
Corporate Contrition

ROBYN CARROLL*

I. Introduction

In September 2021, the Federal Court of Australia imposed a penalty of \$10.5 million on Westpac for its ‘egregious’ conduct in misleading superannuation customers in contravention of provisions in chapter 7 of the Corporations Act 2001 (Cth) (Corporations Act).¹ In determining the civil penalty to be paid by the bank for its contravening conduct O’Byrne J took into account that Westpac had made ‘no expression of contrition or remorse’, that it had not sent any correspondence to the affected members, nor had any correspondence containing any apology to those individuals been proposed, despite the passage of more than six months since the High Court of Australia handed down its decision affirming Westpac’s contraventions of the Corporations Act.² In determining a penalty ‘at the highest levels permitted by the Act’ O’Byrne J emphasised that Westpac ‘has not expressed regret for the conduct, does not appear to have taken steps to remedy the compliance deficiencies and has been tardy in progressing a remediation plan.’³

Cases like *ASIC v Westpac* and other cases discussed in this chapter invite us to consider whether a corporation can experience remorse or contrition and, if so, how this is expressed. Why does the law consider remorse and contrition, how do courts judge whether a corporation can be attributed with being remorseful or contrite and for what purposes? Is an apology ever sufficient and always necessary? The aim of the chapter is to answer these and other questions that arise when we consider corporate remorse and contrition.⁴

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¹ *Australian Securities and Investments Commission (ASIC) v Westpac Securities Administration Limited, in the matter of Westpac Securities Administration Limited* [2021] FCA 1008, (2021) 156 ACSR 614 [45] (*ASIC v Westpac*); M Pelly, ‘Judge blasts “no regrets” Westpac over super bungles’ *Australian Financial Review* (13 September 2021).

² *Westpac Securities Administration Ltd v ASIC* [2021] HCA 3, (2021) 270 CLR 118, (2021) 387 ALR 1 (*Westpac v ASIC*), affirming the decision of the Full Court of the Federal Court in *ASIC v Westpac Securities Administration Ltd* [2019] FCAFC 187, (2019) 272 FCR 170 (*ASIC v Westpac Securities*).

³ *ASIC v Westpac* (n 1) [95].

⁴ The discussion in the chapter is based on Australian legislation and case law. To the extent that remorse and contrition are relevant to decision making about the consequences of corporate misconduct in other jurisdictions, we might expect the principles and guidelines discussed here to be relevant in jurisdictions where the objects of the law and functions of remorse and contrition are the same or similar.

Section II of the chapter identifies the challenge of attributing the emotional state of remorse and contrition to a corporation, and identifies in broad terms the ways courts deal with this challenge. Section III discusses the meaning of remorse and contrition. Section IV identifies the objects of criminal law and civil penalty regimes and the functions that remorse and contrition serve in the law. With these objects and functions in mind, section V discusses what courts regard as evidence of remorse and contrition and what factors influence the weight given to that evidence. Section VI discusses the circumstances that courts identify as evidence of genuine corporate contrition and remorse. This is followed in section VII by an exploratory discussion of the merits of recognising contrition as a corporate 'state of mind', and what having regard to corporate systems as well as corporate words and actions brings to this inquiry. The chapter concludes that despite the difficulties of attributing remorse and contrition as a state of mind to a corporation, this inquiry is consistent with long-standing approaches and principles in the law and supports the law's goals of corporate compliance and regulation.

II. Corporate Remorse and Contrition: A Challenging Concept

In the introduction to their interdisciplinary study of remorse, Michael Proeve and Steven Tudor describe remorse as a 'fundamentally important moral emotion'.⁵ As they explain, while remorse, as a type of emotion, is of interest to psychologists, it is also of interest to philosophers and lawyers because of its moral aspects and its role in the law, particularly criminal law.⁶ This chapter considers the circumstances in which this 'moral emotion' plays a role in the law in sentencing corporations and in determining civil penalties for contraventions of the law by corporations. The concept of a corporation experiencing human feelings and emotions that might accompany wrongdoing and its aftermath, including guilt, shame, remorse and regret, obviously is challenged by the artificial legal personality of a corporation. Leaving to one side the capacity of the natural persons who constitute the organs of a corporation or are its agents and employees to feel these emotions, we are left with the question whether a corporation can be attributed in some way with the 'fundamentally important' moral emotions of contrition and remorse. Courts express scepticism at times that contrition can be attributed to a corporation, particularly in the context of civil penalties regimes. In *ACE Insurance Ltd v Trifunovski (No 2) (Trifunovski)*, Pellam J stated:

It is not clear to me how an artificial construct such as a corporation can experience the complex human emotion of contrition made up, as it is, of an amalgam of distinctly human emotions such as regret, shame and sympathy. I do not doubt that a corporation may exhibit signs of regret but it is too much to expect that such an artificial construct can be meaningfully contrite.

⁵ M Proeve and S Tudor, *Remorse: Psychological and Jurisprudential Perspectives* (Farnham, Ashgate, 2010), 1. While the focus of their work is remorse, the words 'remorse' and 'contrition' are used interchangeably in the law, as will be seen in section III.

⁶ *ibid.* The authors note that remorse is generally viewed as a significant emotion in restorative justice, much more so than in traditional criminal justice. This chapter raises for consideration the role of remorse in regulatory proceedings, where arguably there are similar public interest concerns in punishing and deterring anti-competitive behaviour and protection of consumers.

For civil penalty cases involving corporations it would be more coherent to ask only whether the corporation has changed its behaviour. Nothing more can be expected; a person who does not literally or physically exist may not wear sackcloth.⁷

Other judges have referred to there being ‘some conceptual difficulty in the notion of a corporation expressing “contrition”’.⁸ Similar scepticism is also evident in law reform recommendations. In discussing what factors should be provided for sentencing a corporation in its Criminal Corporate Responsibility Report (2020 Report), the Australian Law Reform Commission (ALRC) expressed doubts about the utility of considering corporate contrition as a factor.⁹ Referring to the sentencing factors in section 16A of the Crimes Act 1914 (Cth) (Crimes Act), which includes the factor in section 16A(2)(f), namely ‘the degree to which the person has shown contrition for the offence’, the Commission refers to the focus on ‘contrition’ as being ‘less cogent for corporate offenders’¹⁰ than for natural persons.

Notwithstanding the reservations expressed in the context of corporate wrongdoing, courts express judicial pragmatism in other cases. This pragmatism is informed no doubt by the fact that criminal sentencing policy considerations currently are applied to natural and corporate defendants. For example, in sentencing a corporation in *Ampol Ltd v Environment Protection Authority*,¹¹ Grove J states that ‘[w]hilst “contrition” is perhaps an inappropriate attribute for a corporation, it should be deemed to possess the equivalent.’¹² The same pragmatism is evident in civil penalty regimes aimed at deterring corporate wrongdoing. It is also evident from civil cases in which evidence of contrition is admissible as a factor relevant to the assessment of compensatory and exemplary damages for some torts, including where the defendant is a corporation.¹³

Besides pragmatism, there are indications that courts consider that having regard to expressions of contrition and remorse by corporations furthers the law’s objects, notwithstanding the conceptual challenge of their being an artificial construct. In *Construction, Forestry, Mining and Energy Union (CFMEU) v Pilbara Iron Co (Services) Pty Ltd (No 4)*,¹⁴ for example, while accepting the force of Pellam J’s comments in *Trifunovski* noted above, Katzman J considered that ‘more can be expected of a corporation than that it has changed its behaviour.’¹⁵ There are multiple ways that a corporation can express contrition and in doing so demonstrate ‘consciousness of the seriousness of the contravening conduct that may be relevant to penalty’¹⁶ and an intention to make

⁷ *ACE Insurance Ltd v Trifunovski (No 2)* [2012] FCA 793 (*Trifunovski*). In this case Perram J concludes that ‘for civil penalty cases involving corporations it would be more coherent to ask only whether the corporation has changed its behaviour’: *ibid* [113]–[114].

⁸ *Comcare v John Holland Pty Ltd* [2014] FCA 1191 [101] (*Comcare*).

⁹ Australian Law Reform Commission (ALRC), *Corporate Criminal Responsibility* (Report No 136, April 2020) Ch 8 (ALRC Final Report).

¹⁰ *ibid* [8.40] note 42.

¹¹ *Ampol Ltd v Environment Protection Authority*, No 60139/1995 (NSWCCA, 26 October 1995) (*Ampol*) (Grove, Newman and Dunford JJ agreeing). See also *Morrison v Powercoal Pty Ltd & Anor (No 3)* [2005] NSWIRComm 61, (2005) 147 IR 117 [111] (*Morrison*).

¹² *Ampol* (n 11) 12.

¹³ See section IV.D.ii.

¹⁴ *Construction, Forestry, Mining and Energy Union (CFMEU) v Pilbara Iron Co (Services) Pty Ltd (No 4)* [2012] FCA 894, (2012) 225 IR 113 (*Pilbara Iron Co*).

¹⁵ *ibid* [34].

¹⁶ *Director of Consumer Affairs Victoria v Gibson (No 3)* [2017] FCA 1148 [50] (*Gibson*).

amends for their wrongdoing (or not) and other states of mind relevant to culpability notwithstanding that it is an artificial construct.¹⁷

The law attributes remorse and contrition to a culpable corporation through consideration of various forms of evidence that are discussed in section VI. I use ‘attributes’ here in a broad sense to mean ways in which the law has regard to consciousness and intention on the part of a corporation. These forms of evidence include words and actions of corporations consistent with existing general law and statutory attribution rules,¹⁸ and ‘systems intentionality’ by which a corporation’s state of mind is manifested through its systems, policies and practices.¹⁹

Questions whether a corporation can ‘feel’ remorse or contrition and has moral obligations beyond obligations imposed by the law invite inquiries into corporate culpability beyond the scope of this chapter: some of these are undertaken ably by the authors of other chapters in this book, who provide philosophical and jurisprudential reasons for attributing moral and legal responsibility to a corporation.²⁰ Ultimately, whether ‘being’ remorseful or contrite is described as a state of emotion (‘feeling’ contrite) or a state of mind (‘thinking’ contritely) makes little or no difference for the purposes of the analysis of corporate contrition. In attributing contrition and remorse to a corporation in sentencing and imposing a civil penalty and elsewhere in the law, courts take a pragmatic approach to the corporation as a legal construct in order to further the objects of the law.

III. Meaning of Remorse and Contrition

This section identifies the meaning attributed to remorse and contrition in leading dictionaries, social and psychological accounts, and the law. The functions of remorse and contrition and how courts judge whether a person expresses these emotions are discussed in subsequent sections of the chapter in light of the discussion in this section.

A. Dictionary Definitions of Remorse and Contrition

The *Australian Oxford Dictionary* defines remorse as ‘deep regret for a wrong committed’, and contrition as ‘the state of being contrite; thorough penitence’.²¹ The *Oxford English Dictionary* (OED) definition of ‘remorse’ refers to:

deep regret or guilt for doing something morally wrong; the fact or state of feeling sorrow for committing a sin; repentance or compunction ... an attack of deep regret or guilt.²²

¹⁷ For analysis of limitations of traditional methods of attributing mental states to corporations, see E Bant, ‘Culpable Corporate Minds’ (2021) 48 *University of Western Australia Law Review* 352, 354; E Bant, ‘Catching the Corporate Conscience: A New Model of “Systems Intentionality”’ (2022) *Lloyd’s Maritime and Commercial Law Quarterly* 467, 468–71 and sources cited therein; Bant, ch 9 of this volume; M Diamantis, ‘Functional Corporate Knowledge’ (2019) 61 *William & Mary Law Review* 319; Diamantis, ch 10 of this volume.

¹⁸ Generally, see R Leow, *Corporate Attribution in Private Law* (Oxford, Hart Publishing, 2022); Leow, ch 6 of this volume.

¹⁹ Bant, ‘Catching the Corporate Conscience’ (n 17).

²⁰ See Harding, ch 2 of this volume; Crofts, ch 3 of this volume.

²¹ *Australian Oxford Dictionary*, 2nd edn (Melbourne, Oxford University Press ANZ, 2004) ‘remorse’.

²² *Oxford English Dictionary* at www.oed.com/, ‘remorse’.

The OED definition of ‘contrition’ is:

the condition of being bruised in heart; sorrow or affliction of mind for some fault or injury done; spec penitence for sin.²³

The *Encyclopaedic Australian Legal Dictionary* defines ‘remorse’ as ‘contrition or shame’ but does not provide a separate definition of ‘contrition.’²⁴

B. Social and Psychological Accounts of Remorse

Proeve and Tudor provide a detailed psychological account of remorse and the related emotions of regret, guilt and shame.²⁵ From a philosophical perspective, remorse is one of the ‘retractive emotions’, in that ‘the remorseful person retracts or withdraws from something which is seen as part of or associated with oneself.’²⁶ Other retractive emotions include guilt, shame, regret, compunction, contrition and repentance. From a psychological perspective, the central constitutive thought of regret is ‘the wish that things were otherwise than they actually are.’²⁷ Regret, Proeve and Tudor explain, will generally include remorse, guilt and shame,

each as types of ‘agent regret’, as opposed to ‘spectator regret’. The distinction between remorse and guilt is not always easy to draw; both involve a sense that one has done wrong. The main way to distinguish between the two, however, is in terms of their object: generally, guilt is more focussed on oneself as guilty of having transgressed some authoritative rule or command, while remorse is more focussed on one’s deeds and its consequences. Shame is also closely related to remorse (and guilt), but involves a greater sense of oneself as flawed, disgraced or discredited, and characteristically involves a desire to cover one’s flaw, to hide or withdraw.²⁸

Remorse is an emotion in which the remorseful person’s behaviour towards others, through apologies and making amends by repairing damage, plays a central role.²⁹ Responses of others to a remorseful person are also a key part of the interpersonal nature of remorse. These responses include judgment and punishment (in both formal and informal settings). There is also the possibility ‘that a person’s remorse can serve as an indicator of changed behaviour in the future.’³⁰ Proeve and Tudor present a working definition of remorse that includes several characteristics, such as

recognition that one has caused harm, an acceptance of responsibility for causing that harm, an associated internal strife, a desire to atone or make things right, a desire to be forgiven and perhaps some actions in furtherance of atonement and reparation.³¹

²³ *ibid* ‘contrition.’

²⁴ *Encyclopaedic Australian Legal Dictionary – Online* (Sydney, Butterworths, 2002) ‘remorse’. Interestingly, this Encyclopaedia entry for ‘remorse’ cites the Crimes Act (n 24), s 16A(2)(f), which refers to ‘contrition’ not ‘remorse’. See section III.C.

²⁵ Proeve and Tudor (n 5).

²⁶ *ibid* 2.

²⁷ *ibid*.

²⁸ *ibid* 2–3.

²⁹ *ibid* 3.

³⁰ *ibid*. I discuss the functions of remorse in the law in more detail in section IV, and how it is judged in section V.

³¹ Proeve and Tudor (n 5) 48. See also S Bandes, ‘Remorse and Criminal Justice’ (2016) 8 *Emotion Review* 14, 15.

Many of these characteristics are reflected in what the law says is evidence of contrition and remorse for sentencing and imposing civil penalties, including evidence of corporate remorse and contrition, as we see in section VI.

C. Meaning of Remorse and Contrition in the Law

There is a long history in criminal law of courts' taking into account whether an accused is genuinely remorseful for having committed the offence as a mitigating factor.³² There is legislation throughout Australia and case law that confirms the common law principle that genuine remorse and contrition are relevant to sentencing. The words 'remorse' and 'contrition' are not defined in the legislation. The meaning of remorse, explains Adams J in *Georgopolous v The Queen*,³³ 'is a commonsense one – as shown by all the dictionary definitions – it is regret or sorrow for the wrongdoing'.³⁴ In discussing the meaning of remorse, the New South Wales Court of Criminal Appeal states in *Alvares v The Queen*:

[R]emorse in this context means regret for the wrongdoing which the offender's actions have caused because it can be safely assumed that an offender will always regret the fact that he or she has been apprehended. Remorse is but one feature of post-offence conduct upon which an offender may seek to rely as a matter which has the potential to mitigate penalty. The manner in which the issue of remorse is approached is not unique to either the sentencing process or to the courtroom. Indeed, it is a common feature of everyday existence.³⁵

An offender's expression of remorse or contrition is distinct from a sense of regret.³⁶ As noted in *Alvares*, courts distinguish between general regret as a result of the offence and genuine contrition for having committed the offence.³⁷ There can be no real remorse without an acceptance of responsibility.³⁸ In criminal proceedings the extent to which remorse may be inferred from a plea of guilty will depend in large measure upon the motivation of the person entering the plea. The court asks the question 'does the plea reflect genuine remorse, or is it simply a recognition of the inevitable?'³⁹ Where there is a strong case against the accused, a denial of responsibility may demonstrate an absence of remorse.

i. Sentencing Legislation

State and federal legislation set out multiple factors for courts to take into account in sentencing a defendant. In the federal jurisdiction, section 16A(1) of the Crimes Act

³² See, eg, *Neal v The Queen* [1982] HCA 55, (1982) 149 CLR 305, 315; *R v Cameron* [2002] HCA 6, (2002) 209 CLR 339 [65] (*Cameron*); Crimes Act (n 24), s 16A(2)(f); Crimes (Sentencing Procedure) Act 1999 (NSW), s 21A(3)(i); Criminal Law (Sentencing) Act 1988 (SA), s 10(1)(g).

³³ *Georgopolous v The Queen* [2010] NSWCCA 246 (*Georgopolous*).

³⁴ *ibid* [11].

³⁵ *Alvares v The Queen* [2011] NSWCCA 33, (2011) 209 A Crim R 297 [44] (*Alvares*).

³⁶ *R v Hargraves* [2010] QSC 188 [45]. In *R v Alqudsi* [2016] NSWSC 1227 [106], for example, where the offender was convicted of offences contrary to the Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth), the Court found that while expressing regret, the conduct of the offender did not amount to contrition.

³⁷ *R v Loiterton* [2005] NSWSC 905 [182].

³⁸ *R v Hall (No 2)* [2005] NSWSC 890 [112].

³⁹ *ibid* [109], citing *R v Winchester* (1992) 58 A Crim R 345, 350.

provides that in determining the sentence to be passed, or the order to be made, in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.⁴⁰ In addition, section 16A(2) states that a court must take into account a number of other matters as are relevant and known to the court, and which include:

- (f) the degree to which the person has shown *contrition* for the offence:
 - (i) by taking action to make reparation for any injury, loss or damage resulting from the offence; or
 - (ii) in any other manner. [emphasis added]

Section 16A was introduced into the Crimes Act in 1990 and refers to ‘contrition’ rather than remorse.⁴¹ It appears from the cases that section 16A(2) was intended to reflect the existing common law and general law sentencing considerations at the time the section was introduced.

There do not appear to be any cases that consider the specific meanings of ‘contrition’ in the statutory context of section 16A(2) of the Crimes Act.⁴² The cases do not indicate any significance difference between the meaning of ‘contrition’ and ‘remorse’ for sentencing purposes under this section, and a number of cases indicate that ‘contrition’ and ‘remorse’ are used interchangeably by courts.⁴³ For example, in *Director of Public Prosecutions v Goldberg*,⁴⁴ where Vincent JA (Winneke P and Batt JA agreeing) considered whether contrition is distinguishable from remorse, his Honour concludes:

Whether or not a distinction that is of practical significance can be made, or was intended to be made by the legislature, between the notions of remorse and contrition under Section 16A, I have serious doubts. The section, it is to be noted, contains no reference to remorse as a sentencing consideration. Apart from what I would anticipate would be the difficulty in attributing different meanings to the words contrition and remorse which would be capable of useful application on a day to day basis, I consider that it is highly unlikely that when setting out an extensive list of factors which a sentencer was required to take into account, the presence of remorse was deliberately omitted.⁴⁵

⁴⁰ Section 16A was introduced into the Crimes Act (n 24) by the Crimes Legislation Amendment Act (No 2) 1989 (Cth) (No 4 of 1990) (Amending Act). Section 16A came into effect on 17 July 1990. The intention of the Amending Act was to streamline the principles applicable to sentencing offenders in Commonwealth and State jurisdictions, Second Reading Speech. Section 16A was based on s 10 of the (now repealed) Criminal Law (Sentencing) Act 1988 (SA) (CLS Act). The CLS Act was replaced by the Sentencing Act 2017 (SA), which uses the term ‘remorse’ and not ‘contrition’.

⁴¹ The Crimes Act (n 24) was amended by the Crimes Legislation Amendment Act (No 2) 1989 (Cth) (Amending Act) and came into effect on 17 July 1990. The Amending Act was introduced in response to Australian Law Reform Commission, *Sentencing* (Report No 44, March 1988), which was tabled in Parliament in 1988. See also ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report No 103, 2006) (ALRC Report No 103). The ALRC recommended wholesale reforms of s 16A, including for the common law principles of sentencing to be codified in federal sentencing legislation.

⁴² National Judicial College of Australia, Commonwealth Sentencing Database, ‘Contrition and Reparation’ at https://csd.njca.com.au/principles-practice/general_sentencing_principles/s16a_specific_relevant_factors/contrition/ (accessed 2 August 2022) (Commonwealth Sentencing Database).

⁴³ *ibid*, citing *Director of Public Prosecutions v Goldberg* [2001] VSCA 107 [41] (Vincent JA, Winneke P and Batt JA agreeing) (*Goldberg*). See also *Alvares* (n 35).

⁴⁴ *Goldberg* (n 43).

⁴⁵ *ibid* [41].

Further, in *Alvares*,⁴⁶ Buddin J (McClellan CJ at CL and Schmit J agreeing) did ‘not detect any meaningful distinction between’ the two terms ‘remorse’ and ‘contrition’.⁴⁷ This is consistent with the use of both terms interchangeably in criminal and civil penalty case law.⁴⁸

ii. Civil Penalties Regimes

Contrition and remorse are recognised by the courts as factors to be taken into account in determining the civil penalty to be imposed under a considerable number of statutes enacted in Australia since 1974 that create civil penalties and regulate corporate activities, including banking, commercial activities, occupational health and safety, and industrial law.⁴⁹ The words ‘remorse’ and ‘contrition’ are not defined by the legislation. The meaning given to these words is consistent with their meaning in the common law, which, historically, is drawn from criminal law outlined in the previous section. The words ‘contrition’ and ‘remorse’ are used interchangeably in both federal and State civil penalty cases.⁵⁰

iii. Civil Actions

In tort cases, which arise primarily under State law in Australia, courts generally refer in their judgments to acts of ‘contrition’ using its common law meaning. For example, in defamation cases, courts may inquire whether a ‘contrite apology’ was offered.⁵¹ Use of the word ‘contrition’ rather than reference to ‘remorse’ in civil actions may be an attempt to articulate the importance of genuine sorrow and regret as a mitigating factor in civil actions, in a way that is distinct from criminal law, where ‘remorse’ is a well-established factor in State sentencing legislation. Other than that possible explanation, there is nothing to suggest that remorse and contrition have any different meaning in this context.

iv. Summary

A review of Australian legislation and case law reveals that the words ‘remorse’ and ‘contrition’ are used interchangeably as having the same or similar meaning. A person is described as being in a contrite state or remorseful when they show regret and other emotions for their actions, that they accept responsibility for their actions and

⁴⁶ *Alvares* (n 35).

⁴⁷ *ibid* [38].

⁴⁸ *Director of Public Prosecutions v Thomas* [2016] VSCA 237, (2016) 347 ALR 275 [13] confirms that all of the ‘matters specified in s 16A(2) to which the Court must have regard, with the exception of (p) have been conventionally regarded as matters which sentencing courts took into account at common law prior to the amending legislation.’ (Section 16A(2)(p) provides for ‘the probable effect that any sentence or order under consideration would have on any of the person’s family or dependants.’)

⁴⁹ *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46, (2015) 258 CLR 482 (*Agreed Penalties Case*), providing examples to support this at fn 17.

⁵⁰ For example, in *Gibson* (n 16) [50], Mortimer J refers to ‘remorse or contrition’ as relevant to penalty; cases referred to in section IV.C.ii.

⁵¹ For example, *Pedavoli v Fairfax Media Publications Pty Ltd* [2014] NSWSC 1674, (2014) 324 ALR 166 [99] (McCallum J) (*Pedavoli*).

the harm they have caused, and they acknowledge their wrongdoing and the injury it has caused, or take action to make reparation or both. No distinction appears to be made between the meaning of these words in the context of individual or corporate defendants, notwithstanding the conceptual difficulty identified in section I of attributing emotions to a corporation. There is no indication in the statutes or case law in Australia that the words 'contrition' or 'remorse' have distinct and different meanings as factors in sentencing, in civil penalty regimes or in civil actions. It might be preferable for the word 'contrition' to be used in civil actions given the long association of 'remorse' with sentencing principles. At the same time, it might also be preferable, in cases that arise in the federal jurisdiction in Australia, to inquire into the presence or absence of 'contrition' rather than 'remorse' when dealing with a culpable corporation in view of the reference to 'contrition' in section 16A(2)(f) of the Crimes Act. In the end, nothing appears to turn on which word is used.⁵²

IV. Functions of Remorse and Contrition

The law has regard to remorse or contrition as a mitigating factor when a defendant is being punished for a crime, when a penalty is being imposed to deter contraventions of the law outside the criminal law and where an act of contrition is relevant in civil claims to damages. Evidence that a defendant is remorseful or contrite is one of many factors that can be taken into account in the holistic approach taken in each of these situations. While the primary objects of criminal law, civil penalties regimes and civil claims differ, there is an overlap in the objects of punishment and deterrence. This section begins with reference to theoretical accounts of the functions of remorse, then examines the objects of criminal law, civil penalties regimes and civil actions and the functions of remorse and contrition in each.

A. Theoretical Accounts of the Function of Remorse and Contrition

Proeve and Tudor explain that there are a number of theories in the criminal law context that account for the function of remorse, and which help to explain why the law takes remorse and contrition into account in determining the consequences of wrongdoing.⁵³ They refer to three accounts. First, equity theory, according to which punishment restores some sense of equity between a victim and offender. A lesser degree of punishment will be needed to restore equity in the case of an offender who is remorseful than an offender who is unremorseful. A second account emphasises the communicative function of remorse. Erving Goffman and Aaron Lazare suggest that remorse communicates support for community values, while a lack of remorse communicates rejection of those values, which leads to the concern that an offender is likely to reoffend. A third

⁵² Accordingly, it is of no consequences that I refer sometimes to remorse *and* contrition and at other times to remorse *or* contrition in this chapter.

⁵³ Proeve and Tudor (n 5) ch 4.

account, Affect Control Theory, regards emotions such as remorse as signals about a person's character. In this way, 'evaluations of one's identity by others is enhanced by showing negative emotions after negative behaviours and positive emotions after positive behaviours'.⁵⁴ Proeve and Tudor explain the last theory is consistent with meta-analysis showing that an expression of remorse can lead to a more positive judgment about an offender and lower punishment than where there is no expression of remorse. These theories contribute to our understanding of these emotions, and why the law recognises remorse as a mitigating factor in determining the legal consequences of crimes and civil wrongs.

Proeve and Tudor identify a number of rationales for treating remorse as a mitigating factor in sentencing, favouring the rationale 'that mitigation is a way of recognising the offender in his remorse, and so is a way of honouring remorse as a good. This rationale builds on a communicative approach to sentencing'.⁵⁵ This analysis raises for consideration the rationale for treating contrition and remorse as a factor in sentencing corporations, when imposing civil penalties as distinct from criminal sentencing, and whether remorse and contrition is a 'good' in itself in the corporate context, a question to which we return in section VII.

Despite doubts that have been expressed about whether judges can reliably ascertain an offender's remorse, and consequently whether such an uncertain factor should be given any role in sentencing, Proeve and Tudor conclude that judges and juries are likely to remain 'deeply interested in whether or not an offender is remorseful' because:

Remorse is a sign of the possibility of redemption, a deep theme in our legal system. It serves as a key point of agreement between the accused and their accusers: the court denounces the actions of the accused person, and the accused reciprocates by remorsefully repudiating their actions in turn.⁵⁶

This assessment of the law's interest in remorse is borne out by legislation and case law principles in Australia referred to in the next section.

B. Criminal Law and Remorse and Contrition in Sentencing

i. Objects of the Criminal Law

The purposes of criminal punishment are various; they include the protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The High Court in *Veen v The Queen (No 2)* explains that these purpose overlap and that

none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.⁵⁷

⁵⁴ *ibid* 208.

⁵⁵ *ibid* 210.

⁵⁶ K Rossmannith, S Tudor and M Proeve, 'Courtroom Contrition: How do Judges Know?' (2018) 27 *Griffith Law Review* 366, 367.

⁵⁷ *Veen v The Queen (No 2)* [1988] HCA 14, (1988) 164 CLR 465, 476 (Mason CJ, Brennan, Dawson and Toohey JJ).

In giving effect to the retributive and other purposes of the criminal law the courts apply a fundamental principle of sentencing law, which is proportionality.⁵⁸ The principle of proportionality requires the judge

to make a judgment concerning the relationship of the penalty to the facts. This is a value judgment, based on experience and instinct, derived after taking into account all the facts and circumstances of the case.⁵⁹

In general, a sentencing court will, after weighing all of the relevant factors, reach a conclusion that a particular penalty is the one that should be imposed.⁶⁰ In weighing these factors the court applies what is referred to as an ‘instinctive synthesis approach’, which recognises that there must be a synthesising of the relevant factors in the process of which ‘greater and lesser weight will be allocated to some factors depending on their relevance to the person convicted and his or her crime.’⁶¹

ii. Functions of Remorse in Sentencing Laws

The factors considered in sentencing include factors in mitigation. Evidence of genuine contrition may indicate the offender has reasonable prospects of rehabilitation,⁶² which may work to reduce the sentence otherwise imposed.⁶³ As Adams J explains in *Georgopolous*, remorse ‘will often be relevant to a greater or lesser extent to the assessment of the prospects of rehabilitation.’⁶⁴ This is because, as stated by the Victorian Court of Appeal in *Barbaro v The Queen*:

If there is evidence of remorse, and if that remorse is genuine, it is a very important element in the exercise of the sentencing discretion. Remorse of this kind enhances prospects of rehabilitation and reduces the need for specific deterrence. An offender who pleads guilty because he or she has an accurate appreciation of the wrongfulness of his or her offending, and of its impact upon its victim or victims, and who desires to do what reasonably can be done to repair the damage and to clear his or her conscience, is someone to whom mercy – in the form of a material reduction in what would otherwise be an appropriate sentence – is very likely due.⁶⁵

The law’s approach to remorse in sentencing and mitigating factors reflects the principle of proportionality. It also speaks to a reduced need for specific deterrence where there is a good prospect of rehabilitation.⁶⁶ In *R v Zhu*,⁶⁷ Hall J held that as a result of the genuine contrition displayed by the offender, less weight was to be given in that case to the

⁵⁸ *Hoare v The Queen* [1989] HCA 33, (1989) 167 CLR 348, 354 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ); ALRC Report No 103 (n 41) 150 [5.3]; *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13 [89]–[90] (Edelman J) (*Pattinson*).

⁵⁹ *Markarian v The Queen* [2005] HCA 25, (2005) 228 CLR 357, 385 [69] (McHugh J).

⁶⁰ *ibid* 373 [37] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

⁶¹ *ibid* 387 [73] (McHugh J).

⁶² Commonwealth Sentencing Database (n 42) ‘6. Interaction with other sentencing purposes’.

⁶³ *Georgopolous* (n 33) [11]–[14].

⁶⁴ *ibid*.

⁶⁵ *Barbaro v The Queen* [2012] VSCA 288 [39] (*Barbaro*). This passage is also stated in *R v Phillips* [2012] VSCA 140, (2012) 37 VR 594.

⁶⁶ *Cameron* (n 32) [65].

⁶⁷ *R v Zhu* [2013] NSWSC 127.

need for the penalty to achieve specific deterrence.⁶⁸ In *Cameron v The Queen*,⁶⁹ Kirby J also suggested that evidence of genuine contrition may indicate less emphasis needs to be placed on general deterrence.⁷⁰ The extent to which contrition is relevant to general and specific deterrence is significant not only to the imposition of a criminal sentence which aims to punish, it also speaks to the law's aim to deter reoffending and to deter others more generally.

C. Civil Penalty Regimes and Civil Penalties

i. Objects of Civil Penalty Regimes

In essence, 'civil penalty provisions are included as part of a statutory regime involving a specialist industry or activity regulator or a department or Minister of State of the Commonwealth ("the regulator").'⁷¹ Whereas criminal penalties import notions of retribution and rehabilitation, the purpose of a civil penalty, as French J explained in *Trade Practices Commission v CSR Ltd*,⁷² is 'primarily if not wholly protective in promoting the public interest in compliance.'⁷³ In *CFMEU v Australian Building and Construction Commissioner*,⁷⁴ the Full Court of the Federal Court cited the decision of French J in *CSR Ltd*⁷⁵ and the reasons of the plurality in *Commonwealth v Director, Fair Work Building Industry Inspectorate (Agreed Penalties Case)*⁷⁶ as establishing that deterrence is the 'principal and indeed only object of the imposition of a civil penalty, concluding '[r]etribution, denunciation and rehabilitation have no part to play.'⁷⁷ Most recently, in *Pattinson*, the High Court confirmed that the purpose of civil penalty regimes created by legislation 'is primarily, if not solely, the promotion of the public interest in compliance with the provisions of the Act by the deterrence of further contraventions of the Act.'⁷⁸

As in criminal law, the court considers both general and specific deterrence. The need for specific deterrence is informed by the attitude of the contravener to the contraventions, both during the course of the contravening conduct and throughout any civil penalty proceedings.⁷⁹ By analogy with criminal sentencing, contrition and remorse conventionally give some comfort to a court that reoffending is unlikely and therefore specific deterrence less important.⁸⁰

⁶⁸ *ibid* [221].

⁶⁹ *Cameron* (n 32).

⁷⁰ *ibid* [65].

⁷¹ *Agreed Penalties Case* (n 49) [24].

⁷² *Trade Practices Commission v CSR Ltd* [1990] FCA 521, (1991) ATPR 41-076, 52, 152 (*CSR Ltd*).

⁷³ *Agreed Penalties Case* (n 49) [55] (French CJ, Kiefel Bell, Nettle and Gordon JJ), [110] (Keane J). See also *Australian Competition and Consumer Commission (ACCC) v TPG Internet Pty Ltd* [2013] HCA 54, (2013) 250 CLR 640 (*ACCC v TPG*) [65] (French CJ, Crennan, Bell and Keane JJ).

⁷⁴ *CFMEU v Australian Building and Construction Commissioner* [2018] FCAFC 97, (2018) 264 FCR 155.

⁷⁵ *CSR Ltd* (n 72).

⁷⁶ *Agreed Penalties Case* (n 49).

⁷⁷ *ibid* [19].

⁷⁸ *Pattinson* (n 58) [9]. In a separate judgment, Edelman J reasons that while deterrence is the primary principle of justice in imposing civil penalties, other manifestations of the primary principle of justice, 'totality, consistency, and course of conduct', still apply. The continued recognition of these manifestations of the concept of 'desert' means that although deterrence might be the principal purpose, it cannot be the only purpose for the imposition of civil penalties: *ibid* [103]–[104].

⁷⁹ *ACCC v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181 [159] (*Reckitt Benckiser*).

⁸⁰ *ibid*.

ii. Functions of Remorse and Contrition in Determining Civil Penalties

In fixing the amount of a civil penalty, courts have regard to a list of factors developed by the courts to give effect to the purpose of the civil penalty provisions. The list of factors originates in those identified by French J in *CSR Ltd* (the ‘French Factors’) and a similar list identified by Santow J in *Australian Securities and Investments Commission (ASIC) v Adler*.⁸¹ The factors and consideration may be broadly grouped into two categories: those factors and considerations relating to the objective nature and seriousness of the offending conduct, and those relating to the particular circumstances of the contravenor.⁸²

In *Australian Competition and Consumer Commission (ACCC) v Woolworths Ltd*, Edelman J surveyed the factors described in previous cases that will commonly be relevant in considering deterrence and included ‘the extent of contrition for the conduct’ as a factor relating to the particular circumstances of the contravenor.⁸³ This factor has been referred to in subsequent Federal Court and Full Federal Court decisions as a factor relevant to the need for a penalty to achieve specific deterrence.⁸⁴ In *Pattinson*, the High Court referred to ‘remorse’ as a factor that may be taken into account in determining a civil penalty, as a factor of the kind adverted to by French J in *CSR Ltd*.⁸⁵

The approach taken by the courts to fixing a civil penalty, while seeking only to determine what penalty is needed to achieve deterrence, is much the same as the sentencing decision-making process. In *ASIC v Westpac*, O’Byrne J summarised the way the courts apply these factors:

These factors are neither exhaustive of potentially relevant matters to be considered nor ‘a rigid catalogue or checklist of matters to be applied in each case’: *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68 at [101]. The process of fixing an appropriate civil penalty may, to an extent, be likened to the ‘instinctive synthesis’ method involved in the criminal sentencing process: *Westpac BIO case* at [261]; *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25 (*Reckitt Benckiser*) at [44]. This involves addressing each relevant matter and, without expressly giving a weighting to those matters, instinctively synthesising them to apply a value judgment and arrive at an ultimate penalty that is proportionate to the contraventions at issue.⁸⁶

⁸¹ *Australian Securities and Investments Commission (ASIC) v Adler* [2002] NSWSC 483, 42 ACSR 80. See also a list of factors identified by Perram J in *ACCC v Singtel Optus Pty Ltd (No 4)* [2011] FCA 761, (2011) 282 ALR 246, 250–51 [11], referred to without objection on appeal: *Singtel Optus Pty Ltd v ACCC* [2012] FCAFC 20, (2012) 287 ALR 249, 258 [37] (the Court).

⁸² *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113, (2017) 254 FCR 68 [102] (Dowsett, Greenwood and Wigney JJ) (*Queensland Infrastructure Case*); *Australian Securities and Investments Commission v Westpac Banking Corp* [2019] FCA 2147 (*Westpac BIO case*) [256]–[260] (Wigney J).

⁸³ *ACCC v Woolworths Ltd* [2016] FCA 44 [126] (*Woolworths*).

⁸⁴ *ACCC v Reckitt Benckiser (Australia) Pty Ltd (No 7)* [2016] FCA 424, (2016) 343 ALR 327 (Edelman J) (*Reckitt Benckiser No 7*), applied by the Full Court of the Federal Court as a factor on appeal in *Reckitt Benckiser* (n 79) [159]; *ACCC v Superfone Pty Ltd* [2021] FCA 278 [84] (Murphy J) (*Superfone*); *Gibson* (n 16) [50] (Mortimer J), referring to ‘remorse and contrition’; *ASIC v Westpac* (n 1) [22] (O’Byrne J), ‘remorse and contrition’.

⁸⁵ *Pattinson* (n 58) [47] (Kiefel C), Gageler, Keane, Gordon, Steward, Gleeson JJ).

⁸⁶ *ASIC v Westpac* (n 1) [23].

The extent of contrition of a contravenor is considered, therefore, in a holistic assessment of the penalty to be imposed. In the event that the need for specific deterrence does not arise in the circumstances of the case, lack of contrition for the wrongful conduct will be of no particular relevance to the assessment of penalty.⁸⁷

D. Civil Actions

i. The Objects of Damage Awards in Civil Actions

The primary object of awarding damages for wrongdoing is to compensate the victim of a tort or breach of contract, with the aim, so far as possible, of putting a party who suffers loss or damage in the same position she would have been in had the tort or breach of contract not occurred.⁸⁸ The payment of money is awarded as ‘a substitute for that which is generally more important than money: it is the best that a court can do.’⁸⁹ In contrast, exemplary damages are available in some areas of the law and are awarded ‘to punish the defendant, and presumably to serve one or more of the object of punishment – moral retribution or deterrence.’⁹⁰ Exemplary damages are awarded for conduct that is ‘conscious wrongdoing in contumelious disregard of another’s rights.’⁹¹ The assessment of exemplary damages is at the discretion of the judge or jury, and the considerations that enter into the assessment of exemplary damages are quite different from the considerations that govern the assessment of compensatory damages.⁹² In view of the purposes of exemplary damages, all conduct aggravating or mitigating the circumstances will be taken into account.⁹³

ii. Functions of Remorse and Contrition in the Assessment of Damages

To achieve the compensatory purpose of damages, the law looks to the plaintiff’s loss or damage rather than to the defendant’s conduct in response to the wrong. Contrition and remorse have, therefore, a very limited role to play in the law of torts and other civil actions. In actions where damages are available for torts that protect reputation, dignity and feelings, however, the common law has long recognised the significance of contrition by a defendant in mitigation of damages. For example, in defamation, a suitable and sufficient correction and apology, or the lack thereof, is a factor in mitigation⁹⁴

⁸⁷ *ASIC v Dover Financial Advisers Pty Ltd (No 3)* [2021] FCA 170 [141] (O’Byryan J).

⁸⁸ *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39 (HL) (torts); *Robinson v Harman* (1838) 1 Ex 850, 154 ER 363 (breach of contract).

⁸⁹ H McGregor, *McGregor on Damages*, 19th edn (London, Sweet & Maxwell, 2014) 13 at [2-001], cited by Edelman J in *Woolworths* (n 83) [166].

⁹⁰ *Uren v John Fairfax & Sons Ltd* [1966] HCA 40, (1966) 117 CLR 118, 149 (Windeyer J) (*Uren*).

⁹¹ *Whitfeld v De Lauret & Co Ltd* [1920] HCA 75, (1920) 29 CLR 71, approved in *Uren* (n 90) 154 (Windeyer J).

⁹² *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* [1984] HCA 12, (1985) 155 CLR 448 [203].

⁹³ *Fontin v Katapodis* [1962] HCA 63, (1962) 108 CLR 177 [187] (HCA) (Owen J). See also *Pattinson* (n 58).

⁹⁴ *Cassell & Co Ltd v Broome* [1972] AC 1027, 1071 (HL). As Michael Tilbury notes, ‘mitigation is used “in a peculiar sense” in defamation, false imprisonment and malicious prosecution actions to show that the plaintiff’s loss is less than, at first blush, it appears to be’: M Tilbury, *Civil Remedies*, vol II: *Principles of Civil Remedies* (Sydney, Butterworths, 1993) [11027].

or aggravation⁹⁵ of loss.⁹⁶ In this respect, the publication of a reasonable correction combined with ‘a contrite apology’ can mitigate the damage to the plaintiff’s reputation and feelings and reduce the damages payable by the defendant⁹⁷ or the amount of monetary compensation required for an offer to make amends to be reasonable.⁹⁸ To be significant as a mitigating factor, the apology must be an expression of regret for the plaintiff’s hurt and embarrassment⁹⁹ and accept responsibility for the inaccuracy.¹⁰⁰ Apologies are also relevant to the assessment of exemplary damages.¹⁰¹

V. Judging Remorse and Contrition

The law regards the presence of these emotions as significant to the justice system where they provide evidence of mitigation, of the potential for rehabilitation of the defendant and of deterrence, general and specific. The approach to judging remorse and contrition is similar in sentencing and determining civil penalties, even though the objects of sentencing are broader than civil penalties. Judging remorse and other emotions such as regret and sorrow is a judicial exercise informed by the facts and circumstances of each case. The extent of those emotions will determine the extent of remorse and, hence (within limits), the extent of mitigation.¹⁰² It is for the defendant, or respondent, to satisfy the court that there is ‘genuine penitence and contrition and a desire to atone’¹⁰³ by putting evidence of remorse or contrition before the primary judge as ‘a circumstance of mitigation.’¹⁰⁴ This section discusses in general terms the nature of the evidence to which courts have regard in assessing contrition. Section VI discusses specifically what courts consider as evidence of contrition when the defendant is a corporation.

A. Guilty Pleas, Admissions and Cooperation are Discrete Mitigating Factors Relevant to Judging Remorse

In sentencing a defendant, the law differentiates between a guilty plea as a mitigating factor in sentencing and a plea of guilty as evidence of remorse or contrition. This is despite the fact that in many cases, perhaps, the plea of guilty will be motivated or

⁹⁵ *Rookes v Barnard* [1964] AC 1129 (HL); *Carson v John Fairfax & Sons Ltd* [1993] HCA 31, (1993) 178 CLR 44.

⁹⁶ Exemplary damages were previously but no longer are available in Australia for defamation: Defamation Act 2005 (NSW), s 33 and equivalent Defamation Act provisions in other States and Territories.

⁹⁷ *ibid* s 38.

⁹⁸ *Pedavoli* (n 51) [99].

⁹⁹ *Uren* (n 90) 141 (Menzies J).

¹⁰⁰ *Pedavoli* (n 51) [99] (McCallum J).

¹⁰¹ *Uren* (n 90).

¹⁰² *Georgopolous* (n 33) (Adams J).

¹⁰³ *Barbaro* (n 65) [38] (Maxwell P, Harper JA and T Forrest AJA).

¹⁰⁴ *Reckitt Benckiser* (n 79) (Jagot, Yates and Bromwich JJ) [161]–[162], citing *Barbaro* (n 65) [38] (Maxwell P, Harper JA and T Forrest AJA) in the criminal context and *National Tertiary Education Industry Union v Swinburne University of Technology (No 2)* [2015] FCA 1080 [109] (Mortimer J) in the civil penalty context.

at least accompanied by regret for the crime that has been committed.¹⁰⁵ A court has regard to a guilty plea that brings the criminal proceedings to an end without a trial of the charges as a separate factor under section 16A(2)(g) of the Crimes Act: a guilty plea is regarded as having utilitarian value because it saves time and the expense of prosecution and a trial. In *Xiao v R*,¹⁰⁶ for example, the Court was considering whether the utilitarian value of a guilty plea should be taken into account under the separate provision in section 16A(2)(g) of the Crimes Act in addition to contrition under section 16A(2)(f). In relation to paragraph (g), the Court concluded that contrition and a guilty plea should both be taken into account, saying:

It is important to bear in mind that if the utilitarian value of the plea could not be taken into account it would leave s 16A(2)(g) with very little work to do. Contrition and remorse are factors that are separately required to be taken into account under s 16A(2)(f). The fact that the various factors in s 16A(2) will from time to time overlap, does not lessen the force of this consideration.¹⁰⁷

Similarly, as the cases discussed in section VI.B.i show, contrition or remorse as a mitigating factor can play an overlapping role with admissions of contraventions and cooperation with regulators in civil penalty regimes.

B. Judicial Consideration of Contrition and Remorse Raises Multiple Issues

As Ian Freckleton reminds us, there are many issues in the criminal law concerning remorse that arise at the point of sentencing an offender. These issues concern the means of assessing the genuineness or otherwise of asserted remorse, the amount of significance that should be given when it is found, and dealing with the risk of double counting in reducing a sentence for the interrelated factors of an offender's remorse, good prospects of rehabilitation and a finding as a result that they are unlikely to reoffend.¹⁰⁸ Many of the same issues arise when fixing the amount of a civil penalty to achieve the objectives of that regime, including the need to consider different forms of evidence of remorse, to avoid double counting between factors and to assess whether or not the expression of remorse is genuine.

C. Evidence of Contrition and Remorse Takes Many Forms

The law is not prescriptive about what can constitute evidence of remorse, generally leaving this as an open-ended inquiry that looks to evidence that shows that a defendant feels regret or other emotions as a result of their actions, that they accept responsibility for

¹⁰⁵ *Georgopolous* (n 33) [11]–[14] (Adams J).

¹⁰⁶ *Xiao v R* [2018] NSWCCA 4, (2018) 96 NSWLR 1.

¹⁰⁷ *ibid* [272].

¹⁰⁸ I Freckleton, 'Book Review: Remorse: Psychological and Jurisprudential Perspectives, by M Proeve and S Tudor' (2011) 18 *Psychiatry, Psychology and Law* 315, 318.

their actions and the harm it has caused, acknowledge their wrongdoing and the injury it has caused, or take action to make reparation or both. In many instances, however, ‘the most compelling evidence of this will come from testimony by the offender’.¹⁰⁹ At the same time, it is commonly understood that ‘remorse that results in actions and not only words is plainly more significant’.¹¹⁰ Some legislation makes express reference to how contrition can be shown; for example, section 16A of the Crimes Act expressly refers to ‘taking action to make reparation ... or in any other manner’.¹¹¹ Other sentencing legislation is more prescriptive, stipulating the evidence that must be provided if remorse is to be considered as a mitigating factor. For instance, section 21A(3)(i) of the Crimes (Sentencing Procedure) Act 1999 (NSW) provides that remorse may only be considered as a mitigating factor if the offender has provided evidence that they have accepted responsibility for their actions and have acknowledged the injury, loss or damage caused by their actions or made reparation for such injury, loss or damage (or both).¹¹²

D. Empirical Insight into what Courts Consider when Judging Remorse

Proeve and Tudor’s research on remorse in the legal system includes a study with Kate Rossmanith of how judges know about remorse.¹¹³ Courtrooms can serve as ‘theatres of remorse, and of remorselessness’.¹¹⁴ In many instances, however, courts will look for evidence of remorse outside the courtroom. In a study published in 2018, the authors interviewed 20 magistrates and judges in New South Wales, exploring how judges themselves understand their own ways of knowing about remorse. They report that many judges want to see remorse in the courtroom and are confident that they know it when they see it. At the same time, they consider it important to have regard to evidence of an offender’s remorse outside the courtroom, from the moment the offence was committed up until the sentencing hearing (which is often over a period of several years). The authors conclude, based on the interview data, that ‘Although in-court displays of remorse can be highly significant, perhaps the most remorse-indicative behaviours are those that occur outside the courtroom.’¹¹⁵

It is clear from the factors applied by the courts in civil penalty proceedings that evidence of contrition outside the courtroom is also highly important in these proceedings, not only in criminal proceedings.

¹⁰⁹ *Barbaro* (n 65) [38] (Maxwell P, Harper JA and T Forrest AJA).

¹¹⁰ *Georgopolous* (n 33) [11]–[14] (Adams J).

¹¹¹ Commonwealth Sentencing Database (n 42).

¹¹² See also Sentencing Act 2017 (SA), s 11.

¹¹³ Rossmanith, Tudor and Proeve (n 56). The authors cite previous studies published in recent years, involving formal and informal interviews with sentencing judges in relation to remorse: *ibid* fn 19.

¹¹⁴ *ibid* 367.

¹¹⁵ *ibid* 378.

E. Genuineness of Remorse and Contrition

The many challenges associated with judging the genuineness of remorse and contrition and the role of remorse in the justice system are well known to the law and to scholars from many disciplines.¹¹⁶ Assessments of the genuineness of remorse, regret and sorrow are not confined to the justice system; indeed, this is acknowledged in *Alvares* as 'a common feature of everyday existence'.¹¹⁷ Individuals and the public also judge the sincerity and value of expressions of remorse and contrition in the form of apologies on a daily basis.¹¹⁸ Research and scholarship on apologies by philosophers, sociologists, criminologists, psychologists, lawyers and others offer many valuable insights into the meanings of apologies and the components of an apology that will usually be necessary for an apology to be judged as genuine. This body of literature in turn deepens our understanding of how remorse and contrition are expressed.¹¹⁹

Nick Smith and others¹²⁰ attribute meaning to apologies by reference to component parts, which in turn are important to understanding the meaning of what is variously described as a full, meaningful, genuine, 'categorical' or 'good enough' apology.¹²¹ There is consensus that a full apology incorporates an expression of heartfelt regret and remorse for what has happened, sympathy for the victim and acknowledges the wrongdoer's transgression.¹²² For some, the apology must also offer some form of recompense and a commitment to change in the future.¹²³ The presence of these core components is consistent with the ways of showing genuine remorse in society and in the law. Another insight from apology scholarship for judging remorse concerns the importance of identifying the moral community by whom the offender is being judged.¹²⁴ In the justice system, judges reflect legal and societal expectations in their judgments, which include civil norms about how wrongdoers respond to their conduct and the harmful

¹¹⁶ Leading works include Proeve and Tudor (n 5) and N Smith, *Justice Through Apologies: Remorse, Reform and Punishment* (New York, Cambridge University Press, 2014).

¹¹⁷ *Alvares* (n 35) [44].

¹¹⁸ Psychological research tells us that what constitutes an apology for the recipient in any particular situation and context is a highly unique and subjective experience; see A Allan and R Carroll, 'Apologies in a Legal Setting: Insights from Research into Injured Parties' Experiences of Apologies after an Adverse Event' (2016) 24 *Psychiatry, Psychology and the Law* 1, 10.

¹¹⁹ N Smith, *I Was Wrong: The Meanings of Apology* (New York, Cambridge University Press, 2008); N Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (Stanford, CA, Stanford University Press, 1991); A Lazare, *On Apology* (Oxford, Oxford University Press, 2004); K Gill, 'Moral Functions of Apology' (2000) 31 *Philosophical Forum* 11; J Gardner, *From Personal Life to Private Law* (Oxford, Oxford University Press, 2018) ch 4; A Allan, 'Functional Apologies in Law' (2008) 15 *Psychiatry, Psychology and Law* 369; P Vines, 'The Power of Apology: Mercy, Forgiveness or Corrective Justice in the Civil Liability Arena?' (2007) 1 *The Journal of Law and Social Justice* 1.

¹²⁰ Smith (n 119); Lazare (n 119); D Slocum, A Allan and M Allan, 'An Emerging Theory of Apology' (2011) 62 *Australian Journal of Psychology* 83.

¹²¹ Smith (n 119) 'categorical'; Slocum, Allan and Allan (n 120) 'good enough'.

¹²² A Allan, 'Apology in Civil Law: A Psycho-Legal Perspective' (2007) 14 *Psychiatry, Psychology and Law* 5.

¹²³ *ibid.* See also C Petrucci, 'Apology in the Criminal Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System' (2002) 20 *Behavioral Sciences & the Law* 337, 341; C Petrucci, 'Apology in the Criminal Justice Setting: An Update' (2017) 7 *Oñati Socio-Legal Series* 437.

¹²⁴ P Vines 'The Value of Apologising within a Moral Community: Making Apologies Work' (2017) 7 *Oñati Socio-Legal Studies* 370.

consequences of their actions on others. Corporations are also commonly judged by consumers and markets on how they respond to corporate wrongdoing and harm.¹²⁵

Notwithstanding the difficulties of judging remorse and contrition, judges regularly undertake this exercise. Genuineness of remorse is important in sentencing, as explained by Simpson J in *Mariam v R*:

[A]lthough it is well established that remorse may be taken into account as a mitigating factor in sentencing, some attention needs to be paid to the logic of doing so. Genuine remorse may be an indicator of the unlikelihood of further offending, in which case it may have significant relevance. If it is not indicative of that likelihood, I see little relevance in such evidence.¹²⁶

Questions persist about the ability to judge whether an offender's remorse is genuine.¹²⁷ In particular, it may be difficult to differentiate a corporation's genuine remorse or contrition from mere lip service. Notwithstanding, courts have accepted that it is possible to assess the genuineness of corporate remorse, for example, in occupational health and safety matters. In *WorkCover Authority of New South Wales (Insp Mulder) v Yass Shire Council*, Wright J states:

Although some commentators have pointed out that it is impossible for a judge accurately to estimate the sincerity of remorse or contrition (Ashworth, *Sentencing and Criminal Justice*, London, 1994 at 130, as cited by Mack and Anleu, *Pleading Guilty: Issues and Practices*, Australian Institute of Judicial Administration, 1995 at 161), experience in occupational health and safety matters indicates that in many cases it is possible for an employer charged under the Act to provide tangible confirmation of contrition by support and assistance rendered to injured employees or to the families of victims of fatal accidents.¹²⁸

Courts make assessments of genuineness in determining what weight, if any, to give to a defendant's expression of remorse or contrition. It is clear that this exercise takes on further complexity when the defendant is a corporation. Given that courts deem corporations capable of possessing the equivalent of contrition attributed to a natural offender,¹²⁹ it is unsurprising that the process of judging essentially is the same, notwithstanding the need for attribution based on principles applicable to an artificial construct.

¹²⁵ See, eg, K Vinayagamoorthy, 'Apologies in the Market Place' (2013) 33 *Pace Law Review* 1081; R Carroll, C To and M Unger, 'Apology Legislation and its Implications for International Dispute Resolution Practitioners' (2015) 9 *Dispute Resolution International* 115. For an analysis of issues specific to collective apologies, including corporations, see Smith (n 119) ch 10.

¹²⁶ *Mariam v R* [2013] NSWCCA 338 [64] (Simpson J, Price and RA Hulme JJ agreeing).

¹²⁷ Contrast the situation in facilitated resolution of disputes, where it is for the parties to judge the meaning and value of an apology, not a judge, and implications of this for the parties involved: Allan and Carroll (n 118).

¹²⁸ *WorkCover Authority of New South Wales (Insp Mulder) v Yass Shire Council* [2000] NSWIRComm 57, (2000) 99 IR 284 [35], where his Honour cites in support of his conclusion the decision in *WorkCover New South Wales (Inspector Page) v Walco Hoist Rentals Pty Ltd (No 2)* [2000] NSWIRComm 39, 43; *WorkCover Authority (Inspector Tyler) v Abigroup Contractors Pty Ltd* [2000] NSWIRComm 40, 29; *Corinthian Industries (Sydney) Pty Ltd v WorkCover Authority of New South Wales* [2000] NSWIR Comm 46, (2000) 99 IR 159.

¹²⁹ *Ampol* (n 11). See also *Morrison* (n 11) [111].

VI. Corporate Contrition and Remorse

Sentencing and civil penalties legislation in Australia does not make specific provision for corporate defendants, despite ALRC calls for reform in this regard. The cases make clear that the corporate nature of the defendant does not prevent an inquiry into whether a corporation shows contrition for crimes and corporate misconduct, and provide guidance on what evidence is relevant. This section considers how contrition and remorse are attributed to a corporation and what forms of evidence the courts consider show genuine remorse.

A. Attribution of Contrition or Remorse to a Corporation

The ways in which a corporation can express remorse or contrition include the ways in which a natural person can express these emotions, except that in the case of a corporation, courts look to establish the state of mind of the corporation by considering evidence of remorse and contrition provided by the board, by directors, officers and employees of the corporation, and by corporate systems. While individuals can express remorse and contrition, the inquiry here concerns how contrition is expressed for the purposes of being attributed to the corporation as a distinct entity.¹³⁰

Analysis of the case law reveals that the courts have regard to at least four forms of evidence to judge corporate remorse and contrition, in addition to and aside from admissions of guilt or to contraventions of the law. Admitting to a contravention and submitting to a penalty shows willingness on the part of the defendant ‘to accept responsibility for its actions and to facilitate the course of justice,’¹³¹ which bears on the need for a penalty to specifically deter future contraventions.

B. Forms of Evidence Showing Corporate Contrition and Remorse

In *Environmental Protection Authority v Waste Recycling and Processing Corporation*,¹³² Preston CJ identified four forms of action underlying genuine contrition and remorse that may justify a reduction in the context of a prosecution for environmental damage, which may be summarised as:

- (1) the speed and efficiency of action to rectify any harm caused or likely to continue to be caused by the commission of the offence is the clearest indication of contrition and remorse;

¹³⁰For discussion and critique, see Bant, ‘Catching the Corporate Conscience’ (n 17) and sources cited therein for theories and judicial approaches to attributing corporate culpability and other states of mind, including contrition and remorse, to corporations.

¹³¹*Queensland Infrastructure Case* (n 82) [163].

¹³²*Environmental Protection Authority v Waste Recycling and Processing Corporation* [2006] NSWLEC 419, (2006) 148 LGERA 299 (*Waste Recycling and Processing Corporation*). For an example of where these principles have been applied, see *Secretary, Department of Planning and Environment v Shoalhaven Starches Pty Ltd* [2018] NSWLEC 23 (*Shoalhaven Starches*).

- (2) voluntarily reporting the commission of the offence and any concomitant environmental harm to relevant authorities indicates a genuine desire to act responsibly;
- (3) taking action to address the causes of the offence, such as designing and installing improved pollution prevention and control systems indicates a genuine desire to act responsibly; and
- (4) the personal appearance of corporate executives in court and their personal evidence outlining the company's genuine regret and stating future plans to avoid repetition of such offences is an indication of genuine corporate contrition.¹³³

Although these 'well-founded'¹³⁴ principles are identified in the context of a prosecution for environmental damage, they can be applied to other corporate sentencing contexts.¹³⁵ They are also consistent with the approach by courts in civil penalty regime cases when considering contrition and remorse as a mitigating factor. We saw in section I the damning comments by O'Bryan J about the absence of remorse shown by Westpac for contravening the Corporations Act.¹³⁶ O'Bryan J took into account in determining a penalty 'at the highest levels permitted by the Act' that Westpac had made 'no expression of contrition or remorse'. This finding was based on the absence of any or any proposed correspondence containing any apology to affected clients, that the Bank had not expressed regret for the conduct, did not appear to have taken steps to remedy the compliance deficiencies and had been tardy in progressing a remediation plan.¹³⁷ Had it been otherwise, the presence of evidence of some or all of these ways of showing remorse would have been considered.

Similarly, in the earlier case of *Pilbara Iron Co*,¹³⁸ Katzman J considered as evidence of remorse in addition to changing its behaviour, that a corporation might admit its wrongdoing and spare the other parties the costs of prosecuting the case. It might offer recompense, it might apologise and it might introduce precautions to guard against the risk of reoffending.¹³⁹

It appears from some cases that acceptance of responsibility by a corporation, recognition of the consequences of the wrongdoing and any apologies are regarded as separate mitigating factors from contrition and remorse.¹⁴⁰ This suggests some confusion about what it means for a corporation to be remorseful or contrite, and the role of

¹³³ *Waste Recycling and Processing Corporation* (n 132) [204]–[214].

¹³⁴ See *Chief Executive, Office of Environment and Heritage v Ausgrid* [2013] NSWLEC 51, (2013) 199 LGERA 1 [80] (Pepper J) (*Ausgrid*); *Environment Protection Authority v Moolarben Coal Operations Pty Ltd* [2012] NSWLEC 65 [85]–[89]; *Environment Protection Authority v Moolarben Coal Operations Pty Ltd (No 2)* [2012] NSWLEC 80 [101].

¹³⁵ Decisions concerning occupational health and safety prosecutions of corporations confirm that remorse or contrition can be demonstrated by a variety, or combination, of factors and are relevant to mitigation of penalty, eg: *Inspector Patton v Western Freight Management Pty Ltd (No 2)* [2009] NSWIRComm 124 [76] (Boland J); *Inspector Christensen v Lend Lease Engineering Pty Ltd (formerly Abigroup Contractors Pty Ltd)* [2014] NSWIRComm 42 [55] (Walton J, President).

¹³⁶ *Westpac v ASIC* (n 2) affirming the decision of the Full Court of the Federal Court in *ASIC v Westpac Securities* (n 2).

¹³⁷ *ASIC v Westpac* (n 2) [95].

¹³⁸ *Pilbara Iron Co* (n 14).

¹³⁹ *ibid* [34].

¹⁴⁰ See reference to the ASIC submission in *ASIC v Mayfair Wealth Partners Pty Ltd* [2021] FCA 1630 [237] relating to Australian Securities and Investments Commission Act 2001 (Cth) and Corporations Act 2001 (Cth), s 1041H relating to false, misleading or deceptive conduct. Significant pecuniary penalty ordered in respect of all defendants.

apologies as evidence of being in this state rather than as a separate mitigating factor. The following analysis identifies the multiple forms of evidence that can show genuine contrition and remorse. The four categories are indicative of contrition and remorse, they are not prescriptive. The words and actions that fall within these categories can serve as evidence relating to one or more of the factors and considerations a court takes into account in sentencing and civil penalty regimes. A court may conclude that an aspect of contrition is present, for example by admitting the contravention and submitting to a penalty even though there was no apology, where the court accepts that an apology was not particularly appropriate to the circumstances of the contravention.¹⁴¹

i. Acknowledgement and Voluntary Reporting of the Offence or Contravention and Cooperating with Prosecutors and Regulators

As discussed earlier in the chapter, entering a guilty plea is a mitigating factor in sentencing legislation, which also can show a defendant's remorse and contrition. Relatedly, voluntarily reporting the commission of an offence or contravention also can be evidence of genuine remorse.¹⁴² Cooperation with authorities in the course of investigations and subsequent proceedings is regarded as a mitigating factor that will almost certainly reduce the penalty that would otherwise be imposed, and reflects the fact that such cooperation is evidence of contrition.¹⁴³ In civil penalty regimes, cooperation and assistance with the relevant regulatory authority is a factor concerning the particular circumstances of a corporate contravenor.¹⁴⁴ Cooperation is also regarded separately as evidence of contrition and remorse by a corporation for its contraventions, although cooperation does not necessarily evidence remorse, as it might 'reflect nothing more than an acceptance of the inevitable'.¹⁴⁵

In *Woolworths*,¹⁴⁶ Edelman J considered that Woolworths' cooperation with the ACCC should provide a significant discount from the penalty his Honour otherwise would have awarded in that case. Woolworths were found to have engaged in conduct in their commercial operations that involved multiple contraventions of the Australian Consumer Law. Justice Edelman found that Woolworths' substantial cooperation included assistance with the ACCC investigation, undertaking to the ACCC that Woolworths would address its concerns, and engaging with the ACCC on Woolworths' new product-quality framework and other new initiatives, initiating settlement discussions and reaching agreement on contraventions with the ACCC, including the appropriate relief (other than as to penalty) to be recommended to the Court. The agreement on contraventions meant that 'the parties and the Court were spared the substantial cost of a trial'.¹⁴⁷

¹⁴¹ *Australian Federation of Air Pilots v HNZ Australia Pty Ltd* [2015] FCA 755 [43], referred to in *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union* [2022] FCA 37 (*NEXT DC P2 Project Case*).

¹⁴² *Waste Recycling and Processing Corporation* (n 132).

¹⁴³ See *Commissioner of Taxation v Arnold (No 2)* [2015] FCA 34, (2015) 324 ALR 59 [189] for cases cited for authority on this point and a discussion of authorities more generally on cooperation as mitigation.

¹⁴⁴ *CSR Ltd* (n 72) 52, 152.

¹⁴⁵ *Queensland Infrastructure Case* (n 82) (Dowsey, Greenwood and Digney JJ) [164]; *NEXT DC P2 Project Case* (n 141) [80].

¹⁴⁶ *Woolworths* (n 83).

¹⁴⁷ *ibid* [162]

His Honour considered Woolworths' actions of cooperation were evidence of a desire to redress their failings, leading his Honour to comment that 'Woolworth's cooperation is also evidence of contrition for its contraventions.'¹⁴⁸ Further evidence of contrition in this case was found in Woolworths' offers and payments of compensation and their apologies to affected consumers.

ii. Rectification, Reparation and Other Forms of Recompense

Rectification of harm, past and future, can be undertaken in various ways, including repair, reparation and recompense. Reparations are a way of showing contrition, for example when sentencing a defendant pursuant to section 16A(2)(f) of the Crimes Act. Reparation payments made by a corporate wrongdoer will constitute evidence of contrition where the wrongdoer had no obligation to make a payment in reparation.¹⁴⁹ In criminal proceedings in *ACCC v Santo Pennisi*,¹⁵⁰ the corporation was found on its plea of guilty to have made false or misleading representations contrary to section 75AZC(1)(A) of the Trade Practices Act 1974 (Cth) by its mixing petroleum fuel types. In relation to contrition, Logan J had regard to a donation to a local charity made in circumstances where the defendant was under no obligation to make any such donation. In his Honour's view, the donation evidenced contrition and 'was in a sense a form of reparation to the community' in that, whilst it is not readily possible to identify particular consumers by name affected by the conduct, 'the type of donation made at least can be seen to have the ability to benefit the motoring public through the better training of drivers or at least the enabling of a charity to undertake that task.'¹⁵¹

Another example of the importance of reparation in conjunction with other acts of contrition is provided by the decision in *Director of Public Prosecutions v Hazelwood Power Corp Pty Ltd (Sentence)*,¹⁵² in which a corporate defendant was found guilty of occupational health and safety offences in relation to fires at its mining operations. Justice Keogh accepted the defendant corporation's submission that it demonstrated remorse in a number of ways, including by the provision of \$100 gift cards to each of the 6,700 households in the local community affected by the fires, to be spent in local business (costing a total of approximately \$650,000). This accompanied a \$100,000 contribution to a local council's community clean-up initiative; a \$50,000 donation to the Gippsland Emergency Relief Fund; and making \$500,000 available to the Community Social Capital Committee (which comprised local organisations such as rotary clubs and church associations), and other community sponsorship.¹⁵³

Reparation payments will not necessarily be afforded much or any weight as evidence of contrition. For example, in determining the civil penalty to be applied in

¹⁴⁸ *ibid* [163].

¹⁴⁹ See *Director of Public Prosecutions v Hazelwood Power Corp Pty Ltd (Sentence)* [2020] VSC 278 [163] (*Hazelwood Power Corp*).

¹⁵⁰ *ACCC v Santo Pennisi* [2007] FCA 2100.

¹⁵¹ *ibid* [47]. One might question whether the donation was sufficiently directed to the harm the provision is intended to prevent and to which the penalty was directed, so as to justify a reduction in penalty on the ground of deterrence in this case.

¹⁵² *Hazelwood Power Corp* (n 153).

¹⁵³ *ibid* [167].

an occupational health and safety case following the death of an employee in *Comcare v John Holland Pty Ltd*,¹⁵⁴ Siopis J considered that little weight could be attached to financial and other contributions to community projects in the context of an Act directed towards one specific aspect of the way in which the employer conducts its business operations, 'namely, the employer's conduct in relation to protecting the safety of its employees at the workplace. It is that specific aspect of an employer's conduct which forms the focus of attention in relation to the imposition of a civil penalty.'¹⁵⁵

In some contexts, action taken, including payment of compensation that a defendant is legally obliged to make, can be evidence of contrition. In civil penalty cases, for example those resulting from contraventions of consumer protection and corporate regulation provisions, a corporation may be obliged to compensate consumers, members and other people who have suffered loss or damage as a result of the contravention. Can a willingness to pay compensation in these circumstances demonstrate contrition or remorse? Payment of compensation for breach of a common law or statutory obligation may be regarded as evidence of contrition in some circumstances in at least two ways. First, the voluntariness and speed with which action is taken or offers and payments are made may show contrition.¹⁵⁶ Second, when offered in conjunction with an apology, the promise to make good the harm in this way may show that the apology is sincere and meaningful. The first aspect was significant in *Woolworths*. In that case, Edelman J had regard to Woolworths' offers and payments of compensation (and their apologies) to affected consumers as evidence of contrition, noting:

Woolworths' offers of compensation were not cynical offers made on the eve of litigation. Compensation was paid to some consumers even before this litigation was commenced. All those who sought compensation were compensated.¹⁵⁷

Subsequently, in *ACCC v Superfone Pty Ltd*,¹⁵⁸ Murphy J cited Edelman J in *Woolworths* on compensation's being evidence of contrition in support of his conclusion that Superfone showed remorse by accepting responsibility and apologising for contravening provisions of the Australian Consumer Law and, further, by consenting to consumer redress orders.¹⁵⁹

iii. Corporate Expressions of Regret and Apologies

Apologies and expressions of regret are further ways in which a corporation can express contrition and remorse in mitigation of sentence or penalty.¹⁶⁰ The cases discussed in

¹⁵⁴ *Comcare* (n 8) [97] (Siopis J).

¹⁵⁵ *ibid.*

¹⁵⁶ *Woolworths* (n 83) [163]; *Waste Recycling and Processing Corporation* (n 132) [204]–[212].

¹⁵⁷ *Woolworths* (n 83) [163].

¹⁵⁸ *Superfone* (n 84).

¹⁵⁹ *ibid* [84].

¹⁶⁰ The authorities indicate that any lack of contrition or remorse, and the absence of an apology, is not an aggravating circumstance such as might increase the penalty, although evidence of contrition can operate to reduce a penalty: *BHP Steel (AIS) Pty Ltd v Construction, Forestry, Mining and Energy Union* [2001] FCA 336 (Kiefel J); *Cahill v Construction, Forestry, Mining and Energy Union (No 4)* [2009] FCA 1040, (2009) 189 IR 304 [87] (Kenny J); *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 4)* [2013] FCA 930 (Murphy J).

this subsection show that judges assess the genuineness of a corporate apology and its value in mitigation by reference to many factors, which include timing, fullness and voluntariness: this is consistent with psychological research into what makes an apology meaningful.¹⁶¹

A corporate apology raises at least two additional issues: attribution of remorse or contrition as a state of mind, and the mitigating value of a corporate apology. The first issue relates to how a corporation can express regret or offer an apology. There must be some basis for attributing remorse or contrition to a corporate offender based on words offered by the corporation, for example through a resolution of the board of directors, or a public apology on behalf of the corporation, for example by the chief executive officer or other senior executives. In *Chief Executive, Office of Environment and Heritage v Ausgrid*,¹⁶² for example, the defendant corporation was found to have expressed contrition and remorse through affidavit and in-court oral evidence of the company's Chief Operating Officer, whereby he unreservedly apologised on behalf of the company for the commission of the offence and the harm caused to an Indigenous community by damage to a rock engraving attributed to the company's excavation.

More generally, while words of apology by corporate executives and officers will be considered, it is clear that evidence of contrition and remorse is more readily accepted through a corporate defendant's actions. Courts have said in a number of cases that corporate contrition cannot be demonstrated through the evidence of the personal feelings of remorse of senior officers of a company.¹⁶³ The personal evidence of senior officers as to the company's contrition, however, and the company's steps taken to ensure wrongdoing never occurs again, is relevant.¹⁶⁴ The following two cases, both involving criminal proceedings, show that evidence of genuine remorse of senior officers of a corporation is not the only way to attribute this state of mind to the company, and that the genuineness of corporate remorse may be ascertained through the content of its submissions and legal arguments proffered at trial.

In *Secretary, Department of Planning and Environment v Shoalhaven Starches Pty Ltd*,¹⁶⁵ a company failed on five occasions to disclose political donations as required by law. Justice Moore considered whether the company had shown remorse for the offence as required by section 21A(3)(i) of the Crimes (Sentencing Procedure Act) 1999 (NSW). The Company Secretary filed an affidavit 'on behalf of the defendant' that included an apology. The prosecution sought to diminish the weight of this as evidencing contrition because the directors more senior to the Secretary gave no such evidence. Justice Moore rejected this submission (as the evidence was not challenged in cross-examination) and held that an affidavit and statement of apology, both of which were stated to have been made 'on behalf of' the company, were valid statements that demonstrated the company's remorse as to the wrongdoing.¹⁶⁶

¹⁶¹ This research is discussed in Allan and Carroll (n 118).

¹⁶² *Ausgrid* (n 135).

¹⁶³ See *Director of Public Prosecutions v Esso Australia Pty Ltd* [2001] VSC 263, (2001) 124 A Crim R 200 (*Esso*); *Waste Recycling and Processing Corporation* (n 132).

¹⁶⁴ See *Ausgrid* (n 135) [80] (Pepper J).

¹⁶⁵ *Shoalhaven Starches* (n 132).

¹⁶⁶ *ibid* [77].

In *Director of Public Prosecutions v Esso Australia Pty Ltd (Esso)*,¹⁶⁷ two workers were killed and others were injured in an explosion at one of Esso's three Longford gas-processing plants. The court had to decide the sentence for Esso's criminal offences committed under the Occupational Health and Safety Act 1985 (Vic). The Chairman and Managing Director were found to have exhibited genuine remorse. However, those personal expressions of remorse of the senior officers were not translated into corporate remorse for three reasons. First, Esso was found to have treated its employees in a litigious matter. This was evidenced through the content of the submissions put forward by Esso's lawyers. For instance, Esso made submissions that an employee had the requisite information to protect himself from harm, when in fact it was found that 'there was only one entity responsible ... Esso' and it was only the corporation who was found to have committed the wrong. Second, although Esso was found to limit the issues in trial and make admissions, its defence at trial was described by the court as 'obfuscation – designed not to clarify, but to obscure', whereby 'Esso sought to make it appear that the identification of the hazard, risk and cause was impossibly difficult'.¹⁶⁸ Third, and significantly in this case, Esso failed to accept responsibility for what happened at the plant. This was seen in qualifying comments by the counsel for Esso in face of its defence, for example, 'Whilst Esso does not accept the accuracy or correctness necessarily of each of the criticisms levelled ...'.¹⁶⁹

The Court in *Esso* also said, in relation to acceptance of responsibility:

Normally in sentencing, a failure to accept responsibility sounds in the matter of specific deterrence. This is not so here, because Esso has demonstrated by its subsequent operational reforms that it has acted responsibly to remedy past deficiency. But its lack of acceptance of responsibility has a relevance in my not accepting that Esso's expression of remorse is practical and operational. Esso's failure to still accept responsibility for these tragic events is a serious deficiency.¹⁷⁰

The important message this case signals is that 'expressions of remorse need to be translated into reality',¹⁷¹ including in the way that a trial is conducted. It is not uncommon for legal representatives to offer apologies on behalf of their corporate client. While a corporation can show genuine contrition and remorse through apologies by its executives and representatives, Preston CJ eloquently explains that this 'is more readily demonstrated by an offender "taking actions" rather than offering "smooth apologies" through legal representatives'.¹⁷²

A second issue concerns the assessment of an apology and the weight given to words of this nature as evidence of contrition. Even when a court does accept an expression of regret and contrition as genuine, whether by a natural person or a corporation, its value in mitigation will be diminished, for example, by attempts to attribute responsibility for the conduct to the provocative conduct of others, and when the expressions

¹⁶⁷ *Esso* (n 163).

¹⁶⁸ *ibid* [45].

¹⁶⁹ *ibid* [46].

¹⁷⁰ *ibid* [48].

¹⁷¹ *ibid* [43] (Cummins J).

¹⁷² *Waste Recycling and Processing Corporation* (n 132) [203].

were belated.¹⁷³ Further issues arise in the case of a corporate apology that shows genuineness, for example, by including an undertaking to operate differently in the future, when the value of that undertaking might be doubted because the make-up of the board of directors or individual executives and officers has changed since the wrongdoing, or will inevitably change in the future.

iv. Taking Action to Address the Causes of the Offence or Harm

In *Waste Recycling and Processing Corporation*,¹⁷⁴ the defendant pleaded guilty to polluting waters in breach of section 120(1) of the Protection of the Environment Operations Act 1997 (NSW), when toxins from its landfill waste disposal site entered nearby creek waters. In sentencing the defendant, Preston CJ said that ‘taking action to address the causes of the offence, such as designing and installing improved pollution prevention and control systems’ to ensure that the type of incident did not happen again, indicated a genuine desire to act responsibly and showed the genuine contrition and remorse of the defendant.¹⁷⁵ This category of evidence looks to the prevention of ongoing loss or harm and in the future, in other ways than the previous categories.¹⁷⁶

There are many forms that action showing remorse and contrition might take, including taking steps to remedy compliance deficiencies and developing and implementing a remediation plan. Actions undertaken by a corporation for the purpose of preventing future contraventions of the law and to avoid potential loss and damage in the future are of much interest to scholars, regulators and courts.¹⁷⁷ Changes in behaviour of this nature provide insight into the state of mind of a corporation that supports theories of corporate accountability¹⁷⁸ and informs decision making by regulators in deciding what remedial and other actions to take.¹⁷⁹ Evidence of contrition may be relevant to the decision to accept an enforceable undertaking from a corporation, for example, and whether

¹⁷³ For example, *Construction, Forestry, Maritime, Mining and Energy Union v Kyren Pty Ltd* [2020] FCA 1356 [74]–[75].

¹⁷⁴ *Waste Recycling and Processing Corporation* (n 132). For an example of where these principles have been applied, see *Shoalhaven Starches* (n 132).

¹⁷⁵ *Waste Recycling and Processing Corporation* (n 132) [212], citing *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 700–01.

¹⁷⁶ In contrast to undertakings and promises to change behaviours and systems of operations in the future incorporated, for example, in an apology, this category focuses on actions taken subsequent to the offence or contravention to make the change.

¹⁷⁷ Actions of this nature undertaken by a corporation and that show insight, regret and contrition can be relevant for purposes other than mitigation of sentence and penalties. They may be relevant, eg, to a corporation's fitness to hold a licence and operate regulated business. Examples of conduct, culture and insights relevant to operating a casino are provided in State of Western Australia, *Perth Casino Royal Commission*' (Final Report, 4 March 2022) ch 17, 'Assessment of Crown Suitability and Path Forward'.

¹⁷⁸ Brent Fisse for example, promotes 'reactive corporate fault' as way to attribute culpability to a corporation and as a factor in mitigation in sentencing and regulatory decision making; see B Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions' (1983) 56 *Southern California Law Review* 1141; B Fisse and J Braithwaite, *Corporations, Crime and Accountability* (Cambridge, Cambridge University Press, 1993); Fisse, ch 7 of this volume.

¹⁷⁹ See Bant, 'Catching the Corporate Conscience' (n 17) 470, fnn 24 et seq, where Bant acknowledges scholars whose work informs theories of corporate liability and 'systems intentionality' as a model of corporate responsibility.

to commence civil penalty proceedings.¹⁸⁰ Bant makes the important point that ‘as a matter of regulatory practice, the defendant’s state of mind influences the enforcement strategy deployed by the regulator.’¹⁸¹ Evidence that a corporation has taken measures to reduce the likelihood of its committing a subsequent offence is also relevant in criminal law to punishment, rehabilitation and deterrence. Similarly, in civil penalty cases, it is relevant to deterrence if a corporation shows an intention (or not) to ‘change its ways.’¹⁸²

Examples of action taken for this purpose were noticeably absent in the *ASIC v Westpac* case referred to in section I. Other examples of corporate misconduct in the banking industry were identified in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry in 2019.¹⁸³ The ‘fees for no service’ cases involving AMP, in which bank customers were charged fees for services without authority after they died through automated fee deduction systems, are one such example.¹⁸⁴ Bant uses this misconduct of the AMP group companies as an example of where ‘the absence of any effective system for overseeing and auditing outcomes arguably itself reflects an intentional decision not to “care” about the accuracy of payments.’¹⁸⁵ According to Bant, in the event that a corporation is notified of a continuing contravention through an automated system and yet continues to run its system, an ‘inference of specific intention in cases where the unlawful takings occurred becomes irresistible.’¹⁸⁶ Similarly, a corporation’s continuing to run its system in these circumstances could allow a court to draw inferences as to the corporation’s remorseful or contrite state of mind.

There are other ways in which a corporation can demonstrate contrition or remorse by undertaking preventive action in the future. In the *NEXT DC P2 Project Case*,¹⁸⁷ Banks-Smith J considered that a corporate defendant could demonstrate that it intended

¹⁸⁰The ACCC, for example, has broad authority to accept written undertakings in the exercise of its powers under the Competition and Consumer Act 2010 (Cth) (CCA). These enforceable undertakings have, in the past, included provisions for a party to undertake corrective advertising, refunds and education programmes. In some instances, undertakings include voluntarily issuing a public apology: see, eg, ACCC, ‘Advanced Lifestyle International Retail Pty Ltd – s.87B Undertaking’ (1 September 2011) at www.accc.gov.au/public-registers/undertakings-registers/s87b-undertakings-register/advanced-lifestyle-international-retail-pty-ltd-s87b-undertaking; and ACCC, ‘Harris Scarfe Admits Sale Prices May have Misled, Issues Public Apology’ (4 November 2004) at www.accc.gov.au/media-release/harris-scarfe-admits-sale-prices-may-have-misled-issues-public-apology. Section 87B of the CCA empowers the ACCC to accept written undertakings in the exercise of its powers under the CCA (other than pt X). It also allows for the enforcement of such undertakings in the Federal Court of Australia. Where an undertaking is accepted by the ACCC, litigation and the imposition of penalties may be avoided.

¹⁸¹Bant, ‘Culpable Corporate Minds’ (n 17) 357. In support, Bant references ASIC, ‘ASIC Corporate Plan: 2019–23’ (August 2019) at <https://download.asic.gov.au/media/5248811/corporate-plan-2019-23-published-28-august-2019.pdf> (ASIC Corporate Plan).

¹⁸²*NEXT DC P2 Project Case* (n 141) [81]; *Queensland Infrastructure Case* (n 82) [164] (Dowsett, Greenwood and Wigney JJ).

¹⁸³Commonwealth of Australia, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, 1 February 2019).

¹⁸⁴See ASIC, ‘Concise Statement’ (*Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd*, VID420/2021, 29 July 2021) at <https://asic.gov.au/media/f0rim31a/concise-statement-asic-v-amp-financial-planning-pty-ltd.pdf>; *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd* (No 3) [2020] FCA 1421 (Allsop CJ), discussed in Bant, ‘Catching the Corporate Conscience’ (n 17) 488–89.

¹⁸⁵Bant, ‘Catching the Corporate Conscience’ (n 17) 489.

¹⁸⁶*ibid.*

¹⁸⁷*NEXT DC P2 Project Case* (n 141).

to change its ways by setting up ‘systems, processes, procedures or education to ensure that its officers did not encourage unlawful conduct in the future.’¹⁸⁸ In that case, the Court imposed a pecuniary penalty after making a declaration with the consent of the parties that the respondent contravened section 500 of the Fair Work Act 2009 (Cth). The contravention was the result of the improper conduct of the respondent Union’s official, who was present on a building and construction site for a period without escort and who failed to comply with a request to move. An order was also made by consent for the Union at its cost to arrange for each of relevant permit-holding officials to attend stipulated training. In determining the appropriate penalty, her Honour referred to one of the real issues between the parties as being ‘whether by the Union’s conduct is has expressed contrition.’¹⁸⁹ Justice Banks-Smith discounted the penalty by taking into account the Union’s cooperation and an element of contrition on the basis that ‘however described, the fact that the Union consented to an order that it implement the third party training program (at its cost) indicates a willingness to “change its ways”.’¹⁹⁰

Contrast the decision in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 4)*.¹⁹¹ In this case, Murphy J also took account of arrangements made by the company for compliance training of employees and for future advice to be provided regarding employees’ rights to raise relevant concerns. His Honour regarded these as corrective action that tends to reduce future loss and damage, however, and as a factor tending to mitigate a civil penalty in a Fair Work Act, but not as evidence of contrition. I suggest the better view is that corrective action of this nature can also be evidence of contrition if it shows that a corporation is remorseful for its conduct in the past and intends to make changes to its operations in order to comply with the law in the future.

Another example of a corporation ‘changing its ways’ is provided by *Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Commonwealth Bank of Australia Ltd*.¹⁹² In this case, Yates J referred to the defendant Bank’s contrition and remorse in respect to its money-laundering contraventions, as evidenced by its acknowledgement of the seriousness of its contraventions and by undertaking significant steps to address the underlying deficiencies that led to the contraventions.

VII. Corporate Remorse and Contrition: Future Directions

In this final section of the chapter, I explore two related issues that emerge from the case law and the ALRC’s 2020 report on *Corporate Criminal Responsibility*.¹⁹³ The first issue

¹⁸⁸ *ibid* [81]. Contrast the conclusion on the facts in *Queensland Infrastructure Case (n 82)* [102], [164] (Dowsett, Greenwood and Wigney JJ).

¹⁸⁹ *NEXT DC P2 Project Case (n 141)* [57].

¹⁹⁰ *ibid* [81].

¹⁹¹ *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 4)* [2013] FCA 930 (Murphy J).

¹⁹² *Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Commonwealth Bank of Australia Ltd* [2018] FCA 930 [43].

¹⁹³ ALRC Final Report (n 9).

is whether there is a place for contrition as a discrete factor in any future codification of the factors to be considered when sentencing a corporation and determining civil penalties. The second and related issue is whether sentencing and civil penalty factors ought only to include factors relating to a corporation's behaviour, rather than a state of mind, namely, contrition.

A. Codification of Corporate Sentencing Factors

In the *Same Time, Same Crime: Sentencing of Federal Offenders Report*¹⁹⁴ in 2006, the ALRC recommended wholesale reforms to section 16A of the Crimes Act, including for common law principles of sentencing corporations to be codified in federal sentencing legislation. In its subsequent 2020 Report, the ALRC reiterated its recommendation for its 2006 recommendations to be implemented. The ALRC notes that the courts have drawn on the case law relating to imposing civil penalties on corporations to fill the gaps in section 16A(2) for corporate offenders. It cites as an example *Director of Public Prosecutions (Cth) v Nippon Yusen Kabushiki Kaisha*, where Wigney J observed that the factors that have emerged from civil penalty cases will generally be relevant to sentencing corporations for criminal offences, in addition to the section 16A(2) factors from the Crimes Act.¹⁹⁵

Recommendation 10 in the ALRC's 2020 Report is that the Crimes Act to be amended to require a court to consider stated factors when sentencing a corporation (as distinct from a natural person).¹⁹⁶ The factors set out by the ALRC in Recommendation 10 do not include remorse or contrition. The Commission refers to contrition as 'less cogent for corporate offenders'.¹⁹⁷ Recommendation 10 includes a number of factors the cases discussed in section VI indicate could provide evidence of expression of remorse or contrition, in particular:

- (e) whether the unlawful conduct was voluntarily self-reported by the corporation;
- ...
- (g) the extent of any efforts by the corporation to compensate victims and repair harm;
- ...
- (i) any measures that the corporation has taken to reduce the likelihood of its committing a subsequent offence, including:
 - i. internal investigations into the causes of the offence;
 - ii. internal disciplinary action; and
 - iii. measures to implement or improve a compliance program.

¹⁹⁴ ALRC Report No 103 (n 41).

¹⁹⁵ Section 16A(2)(f) refers to the degree to which the person has shown contrition for the offence (i) by taking action to make reparation for any injury, loss or damage resulting from the offence; or (ii) in any other manner. See ALRC Final Report (n 9) [8.30]; *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876, (2017) 254 FCR 235 [220] (*Nippon Yusen Kabushiki Kaisha*).

¹⁹⁶ Neither federal nor State legislation includes factors specific to corporations.

¹⁹⁷ ALRC Final Report (n 9) [8.40]. As we have seen earlier in this chapter, the courts do refer to contrition in the context of corporate wrongdoing. See, eg, *Woolworths* (n 83) [161]–[167]; *Nippon Yusen Kabushiki Kaisha* (n 194) [253]–[254].

Each of these factors concerns actions taken after the wrongful conduct, which reflects an acknowledgement by the corporation of its wrongdoing, an intention to make amends in some way and to prevent subsequent offences.¹⁹⁸

The ALRC recommends its proposed statutory guidance on sentencing corporations in its Report on the basis that it would

highlight the relevance of certain factors that have not consistently been cited in the case law, namely, whether the company has undertaken any internal investigations or disciplinary action; any advantage realised by the corporation; and the effect of the sentence on third parties.¹⁹⁹

Specifically, the explicit inclusion as mandatory considerations of ‘measures that the corporation has taken to reduce the likelihood of its committing a subsequent offence’ and ‘the extent of any efforts by the corporation to compensate victims and repair harm’ may incentivise good corporate behaviour in response to offences.²⁰⁰ The ALRC suggests there is a policy argument for specifically spelling out the relevance of voluntary self-reporting in respect of corporate offenders, given its particular importance in the corporate crime context, and equally a policy argument for specifically providing for ‘the extent of any efforts by the corporation to compensate victims and repair harm’ (in factor (g)). The Recommendation is for these specific factors to apply to corporations, rather than relying on section 16A(2)(f) of the Crimes Act.

The Recommendation 10 factors indicate a preference for evidence of actions rather than words of contrition or evidence of this corporate state of mind. This argument appears to be based on the conceptual challenge of attributing a human emotion and feelings of contrition to a corporation.

There is merit in codifying factors relevant to corporations that might not be captured by current sentencing factors applicable to natural persons, or which are not applied consistently in the case law. Recommendation 10 is for a non-exhaustive list of factors to supplement, rather than replace, the general sentencing factors, principles and purposes when implemented with the 2006 recommendations. There is scope to argue, therefore, that contrition remains a relevant factor. In the event of reform, however, and notwithstanding the ALRC’s reasons for not expressly including this factor, I advocate that corporate contrition or remorse be expressly included as a separate factor on a number of grounds.

First, as seen in section VI, the factors that currently apply under sentencing legislation allow for both behaviours and evidence of a contrite corporate state of mind to be considered in giving effect to the objects of the criminal law. There is an established body of case law to guide decision making about whether a corporation has expressed

¹⁹⁸ The primary object of compensation in the law is corrective justice rather than retribution or deterrence, and for this reason it serves a purpose different from reparations and other non-monetary forms of redress by which a defendant offers to make amends for wrongdoing independently of any liability to pay compensatory damages. As discussed in section VI, this does not preclude the act of offering compensation as being capable of showing contrition.

¹⁹⁹ ALRC Final Report (n 9) [8.34].

²⁰⁰ *ibid* [8.40]. Arguably, some of the factors included in Recommendation 10 are captured by the existing (or amended) list of general factors that apply to any defendant. In particular, factor (e) – voluntary self-reporting – overlaps with Crimes Act (n 24), s 16A(2)(h) – cooperation with law enforcement agencies in the investigation of the offence.

contrition or remorse for crimes and contravention of civil penalty provisions, and how much weight ought to be given to that corporate state of mind. Courts are experienced in avoiding double counting when applying factors that overlap; this could include distinguishing evidence of behaviour and as to state of mind. An assessment of contrition as state of mind (or absence thereof) that takes into account evidence of past and future behaviours attributable to a corporation through the words and actions of its board of directors and senior officers, and by reference to systems intentionality, potentially informs a court and regulators more holistically whether a company has mended or intends to mend its ways than would limiting the inquiry only to behaviours such as voluntarily cooperating with a regulator, making repair and restoration, and taking steps to prevent a reoccurrence of harm in the future. Systems intentionality, which looks beyond words and actions of the corporate officers and the directing mind and will of the corporation, captures more fully the evidence of intention that a court needs to give effect to the objects of the law in imposing sentences and civil penalties.

Second, retaining contrition as a mitigating factor in sentencing a corporation recognises and honours remorse and contrition as a societal ‘good’ (to use Proeve and Tudor’s words²⁰¹) significant to both natural and corporate defendants. This social ‘good’ is an interest of the law in the reference to ‘the public interest’ in the words of Kirby J in *Cameron*:

Where genuine remorse is established to the satisfaction of the sentencing judge, it may be in the public interest to mitigate punishment further as a reinforcement for the prisoner’s resolve to avoid repetition of such conduct in the future and as an example to others.²⁰²

Recognition of genuine remorse and contrition communicates the value society places on these emotional states for punishment and deterrence. By taking account of contrition amongst other factors when imposing civil penalties, the law looks for evidence of corporate remorse or contrition, or which otherwise indicates ‘consciousness of the seriousness of the contravening conduct that may be relevant to penalty’.²⁰³ In doing so, the law provides incentives for corporations and other defendants to comply with the law in the future and to take responsibility for their actions. This is consistent with the comment of the High Court in *Pattinson* that an expression of genuine remorse by those responsible for a contravention might justify only a modest penalty, ‘because no more would be necessary to incentivise the contravenors to remain mindful of their remorse and their public expressions of that remorse to the court’.²⁰⁴

Third, the law already takes into consideration evidence of corporate contrition in awarding compensatory and exemplary damages in some tort cases, notwithstanding the inability of a corporation to ‘feel’ contrite. Although the purpose of attributing contrition to a corporation in assessing tort damages primarily is to compensate rather than punish and deter, the latter are objects of civil damages in some cases and, where available, the approach to judging contrition is much the same.

²⁰¹ Proeve and Tudor (n 5) 210.

²⁰² *Cameron* (n 32) [65].

²⁰³ *Gibson* (n 16) [50] (Mortimer J). See also *Superfone* (n 84) [20] (Murphy J).

²⁰⁴ *Pattinson* (n 58) [47].

Finally, legal personality and the privileges that attach to that status provide a defensible basis on which to impose moral and legal obligations for culpable behaviour, as a number of the authors of chapters in this collection demonstrate.²⁰⁵ Conceptualising the corporation as a legal and moral agent whose conduct makes it culpable and accountable in law justifies legally and morally the attribution of contrition and remorse to the corporation to inform decisions on mitigation of sentences and penalties.

B. Two Further Matters

There are further matters arising from the ALRC's 2020 recommendations that warrant consideration beyond the scope of this chapter, but which are worth noting here. The first matter concerns the potential function of contrition and remorse in the event that the ALRC's 2020 Report Recommendation 12 were implemented.²⁰⁶ This proposed amendment to the Crimes Act would give a court sentencing a corporation the power to make a number of non-monetary penalty orders, including publicity or disclose orders and corrective orders. The presence or absence of contrition could be a relevant factor in this decision making.

The second matter concerns whether contrition should be codified as a statutory factor not only in sentencing corporations but also in determining civil penalties. Evidence of remorse and contrition is relevant to decision making in civil penalty regimes at two points in time at least. First, when a regulator is deciding what action to take when a corporation has contravened the law. Evidence of contrition may be highly relevant to the decision to accept an enforceable undertaking from a corporation, for example, and whether to commence proceedings for the imposition of a civil penalty.²⁰⁷ Second, evidence of a corporation's state of mind is particularly relevant when a regulator commences proceedings for a civil penalty to be imposed. Here, as Bant explains, courts commonly look for indicia of the defendant's blameworthiness through factors including state-of-mind criteria, such as the defendant's knowledge, intention, regret or contrition.²⁰⁸ The clear rationale for taking evidence of contrition into account when determining a civil penalty is that where a wrongdoer is contrite, the object of deterrence can be achieved by a lesser penalty than might otherwise be the case.²⁰⁹

The ALRC recommends the enactment of a statutory list of factors to be considered by a court when making a civil penalty order in respect of a corporation, to maintain 'principled coherence and consistency in the assessment of penalties for corporations'.²¹⁰

²⁰⁵ Harding, ch 2 of this volume; Crofts, ch 3 of this volume.

²⁰⁶ ALRC Final Report (n 9) ch 8, 347.

²⁰⁷ See section VI.B.iv.

²⁰⁸ Bant, 'Catching the Corporate Conscience' (n 17) 483.

²⁰⁹ Paterson and Bant argue that the fact that courts routinely take into account considerations of defendant culpability, contrition and cooperation in assessing the proper level of a civil penalty for contraventions of the Australian Consumer Law 'inherently reflects concepts of retributive justice and "just deserts"', not just deterrence: JM Paterson and E Bant, 'Intuitive Synthesis and Fidelity to Purpose? Judicial Interpretation of the Discretionary Power to Award Civil Penalties under the Australian Consumer Law' in P Vines and MS McDonald (eds), *Statutory Interpretation in Private Law* (Leichhardt, Federation Press, 2019) 154, 171. Support for this view is provided by Pattinson (n 58) [103]–[104] (Edelman J).

²¹⁰ ALRC Final Report (n 9) Recommendation 11, ch 8, 337.

The factors, listed in Recommendation 11, would apply ‘to the extent that they are relevant and known to the court’, and would apply ‘in addition to any other matters.’²¹¹ Unlike the case law factors that include contrition and remorse, but consistent with the sentencing factors listed in Recommendation 10, there is no express reference in Recommendation 11 to remorse or contrition. Contrition should be included as a factor if the civil penalty factors are codified, for the reasons advanced in section VII.A in respect of sentencing factors. This would guide corporate decisions, systems, policies and practices, decisions by regulators and determinations of civil penalties by the courts.

VIII. Conclusions

A person is described as being in a contrite state or remorseful when they show regret and other emotions for their actions, that they accept responsibility for their actions and the harm it has caused, and acknowledge their wrongdoing and the injury it has caused or take action to make reparation, or both. Although apologies and statements made in court are a significant way to express remorse, more is expected than ‘smooth words’, even when an apology is offered with sincerity. The law takes genuine remorse into account as a mitigating factor in sentencing a person, including a corporation, because it is considered just to impose a lesser penalty when remorse or contrition is shown. The punishment and deterrent functions of criminal law are served even though the sentence is reduced, because the offender has experienced remorse and expressed support for community values, which lessens concern about reoffending. When a civil penalty is imposed, the court looks to what is necessary to achieve general and specific deterrence.

What purpose does remorse and contrition serve, and how does a court judge corporate contrition? Corporate contrition is a factor in the assessment of sentences and civil penalties. Evidence of contrition is found in words that express regret, remorse and sorrow, and that acknowledge wrongdoing and its impact on others. This includes personal evidence of corporate executives expressing the company’s genuine regret. A corporation can also express contrition in more tangible ways through its actions by rectifying past and potential future harm, cooperating with regulators, and through stating plans or taking actions to address the cause of the offence and avoid its repetition offence in the future. The inquiry into a corporation’s state of mind judged by its actions to date and its intention to ‘mend its ways’ is conducted by considering many forms of evidence, including words, actions and corporate systems, policies and practices. In this way actions, not just words, and what action is taken, guide judgments as to whether a corporation is genuinely contrite.

²¹¹ *ibid.*