FINES: THE LAW IN VICTORIA

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1 INTRODUCTION

Of all criminal punishments, the fine is the one most frequently administered. Though available as a sanction against those convicted on indictment, and regarded as especially appropriate in cases of acquisitive crime or for corporate offenders,[1] it is predominantly a dispositive measure in relation to summary offences. More than $20 million is raised annually in Victoria by way of fines and approximately half is collected for breaches of road traffic laws.[2] A fine is generally a monetary exaction ordered as punishment following conviction, but statutory definitions often include costs and compensation as well as monetary penalties levied.[3] Thus, the general definition of a fine under s. 3 of the Magistrates (Summary Proceedings) Act 1975 (Vic.) as a 'pecuniary penalty or pecuniary forfeiture payable under a conviction' is, under s. 107(1), extended, for the purposes of fine recovery to include 'pecuniary compensation and fees, charges and costs payable under a [summary] conviction or order . . .'. Similar extensions are to be found in the Crimes Act 1914 (Cth),[4] and the Service and Execution of Process Act 1901 (Cth).[5] Liability to pay a fine may also arise without the need for a conviction or other form of judicial order and this form of exaction (the so-called 'on-the-spot' fine) is rapidly coming to dominate the statistical picture of fine imposition and enforcement.[6] In 1981, in passing the Penalties and Sentences Act, Victoria took some preliminary steps towards revising the basis upon which fines are calculated in that state. However, the balance of the law relating to fines is scattered throughout the statute books and the purpose of this article is to bring some semblance of unity to this otherwise neglected field of law.

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[1] Magistrates (Summary Proceedings) Act 1975, s. 169(e); Acts Interpretation Act 1901 (Cth), s. 24; Crimes Act 1914 (Cth), s. 16; Conciliation and Arbitration Act 1904 (Cth), ss. 109, 111, 120 and 121; Trade Practices Act 1974 (Cth), Part V; Scutt J., 'The Commonwealth Conciliation and Arbitration (Amendment) Act 1972: Solution or Solecism', (1973) 47 *Australian Law Journal* 78, 79; Fox R. G., 'Corporate Sanctions: Scope for a New Eclecticism', (1982) *Malaya Law Review* (in press).

[2] Victoria, *Parliamentary Debates*, Legislative Assembly, 1976, 4153; 1979, 3093.

[3] There is, indeed, a tendency in modern regulatory legislation to abandon the term 'fine' in favour of the expression 'pecuniary penalty', *e.g.* Trade Practices Act 1974 (Cth) s. 76 and see Cooper E. J., 'The Quasi-Criminal Federal Jurisdiction', (1970) 44 *Australian Law Journal* 365. If an Act provides both for 'fines' and 'pecuniary penalties', the implication is that the latter are recoverable by civil process only: *Brown v. Allweather Chemical and Grouting Co. Ltd* [1953] 2 W.L.R. 402.

[4] S. 18A(2).

[5] S. 26A(1).

[6] Compare figures in (1975-6) 61 *Yearbook of Australia* 470-1 with equivalent tables over the preceeding decade.

The use of pecuniary penalties in the criminal justice system is of ancient origin. It can be first traced to the abandonment of Anglo-Saxon blood feuds in favour of the levying of a money prize payable partially to the victim or his relations and partially to the lord to whom the parties owed obeisance. This transformed a crude physical means of purging guilt into one which had the added advantage of offering compensation as well as redress of wrongs to injured parties. The revenue aspects of this practice did not escape the Normans who adapted it to minor offences by the process of amercement (*i.e.*, the exaction of a monetary payment to prevent forfeiture of chattels following conviction).[7] But the fine, in its modern form, is most directly the product of the emerging distinction between felonies and misdemeanours. The former were normally punishable by death while the latter resulted in an order of indefinite imprisonment, but it was accepted, at least initially, that a misdemeanant would be permitted to redeem his liberty by some form of monetary payment:[8]

> [The judges pronounced] a sentence of imprisonment and then allowed the culprit to 'make fine' that is to make an end (*finem facere*) of the matter by paying or finding security for a certain sum of money. In theory the fine is a bilateral transaction, a bargain; it is not 'imposed', it is 'made'.

In time, as other sanctions were substituted for punishment and statutory felonies proliferated, the fine became more generally available as a sentencing option for the more serious class of crime and became recognised as an independent monetary penalty due to the Crown, its imposition giving rise to a debt of record[9] and its receipt ordinarily being credited to consolidated revenue. And, in a reversal of the original relationship whereby payment of a fine could expunge a sentence of imprisonment, incarceration nowadays is the automatic default alternative to payment of a fine. Though the deterrent, rehabilitative and retributive potentials of fines are no better understood than for other criminal sanctions, the fine is regarded as one of the more flexible humane and less costly of the dispositional options available to the courts. It is considered to be unequivocally punitive and designed to deter,[10] but empirical assessments of its efficacy are difficult to come by[11] and the weight to be given to any such evidence is rendered

[7] Pollock F. and Maitland F. W., *The History of English Law* (2nd ed., reprint 1923) ii, 453, 458 and 514; Westen D. A., 'Fines, Imprisonment and the Poor: "Thirty Dollars or Thirty Days"', (1969) 57 *California Law Review* 778, 783-7; *Re Nottingham Corporation* [1897] 2 Q.B. 502; *Magna Carta* s. 20; *Samsoondar Ramcharan v. R.* [1973] A.C. 414, 423 (P.C.).

[8] Pollock and Maitland, *op. cit.*, 517; *Beecher's Case* (1577) 8 Co. Rep. 58a, 59b, 77 E.R. 559, 564.

[9] *A.-G. for Northern Ireland v. Mines* [1943] N.I. 66; *McKinnon v. R.* (1927) 40 C.L.R. 217, 225-6; *Treasury v. Harris* [1957] 2 Q.B. 516, 523-5. They are debts of record even though imposed by a Magistrates' Court: *Cooper & Sons v. Dawson* [1916] V.L.R. 381, 392-4; *cf. Henderson v. O'Connell* [1937] V.L.R. 171, 174-5.

[10] Morgan R. and Bowles R., 'Fines: The Case for Reform', [1981] *Criminal Law Review* 203.

[11] U.K. Home Office, *The Sentence of the Court* (1969) 71, *cf.* Bottoms A. E., 'The Efficacy of the Fine: The Case for Agnosticism', [1973] *Criminal Law Review* 543.

problematical because of the inefficiencies of fine collection and the fact that, unlike other penalties, the fine need not be personally met by the offender. Though use of this sanction is the legislature's preferred mode of dealing with offences whose gravity is not thought to warrant imprisonment, this aim is somewhat undercut by the practice of imprisoning fine defaulters. This is justified as being an aid to execution rather than as a more punitive alternative to the fine but, for those lacking the means to pay, it is in effect a substitute punishment. From an administrative point of view, fining is regarded as an inexpensive sanction, with revenue generation a secondary advantage. But the actual costs of fine imposition and collection are not known and raising revenue in this manner may frequently involve the enrichment of the state to the detriment of the victims of crime, since the exacting of fines reduces the defendant's total assets available for victim compensation. Proceeds of fines have been regularly used in the past as a means of inducing and rewarding law enforcement[12] and while little is left of early common informer legislation, whereby the informant personally received the fine imposed, numerous legislative provisions still exist governing the apportionment of penalties collected. Not all go to consolidated revenue for the purpose of the state.[13]

Though the legislature places heavy reliance on the fine as a sanction, cases defining the principles of its use are infrequently reported in Victoria.[14] General sentencing principles would dictate that where the legislature allows the option of a fine, the appropriate level within the statutory limits prescribed for the particular offence must be proportionate to the gravity of the offence committed (subject to any mitigating considerations) with the heaviest fine being kept for the worst possible case. Where a fine is available as an alternative to imprisonment, the sentencer should initially consider whether imprisonment is warranted for the offence in question for if the crime is properly one deserving of a custodial sentence, to fine alone

[12] 3 *Blackstone Commentaries on the Laws of England* 161-2. Prior to the establishment of police forces, private prosecutions were encouraged. These allowed citizens to bring actions to enforce penalties imposed by some statute as punishment. If the statute gave the penalty to any person who would sue for it, such an action was known as a 'popular' or 'common informer' action. Where the penalty was to be distributed partly to the Crown and partly to the informer, the action was known as a *qui tam* action because it was described as being brought by one *qui tam pro dimino rege quam pro si ipso im hac parte sequitur* (who sues on behalf of our Lord the King as well as for himself). Such actions are still possible under certain statutes in Victoria but, under the Limitation of Actions Act 1958, s. 5(5)(a), must be brought within two years of the date upon which the cause of action accrues. See also Common Informers (Parliamentary Disqualifications) Act 1975 (Cth) and Pollock and Maitland, *op. cit.* 522-5 for the prior concept of penal damages.

[13] See text at n. 87 *infra* (para. 2.11).

[14] Specific legislative guidance regarding the imposition of fines is very rare. Section 13(1) of the Petroleum Retail Marketing Sites Act 1980 (Cth) enjoins a court, when imposing a pecuniary penalty upon a corporation, to have regard to all relevant matters including the circumstances in which the contravention took place and whether the corporation had previously been found by the court in proceedings under the section to have contravened that provision. For a similar provision see Trade Practices Act 1974 (Cth), s. 76(1).

would be wrong unless mitigating circumstances are present.[15] Because imprisonment is prescribed for non-payment, the courts have stressed that penalties should not be set at such a high level as to render imprisonment in default a certainty. It is improper to do so since it only serves to bring about the custodial sentence which the fine was presumably intended to avoid. It is thus accepted that a fine appropriate to an offence can be reduced in amount to a level which the offender can realistically be expected to discharge having regard to his impecuniosity.[16] But the converse is not true. A fine heavier than that warranted by the gravity of the offence cannot be imposed upon a person of wealth, who could well afford it, even though such action is intended merely to achieve equivalent correctional impact on offenders of differing means but equal culpability.[17] Similarly, it is equally impermissible to imprison an offender simply because it is known that, in terms of financial impact, the fine that would ordinarily be appropriate would be virtually meaningless to him. And, as a corollary of this, if prison is truly indicated as punishment for the crime, the wealthy are not permitted to be saved from incarceration by the payment of a heavy fine if others of lesser means would not realistically have been granted the same option.[18]

There seem to be two exceptions to the general understanding that the possession of means is not relevant to quantum. First, heavier fines are permitted in order to force the disgorging of profit derived from acquisitive crime where it appears that the offender has retained the proceeds or the benefit of his depredations.[19] Though the heavier fine is directed towards ensuring that there is no criminal gain, the benefit of the higher penalty accrues to the coffers of the state and is, ironically, not available to fund victim reimbursement.[20] Secondly, corporations are also vulnerable to higher maximum fines both by statute and in practice.[21] The underlying assumption, which is not always justified, apparently is that companies have

[15] Thomas D. A., *Principles of Sentencing* (2nd ed. 1979) 318.

[16] *Young v. Geddie* (1978) 22 A.L.R. 232; *Winkler v. Cameron* (1981) 33 A.L.R. 663. But it is not possible for sentences involving fines to be made concurrent with each other or a smaller single lump sum to be imposed for multiple offences. Fines must be imposed for each individual offences and the aggregate must be ordered to be paid: *Waterman v. Oliver* [1911] 13 W.A.R. 109.

[17] This might have been possible under s. 57 of the Magistrates' Courts Act 1971 had it not been repealed before it was proclaimed. It provided that: 'In fixing the amount of a monetary penalty a Magistrates' Court or Justice shall take into consideration among other things the means of the offender so far as they appear or are known to the Court or Justice.'

[18] Thomas, *op. cit.* 318.

[19] *Glickman* (Unreported decision of the Victorian Court of Criminal Appeal, 19/12/79); *Larmer v. Dome Lighting Products Pty Ltd* (1978) 4 T.P.C. 54; *R. v. Wattle Gully Gold Mines N.L.* [1980] V.R. 622; *Ducret v. Colourshot Pty Ltd* (1981) 35 A.L.R. 503.

[20] *Cf.* American Law Institute, Model Penal Code, s. 7.02(3): 'The court shall not sentence a defendant to pay a fine unless: (a) the defendant is or will be able to pay the fine; and (b) the fine will not prevent the defendant from making restitution or reparation to the victim of the crime.'

[21] *Hartnell v. Sharp Corporation of Aust. Pty Ltd* (1975) 5 A.L.R. 493, 500. A corporation is usually subject to double the fine applicable to a natural person but,

access to greater wealth than individuals and must therefore be subject to correspondingly heavier penalties to bring about equal conformity to the law. Two other limiting factors appear to exist. One is that fines should not be set so low as to amount to a licence to commit further offences.[22] This principle is more capable of being observed in relation to convictions on indictment where fine maxima are potentially quite high, than in regard to summary matters where penalty limits, particularly for traffic and parking offences or breaches of municipal by-laws are so low, even for repeated violations, that they seem calculated to be no more than a means of raising revenue. The other is that, although fines are unique among criminal sanctions in that they need not be discharged personally, it is wrong in principle to fix them on the assumption that they will be met by someone other than the offender. Though there may be reason to believe that fines incurred by juveniles will be paid by their parents or those levied against employees, by their employers, the court must disregard this likelihood.[23] But this is not to say that the court may not accept as a mitigating consideration the impact of a fine on third parties. Particularly where substantial fines are being considered for corporate offenders, the sentencer must make allowance for the detriment which might flow to innocent persons, especially

particularly under federal legislation, provisions exist which prescribe a five, ten or twenty fold increase in the monetary penalty if the offender is a company, *e.g.*:

DOUBLE PENALTY

Act	*Maximum Fine Authorised*	
	Person	*Corporation*
	$	$
Migration Act 1958 (Cth), s. 53(1)(a)	1,000	2,000
Migration Act 1958 (Cth), s. 53(1)(b)	2,000	4,000
Secret Commissions Act 1905 (Cth), ss. 4, 5 and 6	1,000	2,000
Foreign Proceedings (Prohibition of Certain Evidence) Act 1976 (Cth), s. 7(1)	5,000	10,000
Coroners Act 1958, s. 20B(2)	500	1,000
Legal Profession Practice Act 1958, s. 98(1)	10 p.u.	20 p.u.
FIVE-FOLD INCREASE		
Insurance Act 1973 (Cth), s. 113(3)	2,000	10,000
Trade Practices Act 1974 (Cth), s. 76	50,000	250,000
Trade Practices Act 1974 (Cth), s. 79	10,000	50,000
Securities Industry Act 1975, s. 113(a) and (b)	10,000	50,000
TEN-FOLD INCREASE		
Air Navigation Act 1920 (Cth), s. 22(4)(b)	1,000	10,000
Coal Industry Act 1946 (Cth), s. 54	200	2,000
Defence Act 1903 (Cth), s. 73F(2)(a)	200	2,000
Life Insurance Act 1945 (Cth), s. 149	200	2,000
Stevedoring Industry Act 1956 (Cth), s. 44(3)	200	2,000
TWENTY-FOLD INCREASE		
Crimes (Biological Weapons) Act 1977 (Cth), s. 8(2)	10,000	200,000

[22] *Isherwood v. O'Brien* (1920) 23 W.A.R. 10, 14.
[23] See text at n. 8 *infra* (para. 2.12).

shareholders, who have not been the principal beneficiaries of the unlawful enterprise:[24]

> If the directors of corporations were the sole shareholders, a fine levied on the corporation would be justified as an indirect way of fining the directors for their own offences. But then, this end could be achieved with greater precision by fining the directors, who by hypothesis would be men of substance because they would possess the shares. In most large concerns directors are not the sole shareholders, and a fine imposed on the corporation is in reality aimed against shareholders who are not directors or responsible for the crime, *i.e.*, [it] is aimed against innocent persons. The theory that shareholders whose purses are thus lightened will be moved to dismiss the directors is unrealistic, because it is now a commonplace that shareholders in large public companies have practically no control over the management. In any event it is curious reasoning that an innocent person may properly be punished in order to compel him to do something that the law could, if it wished, do directly.

2 IMPOSITION

2.1 *Indictable Offences*

At common law misdemeanours came to be punishable by imprisonment, fine and possibly whipping.[25] But, unless the degree of punishment was limited in some way by statute, the amount of fine or period of imprisonment was left entirely to the court's discretion. The only general limitation was that it should not be so inordinately heavy as to violate the prohibition on excessive fines and cruel and unusual punishments contained in the Bill of Rights 1688.[26] Felonies only gradually came to be punishable by fine in the middle of Queen Victoria's reign following the end of transportation and the reduced reliance on capital punishment for this class of offence. Even so, fines for felonies were limited by statute to cases in which the accusation could be determined summarily.[27] In Victoria, the situation generally with respect to indictable offences has been qualified by s. 478(2) of the Crimes Act 1958 which permits superior courts to impose a fine in addition to or in lieu of any other punishment provided for indictable offences under the Crimes Act, at common law, or under any other state

[24] Williams G., *Criminal Law* (2nd ed. 1961) para. 283, adopted by the Full Court of Victoria in *Wattle Gully Gold Mines* [1980] V.R. 622. In that case the court reduced from $20,000 to $500 a fine imposed upon a mining company on conviction of one count of fraudulently disseminating misleading information likely to have the effect of raising the market price of the company's shares contrary to Securities Industry Act 1975, s. 110. Weight was given to the effect of the fine on the shareholders, the absence of gain or benefit to the company from the offence and the fact that a director had been imprisoned for the same offence.

[25] Stephen J. F., *A History of the Criminal Law of England*, (1883) i, 490.

[26] 1 Will and Mary, sess. 2, c. 2 (1688); *R. v. Morris* [1951] 1 K.B. 394, 396; *Australian Consolidated Press Ltd v. Morgan* (1964) 112 C.L.R. 483, 497. The Bill of Rights 1688 applies to both Victoria and the Commonwealth: Imperial Acts Application Act 1980 Part II, Division 3; *R. v. Wright and Pope* [1980] V.R. 41, 44-5; *Commonwealth v. Colonial Combing, Spinning and Weaving Co. Ltd* (1922) 31 C.L.R. 421, 463. To this extent it is true to say that the punishment of every common law crime is controlled by some statute. Rinaldi F., *Imprisonment for Non-Payment of Fines* (2nd ed. 1976) 33-5 argues that a fine beyond the means of the offender could be regarded as 'excessive' and thus violate the Bill of Rights.

[27] *Treasury v. Harris* [1957] 2 Q.B. 516, 523.

Act.[28] This blanket power to fine is not applicable to the indictable offences of treason or murder, which are punishable by imprisonment for life[29] or where the court exercises a dispositional power which precludes it from sentencing the offender to punishment, for example, by making a probation order.[30] Nor does it extend to indictable offences punishable under any Federal Act,[31] however a similar power to fine in lieu of imprisonment is to be found, so far as federal offences are concerned, in the Crimes Act 1914 (Cth), s. 16(1). The powers to fine under both these provisions themselves are subject to the prohibition on 'excessive fines' contained in the Bill of Rights 1688 and this imperial legislation is similarly applicable to any other statute which permits the imposition of fines at large *i.e.* 'such fine as is thought fit',[32] or 'as the court awards',[33] or 'in the discretion of the court',[34] or 'of any amount'.[35] In the case of corporate offenders committing indictable or summary offences punishable under federal law only by imprisonment, s. 24 of the Acts Interpretation Act 1901 (Cth) provides that the court may substitute a pecuniary penalty in accordance with a stipulated formula, namely, where the imprisonment is (a) not more than six months — $200; (b) between six months and a year — $400; between one year and two — $1,000; and more than two years — $2,000.

2.2 *Summary Offences*

Though imprisonment may be specified as the only penalty for a summary offence or for an indictable offence triable summarily, Magistrates' Courts are, by s. 56(1) and (3) of the Magistrates' Courts Act 1971 (Vic.), invested with a wide power to substitute a monetary penalty. The key provision is s. 56(1) which states:

> Except where otherwise expressly enacted when a Magistrates' Court has authority under this or under any other Act to impose imprisonment for an offence punishable on summary conviction and has not authority to impose a monetary penalty for that offence the Court when adjudicating on the offence may, if it thinks that the justice of the case will be better met by a monetary penalty than by imprisonment, impose a penalty of not more than $1,000 and may order that the defendant be imprisoned for a term of not more than twelve months in default of payment of the penalty.

[28] See Crimes (Classification of Offences) Act 1981, s. 8(c). Prior to this Act (which also abolishes the use of the felony/misdemeanour classification), s. 478(2) was limited to indictable offences punishable under the Crimes Act 1958 alone: *R. v. Wright and Pope* [1980] V.R. 41, 44-5.

[29] *R. v. Schultz* [1976] V.R. 325.

[30] Crimes Act 1958, s. 478(2) does not permit a fine to be imposed in addition to or in lieu of probation because the latter is not a form of punishment. It is an order made 'instead of sentencing': Crimes Act 1958, s. 508(1); *R. v. Wright and Pope* [1980] V.R. 41, 44.

[31] *All-Cars Ltd v. McCann* (1945) 51 Argus L.R. 214; *Darcy v. Nikoloff* [1954] S.A.S.R. 62; *R. v. Mirkovic* [1966] V.R. 371.

[32] Juries Act 1967, ss. 67 and 68(1)(a).

[33] Wrongs Act 1958, s. 10(1) and (2).

[34] Defence Act 1903 (Cth), s. 91(b). See also Instruments Act 1958, s. 81.

[35] Defence Act 1903 (Cth), s. 73(F)(2)(b); Trading with the Enemy Act 1939 (Cth), s. 5(4)(b); War Crimes Act 1945 (Cth), s. 11(1).

The discretion referred to in this provision is unavailable when the court is exercising Federal jurisdiction[36] or where there is an express enactment to the contrary. This may take the form of precise exclusionary words specifically referring to s. 56(1), such as found in s. 28(3) of the Motor Car Act 1958 (Vic.), or other more general wording. However the specification of a mandatory minimum term of imprisonment will not, of itself, oust the fining power. In *Healy v. Festini*[37] the defendant was convicted of a second offence of selling liquor without a licence in breach of a section of the now repealed Licensing Act 1958 (Vic.) which prescribed a mandatory minimum term of imprisonment for recidivists. But instead of ordering the offender to prison, the magistrate fined him under the then equivalent of s. 56(1) of the Magistrates' Court Act. The informant obtained an order to review, arguing that the opening words 'Except where otherwise expressly enacted' referred to any provision which was clearly and unambiguously inconsistent with the power to fine given under s. 56(1). Such inconsistency was to be found in any provision, such as the one in the Licensing Act, which completely and exhaustively defined the punishment for second offenders. A majority of the Full Court ruled that the magistrate did have the power to substitute a fine for imprisonment in the circumstances. Gavin Duffy and Hudson JJ. explained that provisions for mandatory imprisonment, far from pointing away from the operation of s. 56(1), were a clue to its intended operation since it pre-supposed the existence of legislative enactments which provided for imprisonment and nothing else:[38]

> The contrary enactment which must be found in order to bring it within the exception must be one in which an intention is clearly expressed that the court is not to have the power conferred by s. 56(1). In my opinion such an intention is not to be found in an enactment which simply in positive terms provides for the imposition of imprisonment and by inference excludes any other penalty. This merely fulfils the essential condition in which the power conferred by s. 56(1) is to be exercisable.

Nor is the power to substitute a fine for imprisonment excluded by the fact that fining powers exist elsewhere in the same legislation. In *Healy v. Festini* it was also contended by the informant that because under the Licensing Act first offenders were subject to a mandatory minimum fine, a consequence of treating s. 56(1) as applicable would be that magistrates could not only reduce the punishment prescribed for second offenders from imprisonment to a fine, they could also set the level of the fine below that mandated for first offenders. This too was rejected. The court held that the test for exclusion was not whether other provisions existed for the punishment by fine of the same offence committed in different circumstances, but rather whether the special class of case provided for by s. 56(1), namely, one where justice would be better met by a fine than imprisonment, was adverted to and intended to be excluded from the operation of the section

[36] *Supra* n. 31 (para. 2.1).
[37] [1958] V.R. 225.
[38] *Ibid.* 230 *per* Hudson J.

in question. This approach was followed by the High Court in *Rose v. Hvric*[39] where Kitto, Taylor and Owen JJ. ruled that the word 'expressly' served to emphasise that s. 56(1) was of general application and not to be denied its operation save by something actually inconsistent with it in the operation of another enactment. Unless the legislation in question clearly exhibits an intention to deal exclusively with the punishment for an offence, there is no implied repeal or 'negative implication' with regard to s. 56(1):[40]

> It is true that for a second or subsequent offence . . . the Licensing Act prescribes a liability not merely to imprisonment, but to a minimum term of imprisonment . . . [H]owever [s. 56(1)] can take effect exactly as it does where no minimum term is prescribed, for its operation is merely to add a different kind of liability, less severe, as an alternative which a court of Petty Sessions may adopt where it thinks that 'the justice of the case will be better met' thereby. There is no inconsistency. The general provision of [s. 56(1)] is opposed not by anything that is enacted in [the Licensing Act], but at most by an inference of an intention which has not reached the point of enactment.

A provision similar to that found in s. 56(1) of the Magistrates' Courts Act 1971 (Vic.) is contained in s. 16(1) of the Commonwealth Act 1914 which states that, in respect of the penalties set out in the Crimes Act itself, a court may 'if it thinks a pecuniary penalty sufficient to meet the case . . .[41] impose a fine in lieu of imprisonment'. This is in addition to the special provision in the Acts Interpretation Act 1901 (Cth), s. 24 generally allowing fines to be substituted for imprisonment for federal corporate offenders. It is to be noted that, unlike the Victorian legislation, s. 16(1) applies to those convicted on indictment as well as summarily and the amount of fine which may be imposed is not subject to any upper limit. Despite the absence of the introductory qualification found in s. 56(1), there is no doubt that express legislative words can also oust the fining discretion granted by s. 16(1). The question whether its operation is impliedly curtailed by the presence of mandatory minimum sentences will also probably be resolved in the negative in accordance with the authorities cited above.

2.3 *Non-Judicial Fines*

A number of statues now permit either the payment of a pecuniary penalty to forestall prosecution for an alleged offence or the direct imposition of some form of monetary penalty by a nominated body or person in order to punish non-compliance with the statute in question. Though these forms of exaction are punitive in nature, none requires any measure of judicial involvement. The process of allowing expiation of guilt by the payment of a fixed fine set out in an infringement notice has come to dominate the disposition of minor summary offences, usually traffic

[39] (1963) 108 C.L.R. 353.
[40] *Ibid.* 360-1.
[41] The Crimes Amendment Act 1982 (Cth) changes the phrase 'sufficient to meet the case' to 'appropriate in all the circumstances of the case': s. 4(1)(a).

violations, over the past two decades. For each case recorded as leading to a conviction in a Magistrates' Court in Victoria, two more were settled by payment of an 'on-the-spot' fine without any judicial proceedings. The number and proportion of non-judicial expiations of summary offences by way of fines has been increasing steadily throughout Australia and, in Victoria, currently amounts to some 600,000 cases a year.[42]

2.4 *Infringement Notices*

The procedure for expiating minor offences by payment of 'on the spot fines', without the need for any form of curial intervention is available in Victoria under the Dog Act 1970, s. 22A; Housing Act 1958, s. 113F; Litter Act 1964, s. 3B; Motor Boating Act 1961, s. 32A; Road Traffic Act 1958, s. 11A(10) and the Airports (Surface Traffic) Act 1960 (Cth), s. 13. Under such legislation, where it is claimed that certain summary offences have been committed, police or other enforcement officers may, instead of laying an information, serve an infringement notice upon the alleged offender. This notice specifies the monetary penalty fixed by statute for the infringement and indicates that, if this amount is paid to a nominated office within a prescribed period, no prosecution will be brought for the alleged offence. Payment is not made 'on the spot'; all that occurs is that the offender, on the spot, discovers the extent of his liability. If the offender agrees to this arrangement by making the specified payment in time, he is deemed to have expiated his wrong-doing on payment of the penalty. Further proceedings are barred and no conviction for the offence is regarded as having been recorded save that such expiation under the Road Traffic Act 1958 may still lead to the offender earning demerit points under s. 27 of the Motor Car Act 1958. The legislation allows for the withdrawal of infringement notices so that an information and summons can be issued in the ordinary manner in relation to the offence if, on later consideration, the authorities regard it more appropriate that it be dealt with by a court. If this happens and the court finds the accused guilty, it may impose any penalty within the statutory range available for the particular offence. A less elaborate, but similar approach is taken under the Constitution Act Amendment Act 1958 (Vic.), where, by s. 247(a)(b), an elector facing prosecution for having failed to vote may agree to a fine imposed by the Chief Electoral Officer, instead of having the matter determined by a Magistrates' Court.[43] Other, somewhat differently worded provisions, do not require the consent of the alleged offender, but permit the Transport Regulation Board,[44] the Commissioner of Land Tax,[45] the Comptroller of

[42] (1976-7) 61 *Yearbook of Australia* 470-1.
[43] Constitution Act Amendment Act 1958 (Vic.), s. 274(a)(b).
[44] Motor Car Act 1958, s. 21B(2C).
[45] Land Tax Act 1958, s. 84(1).

Stamps[46] or others[47] to directly demand the payment of pecuniary penalties without obtaining a court order.

2.5 *Disciplinary Mulcts*

Many other entities, particularly those concerned with the regulation and internal discipline of bodies such as the public service, the staff of semi-governmental authorities, and members of statutorily controlled professions and sporting groups, are invested with legislative power to directly impose 'fines' or other monetary penalties upon persons in breach of their governing Acts or regulations.[48] Because the exercise of this power does not involve the initiation of any judicial proceedings, protections which attach to hearings of a criminal or civil nature will not be available at such non-curial adjudications. In *R. v. White*,[49] the defendant had been fined by his chief officer under the Commonwealth Public Service Act 1922 for failing to obey a lawful order. After an unsuccessful appeal to the Public Service Board which confirmed the fine, he brought the matter before the High Court on *certiorari* arguing that the sections enabling the imposition and confirmation of the fine were criminal in nature and, as a consequence, the Public Service proceedings amounted to an unconstitutional usurpation of the judicial power of the Commonwealth. The High Court disagreed. It looked first at the extent of the legislation's operation to ascertain whether the provisions in question were intended to be of general application to all members of the community or whether, though creating so-called 'offences' and providing for their 'punishment' they were no more than a means of defining misconduct by those belonging to a particular professional body or branch of the public service and for maintaining the organisation's internal discipline by monetary penalties or other sanctions. It held that the provisions conformed to the second category and did not invade the realm of the judicial power:[50]

[46] Cattle Compensation Act 1967, s. 17(3); Stamps Act 1958, s. 159(3); Swine Compensation Act 1967, s. 17(3).

[47] National Parks and Wildlife Conservation Act 1975 (Cth), s. 71(1)(r).

[48] Aliens Act 1947 (Cth), s. 18; Broadcasting and Television Act 1942 (Cth), s. 56(2)(b); Commonwealth Teaching Services Act 1972 (Cth), s. 35(1)(b); Navigation Act 1912 (Cth), s. 115(1)-(13); Postal Services Act 1975 (Cth), s. 61(9)(b) and (c); Public Service Act 1922 (Cth), s. 62(6)(a)(ii); Telecommunications Act 1975 (Cth), s. 58(9)(b) and (c) Architects Act 1958, s. 11(1)(c) and 11(4); Co-operation Act 1958, s. 64(1); Dentists Act 1972, s. 25(1)(ii); Estate Agents Act 1980, s. 11(3)(c); Friendly Societies Act 1958, s. 39; Industrial Training Act 1975, s. 57(i); Legal Profession Practice Act 1958 s. 31(1)(d)(i); Local Government Act, 1958, s. 173(6)(d); Metropolitan Fire Brigades Act 1958, s. 78B(2)(b)(ii); Pharmacists Act 1974, s. 18(3)(iv); Police Regulation Act, ss. 88(3)(c), 88(4)(c) and 88(5)(c); Public Service Act 1974, s. 59(2)(c); Psychological Practices Act 1965, s. 19(c); Racing Act 1958, ss. 45(g), 77(1)(e), 77(2) and 79(2); Railways Act 1958, ss. 161(1), 163 and 172; Scaffolding Act 1971, s. 15(9)(d); Securities Industry Act 1975, s. 30(2); Valuation of Land Act 1960, s. 13C(3)(iii); Veterinary Surgeons Act 1958, s. 22(3)(iv); Water Act 1958, s. 168.

[49] *R. v. White; Ex parte Byrne* (1963) 109 C.L.R. 665.

[50] *Ibid.* 670-1.

> We think that the so-called fine is nothing but a mulct to be deducted from salary or pay and we think that the provisions of s. 55, in spite of the heading of Division 6, 'Offences', should be interpreted as wholly concerned with breaches of discipline and disciplinary measures concerned only with the Service. Division 6 is, of course, limited to the Service and we are not here dealing with a law having general operation over all the members of the community. We are dealing with the regulation of what is, no doubt, a very large body of people with respect to their work for and their relations with the Commonwealth Crown . . . it is a law with very special application. Section 55, in creating so-called 'offences' and providing for their 'punishment', does no more than define what is misconduct on the part of a public servant warranting disciplinary action on behalf of the Commonwealth and the disciplinary penalties which may be imposed or recommended for such misconduct; it does not create offences punishable as crimes. The [appellate procedures prescribed under the Act] are directed to safeguarding public servants from possible official injustice in the determinations whether there has been departure from the 'code' established by s. 55(1) and, if so, what punishment should be imposed. The establishment of these safeguards does not indicate that an officer whose conduct is being investigated is being tried for a criminal offence . . . neither a Chief Officer nor an Appeal Board . . . sits as a court of law exercising judicial power; such sits as an administrative tribunal maintaining the discipline of the Commonwealth service in the manner prescribed by law.

Consistent with this view of the lawfulness of such mulcts and of their neutral nature, it was held in *Attorney-General (Victoria) v. Riach*[51] that the protections against self-incrimination offered by s. 29 and 30 of the Evidence Act 1958 (Vic.) or at common law in respect of civil and criminal proceedings do not apply in relation to the non-curial determinations at which disciplinary fines are exacted. Riach declined to give evidence before a board of inquiry because it would tend to incriminate him at proceedings under s. 59 of the Victorian Public Service Act 1974 at which he was at risk of suffering a reprimand, a maximum fine of $200 (now $400), transferral, dismissal, or certain other deprivations. Mr Justice Kaye held, first, that the respondent was wrong in refusing to answer questions under s. 29 of the Evidence Act on the ground that they might expose him to a penalty or forfeiture or might disgrace or criminate him because, at the determination of the charges laid against him under the Public Service Act, he was not subject to punishment for treason, felony or misdemeanour as required by the wording of s. 29.[52] Secondly, he was not protected by s. 30 of the Evidence Act, which prohibits the use of statements before the board in subsequent civil or criminal proceedings, because, following *White's* case, the disciplinary proceedings under s. 59 fell into neither class. Nor, thirdly, was he protected from self-incrimination at common law because these rules too were primarily designed to remove from witnesses compulsion to answer questions which would subject them to criminal penalties. The only civil proceedings to which the privilege against self-incrimination was available at common law were common informer actions for the recovery of a penalty or those involving a forfeiture of an estate in land and nothing which the respondent faced as a consequence of charges laid under the Public Service Act fell within those categories.

[51] [1978] V.R. 301.
[52] The wording now reads 'treason or an indictable offence'.

2.6 *Power to Remit Fines*

In addition to the inherent power the sovereign has to remit penalties generally by exercise of the royal prerogative of mercy, a specific right to mitigate monetary penalties or to order the discharge of persons imprisoned for non-payment of fines is vested in the Crown by s. 7 of the Penalties and Sentences Act 1981 (Vic.) which declares that:

> It shall be lawful for the Governor to remit in whole or in part any sum of money which is imposed under any Act as a penalty or forfeiture, although such money may be in whole or in part payable to some party other than the Crown, and to order the discharge from prison of any person who is imprisoned for non-payment of any sum of money so imposed, although such sum is in whole or in part payable to some party other than the Crown.

Occasionally the courts are also expressly authorized to remit part at least of a monetary penalty. For instance, such a power of mitigation is specifically granted to Magistrates' Courts in respect of first offenders under the Stamps Act 1958 (Vic.) where, if it is expedient, the Court may mitigate a penalty due under the Act by reducing it to a sum not less than a quarter of the amount otherwise due.[53] Apart from the Crown's blanket powers of remission at common law or under the Penalties and Sentences Act, many pieces of legislation, particularly those designed to raise revenue by way of taxes, duties, or other forms of impost, contain allowance for executive remission of the whole or part of any fine or monetary penalty levied under the Act. Normally the legislation will vest the power in the responsible minister,[54] but many Commonwealth Acts imposing penalties for non-payment of taxes and levies also permit the power to be delegated. However, though the minister retains an unfettered discretion to remit penalties, an upper limit is usually placed upon the sum which can be remitted by others. The maximum ranges from $1 to $1,000.[55] It is improper to rely on the

[53] S. 14.

[54] Land Tax Act 1958, s. 84(2) (Commissioner of Land Tax has power to remit penalty duty); Payroll Tax Act 1971, s. 22(2) (Minister may remit penalty tax); Stamps Act 1958, s. 28(3) (Minister may remit or mitigate any penalty payable on stamping). See also Cattle Compensation Act 1967, s. 17(2) and Swine Compensation Act 1967, s. 17(2).

[55] The usual wording is that the minister or authorized person may, in a particular case, for reasons that the minister or the authorized person in his discretion thinks sufficient, remit the whole or part of an amount payable but the remission granted by the authorized person is not to exceed a stated sum *e.g.* $1 — Poultry Industry Levy Collection Act 1965 (Cth), s. 8(2) and (3); $5 — Honey Export Charge Collection Act 1973 (Cth), s. 6(2) and (3); $10 — Dried Fruits Levy Collection Act 1971 (Cth), s. 7(3) and (4); Pig Slaughter Levy Collection Act 1971 (Cth), s. 7(3) and (4); $100 — Apple and Pear Levy Collection Act 1976 (Cth), s. 7(3) and (4); Live-Stock Export Charge Collection Act 1977 (Cth), s. 6(2) and (3); Live-Stock Slaughter Levy Collection Act 1964 (Cth), s. 9(3) and (4); Meat Export Charge Collection Act 1973 (Cth), s. 7(3) and (4); $500 — Dairy Industry Assistance Act 1977 (Cth), s. 8(2) and (3); $1000 — Dairy Industry Stabilization Act 1977 (Cth), s. 6(2) and (3). See also remission powers contained in Gift Duty Assessment Act 1941 (Cth), s. 27; Income Tax Assessment Act 1936 (Cth), ss. 207(1), 221YDB(4), 221YN(5), 226(3), 251W(2) and (3); Payroll Tax Assessment Act 1941 (Cth), ss. 27 and 43; Sales Tax Assessment Act No. 1 1930 (Cth), ss. 25(2B) and 46(1); Sales Tax Assessment Acts Nos. 2-9 1930 (Cth), s. 10(2B); Sales Tax Procedure Act

remission power to give effect to a prior understanding between the parties that only an agreed penalty will be exacted. In *Attorney-General for the Commonwealth v. Abrahams*,[56] taxation prosecutions were instituted in the High Court against three defendants charging each of them with fraudulent understatement of income and fraudulent avoidance of income tax under the Income Tax Assessment Act 1936 (Cth). The defendants were liable, under the relevant sections, to fines and a penalty equivalent to treble the amount of tax evaded. Prior to prosecution, the Commissioner of Taxation and the defendants had entered into an agreement for the payment of a specified sum in settlement of the outstanding liability. Nevertheless, prosecutions were brought with the sole aim of making use of the convictions and sentences thus obtained as a means of ensuring the enforcement of the prior agreement. It was presumably intended that the remission power would be used to reduce the Court imposed penalty to the sum the parties had agreed to. Starke J. however held that the agreement was contrary to the policy and plain intention of the Act; the legislature had reposed in the judicial power, and not in the executive government, the authority and duty to determine the penalty. The penalty sections did not contemplate the executive government and any party agreeing between themselves what the penalty should be and, in view of the admitted purpose of the proceedings, his Honour refused, so long as the agreement and purpose subsisted, to give any judgment lending the aid of the Court to such purpose and indefinitely adjourned the hearing of prosecutions.

2.7 *Time to Pay*

Persons fined may be granted time to pay. Where a fine is imposed for an indictable offence tried before the Supreme or County Court payment may be demanded either forthwith, or within such time as the court allows.[57] In the Magistrates' Court, fines are payable immediately, or if the offender is not present on conviction, within 21 days of a notice of fine being posted to him.[58] Under s. 82 of the Magistrates' (Summary Proceedings) Act 1975 (Vic.), any Stipendiary Magistrate to whom an offender applies at any time after conviction may allow time for the payment of fines, costs or other sums and, in addition, may authorize payment by instalments. Similarly, a Children's Court can direct a child to pay fines, damages or compensation either immediately or by instalments, or within such period it thinks fit.[59]

1934 (Cth), s. 8(1); Wool Tax (Administration) Act 1964 (Cth), ss. 40(3) and 63(2), and also in the Meat Chicken Levy Collection Act 1969 (Cth), s. 5(2); Stevedoring Industry Charge Assessment Act 1947 (Cth), ss. 20(3) and 35(2); Tobacco Charges Assessment Act 1955 (Cth), ss. 18(3) and 31(2).

[56] (1928) 1 A.L.J. 388.

[57] Crimes Act 1958, s. 439(1)(a). See also County Court Act 1958, s. 32(3) and *R. v. Knight* [1980] *Criminal Law Review* 446.

[58] Magistrates' Summary Proceedings Act 1975, s. 106(1)(c) and (d).

[59] Children's Court Act 1973, s. 44.

The Commonwealth Crimes Act 1914, by s. 18A(1)(b) and (c), makes state law relating to time to pay and payment by instalments applicable to fines imposed upon persons convicted for Commonwealth offences within the state.[60] Again, where a person is before a court on proceedings under the Service and Execution of Process Act 1901 (Cth), time to pay, or payment by specified instalments may be permitted.[61] The penalty provisions of a number of federal revenue statues also allow court a discretion to extend time for payment or permit payment by instalments.[62] If the offender's absence of means is a mitigating factor warranting a reduction of the amount of the fine, it is also relevant to whether time should be allowed for payment. Whether time payment enhances or weakens the deterrent impact of the sanction is not known, but the courts are reluctant to allow the period of payment to extend over too long a time.[63]

2.8 *Fines for Continuing Offences*

Special fining provisions may exist for continuing offences. Most crimes consist of acts which, once committed, fully complete the offence which then exists only in the past. Though there may be repetition of such acts, each is regarded as attracting a separate fine or other sanction and, if a time limit on the initiation of proceedings applies, time will run separately for each independent breach even though they form part of a series of multiple violations. An offence of a continuing nature normally comprises a single ongoing failure to perform some duty imposed by law. Failure to carry out the duty imposed gives cause for complaint each day it continues but can be prosecuted as only one offence:[64]

> Such passive conduct may constitutes a crime when first indulged in but if the obligation is continuous the breach though constituting one crime only continues day by day to be a crime until the obligation is performed. In such a case in measuring the period of limitation, if one is applicable, the right to lay an information is not barred if the breach has continued up to the day the information was laid or if the breach was cured before the information was laid, time counts from the day when the oligation was satisfied. The question whether an offence is of a continuing or continuous nature generally arises in the case of statutory offences and the question is solved by ascertaining what is the precise nature of the offence.

The courts will most easily find a statutory intention to create a continuing offence if the legislation, in its general terms, creates an obligation and bases liability on some act of 'non-observance', particularly if it couples this with a penalty clause providing for a fine or other sanction for every day during which failure to discharge the obligation continues.[65] Because

[60] For recent changes to s. 18A see n. 79 *infra* (para. 3.12).
[61] Service and Execution of Process Act 1901 (Cth), s. 26F(4)(a).
[62] Income Tax Assessment Act 1936 (Cth), s. 247(2); States Receipts Duties (Administration) Act 1970 (Cth), s. 79(2); Wool Tax (Administration) Act 1964 (Cth), s. 82(2).
[63] Thomas, *op. cit.* 321.
[64] *R. v. Industrial Appeals Court; Ex parte Barelli's Bakeries Pty Ltd* [1965] V.R. 615, 620. See also *Cook v. Cook* (1923) 33 C.L.R. 369.
[65] *Jones v. Lorne Saw Mills Pty Ltd* [1923] V.L.R. 58, 65 citing *Solicitor to the Board of Trade v. Ernest* [1920] 1 K.B. 816.

fines for continuing offences can be quite substantial, the legislature normally does not permit them to accrue on a daily (or weekly)[66] basis until an initial conviction for a breach has been obtained. Thus, typically, s. 13 of the Clean Air Act 1958 (Vic.) creates a series of offences punishable by fine and then declares that, 'in the case of a continuing offence', offenders are further liable 'to a daily penalty of not more than $2,000 for each day the offence continues after conviction or order by any court'. Another way in which the legislature reveals its intention to treat crimes as being of a continuing nature is to list one penalty for the substantive offence together with another which is described as a 'default penalty'.[67] The purpose of this is explained in s. 112(1) of the Building Societies Act 1958 (Vic.) as follows:

> Where in or at the foot of any section or part of a section of this Act there appears the expression 'Default Penalty', it signifies that any person who is convicted of an offence against this Act under that section or part shall be guilty of a further offence against this Act if the offence continues after he is so convicted and liable to an additional penalty for each day during which the offence so continues of not more than the amount expressed in the section or part as the amount of the default penalty.

The default penalty is applicable only to the continuing offence and cannot be incurred until at least one prior conviction for the same breach has been recorded.[68] Sometimes a time limit is set for the observance or performance of a particular obligation. The cases suggest that if the breach continues beyond this deadline, the obligation is spent at the expiration of that time limit and cannot, thereafter, be regarded as giving rise to a continuing offence.[69] In order to catch ongoing breaches in such circumstances, the legislature has found it necessary to include in certain Acts wording, such as contained in s. 571(1) of the Companies (Victoria) Code 1982 (Vic.), stating that:

> Where —
> (a) by or under a section, or a sub-section of a section, of this Code an act or thing is required or directed to be done within a particular period or before a particular time;
> (b) failure to do that act or thing within the period or before the time referred to in paragraph (a) constitutes an offence; and
> (c) that act or thing is not done within the period or before the time referred to in paragraph (a),
> the following provisions of this sub-section have effect:
> (d) the obligation to do that act or thing continues, notwithstanding that that period has expired or that time has passed, until that act or thing is done;

[66] Friendly Societies Act 1958, s. 14(7).

[67] See Building Societies Act 1976, s. 112(1); Business Names Act 1962, s. 28; Pipelines Act 1967, s. 29; Securities Industry Act 1975, s. 131(1). The Private Agents Act 1966, s. 47 uses the term 'further penalty' instead of 'default penalty'. *Cf.* Conciliation and Arbitration Act 1904 (Cth), s. 119 discussed in *Quinn v. Martin* (1977) 16 A.L.R. 141.

[68] *Nottage v. Tarac Manufacturers (Adelaide) Ltd* [1941] S.A.S.R. 162.

[69] *Jones v. Lorne Saw Mills Pty Ltd* [1923] V.L.R. 58; *Welsh v. Cornfoot* [1973] V.R. 21; *cf. R. v. Industrial Appeals Court; Ex parte Barelli's Bakeries Pty Ltd* [1965] V.R. 615, 621-2; *R. v. Industrial Appeals Court; Ex parte Circle Realty Pty Ltd* (Unreported decision of Supreme Court of Victoria 28/11/79).

(e) where a person is convicted of an offence that, by virtue of paragraph (d), is constituted by failure to do that act or thing after the expiration of that period or after that time, as the case may be, that person is guilty of a separate and further offence in respect of each day after the day of the conviction during which the failure to do that act or thing continues; and

(f) the penalty applicable to each such separate and further offence is $50.

In *Welsh v. Cornfoot*,[70] Lush J. in discussing a section similar to this[71] explained that such a section contemplated that a direction to do a thing within a particular time will have lapsed by the time a conviction for a default has been obtained and therefore, in order to provide a basis for the prosecution of further offences after conviction, it was necessary for the legislature to revive the direction or requirement so that the offence would now lie in the failure to comply with a revived obligation.

Where daily or other periodic penalties are prescribed for continuing offences, sentencers must strictly calculate the penalties in accordance with the formula provided. Thus, in *Leydon v. Palm Green*[72] a number of corporate defendants were convicted of failing to lodge annual returns due under the South Australian Companies Act 1962 which provides, by s. 380(1), for a default penalty of not more than $20 per day. For one of the companies prosecuted in this case the period of default was 223 days and resulted in the magistrate imposing a fine of $85. In upholding the prosecution's objection that the penalty was both manifestly indequate and wrong in law, Newman A.J. pointed out that 223 days did not divide equally in cents into $85: 'It appears quite clearly to me that he has misapplied his mind as to the penalty to be imposed under this section . . . he has not considered the number of days nor has he applied his mind to the appropriate amount of money which should be imposed as a penalty for each day . . .'.[73] His Honour then calculated that since this was an ordinary case of default the appropriate range was less than half the maximum provided by statute. A fine of between $3 and $6 per day would be appropriate and, for 223 days this would result in a fine of between $669 and $1,338. The magistrate's fine of $85 was therefore patently inadequate and a revised fine of $1,003.50 was substituted calculated on the basis of a daily fine of $4.50.

2.9 *Calculation of Fines — Penalty Units*

Legislation creating offences punishable by fines usually expressly prescribes a maximum penalty in dollar terms for each offence and sometimes fixes a minimum amount as well. Recidivism is allowed for by escalated penalties for second and subsequent offences. Though the ratio of increase for recidivists varies greatly from offence to offence, it is normal to find that the maximum amount of the higher fine is also spelt out as an exact

[70] [1973] V.R. 21, 25.
[71] S. 380(2) Companies Act 1961 (now repealed).
[72] (1978) 20 S.A.S.R. 304.
[73] *Ibid.* 310.

sum. However, a difficulty arises whenever pecuniary penalties are defined in fixed dollar amounts for they tend to be devalued in their correctional impact by the effects of inflation. This is less true in those situations, described below, in which the penalty is calculated by reference to the value of goods, services, or fiscal obligations involved in the offence. Nevertheless, with the passage of time in an inflationary economy, amounts specified in fining provisions cease to be adequate as deterrents in the sense that no longer are they capable of having a significant economic impact on the bulk of offenders. So numerous are finable offences under federal and state law that the regular and systematic readjustment of penalty provisions to allow for the effects of inflation has hitherto never been attempted. Ad hoc adjustments have taken place from time to time either in response to public awareness of gross inadequacies in penalty scales, or in the course of revision of the law for other purposes. No jurisdiction in Australia has made regular price-index adjustments of maximum and minimum fines authorized by statute. In 1981 Victoria took a major step towards controlling this erosion of value by passing the Penalties and Sentences Act 1981 which authorizes and partially implements a changeover from 'fines' to 'penalty units'. Instead of an exact dollar amount being prescribed as the maximum fine for every offence, Victorian monetary penalties are to be imposed, in future, by reference to a defined number of 'penalty units'. The value of the penalty unit is set, under s. 5 of the Act, at $100. But, by legislatively changing its value periodically by a single short enactment, adjustments to the fining provisions contained in a large number of other Acts can be effected at the same time. By this means, inflationary or deflationary changes can be accommodated expeditiously.[74]

The Penalties and Sentences Act initially converts monetary penalties into penalty units in relation to some 400 offences under 56 Acts presently administered by the Law Department. It is intended to extend progressively this translation of fines into penalty units to all remaining State legislation. However, for a time there will be many Acts that make no reference to penalty units. Because many hundreds of offences were reviewed in the course of transposing existing fines into penalty units, the Attorney-General also used the opportunity to re-examine the level of penalty in each case. Where offences were punishable by fine and prison sentence, the existing maximum term was accepted as defining the gravity of the offence and the monetary penalty was brought into line in accordance with a formula that equated a maximum of one week's imprisonment with one penalty unit ($100); a maximum of one month's imprisonment with five penalty units ($500); six months with 25 penalty units ($2,500); one year with 50

[74] See generally Fox R. G., 'Sentencing: New Alternatives in Victoria', (1981) 6 *Legal Service Bulletin* 128. An arrangement along these lines, but one which requires a more elaborate classification of crimes into classes or categories of seriousness, has been proposed by the American Law Institute in its Model Penal Code, s. 6.03.

penalty units ($5,000); and a maximum of two years with 50 penalty units or more.[75] The Attorney-General controlled these changes so that fines in excess of $5,000 could not be imposed by Magistrates' Courts.[76] Because the review led to an upgrading of penalty levels, the formula by which fine defaulters can work off their fines has also been changed to match the preceding scale.[77] Whereas formerly, under s. 106(1)(b) of the Magistrates (Summary Proceedings) Act 1975 (Vic.), a maximum of one month's imprisonment would expunge a fine of up to $50, under s. 10 of the Penalties and Sentences Act 1981 (Vic.) it will serve to discharge up to five penalty units ($500). Similarly, six months' imprisonment will expunge a fine of up to $2,500, whereas formerly the figure was $500.

2.10 *Calculation of Fines — Other Methods*

Though the predominant mode of specifying a fine maximum is by defining the exact dollar amount in the legislation or, increasingly, by specifying the maximum (or minimum) number of penalty units applicable to the offence, the legislature also has a penchant for utilizing other techniques for calculating monetary penalties. Many Acts allow the quantum of the penalty to be calculated by reference to the amount of damage or loss caused, or the extent of the fiscal obligations breached. Though there are almost 200 such provisions to be found in Victorian and Commonwealth legislation, very little consistency is to be found in the formulae used. Sometimes the fine derives its initial value from the worth of the property, goods or services involved, and upon this is superimposed a further amount not exceeding a maximum specified in the legislation. Thus, for use of a drain without permission under s. 156 of the Melbourne and Metropolitan Board of Works Act 1958 (Vic.), the penalty is not to be more than $1,000 over and above the full amount of damage sustained by the Board, while under s. 31 and 32(1) of the Summary Offences Act 1966 (Vic.), no fine is to be more than 25 penalty units above the value of the goods, merchandise or articles involved. This approach may also be coupled with minimum penalties and so, pursuant to s. 84(1) of the Marine Act 1958 (Vic.), failure to take a pilot is punishable by a fine of not less than $100 nor more than $1,000 over the amount which would have been payable if a pilot had been engaged.[78] On other occasions, particularly in relation to taxation and fiscal matters, the monetary penalty is expressed as a percentage or multiple of the amount evaded or otherwise involved. For example, under s. 25 of the Railways Act 1958 (Vic.), evasion of tolls is punishable by a fine equivalent to three times the amount evaded and, under s. 28(1) of the Stamps Act 1958 (Vic.), there is provision for both a penalty of twice

[75] S. 9(1).
[76] S. 9(2).
[77] S. 10. See further text at n. 38 *infra* (para. 3.2).
[78] See also Geelong Waterworks and Sewerage Act 1958, s. 97; Land Act 1958, s. 201.

the amount of unpaid duty and a further penalty of 20% per annum on the unpaid duty owing. So too, under s. 169(2)(a) of the Bankruptcy Act 1966 (Cth), a trustee retaining money without authority is liable to a penalty calculated at the rate of 20% per annum on any amount over $50.[79] A third method used by the legislature involves setting a fixed or, at times, variable ratio between some quantifiable aspect of the subject matter of the offence and the penalty to be exacted, for example, the punishment for possessing more than five counterfeit coins under s. 311 of the Crimes Act 1958 (Vic.) is a fine simply calculated at the rate of not more than one penalty unit and not less than $1 for every piece of counterfeit coin in possession. The varying ratio for determining fines for overloading vehicles under s. 33(5)(a) and 35(5) of the Motor Car Act 1958 (Vic.) is expressed, inter alia, in terms of $2.40 per 50 kilograms or part where the overloading is not more than one tonne and $80 per tonne or part where the excess is more than one tonne.[80]

The precise form in which penalties are cast is of utmost importance in determining whether all or any part of the penalty is of a mandatory nature. For example, in *Mumford v. Hall*[81] the defendant, who had overloaded his truck, was charged with an offence against the precursor of s. 33(5) of the Motor Car Act 1958 (Vic.). The section then read that the offence was punishable by a penalty of not more than £100 'together with an additional penalty' of 10/- for each hundredweight of excess where the excess was below a ton. The justices, in fining the defendant £2, had taken the view that the reference to a penalty of 'not more than' £100 was meant to include the additional penalty and that they were therefore free to inflict any fine so long as it did not exceed £100. Pape J. held that this interpretation was incorrect. In his judgment the legislative intention was that the total fine was to be calculated by reference to a base penalty plus an additional penalty and though setting of the base penalty was a matter for the court's discretion provided it did not exceed £100, it was obligatory for the tribunal to impose the additional penalty in accordance with the formula:[82]

[79] See also Cattle Compensation Act 1967, s. 15(5); Coal Mines Act 1958, ss. 82, 139(2) and 130; Gift Duty Act 1971, s. 43(2); Land Act 1958, ss. 118(2) and 281(4); Land Tax Act 1958, s. 83(1); Payroll Tax Act 1971, ss. 22(1), 36(1)(a) and (b) and 37; Stamps Act 1958, ss. 17(3), 40A(4)(b), 46(2), 60C(2) and (3), 60H(6), 110A(4), 121(2)(a), 131AE(1), 131AF(1) and (5). There are over 50 federal Acts which calculate the penalty as a percentage or multiple of the amount at stake *e.g.* Banking Act 1959 (Cth), s. 26(1); Customs Act 1901 (Cth), ss. 240, 241, 243; Dairy Industry Stabilization Act 1977 (Cth), s. 6(1); Income Tax Assessment Act 1936 (Cth), ss. 140, 207, 221, 227(1), 230(1), 231(1); Navigation Act 1912 (Cth), s. 152; Payroll Tax Assessment Act 1941 (Cth), ss. 27 and 45; Trading With The Enemy Act 1939 (Cth), s. 15(3).

[80] See also Coal Mines Act 1958, s. 81(2); Country Roads Act 1958, s. 52; Egg Industry Stabilization Act 1973, s. 13(4); Explosives Act 1960, s. 48(2); Gas Act 1969, s. 25(3), (4) and (5); Land Act 1958, s. 60(4); Local Government Act 1958, ss. 552 and 663(5); Marine Act 1958, s. 152; Wheat Industry Stabilization Act 1974, s. 10(5); Navigation Act 1912 (Cth), ss. 227B(1) and 329G(1).

[81] [1959] V.R. 86.

[82] *Ibid.* 87.

> Although the justices may fix any penalty up to one hundred pounds, according to the circumstances, in my view once they have fixed that penalty, they must then add to it the additional penalty prescribed by the sub-section. The use of the words 'together with an additional penalty' show that the legislature is dividing the penalty up into two components, namely, penalty and additional penalty. The Act does not say together with an additional penalty of not more than 10 shillings per hundredweight, but fixes a standard in respect of which there is no discretion . . . I think that the words 'an additional penalty' show that the intention of the legislature was that the additional penalty was to be imposed in every case in which there was a conviction, and that the discretion as to the amount was confined to the penalty proper.

In *Byrne v. McLeod*[83] the interpretation of the formula 'not less than £50 nor more than £500 and in addition treble the amount of tax payment whereof he has avoided or attempted to avoid' was in issue. The question was whether the offender was liable to a fixed penalty of treble the amount of tax avoided or attempted to be avoided plus a penalty of a discretionary amount of between £50 and £500, or was liable to a discretionary fine which could neither be less than £50 nor greater than treble the amount of such tax and £500 added together. The majority of the High Court (Gavin Duffy C.J., Rich, Evatt and McTiernan JJ.) held that:[84]

> The words mean to confer upon the competent tribunal one, but only one, discretionary power, namely, to fix the amount of the fine between the amounts of £50 and £500; but the penalty so imposed is, in all cases, to be supplemented by an order for the payment of treble the amount of tax avoided or attempted to be avoided. We agree that, so interpreted, the provision is very drastic in character, but that is explained by the fact it can only be applied to cases of wilful or fraudulent attempts to evade payment of the tax.

The dissenting judges Dixon and Starke JJ. denied that the treble tax was a mandatory addition to the penalty. Both drew attention to what is now s. 41 of the Acts Interpretation Act 1901 (Cth) which declares that pecuniary or other penalties set out at the foot of any section or sub-section of any Act indicates that the contravention of the relevant provision is punishable upon conviction by a penalty 'not exceeding the penalty mentioned'. The reference to the punishment *not exceeding* the stated penalty implied that the legislature had intended to repose in the court generally the authority to determine the sanction and this included a discretion to fix a lesser penalty than that prescribed in the particular statute creating the offence. Dixon J. went on to say that although he suspected that the real intention of the draftsman was 'to make the second or additional part of the penalty absolute and not a maximum only', this was only surmise and he would need to be directed by greater certainty in the drafting of the penalty clause to adopt an interpretation which excluded the general discretion granted by the Commonwealth Acts Interpretation Act 1901 and resulted in the imposition of such a rigid and harsh penalty.[85] To compound the interpretive difficulty, it is to be noted that both s. 41 of the Acts Interpretation Act 1901 (Cth) and the equivalent provision in s. 3 of the Penalties and Sentences Act 1981

[83] (1934) 52 C.L.R. 1.
[84] *Ibid.* 5-6.
[85] *Ibid.* 8.

(Vic.) operate only in cases where the pecuniary or other penalty is set out at the foot of a section or sub-section of an Act of Parliament. Thus, even if the interpretation by Dixon and Starke JJ. of the overriding effect of these provisions is good, the operation of the Acts Interpretation Act 1901 (Cth) may be excluded by locating the penalty provision elsewhere or by wording which sufficiently evinces an intention to exclude its operation. *R. v. Booth*[86] was such a case. It concerned a since repealed provision under the Immigration Act 1901 (Cth) which made the owner, agent etc. of a ship 'liable . . . to a penalty of £100 for each . . . stowaway'. Here again, the issue was whether the £100 penalty was a fixed and irreducible minimum or whether it was merely a maximum. Davidson J. referred to s. 41 of the Acts Interpretation Act 1901 (Cth) and ruled that since, in the section creating the offence, the penalty was not to be found 'at the foot of the section' as required, but was incorporated in the 'concluding words', s. 41 did not operate. Street C.J. examined the various ways in which penalties were imposed in the Immigration Act 1901 (Cth) and noted that while sometimes sanctions were to be found listed at the foot of a section creating an offence, in some places, as in the section before the court, they were placed within the body of the section, and yet other sections did not directly provide for a punishment but relied instead upon general penalty provision elsewhere. He too agreed that s. 41 of the Acts Interpretation Act 1901 (Cth) was only applicable where the penalty was literally at the foot of the section. Because this was not so in the present case, and also because the words 'not more than' did not precede the penalty, he found that the amount of the fine was not subject to judicial discretion. The existence of the phrase 'liable to a penalty' was not inconsistent with this interpretation; it merely described the consequence of a conviction rather than denoting the potential application of a maximum penalty.

2.11 *Destination of Fines*

Normally monetary penalties are payable to the Crown and, under the Victorian Constitution,[87] all revenue is to form a consolidated revenue fund to be appropriated for the purposes of the state. Commonwealth revenues are, by s. 81 of the Commonwealth Constitution, required to form one consolidated revenue fund to be appropriated for the purposes of the Commonwealth. The state Constitution does not prevent the Victorian government later passing Acts directing that fines or other revenues be paid into separate funds and many such funds have, in fact been created. But it is doubtful, because of the supremacy of the Commonwealth Constitution, whether the Commonwealth parliament is similarly competent to enact legislation requiring federal fines to be directly credited to separate funds.[88]

[86] (1948) 48 S.R.N.S.W. 16.
[87] Constitution Act 1975, s. 89.
[88] Campbell E., 'Parliamentary Appropriations', (1971) 4 *Adelaide Law Review* 145, 148-9.

It is therefore rare to find such arrangements provided for by Commonwealth statutes.[89] However a penalty may not be regarded as falling within s. 81 if the provision made for its application evinces an intention that it should not be treated as public revenue. Thus if the Act imposing a penalty directs that part is to be paid to an informant or other aggrieved party and the balance to the Crown, the portion directed to be paid to the informant is not revenue at all and need not be paid into the consolidated revenue fund.[90] The position under the Victorian Constitution regarding receipt of monies into consolidated revenue is supplemented, so far as fines and other monetary penalties are concerned, by s. 6 of the Penalties and Sentences Act 1981 (Vic.) which confirms that, where no other mode of appropriating or applying fines, penalties or other pecuniary obligations imposed under any Act is prescribed, they are to go to consolidated revenue and where, by statute, only a portion of a penalty is appropriated for a particular purpose and no provision is made for the disposition of the balance, the latter also is to form part of consolidated revenue. This covers the disposal of fines imposed for indictable and summary offences under Act such as the Crimes Act 1958 (Vic.), Poisons Act 1962 and Police Offences Act 1958 which contain no direction regarding the manner in which fines are to be accounted for. However more than 80 other statutes, principally those creating summary offences, contain specific directions regarding the allocation of pecuniary penalties. Included amongst such legislation is the Environment Protection Act 1970,[91] Litter Act 1964,[92] Lotteries, Gaming and Betting Act 1966,[93] Motor Boating Act 1961,[94] Motor Car Act 1958,[95] Road Traffic Act 1958[96] and the Summary Offences Act 1966.[97]

Very few of the Acts are concerned to direct that monetary penalties be applied to provide reparation or compensation for those directly harmed by the offender. One such rare example is to be found in s. 64(2) of the Coal

[89] See National Parks and Wildlife Conservation Act 1975 (Cth), s. 46(1)(d). This sub-section is explicable if it is regarded as amounting to a permanent appropriation of fines received under the Act from the Commonwealth Consolidated Revenue Fund to the fund created under the Act. See also Customs Act 1901 (Cth), s. 261 which must also be regarded as making a permanent appropriation from Consolidated Revenue when it provides that all penalties and forfeitures are to be 'applied to such purposes and in such proportions as the minister may direct'.

[90] Campbell, *op. cit.* 146. See Common Informers (Parliamentary Disqualifications) Act 1975 (Cth), s. 3(1); Conciliation and Arbitration Act 1904 (Cth), s. 120; Defence Act 1903 (Cth), s. 118A(5); Designs Act 1906 (Cth), s. 32(2); Re-establishment and Employment Act 1945 (Cth), ss. 19(1)(a) and 33(2).

[91] S. 48A(7) fines to municipal fund where informant municipal officer.

[92] S. 4(2)(a) fines to municipal fund, authority under the Act or consolidated revenue.

[93] S. 81 half the fine is payable to the informant and half to the consolidated fund, but where the informant is a policeman, all goes to consolidated revenue.

[94] S. 32(2)(a)-(c) fines payable to the tourist fund or fund of authority under the Act.

[95] S. 22AA(1), 21B(2E), 67(2), 70(3), 90(4) fines payable variously to consolidated revenue, Motor Accidents Board and Transport Regulation Fund.

[96] S. 7(2) fines payable to one of 26 different funds depending on who is informant.

[97] Ss. 30(9), 62(a), 62(b) fines either all to treasurer of municipality for public use, half to treasurer and half to consolidated revenue, or half to informant and half to consolidated revenue. Where informant a policeman, all goes to consolidated revenue.

Mines Act 1958 (Vic.) which expressly permits the fine to be applied for the benefit of the person injured or, if he has been killed, his representative. Another is to be found in the Marine Stores and Old Metals Act 1958 (Vic.) s. 49, which provides that the penalty may be applied wholly or in part to compensate persons for the wrong or damage sustained, or for the expenses of the proceedings under the act.[98] But such direct consideration for victims is unusual. Sometimes aggrieved parties can take the benefit of the penalty if they appear as informants. While a few statutes allow for the entire penalty to be paid to the informant,[99] in many more, monetary penalties recovered are to be divided equally between the informant and consolidated revenue or some other fund.[1] But the pattern of the legislation in such cases is that if the informant is a police officer, the share to which he would otherwise be entitled may not be received personally, but is to be paid into the consolidated fund[2] or to the police superannuation fund.[3] This principle extends beyond the police force to other initiating officers and thus, where the informant is an officer of a municipality or other government agency, his entitlement will ordinarily go to that local government body or instrumentality.[4] Under the Summary Offences Act 1966 (Vic.), municipalities also take a portion of the proceeds of fines, penalties or forfeitures imposed for breaches of that Act within their municipal district.[5] Under other Acts, receipts will be paid either directly to the treasurer of the municipality for public uses or will be divided equally between the municipality and the consolidated fund.[6] Where regulatory bodies or administrative authorities are established with power to initiate prosecutions, it is usual to find that legislation creating offences includes arrangements for fines for breaches to be paid in full or in part to the body or authority to meet their costs or to be used in the advancement of their objectives.[7] The

[98] See also Designs Act 1906 (Cth), s. 32(2).

[99] Constitution Act Amendment Act 1958, s. 237(1); Melbourne and Metropolitan Board of Works Act 1958, s. 30; Constitution (Cth), s. 46; Common Informers (Parliamentary Disqualification) Act 1975 (Cth), s. 3(1).

[1] Cemeteries Act 1958, s. 53; Constitution Act Amendment Act 1958, s. 313(2); Health Act 1958, ss. 334, 450(1); Lotteries Gaming and Betting Act 1966, s. 81; Pawnbrokers Act 1958, s. 39; Summary Offences Act 1966, s. 62(b); Theatres Act 1958, s. 11(2). Under Health Act 1958, s. 361 the proportion is 2/3 to the informant and 1/3 to consolidated revenue.

[2] Housing Act 1958, s. 113G; Lotteries Gaming and Betting Act 1966, s. 81; Litter Act 1964, s. 4(2)(c); Road Traffic Act 1958, s. 7(2)(a).

[3] Auction Sales Act 1958, s. 42.

[4] Dog Act 1970, s. 31(a); Environment Protection Act 1970, s. 48A(7); Health Act 1958, s. 450(2); Housing Act 1958, s. 113G; Motor Boating Act 1961, s. 32(2)(b); Road Traffic Act 1958, s. 7(2)(b)-(gd); Weights and Measures Act 1958, s. 83(4)(a)-(b).

[5] Ss. 30(9) and 62(b).

[6] Dog Act 1970, s. 31(a); Litter Act 1964, s. 4(2)(a); Local Government Act 1958, ss. 56(1), 467, 893; Road Traffic Act 1958, s. 7(2)(b).

[7] Anzac Day Act 1958, s. 4A(1) and (2); Cattle Compensation Act 1967, s. 10(2)(c); Chiropodists Act 1968, s. 12(3); Chiropractors and Osteopaths Act 1978, s. 18(1) and (2); Dentists Act 1972, s. 44(4); Dieticians Registration Act 1958, s. 10(4); Friendly Societies Act 1958, s. 39; Geelong Harbor Trust Act 1958, s. 121; Geelong Waterworks and Sewerage Act 1958, s. 165; Hairdressers Registration Act 1958, s. 10(6); Harbor Boards Act 1958, ss. 96(4) and 119; Housing Act 1958, s. 113G; Industrial Training

most comprehensive of such provisions is contained in s. 7(2) of the Road Traffic Act 1958 (Vic.) which contains 30 sub-sections directing the distribution of fines and penalties received under the Act for traffic violations to some 26 different funds or bodies.

2.12 *Payment of Fines by Others*

Though punishment is predicated on the offender's personal responsibility for his role in the offence, where the sanction takes the form of a fine, there is no corresponding requirement that it be exacted from the offender in person. It may be voluntarily paid by others, or involuntarily recovered from third parties under legislation which can be used to compel them to assume liability for another's monetary penalty. No statistics exist on the frequency and pattern of payments by third parties, but the practice seems well established with parents paying their children's fines, husbands those of their wives (or vice versa) and employers those of their employees particularly, in the latter case, where the risk of incurring minor fines is regarded as a necessary incident of employment, for example, traffic and parking fines. Unions have also been known to contribute to the payment of their members' fines, particularly if imposed for convictions earned in the course of advancing labour interests in industrial disputes. Relatives, friends, co-workers and sympathisers may similarly provide the wherewithal to prevent imprisonment for non-payment and complete strangers have been known to intervene, often anonymously, to extinguish another's liability, frequently doing so in defiance of the offender's desire that the fine not be paid so that some cause or issue in which he has an interest will gain publicity from the imprisonment which follows default.[8]

In *Viner and Ors v. Australian Building Construction Employees' and Builders Labourers' Federation and Ors*[8a] fines were imposed upon the Federation, its General Secretary and an organizer, for contempt of court. Previous fines against the Federation had been paid by anonymous donors

Act 1975, s. 57(i); Land Surveyors Act 1958, s. 15(1); Latrobe Valley Act 1958, s. 60(c); Legal Profession Practice Act 1958, ss. 53(3)(ba) and 101; Liquor Control Act 1968, s. 155(2)(b); Marine Act 1958, s. 7; Markets Act 1958, s. 39; Metropolitan Fire Brigades Act 1958, s. 77(2); Port of Melbourne Authority Act 1958, s. 115(1); Melbourne and Metropolitan Board of Works Act 1958, ss. 254 and 289(1); Melbourne and Metropolitan Tramways Act 1958, s. 122(1)(a)(ii); Mines Act 1958, ss. 444(4) and 499(c); Motor Boating Act 1961, s. 32(2)(a)-(c); Motor Car Traders Act 1973, s. 48(2)(a); Nurses Act 1958, s. 39(2); Optometrists Registration Act 1958, s. 22(1); Pharmacists Act 1974, s. 36; Physiotherapists Act 1978, s. 21(1); Psychological Practices Act 1965, s. 12; Racing Act 1958, ss. 46(2) and 76(2); Swine Compensation Act 1967, s. 10(2)(c); Veterinary Surgeons Act 1958, s. 28; Water Act 1958, ss. 168, 246, 247 and 383; Wildlife Act 1975, s. 64.

[8] It has been suggested that some sort of injunction process is needed so that a likely third party payer could be enjoined from meeting the fine: Samuels A., 'The Fine: The Principles', [1970] *Criminal Law Review* 201, 209. An application for an injunction is pertinent where it is alleged that the third party *e.g.* a company or union is acting *ultra vires: Drake v. Morgan* [1978] I.C.R. 56 (Q.B.D.).

[8a] Unreported judgment of Keely J., Federal Court of Australia, Industrial Division, Victoria, 18/5/82.

and in the light of this, the Court ordered that the fine be paid by the Federation, or 'by an agent properly authorized in writing' by the Federation 'to make such payment on its behalf'. The Court also directed its Registrar that if he was in any doubt as to whether a person seeking to pay the fine was properly authorized, then he was to refer the matter back to the Court for further determination. In explaining the wording of this order, Keely J. noted that the fine would lack a deterrent impact if it were known that some other person paid the fine 'whether through fear, philanthropy or foolishness'. Just as the Court would not permit one person to serve another's term of imprisonment, so it would not allow another person to directly pay the defendant's fine:[8b]

> But it is clear that a person or body which has been fined and is offered money with which to pay the fine could, if he or it wished, decline the offer refuse to pay the fine and suffer whatever consequences the law provides in such a case. It could be said that the payment of the fine by some person not authorised by him to do so constitutes an interference with his freedom to choose to refuse to pay the fine. On the other hand, where a person who has been fined pays the fine, using money given to him for that purpose, the decision to pay the fine is his — and it cannot later be contended that he did not pay the fine.

On appeal to the Full Federal Court[8c] Evatt and Deane JJ. noted simply that it was 'competent' for his Honour to require that the fine be paid in such a way, and expressed the view that such an order 'could well serve as a model in the future'. The legal basis of such competence was not, however, made clear by the Court. The limited scope of the court's power is obvious. While it can prevent a defendant from flouting its authority by refusing to pay the fine or from relying on others to meet its obligation, it cannot prevent a third party from providing the defendant with means of paying the fine. By this order the defendant is provided with the opportunity to act as a martyr, but if it accepts the money and pays the fine, it suffers no financial loss and hence the deterrent impact is minimal.

It has been pointed out that while there is nothing legally untoward in one person, after an offence has been committed, agreeing to pay another person's fine,[9] an agreement to indemnify someone against fines they may incur in the future can be open to legal objection on the ground that it amounts to the encouragement of crime and that it does so sufficiently to constitute if not incitement, then at least aiding and abetting or counselling and procuring the contemplated crime to which the indemnity relates.[10] Certainly, on the civil side, the courts will decline to lend their aid to the enforcement of contracts of indemnity against criminal liability:[11]

[8b] *Ibid.* 19-20.

[8c] *Australian Building Construction Employees' and Builders Labourers' Federation and Ors v. Viner and Ors*, No. V30 of 1982, 21/7/82.

[9] *Drake v. Morgan, op. cit.* 60; Bein D., 'Payment of a Fine by a Person Other than the Defendant — Law and Policy', (1974) 9 *Israel Law Review* 325, 328-9.

[10] See Commentary [1977] *Criminal Law Review* 739-40. It might also be construed as a conspiracy to pervert or obstruct the course of justice: *R. v. Porter* [1910] 1 K.B. 369, 373.

[11] *Askey v. Golden Wine Co. Ltd* [1948] 2 All E.R. 35, 38 *per* Denning J.

> It is . . . a principle of our law that the punishment inflicted by a criminal court is personal to the offender, and that the civil courts will not entertain an action by the offender to recover an indemnity against the consequences of that punishment. In every criminal court the punishment is fixed having regard to the personal responsibility of the offender in respect of the offence, to the necessity for deterring him and others from doing the same thing again, to reform him, and, in cases such as the present, to make him and others more careful in their dealings, to make him choose with more discrimination his supplier or his servants, and to make him more exact and scrupulous in his supervision of the matters for which he is responsible. All these objects would be nullified if the offender could recover the amount of the fine and costs from another by process of the civil courts.

This is simply a manifestation of the broader rule that the courts will not assist an accused to recover expenses to which he has been put by reason of his own crimes.[12] Even from the taxation point of view, amounts incurred by taxpayers for fines and penalties and in defending proceedings in which fines and penalties are, or might be imposed, are not deductible. In *The Herald and Weekly Times Ltd v. Federal Commissioner of Taxation*[13] Gavan Duffy C.J. and Dixon J. held that penalties imposed upon an offender for breaches of the law committed in the course of exercising a trade are inflicted on him as a personal deterrent and should not be regarded as being incurred by him in his character of a trader:[14]

> The penalty is imposed as a punishment of the offender considered as a responsible person owing obedience to the law. Its nature severs it from the expenses of trading.

However, in *Federal Commissioner of Taxation v. Snowden and Willson Pty Ltd*[15] Webb J. suggested that it was arguable that a company which spent money in the defence of its employees convicted of breaches of the law in the course of its work would, in some cases, be entitled to treat such expenditure as a deductible outgoing:[16]

> Carelessness or inadvertence of employees is incidental to the conduct of many businesses and in some cases it could result in breaches of the law and fines. I have in mind more particularly traffic offences.

A series of statutory provisions permit the transmission of liability for fines from an offender to others. There is no consistency in the means by which this is achieved, but the underlying objective is to cast responsibility

[12] *Beresford v. Royal Insurance Co. Ltd* [1938] A.C. 586; Companies (Victoria) Code, s. 133(2). However, policies of indemnity against third party civil liability for the consequences of even intentional criminal acts will be enforced where such policies are required by law, *Haseldine v. Hosken* [1933] 1 K.B. 822, or if the offence is of a sufficiently minor statutory nature, *Fire & All Risks Insurance Co. Ltd v. Powell* [1966] V.R. 513; *cf.* Health Act 1958, s. 303.

[13] (1932) 48 C.L.R. 113.

[14] *Ibid.* 120.

[15] (1958) 99 C.L.R. 431.

[16] *Ibid.* 441. Applied in *Magna Alloys and Research Pty Ltd v. Federal Commissioner of Taxation* (1980) 33 A.L.R. 213, where the Federal Court held that the legal costs of defending criminal proceedings could be deductible. In *obiter*, Deane and Fisher JJ. suggested at 240 that in appropriate circumstances even fines and penalties could be deductible. Such circumstances might include recurrent parking penalties incurred by a delivery man or a continuing penalty for unlawfully using premises contrary to zoning requirements. See also Hamilton R., 'Deductibility of Fines, Penalties and Legal Expenses', (1980) 9 *Australian Tax Review* 14; Sweeney C. A., 'Deductibility of Legal Expenses' (1981) 55 *Australian Law Journal* 299.

upon those regarded as sharing culpability with the offender though neither personally involved in the commission of the offence nor presently before the court. In some cases the arrangement resembles traditional notions of vicarious responsibility since the secondary party will actually appear before the court and be convicted. But in many others, the obligation to pay the fine, though vicariously incurred, does not carry with it the stigma of conviction. In the former category is s. 29 of the Children's Court Act 1973 (Vic.) which provides that where a child has been found guilty of an offence and has been ordered to pay a fine, damages, compensation or costs, and the court believes that the parents of the child have contributed to the offence by their wilful default or habitual neglect, it may direct the police to lay an information against one or both of the parents charging them with contributing to the offence. If they are convicted they may be directed to pay or contribute towards payment of the child's fine and other court ordered monetary obligations.[17] A number of other Acts similarly require the secondary party to be formally charged and convicted. These are principally concerned with the setting and maintenance of quality standards in the handling and sale of food and other commodities[18] but, under these Acts, the initiative in transferring responsibility rests, not with the court, but with the original defendant. If used successfully, they will lead to him being completely exempted from any penalty. Typical of such provisions is s. 50(1) of the Fruit and Vegetables Act 1958 (Vic.) which may be utilized by an accused as soon as he is charged:

> Where a vendor is charged with an offence he shall be entitled upon information duly laid by him to have any other person whom he charges as the actual offender brought before the court at the hearing of the charge and if after the commission of the offence has been proved the vendor proves to the satisfaction of the court —
>
> (a) that he used due diligence to enforce the execution of the provisions of this Part and the Regulations; and
>
> (b) that the said other person committed the offence in question without his knowledge consent or connivance and in contravention of his orders —
>
> the said other person shall be summarily convicted of such offence and the said vendor shall be exempt from any penalty. The person so convicted shall in the discretion of the court be also liable to pay any costs incidental to the proceedings.

Transmission of a fine to a secondary party without having him convicted is available under provisions such as s. 298(2) and (3) of the Health Act 1958 (Vic.) pursuant to which a convicted person, acting as the agent or servant of another may take steps to recover from his principal or employer any fine or costs imposed without having the latter charged and convicted. The enforcement of the initial penalty can be suspended for three months to enable this action to be taken, but recovery of fines from principals or employers in his way turns upon the applicant demonstrating the absence of personal culpability in respect of the offences of which he stands convicted

[17] See also Children's Court Act 1973, s. 31.

[18] Agricultural Chemicals Act 1958, s. 11(4); Fertilizers Act 1974, s. 25(2); Fruit and Vegetables Act 1958, s. 50(1); Margarine Act 1975, s. 26(1); Milk and Dairy Supervision Act 1958, s. 96; Seeds Act 1971, s. 26(1); Stock Foods Act 1958, s. 28(1).

even though, presumably, the absence of such fault was an insufficient bar to the original conviction. A related civil approach to the recovery of penalties from third parties is found in s. 303 of the Health Act. This modifies the general *ex turpi causa* rule by providing that in any action brought for breach of contract in relation to the sale of food, drugs or other substances, the plaintiff is to be entitled, in addition to any other damages recoverable, to the amount of fines and costs incurred as the result of being convicted for offences arising out of the sale, by him, of the food and substances supplied. There are a further series of general provisions which purport to extend the application of monetary penalties to employers and others on whose behalf the defendant is alleged to be acting.[19] Though the legislative intention is, at times, less clear than desirable,[20] the scope of these provisions seems more consistent with the creation of vicarious liability for both the substantive offence and the penalty, than for the penalty alone.

It has been suggested that the possibility of a fine being paid by third parties is no more relevant to the sentence than the possibility of a defendant escaping from prison.[21] Certainly the courts take the approach that fines should not be assessed in the expectation that a third party will pay them.[22] Nor is it proper to attempt to punish third parties, such as employers who it is anticipated will meet the penalty, by imposing upon a defendant a disproportionately large fine.[23] The willingness of parents, employers or others to contribute the required funds does not provide the appropriate measure of a fine; the statutory penalty limits, the nature of the offence, the degree of the offender's participation in it, and any mitigating circumstances are the primary determinants of the sanction.

2.13 *Death of the Defendant*

In *Treasury v. Harris*,[24] Lord Goddard held that if an offender at death leaves a fine unpaid, his estate must meet it. His Lordship came to this conclusion because he perceived that, in a strict sense, a fine was a debt due to the Crown and, as such, remained owing notwithstanding the demise of the defendant. Consideration of the personal nature of criminal punishment and of its objectives, particularly that of deterrence and reformation, would

[19] Geelong Waterworks and Sewerage Act 1958, s. 166; Harbour Boards Act 1958, s. 108; Labour and Industry Act 1958, s. 195; Melbourne and Metropolitan Tramways Act 1958, s. 122(4); Melbourne and Metropolitan Board of Works Act 1958, s. 255; Seeds Act 1971, s. 25; Stock Foods Act 1958, s. 27.

[20] Mines Act 1958, s. 499(b).

[21] Bein, *op. cit.* n. 9 (para. 2.12), 322.

[22] *R. v. Dodd* [1957] *Criminal Law Review* 159; *R. v. Baxter* [1974] *Criminal Law Review* 611.

[23] *R. v. Lewis* [1965] *Criminal Law Review* 121; *R. v. Po* [1974] *Criminal Law Review* 557.

[24] [1957] 2 Q.B. 516; see also Hall-Williams J. E., 'Note' (1957) 20 *Modern Law Review* 502. As to the effect of the death of a fined offendor on an appeal against sentence see *Henderson v. O'Connell* [1937] V.L.R. 171; *R. v. Jefferies* [1969] 1 Q.B. 120.

seem to militate against the logic of this approach, but his Lordship seemed motivated in part to his conclusion by a desire to retain for the courts the power to use the fine as a means of disgorging the profits of crime notwithstanding the fortuitous death of the criminal:[25]

> It seems to me that it is desirable that the Crown should be able to do so, although the man is dead . . . I do not think that there could be any doubt thrown upon the power of the court in cases of this sort, not only to punish a man for a crime which he has committed, but also to take steps to see that he should not benefit by keeping the results of the crime; and I think that it is equally important that, if a man is dead, his estate should not benefit by the proceeds of the crime.

3 ENFORCEMENT

At common law, a person sentenced to pay a fine by a superior court could be immediately imprisoned to be detained until the amount of the fine was paid; the threat of imprisonment having always been regarded as incidental to the recovery of fines.[26] If the defendant was not in custody when sentenced, the Crown was originally entitled to arrest and detain him pursuant to a writ of *capias ad satisfaciendum*,[27] the ordinary remedy by which a successful civil litigant secured the imprisonment of the judgment debtor.[28] This authorised imprisonment until the fine had been paid; the period served in no way reduced the liability to pay. As part of the statutory abolition of imprisonment for debt, detention upon a writ of *capias ad satisfaciendum* is no longer permitted in Victoria[29] and the enforcement of fines has been placed on a statutory footing. Though separate legislation exists in Crimes Act 1958 (Vic.), s. 439 and Magistrates (Summary Proceedings) Act 1975 (Vic.), Part XI to regulate procedures in the superior and lower courts, there is a considerable overlap in the enforcement provisions. They have three major features in common: first, imprisonment is retained as the preferred mode of handling fine defaulters;[30]

[25] *Treasury v. Harris, ibid.* 527-8.

[26] 'To every fine imprisonment is incident', *Beecher's Case* (1577) 8 Co. Rep. 58a, 59b, 77 E.R. 559, 564; Note, 'Enforcing Fines Upon Conviction on Indictment', (1934) 78 *Law Journal* 395; *McKinnon v. R.* (1927) 40 C.L.R. 217.

[27] *R. v. Templeman* (1701) 1 Salk. 56, 91 E.R. 54.

[28] In addition, recovery of the fine could be enforced by the writs of *fieri facias* or *levari facias* which involved execution against the property rather than the person of the debtor: *R. v. Woolf* (1819) 2 B. & Ald. 609, 106 E.R. 488; *McKinnon v. R.* (1927) 40 C.L.R. 217.

[29] Imprisonment of Fraudulent Debtors Act 1958, s. 3. The Crown's right to commence proceedings for recovery of debt in the Supreme Court by a writ of *capias ad respondendum* under the Crown Proceedings Act 1958, s. 7 is not affected by the Imprisonment of Fraudulent Debtors Act 1958: *Ex Parte Muir* [1932] V.L.R. 182, 185. See also Williams, *Supreme Court Practice*, 44.1.15. Since a fine is a Crown debt, (*R. v. Woolf* (1819) 2 B. & Ald. 609, 106 E.R. 488, *Treasury v. Harris* [1957] 2 Q.B. 516), the procedure under s. 7 theoretically remains open as a means of recovering fines. However, the mandatory wording of Crimes Act 1958, s. 439 points to a legislative intention that the specific fine enforcement procedures under this latter Act should prevail over other more general mechanisms for enforcement of Crown debts.

[30] Though, in summary matters, a preliminary levying of distress may be attempted: Magistrates (Summary Proceedings) Act 1975, s. 106(1)(h).

secondly, a maximum default period of imprisonment is prescribed;[31] and, thirdly, time served as an imprisoned fine defaulter operates, on a *pro-rata* basis, to reduce and ultimately extinguish the outstanding liability.[32]

3.1 *Supreme and County Courts*

When fines for indictable offences are imposed by the Supreme or County Courts in addition to or in lieu of other permitted punishments,[33] they become payable to the Prothonotary or Registrar either forthwith, or within such time as the sentencer allows.[34] In addition, a default period of imprisonment not exceeding two years must be fixed.[35] If no time to pay is permitted, the fine is treated as having been ordered to be paid forthwith[36] and, if not so paid, results in the immediate imprisonment of the offender.[37] If time to pay is allowed, and the appropriate payment nevertheless is not made, a warrant of commitment will be issued by the Prothonotary or Registrar to be executed by the police. Various provisions of the Magistrates (Summary Proceedings) Act 1975 (Vic.), which relate to the issue and execution of warrants of commitment for non-payment of fines in the Magistrates' Court are applied, *mutatis mutandis*, to warrants issued out of the Supreme or County Courts. These include s. 82 governing payment by instalments and s. 108 authorizing the reduction of the period of incarceration in proportion to any part payments made.

3.2 *Magistrates' Courts*

Fines imposed by courts of summary jurisdiction are also payable forthwith unless time to pay or payment by instalments is allowed. Magistrates and justices are similarly obliged to fix a default period of imprisonment whenever they fine, but apply a more refined default scale than the simple undifferentiated two year maximum prescribed in the Crimes Act 1958 (Vic.) for superior courts. The general formula is set out in s. 10 of the Penalties and Sentences Act 1981 (Vic.) which provides that, subject to any express provision to the contrary in any Act, where any court, judge, magistrate or justice imposes a fine on anyone other than a corporate offender,[38] the following default scale is to be applied:

[31] Crimes Act 1958, s. 439(1)(a) (two years); Penalties and Sentences Act 1981 s. 10 (two years).

[32] Magistrates (Summary Proceedings) Act 1975, s. 108. This section is also applicable to fines imposed by the Supreme or County Courts: Crimes Act 1958, s. 439(4).

[33] Crimes Act 1958, s. 478(2), or are imposed pursuant to other legislation which allows enforcement under Crimes Act 1958, s. 439 as though the fine was imposed for an indictable offence *e.g.* Juries Act 1967, s. 71.

[34] Crimes Act 1958, s. 439(4) incorporating Magistrates (Summary Proceedings) Act 1975, s. 82 (time to pay and payment by instalments). The time at which liability arises is discussed in *Treasury v. Harris* [1957] 2 Q.B. 516.

[35] Crimes Act 1958, s. 439(1)(b).

[36] *Rogerson v. Phillips and O'Hagan* [1906] V.L.R. 272, 278.

[37] Crimes Act 1958, s. 439(5).

[38] A fine on a corporation may be enforced in any manner in which an order for the payment of money under the Magistrates (Summary Proceedings) Act may be enforced: Magistrates (Summary Proceedings) Act 1975, s. 106(1)(i).

Number of Penalty Units	*Maximum Default Period*
Not more than 1 penalty unit	One week
More than 1 penalty unit but not more than 5 penalty units	One month
More than 5 penalty units but not more than 25 penalty units	Six months
More than 25 penalty units but not more than 50 penalty units	One year
More than 50 penalty units	Two years

Different default schedules are to be found in the Protection of Animals Act 1966 (Vic.), s. 20A and under Commonwealth legislation[39] Where, as is often the case in lower courts the defendant is not present when the fine is imposed, advice of the penalty must be posted to his address and payment does not become due for a further 21 days after the notice of fine has been sent.[40] And, in such cases, no warrant of commitment is to be executed against the defendant unless the amount owing remains unpaid for at least seven days after payment has been demanded personally by a member of the police force who, at the same time, has also provided the defaulter with a written statement advising him of his right to apply for time to pay or to make payments by instalments under s. 82 or for a re-hearing of the matter under Magistrates (Summary Proceedings) Act 1975 (Vic.) s. 152 and s. 153.[41] By s. 106(1)(h), the informant may request that an initial attempt be made to recover the amount of the fine by levying distress. A court which accedes to such an application will order that the fine be levied by distress but, simultaneously, will fix a term of imprisonment as an ultimate remedy for default. If the police officer executing the distress warrant makes a *nulla bona* return, the defaulter will be committed to prison without further court proceedings. For the purposes of s. 106(1), a fine includes any costs ordered to be paid by the person or corporation fined,[42] and the key enforcement provisions of s. 106 of the Magistrates (Summary Proceedings) Act 1975 (Vic.) are, by s. 85(1), expressly made applicable to fines imposed under the alternative procedure available for hearing informations for certain motoring and other offences under Part VII of the Act.

[39] The following default imprisonment formula is generally prescribed in respect of offences under Commonwealth revenue statutes:

Amount of Fine	*Maximum Default Period*
$4 and under	Seven Days
Over $4 and not more than $10	Fourteen Days
Over $10 and not more than $40	One Month
Over $40 and not more than $100	Two Months
Over $100 and not more than $200	Three Months
Over $200 and not more than $400	Six Months
Over $400	One Year

See Income Tax Assessment Act 1936 (Cth), s. 248; Payroll Tax Assessment Act 1941 (Cth), s. 62; Royal Commissions Act 1902 (Cth), s. 14; Sales Tax Assessment Act No. 1 1930 (Cth), s. 66; States Receipts Duties (Administration) Act 1970 (Cth), s. 80; Stevedoring Industry Charge Assessment Act 1947 (Cth), s. 55(1); Wool Tax (Administration) Act 1964 (Cth), s. 84.

[40] Magistrates (Summary Proceedings) Act 1975, s. 106(1)(d).

[41] *Ibid.* s. 106(1)(f)(i) and (ii).

[42] *Ibid.* s. 106(3).

3.3 *Children's Courts*

The enforcement provisions of the Magistrates (Summary Proceedings) Act 1975 (Vic.) are not applicable to the recovery of fines imposed by a Children's Court.[43] A Children's Court which orders a child to pay a fine or damages or compensation may permit time to pay and allow for payment by instalments, but it also has power to order that, in the case of default, the child be detained for a period of up to three months. Such detention is to take place either in a reception centre or in a youth training centre depending upon whether the child is below or above 15 years of age. In either case, any part payment of the fine made by or on behalf of the child will serve proportionately to reduce the detention period.[44]

3.4 *Execution Against the Person: Imprisonment*

The imprisonment of fine defaulters has been much criticised. The principal objection is that though ostensibly it is threatened only to coerce payment, its actual execution against offenders too impecunious to meet fines imposed upon them amounts to the discriminatorily harsher punishment of the poor and indigent.[45] Secondly, imprisonment in default controverts the initial sentencing assumption that the offence for which the fine was imposed warranted no more than an non-custodial disposition. Thirdly, according to Rinaldi, fine defaulters receive significantly worse treatment in prison than those conventionally jailed for crime since they are ineligible for parole and are unable to gain access to the normal classification and work allocation arrangements within the prison.[46] Fourthly, default imprisonment may involve the state in unnecessary expense. Contumacious fine defaulters, in order to advertise some cause or because of their indifference to prison, may choose to expunge their liability at state expense by voluntarily serving the default period. Though an offender may have means, the courts cannot insist that the indebtedness be met by sale of his assets or the attachment of his earnings. Notwithstanding such criticisms, s. 106 of the Magistrates (Summary Proceedings) Act now gives effect to a 1971 Statute Law Revision Committee Report[47] which recommended that Victoria adopt, as its principal mode of fine enforcement, execution against the offender's person rather than against his property. Imprisonment rather than distress is now the state's first response to non-payment of fines.

[43] Children's Court Act 1973, s. 45.

[44] *Ibid.* s. 44.

[45] 'The main paradox of imprisoning persons too poor to pay their fines is neatly captured in the ironic comment that this provides the only instance where a debtor goes to board at his creditor's house if he is unable to pay his debt': Rinaldi F., *Imprisonment for Non-Payment of Fines* (2nd ed. 1976) 23 citing Robinson, *Jails*, (1944) 64.

[46] *Ibid.* 27. Fine defaulters are, however, eligible to be granted remissions: Community Welfare Service Regulations, 1974, Div. II, Part XIVA, reg. 107B; Div. III, Part XIII, reg. 98. See also Community Welfare Services Act 1970, s. 126.

[47] Victoria, *Report of the Statute Law Revision Committee Upon Recovery of Civil Debts, Venue and Enforcement of Fines in Magistrates' Courts* (1971) paras. 69-81.

3.5 *Imprisonment and Part-Payment*

Any default period ordered to be served by a Victorian Court, or being enforced in Victoria under the Service and Execution of Process Act 1901 (Cth), may be reduced by part-payment of the fine. The Magistrates (Summary Proceedings) Act 1975 (Vic.), s. 108(1) states that:

> the term of imprisonment for which the person liable may be committed shall be reduced by a number of days bearing as nearly as possible the same proportion to the total number of days in such term as the amount paid bears to the whole amount[48] of the fine.

Where part-payment is made before a warrant of commitment is issued, the fact of reduction must be noted on the warrant itself, but payment may also be made while the defaulter is in prison. Part-payment of the unsatisfied amount reduces the outstanding period of imprisonment while full payment entitles the prisoner to be completely discharged.[49] By Crimes Act 1958 (Vic.) s. 439(4), the s. 108 formula is made applicable to default periods fixed by the Supreme and County Courts and like wording is to be found in the Children's Court Act 1973 (Vic.)[50] and the Service and Execution of Process Act 1901 (Cth).[51] The provisions of s.108 which allow liability to be reduced by time served, prevail over any other Act which purports to require imprisonment to continue until the fine is fully paid.[52] It is subject only to s. 26 of the Imprisonment of Fraudulent Debtors Act 1958 (Vic.). This section expressly excludes the impact of s. 108 from Part III of the Imprisonment of Fraudulent Debtors Act which is an Act designed to punish recalcitrant civil debtors by imprisonment without the prison term operating to reduce or extinguish the debt.

3.6 *Service of the Default Period*

The general legislative principle in Victoria is that multiple sentences of imprisonment are to be served cumulatively unless otherwise directed by the sentencing court.[53] In most cases, concurrency or partial concurrency of sentences is in fact ordered. Default periods of imprisonment are also to be served cumulatively upon existing incomplete prison sentences, whether or not those prior terms were imposed for failure to pay fines or as 'ordinary' sentences. However no concurrency with these incomplete sentences is permitted:[54]

[48] 'Whole amount' is declared in s. 108(5) to mean the fine (defined in s. 107(1) to include costs payable pursuant to the original conviction) together with the additional charges of commitment and conveying to prison.

[49] Magistrates (Summary Proceedings) Act 1975, s. 108(1)-(4).

[50] S. 44(3)-(5).

[51] S. 26F(3)(b). See also ss. 26H(2)(d) and 26L(2)(d).

[52] Magistrates (Summary Proceedings) Act 1975, s. 108(6).

[53] Community Welfare Services Act 1970, s. 123(1); Magistrates (Summary Proceedings) Act 1975, s. 109(2). See also Community Welfare Services Act 1970, s. 99 and Magistrates (Summary Proceedings) Act 1975, s. 108(7).

[54] Community Welfare Services Act 1970, s. 123(2).

> Every term of imprisonment imposed upon a person in default of payment of a fine or sum of money shall, notwithstanding anything to the contrary in any Act, be cumulative upon any uncompleted sentence of imprisonment or term of imprisonment in default of payment of a fine or sum of money previously imposed upon the person by a court judge or justice and shall not merge or be concurrent with or be otherwise extinguished or reduced by any sentence of imprisonment or term of imprisonment in default of payment of a fine or sum of money subsequently imposed upon the person by a court judge or justice.

The reference to both a subsequently imposed 'sentence of imprisonment' and a 'term of imprisonment in default' makes it clear that neither can be ordered to be served concurrently with an existing uncompleted default period. Further, the Magistrates (Summary Proceedings) Act 1975 (Vic.), s. 106(1)(g) directs that where a sentence is both one of fine and imprisonment and the offender defaults in payment of the fine, his committal in default is to be cumulative upon his existing prison term. Warrants of commitment may be delivered to the prison prior to the expiry of previous prison sentences, but they are not to be executed until the offender becomes entitled to be discharged or otherwise released.[55] And where a number of warrants are so delivered, the terms of imprisonment specified in them are to be served, so far as practicable, in the sequence in which the fines were imposed.[56] Where a child is detained under s. 44 of the Children's Court Act 1973 (Vic.) in a reception centre or Youth Training Centre for failure to pay two or more fines or sums by way of damages or compensation, the periods of detention in default are to be cumulative upon each other and, where the child is already under an order for detention in a Youth Training Centre, they shall be cumulative upon this other period as well.[57] These Children's Court provisions are subject to the important limitation that, if the aggregate of all such sentences exceeds three years, the length of the default term will be deemed to have been reduced to a period that will ensure that the aggregate does not exceed the general three year maximum for detention prescribed under the Act.[58]

3.7 *Execution Against Property: Distress and Attachment of Earnings*

Prior to the passing of the Magistrates (Summary Proceedings) Act in 1975, most summarily imposed fines were initially enforced by the levying of distress, *i.e.* the seizure and sale of the offender's goods and chattels. Distress is only of value when used against those who have goods, money, or valuable securities which can be seized and realized to pay the fine. Because it was alleged that the courts and police were overburdened by the time consuming requirements involved in issuing and executing distress

[55] *Ibid.* s. 123(3). See also s. 99(2) for offenders sentenced to terms in Youth Training Centres.
[56] *Ibid.* ss. 123(4) and 99(3).
[57] Children's Court Act 1973, s. 44(2)(a). Community Welfare Services Act 1970, s. 99(4) provides that although the warrant commits the offender to prison, the default period may be served at a Youth Training Centre if the offender is already there.
[58] Children's Court Act 1973, s. 44(2)(b).

warrants (more often than not only to have them returned *nulla bona*), the Victorian Statute Law Revision Committee recommended the abolition of distress as a means of recovering fines imposed in Magistrates' Courts.[59] Effect was purportedly given to this recommendation by the passing of s. 106(1)(a) of the Magistrates (Summary Proceedings) Act, but its abolition of distress as a remedy for non-payment of fines is not complete. The relevant portion of s. 106 reads:

> (1) Notwithstanding anything in any Act where a Magistrates' Court stipendiary magistrate or justice imposes a fine the following provisions shall apply —
>
> (a) The fine shall not be or be ordered to be levied by distress except as provided in this Part . . .

While the opening words of s. 106(1) evince an intention that the section is to prevail over provisions in other Acts permitting fines to be enforced by levying distress,[60] four situations exist in which distress may continue to be utilized. First, under s. 106(1)(h) the court may agree to an application by the informant that a preliminary levying of distress take place prior to the issuing of a warrant of commitment. Secondly, a warrant of distress may be issued against a corporate body to enforce an interstate fine under the reciprocal arrangements established pursuant to Magistrates (Summary Proceedings) Act 1975 (Vic.), s. 107. Thirdly, distress remains available as a fine recovery mechanism in all those cases in which the legislature has expressly provided that a fine or pecuniary penalty is to be recovered as a civil debt[61] or debt due to the Crown.[62] While this has special application to corporate offenders for whom default imprisonment is meaningless,[63] the Acts which permit civil processes to be used do not confine their application only to corporate entities. Some restrict the steps which may be taken to those available in a court of summary jurisdiction, but others, presumably those anticipating that the sums involved will exceed the jurisdictional limits of Magistrates' Courts, permit recovery to be pursued in any court of competent jurisdiction.[64] By invoking civil means of enforcing penalties in certain cases, the legislature indicates that it does not want imprisonment to be used as an aid to recovery. Only execution against property, through the levying of distress under Part XII of the Magistrates

[59] Victoria, *Report of the Statute Law Revision Committee Upon Recovery of Civil Debts, Venue and Enforcement of Fines in Magistrates' Courts* (1971) paras. 69-81.

[60] *E.g.* Hawkers and Pedlers Act 1958, s. 23; Marine Act 1958, s. 246; Pawnbroker's Act 1958, s. 39 and Unlawful Assemblies and Processions Act 1958, s. 23.

[61] Conciliation and Arbitration Act 1904 (Cth), ss. 121 and 148; Commercial Goods Vehicles Act 1958, s. 33; Hospitals and Charities Act 1958, s. 70(4); Latrobe University Act 1964, s. 42A(1); Melbourne and Metropolitan Board of Works Act 1958, s. 122; Railways Act 1958, s. 25; Water Act 1958, ss. 168 and 247.

[62] Local Government Act 1958, s. 174(3); Scaffolding Act 1971, s. 15(12).

[63] Magistrates (Summary Proceedings) Act 1975, s. 106(1)(i).

[64] Conciliation and Arbitration Act 1904 (Cth), ss. 121 and 148; Local Government Act 1958, s. 174(3); Scaffolding Act 1971, s. 15(12); Water Act 1958, s. 168; Railways Act 1958, s. 25.

(Summary Proceedings) Act[65] or the attachment of earnings and other assets under Part XIII (or the equivalent remedies in the higher courts),[66] are to be relied upon to secure compliance with monetary orders made under those Acts. Finally, it should be noted that certain federal revenue statutes specifically authorize the levying of distress to enforce unpaid pecuniary penalties or other sums due under the relevant Act.[67]

3.8 *Set-Off*

A number of federal and state Acts[68] expressly allow for fines and other pecuniary penalties (both those imposed by courts and those in the form of disciplinary mulcts)[69] to be directly deducted from salaries of persons employed under the relevant statute or otherwise to be set-off against monies due to the offender. In addition, under federal revenue statutes, power is often given to the revenue raising authority to directly attach all debts owing or accruing to an offender in order to satisfy fines, costs and other penalties incurred by him.[70]

3.9 *Security for Penalty*

The Bail Act 1977 (Vic.), s. 11 allows persons apprehended for offences against certain sections of the Summary Offences Act 1966 (Vic.) (public drunkenness, drunk and disorderly, obscene or offensive language or behaviour *etc.*)[71] to be released by police upon them making a deposit of an amount, not in excess of $50, as security for the payment of any penalty which may later be imposed. The charge may be heard in the accused's absence and if on conviction he is fined, his deposit is appropriated towards the payment of the fine. Any surplus is refunded to the accused if he appears to claim it, otherwise it is paid into consolidated revenue. Under the

[65] See also Evidence Act 1958, s. 110A regarding jurisdiction of justices in relation to distress warrants.

[66] Supreme Court Rules Order 43 (Execution), Order 43 (Writ of *Fieri Facias*), Order 45 (Attachment of Debt), Order 45A (Attachment of Earnings); County Court Rules, Order 29, Rule 10 (Warrant of Execution) Order 29, Rules 34 and 43 (Attachment of Debt or Earnings).

[67] Customs Act 1901 (Cth), s. 259; Income Tax Assessment Act 1936 (Cth), s. 247(1); Payroll Tax (Assessment) Act 1941 (Cth), s. 61(c); Royal Commissions Act 1902 (Cth), 12(c); Sales Tax (Assessment) Act (No. 1) 1930 (Cth), s. 65(c); States Receipts Duties (Administration) Act 1970 (Cth), s. 79(c); Stevedoring Industry Charge Assessment Act 1947 (Cth), s. 54(c); Wool Tax (Administration) Act 1964 (Cth), s. 83(1)(c).

[68] Defence Act 1903 (Cth), s. 107; National Service Act 1951 (Cth), s. 57D(1) and (2); Public Service Act 1922 (Cth), s. 65(1) and (2); Cooperation Act 1958, s. 64(2); Country Roads Act 1958, s. 121; Health Act 1958, s. 398(1); Industrial Training Act 1975, s. 57(i); Local Government Act 1958, s. 467; Metropolitan Fire Brigades Act 1958, s. 78B(9); Parliamentary Officers Act 1975, s. 22; Police Regulation Act 1958, s. 90(3); Public Service Act 1974, s. 66; Water Act 1958, s. 168.

[69] See paragraph 2.5 *supra.*

[70] Income Tax Assessment Act 1936 (Cth), s. 218(1); Payroll Tax Assessment Act 1941 (Cth), s. 36(1); Sales Tax Assessment Act (No. 1) 1930 (Cth), s. 38(1); Stevedoring Industry Charge Assessment Act 1947 (Cth), s. 32(1); Wool Tax (Administration) Act 1964 (Cth), s. 54(1).

[71] Summary Offences Act 1966, ss. 13, 14, 16 and 17.

Protection of Animals Act 1966 (Vic.), s. 16, police may take charge of a vehicle or animal owned by a person arrested for cruelty and may retain that vehicle or animal as security for payment of any penalty or expenses to which the person may become liable. If a conviction is obtained, the court may order that in default of payment the vehicle or animal be sold to satisfy the fine and expenses incurred. A more indirect form of obtaining security against possible future fines is contained in s. 21 of the Printers and Newspapers Act 1958 (Vic.). This requires printers and publishers of all newspapers to enter into recognizances for the sum of $600 with two like sureties prior to the publication of their newspapers. These recognizances are conditioned upon an undertaking that the printer or publisher will pay any fines or penalties which may be subsequently imposed upon them for printing or publishing blasphemous or seditious libels. Under federal law, a number of Acts also allow courts to release offenders upon their giving security for payment of penalties imposed.[72]

3.10 *Other Forms of Execution: Community Service*

In 1979 the Victorian Sentencing Alternatives Committee recommended the enactment of legislation to allow offenders who had been fined, and who lacked the means to pay, the option of performing some form of community service in lieu of the imprisonment in default of payment that would otherwise follow.[73] The committee offered this as a more constructive and cost-effective alternative to imprisonment, and one which possessed the advantage of providing a disposition for defaulters which was consistent with the view of the legislature or the sentencing court that a custodial sentence is not appropriate for the offence in question. The Penalties and Sentences Act 1981 (Vic.) by s. 15(3) partially implements this recommendation by allowing a community service order to be made 'in any case where the court may direct or has directed that the offender be imprisoned in default of payment of a fine'. This means that, on performance of the number of hours of unpaid community service specified in the order (not less than 20 and not more than 360 hours in aggregate),[74] liability for the fine will be expunged irrespective of the monetary value of the work performed. The wording of s. 15(3) is also apt to deal with offenders who, though apparently able to meet the fine when it is imposed, find that subsequently their financial circumstances have deteriorated to the extent that they are facing imprisonment in default. It is not possible, under

[72] Income Tax Assessment Act 1936 (Cth), s. 247(1)(b); Payroll Tax Assessment Act 1941 (Cth), s. 61(b); Royal Commissions Act 1902 (Cth), s. 12(b); Sales Tax Assessment Act (No. 1) 1930 (Cth), s. 65(b); States Receipts Duties (Administration) Act 1970 (Cth), s. 79(1)(b); Stevedoring Industry Charge Assessment Act 1947 (Cth), s. 54(b); Wool Tax (Administration) Act 1964 (Cth), s. 83(1)(b).

[73] Victorian Sentencing Alternatives Committee (Nelson Committee), *Sentencing Alternatives Involving Community Service* (1979) paras. 55-78.

[74] S. 15(1).

existing law, for an offender in such a situation to return to the sentencing court for a variation of the initial sentence (other than by obtaining time to pay or the opportunity to pay by instalments), but he may seek a community service order as a means of avoiding the imprisonment that would otherwise follow.[75]

3.11 *No Procedure for Enforcement*

Where an Act creating offences punishable by a fine makes no specific provision for the enforcement of the penalty, or merely provides that it is to be recovered summarily or before one or more justices, or uses any other words implying that the fine is to be recovered before a Magistrates' Court,[76] Magistrates' Courts Act 1971 (Vic.), s. 55(1) operates (unless expressly excluded) to make the Magistrates' Court the applicable forum for fine recovery. In so doing it impliedly anticipates that Part XI of the Magistrates (Summary Proceedings) Act 1975 (Vic.) will provide the appropriate enforcement machinery. To aid in the exercise of this jurisdiction, s. 50(1)(e) of the Magistrates' Courts Act empowers a Magistrates' Court to make the orders necessary to enforce the payment of fines under Acts which detail no recovery procedures or which indicate only that recovery is to take place before justices. Similarly, s. 55(2) states that where an Act creates an offence punishable by a fine or other means, but does not specify by what court the punishment may be imposed, the prosecution may be initiated in, and the penalty imposed and enforced by a Magistrates' Court. The section has no application to any offence legislatively classified as indictable.[77]

A residual means of enforcement in the special case of fines imposed by a court or justice, otherwise than by a judgment or conviction, for example, criminal contempt,[78] is to be found in s. 4 of the Crown Proceedings Act 1958 (Vic.). This permits the imposition of the fine to be certified by the judicial officer imposing it so that it may be entered and enforced civilly as a final judgment in the Supreme Court.

[75] The legislation also makes it possible for the court, when sentencing a person charged with an imprisonable offence, to consider ordering him to pay a fine and, if satisfied that he has no means of paying it, may make a community service order under s. 15(1) instead of imprisonment or a fine. Note also Magistrates (Summary Proceedings) Act 1975, s. 106(1)(j) which provides that 'where a term of imprisonment is fixed in default of payment of a fine the court magistrate or justice may direct that subject to the provisions of the Penalties and Sentences Act 1981 a community service order be made'.

[76] *E.g.* Cattle Compensation Act 1967, s. 17(1); Commercial Goods Vehicles Act 1958, s. 33; Constitution Act Amendment Act 1958, s. 274; Friendly Societies Act 1958, s. 39; Land Act 1958, s. 410(1); Marine Act 1958, ss. 245 and 247; Mildura Irrigation and Water Trusts Act 1958, s. 93(2); Motor Car Act 1958, s. 22AA(9); Railways Act 1958, s. 25; Swine Compensation Act 1967, s. 17(1); Water Act 1958, s. 382.

[77] Magistrates' Courts Act 1971, s. 55(3).

[78] *In re Gregory* [1940] N.Z.L.R. 983, 987-8. See also Crimes Act 1958, s. 183 which also permits a monetary penalty to be imposed without a formal judgment or conviction.

3.12 *Enforcement of Commonwealth Fines*

By virtue of s. 18A(1) of the Commonwealth Crimes Act 1914, state laws with regard to the enforcement of fines, including those governing imprisonment in default of payment, time for payment, payment by instalments and the giving of security for payment of fines are, insofar as they are not inconsistent with the laws of the Commonwealth, to apply to persons convicted within the state of offences against Commonwealth laws.[79] Under s. 82 of the Judiciary Act 1903 (Cth), suits to recover pecuniary penalties and forfeitures under Commonwealth law may be brought either in the state or territory in which they accrue, or the state or territory in which the offender is found. Pecuniary penalties for any offence against any Commonwealth Act may, unless a contrary intention appears in the legislation, be recovered in any court of summary jurisdiction.[80]

3.13 *Enforcement of Commonwealth Revenue Acts*

Special arrangements apply to the enforcement of penalties imposed under Commonwealth revenue statutes. The options spelt out in s. 247(1) of the Income Tax Assessment Act 1936 (Cth) are typical:[81]

> Where any pecuniary penalty is judged to be paid by any convicted person the Court shall —
> (a) commit the offender to jail until the penalty is paid;

[79] For the position prior to the introduction of s. 18A see *De Vos v. Daly* (1947) 73 C.L.R. 509. The Crimes Amendment Act 1982 (Cth) changes some of the procedures for the enforcement and recovery of fines so far as Federal offenders are concerned by allowing a court in respect of a Commonwealth offender to make a community service order, work order or to sentence to weekend detention in default of the payment of fines: (s. 6(1)(b) amending s. 18A(1)(a)). Whilst this Act was in Bill form (Crimes Amendment Bill 1981 (Cth)) it contained provisions aimed at implementing some of the recommendations contained in the Australian Law Reform Commission's report *Sentencing of Federal Offenders* 1980 (paras. 378-86). In particular, clause 7 of the Bill allowed a person upon whom a fine has been imposed to apply for time, or further time, to pay the fine or part of it even after the period within which it was due to be paid had expired. On such applications the court would have had the power to hear evidence concerning the applicant's financial circumstances and ability to pay, and, if the circumstances warranted, it would have been empowered to: (a) grant time or further time to pay, (b) order that payment be made by instalments or to order that any existing instalments be altered, and (c) where the person had already been imprisoned in default of payment of the fine, reduce the amount of the fine by an appropriate sum having regard to the imprisonment already served. The Bill also provided that an order for imprisonment in default could not be executed unless the court was satisfied that the offender 'had the means to pay the fine and wilfully refused to pay it'. Where the court was not so satisfied, it could reduce the amount of the fine, give the offender time or further time to pay, or it could award any other punishment (not being imprisonment) in lieu of the fine (cl. 7). Pressure from various state governments, which considered that these procedures would have placed an unacceptable burden on their courts, led to the abandonment of these commendable reforms which are now not to be found in the Act as passed. *Cf.* 3.6 *supra.*

[80] Acts Interpretation Act 1901 (Cth), s. 44.

[81] See also Payroll Tax Assessment Act 1941 (Cth), s. 61; Royal Commissions Act (No. 1) 1930 (Cth), s. 12; Sales Tax Assessment Act (No. 1) (Cth), s. 65; States Receipts Duties (Administration) Act 1970 (Cth), s. 79; Stevedoring Industry Charge Assessment Act 1947 (Cth), s. 54; Wool Tax (Administration) Act 1964 (Cth), s. 83.

(b) release the offender on his giving security for the payment of the penalty; or
(c) exercise for the enforcement and recovery of the penalty any power of distress or execution possessed by the Court for the enforcement and recovery of penalties or money adjudged to be paid in any other case.

There is some controversy regarding the relationship between the three parts of this section and their effect. The aim of the section is to recover the pecuniary penalty which is the punishment for certain offences under the Act,[82] but it appears that, on conviction, the court must choose which of the three enforcement procedures is to be adopted and the choice of one operates, automatically, to exclude the other two:[83]

> In my opinion, on the true construction of s. 247, each of its paragraphs confers a power the exercise of which will exclude the subsequent exercise of the power conferred by either of the other two paragraphs. . . . The provisions of s. 247 are, I think, to be regarded as giving powers ancilliary or incidental to the power to exact a pecuniary penalty. The choice given is intended, I think, to be exercised according to the view taken by the Court of the gravity of the 'offence'. I would add two observations in conclusion. In the first place, it probably follows from the view which I have taken that, if the power of committal is exercised under paragraph (a), and the defendant is discharged from jail without payment or release at the expiration of the period which is appropriate under s. 248 [which determines the conditions of discharge from jail], the ordinary civil processes of execution cannot be invoked and the judgment debt is in effect discharged. It may, no doubt, be argued that, even if an exercise of the power given by paragraph (a) precludes a subsequent exercise of the power given by paragraph (c), the powers of enforcing a judgment which the Court possesses apart from express enactment may nevertheless be invoked. But I think myself that paragraph (c) exhaustively describes those powers, and that after commitment those powers can no longer be exercised. Nor is this nearly so surprising a conclusion as might at first sight appear. It is to be remembered once again that this legislation is traceable to a comparatively ancient origin, and to a time when a judgment creditor at common law had his choice between execution against the person of his debtor and execution against his property. It was well settled that, if he chose the former, he could not thereafter have recourse to the latter.

It is to be noted that although, under paragraph (a) the offender is to be committed to jail until the penalty is paid, s. 248(1)(c) permits discharge after service of a specified period of imprisonment[84] and it follows, from his Honour's words, that once the defendant has served his time, the revenue authority can thereafter no longer have recourse to civil execution processes notwithstanding there exists no express provision declaring that imprisonment expunges outstanding liability.

In *McGovern v. Hillman Tobacco Pty Ltd*,[85] Williams J. disagreed that if the power of committal under paragraph (a) is exercised and the defendant serves the statutory period in prison without paying the penalty, the ordinary civil processes of execution could not be used and the judgment debt was, in effect, discharged. While it was true that, at common law, a judgment creditor had his choice of execution against the person of his debtor or execution against his property the present situation was different:[86]

[82] *McGovern v. Shearer* (1949) 4 A.I.T.R. 192, 194. See also *Casley v. Commonwealth* (1980) 30 A.L.R. 38.
[83] *Jackson v. Gromann* [1948] V.L.R. 408, 412 *per* Fullagar J. *McGovern v. Hillman Tobacco Pty Ltd* (1949) 4 A.I.T.R. 272.
[84] The period varies, to a maximum of one year, with the amount of the penalty.
[85] (1949) 4 A.I.T.R. 272.
[86] *Ibid.* 277.

> . . . the judgment creditor in this case represents the Crown, and the judgment creates a debt to the Crown of record and payable instanter. The principle of the common law is the Crown 'who represents the public is entitled to levy for its debts by a united process against the body, goods, and lands of its debtor', *R. v. Woolf* (1819) 2 B. & Ald. 609; *Re Pascoe* [1944] 1 Ch. 310. In the light of this principle, it is difficult to see why the debt should be discharged otherwise than by payment.

In his Honour's view the proper interpretation of the section is that where a pecuniary penalty was adjudged to be paid by a convicted person, the court, initially, had to either commit the offender to jail under paragraph (a) until the penalty was paid, or, under paragraph (c), exercise its powers of distress and execution for recovery of the penalty. If the offender was committed to jail, or was about to be committed, paragraph (b) operated to secure his release or prevent his imprisonment upon him giving security for the payment of the penalty. The security could be given either at the moment of committal or after the offender had been imprisoned:[87]

> The defendant is not sent to gaol as a direct punishment for having committed offences under . . . the Act. . . . The direct punishment for the offence is the penalty which is imposed and the defendant is sent to gaol chiefly as a means of enforcing the penalty. . . . But s. 247 does not expressly provide that imprisonment for the statutory period will release the debt, and as at present advised I am of opinion that it is not released by implication, and that the plaintiff could move the Court for leave to enter judgment for the amount still unpaid, and that this judgment could be enforced like any other judgment of the Court.

This conflict between the views of Williams J. and Fullagar J. still continues. However, in *McGovern v. Carra*,[88] Sholl J. did not think himself bound to hold that the exercise of the options under s. 247 must be precisely contemporaneous with the imposition of the monetary penalty. He considered that a court could adjourn the hearing after conviction and imposition of penalty in order to take evidence as to the effect of imprisonment on the defendant's health or, more importantly, for the purpose of giving him the opportunity of finding a suitable security for the penalty.

3.14 *Fines and Civil Liability*

Though imprisonment for non-payment of a fine extinguishes the obligation to pay,[89] it does not relieve the offender from any other liability which may arise out of the acts or omissions which led to his conviction. Apart from the possibility that the offence may be one for which criminal penalties accrue on a continuing basis,[90] common law or statutory civil

[87] *Ibid.*

[88] [1950] V.R. 454, 460-1.

[89] This is implied in Magistrates (Summary Proceedings) Act 1975, s. 108 and s. 10 Penalties and Sentences Act 1981 and stated expressly in Service and Execution of Process Act 1901 (Cth), s. 26M which provides that where a person has been imprisoned under the Act for failure to pay a fine, 'he is, upon the termination of that imprisonment, discharged . . . from any liability to pay that amount or any part of that amount remaining unpaid, and from any liability to be imprisoned (whether under the law of a State or Territory, under this Part or under any other law of the Commonwealth), by reason of non-payment of that amount or of any part of that amount remaining unpaid.'

[90] See text at n. 64 *supra* (para. 2.8).

liability remains. This is expressly recognised in a number of federal and state Acts which make it plain that the ordering or recovery of a fine or monetary penalty for a breach of the Act in no way relieves an offender from any outstanding tax or other liability which was the subject of the prosecution.[91] Conversely, discharging a civil liability or remedying an omission cannot extinguish an existing obligation to pay a fine. Penalties and fines imposed for offences against federal or state law are not provable in bankruptcy[92] and, consequently, cannot be discharged in full or in part by any bankruptcy process.

3.15 *Interjurisdictional Enforcement of Fines*

Provision is made for the interstate enforcement of fines and penalties imposed by courts of summary jurisdiction under either part IVA of the Service and Execution of Process Act 1901 (Cth) or pursuant to reciprocal arrangements available under s. 107 and 107A of the Magistrates (Summary Proceedings) Act 1975 (Vic.). The former, because it is a means of enforcing imprisonment for non-payment of fines is, necessarily, confined to penalties ordered to be paid by natural persons, whereas the latter specifically relates to the enforcement of fines against corporate offenders. There are no special provisions for the interstate enforcement of fines imposed by higher courts, however a warrant of commitment issued by the Prothonotary of the Supreme Court or the Registrar of the County Court for the apprehension and imprisonment of a fine defaulter under s. 439(1)(b) of the Crimes Act 1958 (Vic.) may, under s. 18 of the Service and Execution of Process Act 1901 (Cth), be endorsed by a judicial officer in another state for execution in that state and may lead to the extradition of the offender to Victoria.[93]

3.16 *Service and Execution of Process Act 1901 (Cth)*

The scheme for the interstate enforcement of fines imposed upon natural persons is set out in Part IVA of the Service and Execution of Process Act 1901 (Cth) the object of which is[94]

[91] Income Tax Assessment Act 1936 (Cth), s. 251; Building Industry Long Service Leave Act 1975, s. 47; Land Tax Act 1958, ss. 83(2) and 83(5)(f); Payroll Tax Act 1971, s. 39. See also Melbourne and Metropolitan Tramways Act 1958, s. 122(2).

[92] Bankruptcy Act 1966 (Cth), s. 82(3). See *Commissioner for Motor Transport v. Train* (1972) 127 C.L.R. 396 in relation to the problem of characterizing an obligation to pay as criminal or civil in nature. It is inappropriate to impose fines on persons known to be bankrupt where it is patent that no possibility exists of the fines being paid: *Hall* (1968) 52 Cr.App.R. 736; *cf. R. v. Savundranayagan* [1968] 1 W.L.R. 1761, 1766 where, though the accused deposed that his assets were little more than £100 and that a receiving order had been made against him, the Court of Appeal upheld a fine of £50,000 (in default 2 years imprisonment) on the hypothesis that some of the appropriated and unrecovered funds had been secreted in overseas bank accounts.

[93] Service and Execution of Process Act 1901 (Cth), s. 18(3)(a). See generally Brown D., 'Judicial Scrutiny of Inter-state Extradition', (1976) 12 *University of Western Australia Law Review* 298.

[94] *Beams v. Samuels* (1969) 14 F.L.R. 201, 204 and 205.

> to enable the courts of the various States and Territories to which the Act applies to act in aid of one another in the enforcement of penalties imposed by way of fines by courts of summary jurisdiction, without the trouble, expense and inconvenience of returning an offender to the State or Territory where the fine was imposed. . . . Under Part IVA the intention manifested by the Legislature is . . . to place the court before whom the person is brought in the same position, as nearly as may be, as though the fine had been imposed by a court in the same State or Territory.

It is to be noted, however, that a fine for the purpose of the Act not only includes pecuniary penalties imposed for offences against federal, state or territorial laws but also any costs, compensation or other charges ordered by the court in the proceedings which lead to the fine. Pecuniary penalties imposed for offences against revenue laws of the Commonwealth are, however, excluded.[95] The general scheme of Part IVA is that where a warrant of apprehension has been issued, or could be issued, against a fine defaulter and the clerk of the court in which the fine was imposed (or a justice of the peace in the state or territory in which the fine was ordered) has reason to believe that the offender is in another state or territory, the clerk or justice may issue a warrant under the Service and Execution of Process Act for the apprehension of the offender where he is believed to be elsewhere in Australia.[96] A constable of police executing the warrant of apprehension must give the defaulter the opportunity of paying the whole of the unpaid amount specified in the warrant forthwith and, if this is done, the sum recovered and the warrant are returned to the original court which imposed the fine.[97] But if the amount owing is not paid, the defaulter is to be brought before a nearby court of summary jurisdiction[98] where he may be ordered to be imprisoned for either the period specified in the warrant or six months, whichever is the shorter.[99] The period of detention may be further proportionately reduced for any part-payment of the fine which has taken place, and the court may suspend the execution of an order of committal to allow the defaulter time to pay or to make payment by instalments.[1] A number of other provisions govern the effect of pardon, remission or part-payment of the fine at various stages in proceedings under the Act.[2] The legislation does not apply to allow imprisonment of juveniles (*i.e.* persons under the age of 18 years) for non-payment of fines,[3] and anyone aggrieved by an order made in relation to an apprehended defaulter may apply to a judge of the Supreme Court of the state or territory in which he was apprehended for a review of the order. This takes place by way of a

[95] S. 26A(1).
[96] S. 26D(1)(a)-(d). The warrant may be withdrawn if the fine is paid in full before execution, s. 26D(3).
[97] S. 26E(2) and (3).
[98] S. 26E(4). The local law relating to the custody, remand, bail and entering into recognizances of persons charged with summary offences, applies to persons apprehended interstate under the Act, s. 26E(6).
[99] S. 26F(1) and (3)(a).
[1] S. 26F(3)(b) and (4)(a).
[2] S. 26H(2), 26J, 26L.
[3] S. 26N.

rehearing.[4] The Act also declares that the conditions of imprisonment of interstate defaulters are to be governed by the laws of the state or territory in which the offender is detained.[5]

3.17 *Reciprocal Enforcement against Corporations*

Magistrates (Summary Proceedings) Act 1975 (Vic.) s. 107(1)-(5) gives effect to a scheme which enables fines summarily imposed in Victoria upon a corporate offender owning property interstate to be enforced in the other state or territory. This takes place pursuant to an agreement with the other state or territory that Victoria will reciprocate by enforcing interstate orders against corporate property in Victoria. When a fine is imposed by a reciprocating court in another state or territory and is payable by a body corporate having, or appearing to have property in Victoria, the clerk of the reciprocating court imposing the fine may forward to the clerk of a Magistrates' Court near the corporate property a copy of the conviction or order and a document certifying the amount of the fine outstanding and requesting that it is enforced. The clerk registers the conviction or order thereupon it is deemed to be a conviction of a Victorian Magistrates' Court.[6] The clerk must then enforce the order by issuing a warrant of distress to recover the amount of the fine by levying against the goods and chattels of the corporate body.[7] Sums recovered pursuant to the warrant are remitted to the reciprocating court. A Victorian clerk of courts may make a similar request to a court of summary jurisdiction in one of the reciprocating states or territories and it will be enforced pursuant to a equivalent legislation. Any sums received in Victoria from an interstate reciprocating court are treated as if they had in fact been paid by the corporate body itself in whole or part satisfaction of the outstanding fine.[8]

In 1978, s. 107A of the Magistrates (Summary Proceedings) Act was added to provide for the reciprocal enforcement of fines against the directors of corporations personally. Under this section, where a conviction is obtained against a corporation in a reciprocating court and it is alleged that one or more of the directors of the company normally reside in Victoria, or are in Victoria, and the court receives the appropriate documents required under s. 107, together with an additional certificate from the Commissioner for Corporate Affairs stating that it appears that the person or persons against whom enforcement is sought were directors of the corporating during the relevant period, the conviction may be registered in the Magistrates' Court and enforced against them rather than the company. After fourteen days written notice has been given to the director or directors affected, a warrant

[4] S. 26G.
[5] S. 26P.
[6] Magistrates (Summary Proceedings) Act 1975, s. 107(7)(a).
[7] S. 107(7)(b).
[8] S. 107(10).

of commitment may be issued. Should the directors not pay the fine on receipt of the notice, they will be imprisoned for a period calculated at the rate of one day's gaol for each $20 or part thereof of the amount unpaid to a maximum of one year.[9] Where more than one director is called upon to pay the fine, the obligation is deemed to have been discharged if it is performed or expiated by the imprisonment by any one of them.[10] A warrant of commitment may be cancelled if the director of the company affected can prove to a Magistrates' Court that, at the time the offence was committed or liability incurred, he had reasonable and probable grounds for believing, and did in fact believe, that the company would be able to meet any liability it incurred at that time, and that he had taken all reasonable steps to ensure that it would be able to meet its obligations as they became due.[11] These special provisions under s. 107 and s. 107A of the Magistrates (Summary Proceedings) Act 1975 (Vic.) were specifically introduced to enforce fines and other monetary penalties imposed upon road haulage companies for failure to pay road charges imposed upon their commercial goods vehicles under the Commercial Goods Vehicles Act 1958 (Vic.).

4 CONCLUSION

From the foregoing analysis the fine emerges as a many faceted sanction shaped over time in a most haphazard manner. Only recently in Victoria has a serious effort been made to provide a coherent basis for fines by re-examining their quantum and by introducing, in the Penalties and Sentences Act 1981 (Vic.), the flexible notion of the penalty unit. To date, only 400 of the many thousands of fining provisions have been converted and, at the present rate, it may take many years before the task is complete. Nothing has yet been done to rationalize the variety of techniques by which fines are calculated, imposed, and enforced. The dramatic upgrading of penalties caused by using a penalty unit base of $100 may lead to an increase in the number of those punished as fine defaulters by imprisonment or community service orders, yet Victoria still lacks legislation which would allow a court to waive these further sanctions if a means enquiry at the enforcement stage indicated that they would cause a disproportionate degree of hardship to a genuinely indigent person. It could, as a start, follow the lead shown in this respect by the Commonwealth Crimes Amendment Bill 1981 which attempted to introduce such a means enquiry for federal offenders.[12] The relationship between the payment of fines and compensation also still awaits a thorough re-evaluation. The state, by retaining fines, inhibits more direct compensatory processes. At minimum,

[9] S. 107A(3).
[10] S. 107A(5).
[11] S. 107A(9).
[12] See n. 79 *supra* (para. 3.12).

if the more than $20 million presently collected was diverted to victims of crime the amounts payable under the Criminal Injuries Compensation Act 1972 (Vic.) could rise from the present maximum level of $10,000 to one which more realistically reflected awards which civil litigation would produce.

The description of the system of fining contained in this article is a legal one and lacks comprehensive empirical data which shows how these laws operate in practice. We are deplorably ignorant of precisely the number of fines imposed, their quantum and destination, the number of fine defaulters and the reasons for defaulting, the actual consequences of default and a score of other matters upon which rational law reform in this area depends. Much more work on fines is needed;[13] identifying the legislative framework is only a first step towards understanding how this most elementary of all criminal sanctions is actually used.

[13] For suggestions, see Morgan R. and Bowles R., 'Fines: The Case for Review', [1981] *Criminal Law Review* 203, 211-3.