earned, recognised when they are brought into the accounts, and realised when they accrue, that is to say when a legal right arises to receive payment. As a matter of ordinary accounting practice, profits are seldom recognised before they accrue, but this is a matter of prudence only; in a proper case they may be recognised before they accrue. Whether or not recognised, however, they are not profits which could or should have been made or which are merely capable of being made, but profits which have actually been made though not yet realised."

All of this goes to show that equitable principles designed to effect deterrence suggest that: (1) the 'advantage' that should be used as an informing factor when setting penalties should extend to revenue (not merely net profits); (2) this 'advantage' may include future revenue attributable to the breach; and (3) that the onus should lie on the defendant to show why the whole amount so identified as 'resulting from' the breach should not be disgorged. Further, this approach aligns with principles applicable across the general law, for example in deceit and breaches of intellectual property torts.

Were this to be applied in a case like the Juukan Gorge scenario, the starting point for setting penalties would be the likely revenue generated from the contravention (at least $145 million) and should take

into account future receipts. The onus would then lie on Rio Tinto to show why it should be entitled to retain any element of that revenue.

5. Other orders

We note that the Bill proposes that the Minister should be vested with the power to issue Stop Activity orders, prohibition orders and remediation orders. It is not clear to us why these powers should be vested in the Minister, rather than in a court. The Minister may occupy a difficult, conflicted position, given the potential interest the government may have in revenue or other benefits (such as employment outcomes) generated by the particular activity and given potential previous involvement by it or by the Minister in granting or considering applications for activities that threaten indigenous heritage.

We suggest that it would be highly desirable, to avoid these conflicts and for the removal of doubt over courts' jurisdiction in these matters, that courts be vested with the power to make these orders in addition to civil and (where required) criminal penalties.

Additionally, we note that the ALRC has recommended that corporations be subject to a suite of non-monetary penalties. These are recommended in part to prevent corporations from incorporating pecuniary penalties into their business models but partly because they provide different mechanisms and options for sentencing bodies, to achieve the desired expressive, deterrent and, where necessary, punitive effects. Thus ALRC recommendation 12 includes:

> a) orders requiring the corporation to publicise or disclose certain information;
>
> b) orders requiring the corporation to undertake activities for the benefit of the community;
>
> c) orders requiring the corporation to take corrective action within the organisation, such as internal disciplinary action or organisational reform;
>
> d) orders requiring the corporation to facilitate redress of any loss suffered, or any expense incurred, by reason of the offence; and
>
> e) orders disqualifying the corporation from undertaking specified commercial activities.

We note that orders such as adverse publicity or community service orders, for example, may be particularly well-suited to meet the expressive aims of the Bill. Naming and shaming, and public service, send strong messages to the wrongdoer, to others tempted to act similarly, to the victims, to their communities and the general public that such behaviour is unlawful and will not be tolerated.

Orders in a form requiring the organisation to undertake 'corrective' organisational reform will be crucial where (as in the Rio Tinto case) the corporation attempts to lay the blame for its actions on systems errors. Where the corporation refuses to reform its systems, this 'reactive fault' strongly displays a culpable intention likely to produce further and similar unlawful activities: see B Fisse, 'The Attribution of Criminal Liability to Corporations: A Statutory Model' (1991) 13 *Sydney Law Review* 277; B Fisse, 'Recent Developments in Corporate Criminal Law and Corporate Liability to Monetary Penalties (1990) 13 *University of New South Wales Law Journal* 1; B Fisse and J Braithewaite, *Corporation, Crime and Accountability* (Cambridge University Press, 1993) 47–49. That demonstrated culpability could then be grounds for further remedies, in the event of repeated wrongdoing, such as orders disqualifying the corporation from engaging in defined activities, or activities in defined areas.

We note that orders of these sorts would sit well alongside and complement the WA government's proposed procurement and debarment regime. We consider that it is highly desirable that contraventions of the proposed Heritage Protection legislation should constitute grounds for consideration under that regime.

6. Proposed Attribution Mechanism

Finally, we note that the proposed Bill makes 'employers' liable for the misconduct of employees, subject to a due diligence defence. This is a useful step in the context of complex corporations, which frequently used general law and statutory attribution rules to avoid responsibility for the acts of their employees. We commend this innovation.

7. Conclusion

We welcome the opportunity to contribute to this important reform initiative. We will be pleased to discuss any aspect of this submission, should that be helpful.

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