COMMONWEALTH DIRECTIONS POWERS AND SECTION 101 OF THE PETROLEUM (SUBMERGED LANDS) ACT (PSLA): ISSUING DIRECTIONS TO COMPANIES

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Section 101 of the PSLA contains a seemingly unlimited discretion to direct the conduct of the titleholder with regard to virtually any matter, and extend the reach of those directions to third parties to whom they are not addressed. Non-compliance can result in cancellation of title.

The first part of the article examines the political history of the Act, revealing that section 101's role was merely to act as a 'stop-gap' while regulations were being made. Given that the bulk of these regulations have now been promulgated, the usefulness of section 101 becomes questionable.

The second part of the article involves a comparative analysis of section 101 with other directions powers, starting from two premises: first, that statutes do not normally permit Ministers to direct the conduct of private parties, and further, that they do not generally extend those directions to third parties to whom they are not addressed. Section 101 is highly unusual, and no reasons can be found to justify it in the petroleum industry.Section 101 should be repealed.

1. INTRODUCTION

"Australia has the world's largest exploitable sea-bed, and perhaps the world's most ambiguous legal system to facilitate its exploitation".[1]

This article considers one provision of Australia's petroleum regime, section 101 of the Petroleum (Submerged Lands) Act 1967 (Cth), [2] to determine whether its role can be justified today, or merely adds to the 'uncertainty' expressed above by the late Professor O'Connell. Section 101 confers upon the Designated Authority[3] an extraordinarily wide power to direct the conduct of a title-holder with regard to seemingly anything associated with the exploration and exploitation of petroleum, and extend the application of those directions to bind third parties to whom the direction is not addressed. In the volatile mining industry, where security of title is paramount, such a potentially unconstrained encroachment upon petroleum operations warrants further investigation.

The term 'directions power' refers to the statutory power of Ministers to mandate particular conduct in specific circumstances. As opposed to regulations, which are commonly prescriptive and of general application, directions powers often contain wide discretions: they are intended to

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1 Reid, P C, 'Commonwealth-State Relations Offshore Mining and Petroleum Legislation; Recent Developments: An Historic Milestone or Millstone?' (1980) 2 *Australian Mining and Petroleum Law Journal* 58, 58 quoting the late Professor O'Connell (1969 APEA Conference).

2 Hereinafter referred to as 'PSLA' or 'the Act' as interchangeable terms.

3 Hereinafter referred to as the 'DA'. The DA is generally the State Mines Minister.

provide flexibility by allowing the decision-maker to direct a specific individual or class of persons. Despite their prevalence in Commonwealth legislation, directions powers are overlooked as a source of administrative control in Australia.[4] However, the potential for such powers to be highly discretionary and to evade parliamentary controls is at odds with the rule of law. Section 101 of the PSLA is a salient example of such a power, having been described as 'unpublicised, unexaminable and unappealable'.[5] Interestingly, there is negligible academic and judicial commentary on the nature and operation of this unbridled discretion. In this article, it is argued that section 101 is not justified, and should be repealed as it no longer serves any useful purpose in the context of Australia's petroleum regime. The article will assess the rationale of the directions provision from historical, practical, and comparative viewpoints, and briefly conclude with proposals for reform.

Section 101 confers an absolute discretion on the Minister whether to issue a direction to the title-holder of a petroleum permit or license. The discretion to determine the content of the decision is similarly broad, and is limited only in respect of matters to which regulations may be made.[6] The regulation-making power in section 157 of the Act encompasses virtually anything concerned with the exploration and exploitation of petroleum, and therefore does not effectively limit the decision-maker.[7] Directions are not confined to the title-holder in their application and can also extend to *any person* in the adjacent area for any reason relating to the exploration or exploitation of petroleum.[8] Furthermore, directions may override regulations and the applied provisions under the Act.[9]

On its face, therefore, section 101 confers an arbitrary discretion to issue unilateral directions which can override transparent sources of administrative control such as regulations. When coupled with sections 102,[10] 103,[11] and 105,[12] the power contained within section 101 becomes particularly significant for the title-holder as a title can be cancelled on the ground that it breaches regulations, directions, conditions, or the Act.[13] In addition, the Act confers upon the DA the power to enforce compliance with the direction and to recover costs from the person to whom it was given.[14] The Joint Authority (JA)[15] has further powers to vary, suspend or exempt compliance with directions.[16] Failure to comply with directions is a criminal offence of strict liability.[17] A private party and a third party non-addressee may, therefore, be directed to perform almost any act, and likewise, may even be prosecuted for a minor breach. The potential for hardship is further

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4 The idea for this paper came from my involvement as Terence Daintith's research assistant in his funded research project entitled 'Administering the Petroleum (Submerged Lands) Act: Too Much Discretion? Or Too Little?'. See T Daintith, 'Administering the Petroleum (Submerged Lands) Act: Too Much Discretion or Too Little?' (2004) *AMPLA Yearbook* 1.

5 Commonwealth, Report of the Senate Select Committee on Offshore Petroleum Resources, Parliamentary Paper No 201 (1971), [17.236] (hereinafter referred to as the 'Senate Review' or 'Senate Committee').

6 PSLA, s101(1).See Appendix.

7 PSLA, s157 (regulation-making power); See further comments on the wide nature of section 157: Senate Committee, above n 5, [7.64].

8 PSLA, s101(2) and especially s101(2)(b).

9 PSLA, s101(5); PSLA s9: the applied provisions are the State laws in force; See also PSLA s99 which explicitly states that section 97 (Work practices) and 98 (Maintenance of property) are subject to s101.

10 PSLA, s102 (Compliance with directions).

11 PSLA, s103 (Exemption); see also PSLA s58 (directions as to recovery of petroleum) and s59 (unit development) to which sections 102 and 103 apply.

12 PSLA, s105 (Cancellation of permits).

13 PSLA, s105.

14 PSLA, s102.

15 Hereinafter referred to as the 'JA'. The JA constitutes Commonwealth and State Mines Ministers.

16 PSLA, s103.

17 PSLA, s101(7A).

enlarged by the fact that there are no established criteria upon which the power will be exercised. Equally, the PSLA provides no system of review if the title-holder or third party disagrees with the requirements of the direction.[18]

Within the context of arguments as to whether section 101 can be used to enforce the work program, the Designated Authority's power to only give 'general' directions has similarly been debated. It has been argued that section 101 provides the only means by which the Designated Authority can enforce a work program, and, while recognising that the power has never been used, stated that if it was, it would '…considerably alter the balance in the overall economic relationship between title-holders and the authorities'.[19] The argument is supported by the introduction of the minimum guaranteed work program bidding system.[20] A contrary approach suggests, however, that because the obligations of the permittee are statutory rather than contractual, and it is a strict liability criminal offence not to comply with a direction, the scope of section 101 does not extend to giving a specific direction to enforce the work program. Similarly it would not allow the Designated Authority to drill the obligatory wells and recover the cost where the permittee has committed a breach.

It is argued below that on the text of the section there are no such restrictions, although the author's empirical findings have been that in practice section 101 has not generally been used to issue a specific direction.[21] The introduction of the Resources Management Regulations[22] will provide a mechanism to enforce the work program without resort to section 101. But on the former argument section 101 continues to serve a role until the making of these regulations, and should not be repealed until that time. There is no doubt, however, that repeal is necessary once that occurs.

The first section of this article examines the background to the enactment of the PSLA and the role of section 101 as a 'stop-gap' while regulations were being made. The ad-hoc collection of directions, the 'Schedule of Specific Requirements',[23] will be looked at against the background of its repeal and of its replacement with objective-based regulations.

The second part of the article seeks to test two hypotheses in respect of Ministerial power. First, that statutes do not normally provide Ministers with the authority to direct the conduct of private parties. Secondly, that statutes do not generally confer upon Ministers the power to extend the application of those directions to third parties, when those orders are in fact addressed to bind somebody else, the title-holder. These assumptions will be challenged by examining whether there is any 'special circumstance', existing by virtue of the unique nature of the petroleum industry,

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18 Although it seems there is a right to procedural fairness at general law: *Kioa v West* (1985) 159 CLR 550**.**

19 McCarthy, S B, 'Comments on a Critical Evaluation of the Petroleum (Submerged Lands) Act' (2000) *AMPLA Yearbook 2000* 125, 129.

20 This was introduced by amending s33(2) and inserting a new s104(3A) into the PSLA: Maloney, D A W, 'Australia's Offshore Petroleum Work Program Bidding System' (2003) *Journal of Energy and Natural Resources Law* 21(2) 127, 133.

21 At least at the Western Australian level. The Western Australian DOIR could only provide evidence of one specific direction, the Direction as to Discharge of Ballast Water issued in 1993 to Ampolex (Legendre) Limited and Wandoo Petroleum Pty Ltd dated 6 January 1997, and one of the administrators could only recall, and not locate, one other direction that was issued to an individual company: WA DOIR communications, 15 September 2004.

22 The *Resource Management Regulations* (Cth) are currently in draft form and it is intended they will be finalised at the end of the 2004 financial year, and when promulgated would doubtless absorb the directions on consent to recovery, production rates etc: DITR communications, 15 September 2004.

23 Commonwealth Department of Industry, Tourism and Resources, *Schedule of Requirements as to Offshore Petroleum Exploration and Production,* (1995), 2003 consolidated version (not published in hard copy) http://www.industry.gov.au/assets/documents/itrinternet/Dir03up.pdf at 3 May 2005.

that can rationalise the use of section 101. The article concludes that there is no such justification, and accordingly, that section 101 should be repealed.

2. HISTORICAL BACKGROUND

2.1 The PSLA

Prior to the enactment of the PSLA, there was no comprehensive legislation dealing with title, and the States individually purported to pass accompanying Acts which extended the application of onshore statutes to the offshore areas.[24] In response to concerns expressed by industry about certainty of title, Australia, as a young and developing petroleum nation, looked to comparable federal systems such as the US and Canada to seek guidance about the legality of such actions. Courts in those jurisdictions doubted the validity of legislation extending State powers to usurp possible Federal jurisdiction.[25]

These international developments raised acute issues as to the appropriate division of responsibilities in the offshore area, crystallising in Australia in the 1960's when the Commonwealth and States began negotiations review the existing legislation, and consider how to efficiently explore for oil.[26] The complexity of the issue was exacerbated by the constitutional tension over ownership of offshore areas, as neither the Commonwealth nor the States were willing to surrender their rights to substantial petroleum royalties.[27] Rather than clearly delineating the precise boundaries of Commonwealth, as opposed to State jurisdiction over offshore waters, the State Ministers announced that they would avoid conflict with the Commonwealth 'at any cost'.[28] The issue of certainty of title was at the forefront of the legislators' minds, as they wanted both to avoid the constitutional litigation prevalent overseas, whilst ensuring that development began expediently.[29] However, the contractual regimes that regulated almost every other petroleum state in the world inherently involved assertions of title.[30]

The Government's answer to avoid all claims of ownership was the Joint Agreement,[31] the '…basic instrument underlying the whole of the joint legislative structure…'.[32] It was tabled in Federal Parliament on 16th November 1965, reflecting the negotiations that had taken place over

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24 M Crommelin, 'Petroleum (Submerged Lands) Act: The Nature and Security of Offshore Titles' (1979) 2 *Australian Mining and Petroleum Law Journal* 135, 135.

25 *U.S. v California* 332 U.S. 19 (1947); *U.S. v Louisiana* 339 U.S. 699 (1950); *U.S. v Texas* 339 U.S. 707 (1950); In the matter of a reference by the Governor in Council concerning the ownership of and jurisdiction over offshore mineral rights P.C. 1965-1970 dated 26th April, 1965; R D Lumb, 'The Continental Shelf' (1968) 6 *Melbourne University Law Review* 357, 366-368.

26 AN Dakin, 'Future Patterns of Legislation for the Petroleum Industry' Ibid. 403, 403; Senate Committee, above n 5, [7.17].

27 Commonwealth Parliament, *Parliamentary Debates,* House of Representatives, 26 October 1967, 2369 (Mr Connor (Cunningham)); A R Thompson, 'Australian Petroleum Legislation and the Canadian Experience' (1968) 6 *Melbourne University Law Review* 370, 382-383.

28 Senate Committee, above n 5, [7.17].

29 Ibid, [7.18], [7.31]; Commonwealth Parliament, *Parliamentary Debates,* House of Representatives, 18 October 1967, 1954 (Minister for National Development David Fairbairn).

30 Germany is an exception: see Kuehne, 'Oil and Gas Licensing: Some Comparative United Kingdom-German Aspects' (1986) 4 *Journal of Energy and Natural Resources Law* 150 as noted by Daintith, above n 4, 7.

31 Department of Minerals and Energy, Commonwealth, *Agreement relating to the Exploration for, and the Exploitation of, the Petroleum Resources, and certain other Resources, of the Continental Shelf of Australia and of certain Territories of the Commonwealth and of certain other Submerged Land* (1967) [hereinafter referred to as the 'Joint Agreement' or 'Agreement'].

32 Commonwealth Parliament, *Parliamentary Debates,* House of Representatives, 18 October 1967, 1944 (Minister for National Development David Fairbairn).

the previous three years, and which laid the foundation for the legislation.[33] Its aim was to guarantee legal title to companies who risk the substantial capital outlay associated with petroleum exploration and development.[34] The Agreement purported to ensure legal certainty by delineating the 'adjacent areas'[35] corresponding to each State and Territory, so that Commonwealth legislation extended to all offshore waters. In this way, two pieces of legislation (Commonwealth and State) governed all offshore exploration. A single title was granted, seemingly free from any doubt as to its validity.[36]

Because the legislation applied indifferently to the offshore areas, uniformity between the Commonwealth and the States was an important aspect of the Agreement. This was achieved by establishing a 'Common Mining Code' under which each State and Territory would enact 'mirror legislation' in response to the passage of the PSLA by the Commonwealth.[37] This required that all governments legislate in identical terms, and any amendments would have to be agreed to unanimously.[38]

The Agreement was expressly stated to be non-justiciable, and the issue of the extent of Commonwealth or State power over adjacent areas surrounding the States was deliberately sidestepped, the governments acknowledging in the Preamble that they would '…not raise questions concerning, or derogating from, their respective constitutional powers…'.[39] The lynchpin of the inter-relationship was the States responsibility for day-to-day administration of the legislation, and consultation with the Commonwealth on all aspects concerning inherent Commonwealth jurisdiction.[40]

The PSLA was hammered out in a political compromise over three years of concentrated negotiations, first between Premiers, then between officials, and finally between lawyers and draftsmen. It was then offered to both the Commonwealth and the States on a 'take it or leave it' basis.[41] Its form had little to do with legislative choice, a conclusion reinforced below both by Opposition outrage at the Bill, and its referral to a Senate Select Committee within days of its enactment. The shape of the Act was more concerned with assuring legality of title, in order to encourage the oil search in Australia,[42] rather than reflecting a well-planned technical structure that would operate in the best interests of both industry and administrators. In light of this background, it is argued that inserting a broad discretion like section 101 into the Act was intended

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33 Dakin, above n 26, 403.

34 Commonwealth Parliament, *Parliamentary Debates,* House of Representatives, 16 November 1965, Joint statement issued by State and Commonwealth Ministers tabled by Minister for National Development, David Fairbairn; Commonwealth Parliament, *Parliamentary Debates,* House of Representatives, 25 November 1965, 2731 (Minister for National Development, David Fairbairn); Dakin, above n 26, 403.

35 Defined in s5A PSLA to mean the area comprising the waters of the sea that are not within the outer limits of the territorial sea of Australia and are within the outer limits of the continental shelf, or in WA and the NT, not within certain areas of the Zone of Cooperation: s5A(1), s5A(1A) PSLA.

36 Crommelin, above n 24, 136.

37 Joint Agreement, above n 31, clauses 3-8.

38 Lumb, above n 25, 454.

39 Thompson, above n 27, 382; Joint Agreement, above n 31, Preamble.

40 These included areas covered by the Commonwealth Constitution, for example, inter-state trade, national security, and defence. In those circumstances, the Commonwealth view would prevail: Joint Agreement, above n 31, clause 9; Power to delegate is found in PSLA Pt IA, s14(1), 14(2) (prescribes the functions and procedures of the Joint Authorities); Crommelin, above n 24, 136.

41 Daintith, above n 4, 32.

42 '*The Ministerial accord announced in April 1964* (forming the basis for the 1967 Joint Agreement) *served the immediate purpose of removing the constitutional legal uncertainties from the minds of petroleum companies':* Commonwealth Parliament, *Parliamentary Debates,* House of Representatives, 26 October 1967, 2377 (Mr Connor (Cunningham)).

to provide for flexibility, and to 'leave the door open' so to speak; the legislators only having time to cover '…the general outline of administrative practices…consistent with laying down the ground rules within which the offshore industry will have to work…'.[43]

Not surprisingly, the PSLA did not sail smoothly through legislative waters, the Labor Opposition attacking it 'root and branch'.[44] They argued that the legislation was too discretionary, and that it constituted both a sell-out of Australia's assets to foreign interests, and an abdication of Commonwealth powers to the States.[45] A further criticism was the uncertainty and non-justiciability of the Joint Agreement underpinning the PSLA.[46] The prime criticism of the Act, however, was due to the lack of consensus and public debate it was accorded: the Minister for National Development informed Parliament of the legislation in its 'dying days', [47] having only spoken publicly of it twice in the two years prior to its enactment.[48] In fact, the Opposition attempted to compel a review of the Bill, before it was passed, by the Senate Standing Committee on Constitutional and Legal Affairs. While this proposal ultimately failed, a compromise was reached that enabled the legislation to be referred to a Senate Select Committee on Off-shore Petroleum Resources, which commenced its deliberations immediately.[49] This underscores both the controversial character of the Bill, and the implicit admission that it still required a great deal of work.[50] I suggest that section 101 was directed at this aspect of the legislation, that is, as a 'catch-all' provision.

2.2 The Intention behind Section 101

The dual titles granted by the States in two capacities[51] offered the permittee or a licensee legal security, even though the source of the underlying rights was uncertain. The Commonwealth, pursuant to the Joint Agreement, only had supervisory capacity, and consequently had no legal right to be involved in the initial grant, administration or variation of titles. As such, and in order to reduce the capacity for States to expand their autonomy, the titles provisions had to be highly detailed.[52] The operational and safety rules required a similar level of detail, however, and it was impossible to complete this in time for the Bill to be passed: according to both Parliament and the witnesses of the Senate Committee, regulations were expected to take a long time to prepare.[53]

There were further impediments compounding the difficulty of completing regulations prior to the enactment of the Bill. Pursuant to the requirement of 'mirror legislation', the Commonwealth and States needed to reach agreement on the matters that regulations would cover, and then translate

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43 Commonwealth Parliament, *Parliamentary Debates,* Senate, 3 November 1967, 2145 (Senator Henty).

44 Commonwealth Parliament, *Parliamentary Debates,* House of Representatives, 26 October 1967, 2367 (Mr Connor (Cunningham)).

45 Ibid, 2367, 2371.

46 Commonwealth Parliament, *Parliamentary Debates,* House of Representatives, 26 October 1967, 2381 (Mr Luchetti (Macquarie)).

47 Commonwealth Parliament, *Parliamentary Debates,* House of Representatives, 26 October 1967, 2367 (Mr Connor (Cunningham)).

48 Ibid, 2390.

49 Reid, above n 1, 60.

50 This is reinforced by the fact that the Committee's work extended over three and a half years, involved 183 deliberative sessions, and the evidence of 84 witnesses. Its final report extended to almost 800 pages, and was, in many respects, highly critical of the Act: Ibid.

51 Under the PSLA (State), and as Designated Authority under the PSLA (Cth): Daintith, above n 4, 6.

52 Ibid.

53 Commonwealth Parliament, *Parliamentary Debates,* Senate, 18 October 1967, 2145 (Senator Henty). A witness before the Senate Committee inquiry into Act said 'It would take all the draftsmen in Australia ten years to knock them into shape': Senate Committee, above n 5, [17.221].

those policies into legal terms that were acceptable to all the parties. This was an enormous task, given the highly technical nature of the industry, Australia's inexperience in petroleum matters, and the rapidly expanding and comparatively new technology in relation to deep-sea mining.[54]

In this new and difficult environment it seemed that there was no '…practicable course to pursue at this comparatively early stage in off-shore operations in Australia…'[55] other than to confer on the Minister a broad discretion to give directions under the Act. It was not intended that directions would become a long-term substitute for regulations. Rather, it was proposed that they be replaced when operating and safety regulations were promulgated, and after draft regulations had been completed and considered by industry. This approach was supported by the fact that offshore operators in Australia had an excellent record of safety responsibility.[56]

It appears that the 'directions' mechanism was contrived as an interim measure which would allow the States most concerned (that is, the resource-rich states of Victoria and Western Australia) to continue relying on the rules they had already been applying in the administration of their own State offshore legislation.[57]

3. LATER DEVELOPMENT OF THE PSLA

3.1 The Amendment of Section 101

At the 1980 Offshore Constitutional Settlement, the Joint Authority (consisting of the State and Commonwealth Mines Ministers) was established, and section 101 amended to require JA approval for the issue of standing directions. Theoretically, the introduction of this procedural obligation means that discretion is reduced under the Act, as a second qualifier is introduced into the decision-making process. However, some members of industry have indicated that having dual authorities allows them to negotiate for a more favourable deal with the authority that they view to be more sympathetic to their case. While the Australian industry may appreciate this apparent ability to 'choose your own forum', to foreign investors it is arguably another administrative hurdle provided by the PSLA. This generates uncertainty as, depending on the exercise of the discretion under section 101, it may or not have a welcomed effect.

In addition, the class of persons to whom directions may apply was significantly expanded to include any person who was in the adjacent area for any reason "…touching, concerning, arising out of or connected with the exploration of the…adjacent area for petroleum…".[58] As a result, directions can apply to anybody connected to the adjacent area pursuant to section 101(2)(b) PSLA. The reason for this amendment was to ensure that the power extended to third parties: more specifically contractors and subcontractors. Despite the obvious practical benefits for the petroleum authorities, uncertainty is created as there are no established criteria outlining clearly to whom directions apply.

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54 Explanatory Notes, *Petroleum (Submerged Lands) Bill* 1967 (Cth) 81; Commonwealth Parliament, *Parliamentary Debates,* House of Representatives, 18 October 1967, 1954 (Minister for National Development David Fairbairn).

55 Commonwealth Parliament, *Parliamentary Debates,* House of Representatives, 18 October 1967, 1954 (Minister for National Development David Fairbairn).

56 Ibid.

57 Daintith, above n 4, 7.; Senate Committee, above n 5, [17.222], [17.101].

58 PSLA, s101(2)(b).

3.2 The Introduction of Objective-based Regulations

The first sign of a move towards uniformity between the Commonwealth and the States was the collation of all issued directions into the Schedule of Specific Requirements.[59] Since the mid-1990's, however, the Department of Industry, Tourism and Resources has been involved in replacing the prescriptive Schedule of Directions with objective-based regulations.[60]

Currently, the following regulations are in force:

> Management of Safety on Offshore Facilities Regulations 1996;
> Management of Environment Regulations 1999;
> Pipelines Regulations 2001;
> Diving Safety Regulations 2002;
> Data Management Regulations 2004.

Work is currently in progress in relation to the introduction of the Well Operations Management Regulations[61] and Resource Management Regulations.[62] Regulations have superseded almost the entire Schedule, and once all of these regulations are promulgated the Schedule of Directions will be repealed in Commonwealth waters, but will remain in place in State waters until such time as mirror regulations are introduced by each of the relevant States.[63]

The objective-based approach is concerned with outcomes, rather than with stipulating in detail how companies should conduct their operations. Title-holders are required to have a management plan in place and approved by the DA prior to the commencement of the relevant activity. Companies must also demonstrate that they have the appropriate expertise to meet objectives and demonstrate compliance with these aims. In addition, work has been underway to 'harmonise' these regulations to ensure that they are consistent in terminology and approach. The public comment period ended in mid-2002 and work is underway to implement the recommendations of this process.[64] The regulations have been made in consultation with industry and other affected parties, and so should provide comprehensive coverage of the necessary technical detail. Furthermore, this initiative to 'harmonise' regulations should stop them from becoming too onerous or incomprehensible.

Using regulations avoids the problems of enforceability and service associated with issuing a direction under section 101.[65] Regulations are binding and pre-established rules of general application which are specific in nature and content. Section 101, on the other hand, is of uncertain application, conferring a broad discretion to direct the conduct of effectively any person at any time. Directions only have legal validity by way of being issued and addressed to the title-holder, meaning that the administrator must advise all title-holders of any new directions. This is arguably an unnecessary administrative burden on the limited resources of petroleum authorities. For

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59 This is discussed further below under the heading 'The Schedule of Specific Requirements' (p. 16).

60 For more information, see Commonwealth Department of Industry, Tourism and Resources, *Offshore Petroleum Exploration and Production: Objective-Based Regulations,* (last revised 21/10/2003), http://www.industry.gov.au/content/itrinternet/cmscontent.cfm?objectID=67129017-3B5F-4E73-AD743E2C48F865E6, at 30 April 2005.

61 The *Well Operations Management Regulations* (Cth) are currently awaiting approval by the Executive Council as a result of the calling of the Federal election 2004: DITR communications, 15 September 2004.

62 See footnote 22.

63 Schedule of Specific Requirements, above n 23.

64 Ibid.

65 This is discussed further below under the heading 'The Schedule of Specific Requirements' (p. 16).

example, an anti-asbestos direction was sent to all titleholders in early 2004, which will have to be issued to all holders at grant, transfer, renewal, or at any time a new company becomes involved in a title.[66]

In addition, it is unclear to whom the directions extend, as 'any persons' could constitute someone working under another title but who happens to be in the adjacent area. Although responsibility is placed upon the titleholder to display the direction in a prominent place, [67] it is unclear whether this ensures that the direction is in fact observed by each and every party in the adjacent area. Thus it may make it difficult to prosecute such third parties for breaches of direction, a fact compounded by the 'reasonable excuse' defence provided in section 101(8) PSLA.[68] Using regulations removes the need to depend on the addressee to bring the direction to the notice of third parties, as they have the force of law and do not require the giving of notice.

4. THE SENATE COMMITTEE AND DISCRETION UNDER THE PSLA

4.1 Criticism of the Scope of Discretion

As the first and only comprehensive review of the PSLA, it is instructive to consider the findings and conclusions of the 1971 Report of the Senate Select Committee. Of relevance to this article are the concerns expressed by the Committee regarding the numerous discretionary powers contained in the Act, in particular section 101, and its implications, as a vast unchecked power, for the rule of law.[69] In this respect, the Committee found that the constitutional conception underlying the legislation was inconsistent with broad concepts of Ministerial accountability. This reinforces the fact that the PSLA is an essentially 'political system'[70], unconcerned with legislative preferences. Consequently, there was no amendment that could remedy an inherent feature of a distinctly devised form of co-operative federalism.[71] While the Committee commented that a 'considerable degree' of discretion was necessary to effectively regulate the regime, section 101 in its current form - 'unpublicised, unexaminable and unappealable' - did not meet this requirement.[72]

The Committee recommended that Parliament re-examine, reduce, and make objective the wide discretions in the Act. Behind these controls should rest formal oversight mechanisms, such as publication, reporting and appeal procedures.[73] Section 101 was considered to be a provision of 'extensive import' and as such, the Committee made specific recommendations in relation to directions: they should contain an expiry date, with an optional for renewal if necessary; if inconsistent with regulations, should only be made in the event of an emergency; and should be made subject to publication and disallowance.[74] None of these recommendations have yet been carried out, and these suggestions are considered below in relation to proposals for reform.

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66 Proof of service of directions was identified as a problem by some PSLA administrators in relation to prosecution for breach of a direction: WA DOIR communications, 28 July 2004.

67 PSLA, s101(2B) and s101(2C).

68 PSLA, s101(8) provides that where a party under s101(2) can prove that they did not reasonably know the direction applied to them, they can escape liability.

69 The main discretionary provisions in the Act were catalogued by the Senate Committee: Senate Committee, above n 5, [7.60-7.70].

70 Ibid, [7.143].

71 Ibid, [7.62], [7.211].

72 Ibid, [17.236]

73 Ibid, [17.88-7.90].

74 Ibid, [17.259].

4.2 Teething Problems: the First Directions under the PSLA

The Committee also examined the first directions made under the Act, and the myriad of problems associated with their use. The first direction with respect to offshore petroleum operations was issued in 1968 to Hematite Petroleum Pty Ltd and Esso Exploration and Production Australia. It mandated that all petroleum operations in the adjacent area be carried out in accordance with the most recent edition of the Code of Safe Practices for Drilling, Production and Pipelines Operations in Maritime Areas, except where its provisions were in conflict with regulations.[75]

However, the direction failed to cover the technical detail adequately, as it made no provision for helium diving procedure.[76] Although the Code suggested the use of the United States Navy Diving Manual in its place, the Professional Divers' Association of Australasia complained that these procedures were inadequate,[77] and furthermore, that the inspectors of the Mines Department displayed a lack of real knowledge in this area.[78]

Similar problems arose in the following year, when the first Off-shore Oil Drilling Divers' Award was issued in conjunction with directions on behalf of the Victorian and Western Australian Designated Authorities.[79] Again, complaints were made in relation to the lack of practical knowledge contained in both the Award and the direction, and industry pleaded for adequate legislative coverage of all diving operations in the Australian offshore petroleum industry.[80] In addition, the Divers' Association expressed confusion at the overlapping and multiple sources of power regulating petroleum operations. For instance, the following sources would have to be consulted and adhered to in order to comply with safety practices: section 97 in relation to good oil field practice; the regulation power in section 157;[81] laws of the relevant State or Territory;[82] and any directions issued under section 101.[83]

In response, the Committee recommended that the provisions designed to ensure observance of safe working procedures be clarified and updated to take account of the four years of experience that had passed.[84] There was danger in each State issuing directions as to safe practices that were not uniform, and consequently there was "…every justification for a uniform code of safety practices with respect to the off-shore petroleum industry…".[85]

Attempts to ensure 'uniformity' of petroleum practices were not made until the mid 1980's when the Schedule was formed. It has been given more recent consideration, however, with the promulgation of regulations.

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75 Ibid, [17.124].
76 Ibid, [17.126].
77 Ibid, [17.128].
78 Ibid, [17.131].
79 Ibid, [17.101].
80 Ibid, [17.106].
81 PSLA, s157.
82 At that time, Ministers could not give a direction inconsistent with the applied provisions: PSLA 1967 (Cth) [see original text of the Act at 1967].
83 Senate Committee, above n 5, [17.77].
84 Ibid, [17.145].
85 Ibid, [17.116].

5. THE SCHEDULE OF SPECIFIC REQUIREMENTS

The Schedule of Specific Requirements as to Offshore Petroleum Exploration and Production provides a list of requirements for day-to-day petroleum operations approvals and procedures.[86]

An examination of the content of the Schedule reveals that section 101 has been used almost exclusively to create a set of detailed safety and operational rules that are intended to apply generally to the industry, and which are made effective by virtue of their attachment to all titles.[87] This is arguably at odds with the design of section 101, an interim 'stop-gap' measure while comprehensive regulations were being made. It is argued that time would have been better spent completing the regulation-making task at an earlier date instead of waiting nearly 30 years, and amassing, in the form of the Schedule and instead of regulations, a detailed collection of ad hoc and lengthy directions.

The Schedule is highly complex and prescriptive, extending to almost 170 pages and containing over 435 specific directions, and nine lengthy appendices.[88] The Schedule contains a number of heads relating to different aspects of petroleum operations. The content covered by the Schedule is as follows:

(i) Part I: Introductory;[89]
(ii) Part II: General Safety;[90]
(iii) Part III: Marine Facilities;[91]
(iv) Part IV: Geological and Geophysical Activities;[92]
(v) Part V: Drilling;[93]
(vi) Part VI: Petroleum Production;[94]
(vii) Part VII: Cranes, Winches & Lifts;[95]
(viii) Part VIII: Diving[96].

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86 Schedule of Specific Requirements, above n 23.

87 WA DOIR communications, 15 August 2004.

88 By way of illustration, see examples of the following directions contained in the Schedule:
Paragraph 502 Equipment
Unless other approved, materials and equipment used in drilling operations shall conform to such standards as are listed below so as to safely withstand the conditions likely to be encountered during such operations for –
(a) Derricks and masks API Std 4A, Specification for Steel Derricks (including Standard Rigs), API Std 4D, Specification of Portable Masts, or API Std 4E, Specification for Drilling and Well Servicing Structures.
Paragraph 231 Scaffolding:
(1) All Scaffolding on platforms shall be in accordance with the following standards:-
SAA AS 1576 , SAA Metal Scaffolding Code;
SAA AS 1575, Tubes, couplers and accessories used in metal scaffolding; and
SAA AS 1577, Solid timber scaffold planks.
(2) Any person directly responsible for the erection and dismantling of scaffolding shall be the shall be the holder of a current approved certificate of competence.
Paragraph 327 Flammable or toxic gases
(2) A drilling or workover installation shall have approved degassing equipment installed in the mud system.

89 Ibid, paragraph 101-105.

90 Ibid, paragraphs 280-287.

91 Ibid, paragraphs 300-381.

92 Ibid, paragraphs 401-456.

93 Ibid, paragraphs 501-553.

94 Ibid, paragraphs 601-655.

95 Ibid, paragraphs 700-750 plus appendices.

96 Ibid, paragraphs 801-849 plus appendices.

Similar to regulations, all the Parts contain general requirements to which the title-holder must adhere. This includes procedures and protocols, obtaining licences and approvals, and data submission requirements and reporting. The minute detail of the Schedule, and the wide discretion contained in section 101, can be better understood against a background of the legal principles relating to discretion and rules.

6. DISCRETION AND RULES

Any definition of discretion must begin with the notion of legitimate choice, that is, a decision reached within the confines of certain restrictions.[97] The tension between the rule of law and administrative discretion is an old one.[98] As a central tenet of liberal society, the rule of law reflects the notion that state power, to the extent that it affects individuals, is to be exercised according to binding general rules made and known in advance, and which are of sufficient specificity to allow individuals to know with tolerable certainty their rights, obligations, and liabilities.[99] To these tenets are added the view of Dicey that discretionary power tends to be contrary to the rule of law because of its 'uncontrolled' and 'arbitrary' character.[100]

Prima facie, section 101 is a gross breach of the rule of law, and constitutes an absolute Ministerial discretion to interfere with any aspect of a titleholder's petroleum operations, and imposes obligations upon any person in the surrounding area. Consistent with this uncontrolled nature of the power is the fact that section 101 directions are not subject to any form of Parliamentary scrutiny.

In practice, is discretion as unconstrained as Dicey suggests? Contemporary legal commentators argue that discretion is constrained not only in a formal sense by its legal terms, but also by a number of economic, social and organisational factors outside the legal structure.[101] That is to say that discretion is bound both by a framework of rules and by non-formal legal principles such as standards, requirements of rationality and purposiveness, and concerns with consistency and fairness.[102] These limits on discretion can be further classified into practice and normative constraints: effectiveness and efficiency; resource limitations; organization structures; and the moral attitudes of other officials,[103] which constrain the exercise of discretion partly by the motivation to treat like cases alike. While a power may be formally discretionary from an exterior, legal perspective, from the internal point of view held by the officials, the discretion is much more

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97 J Bell, 'Discretionary Decision-Making: A Jurisprudential View' in K Hawkins (ed) *The Uses of Discretion* (1991) 89, 93,96.

98 Seidenfeld, 'Bending the Rules: Flexible Regulation and Constraints on Agency Discretion' (1999) 51 *Administrative Law Review*, 431.

99 D J Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1986), 61. For a discussion of the rule of law, see: Fuller, *The Morality of Law*; Raz, *The Authority of Law,* ch i.; Davis, *Discretionary Justice*, ch i.; Hayek, *The Constitution of Liberty.*

100 Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, London, 8th ed. 1915), at 183-187; See further Bell, above n 97, 102.

101 Julia Black, 'Managing Discretion' (Paper presented at the Penalties: Policies, Principles and Practice in Government Regulation Conference, Sydney, 7-9 June 2001). See generally Hawkins, K, 'The Use of Legal Discretion: Perspectives from Law and Social Science' in Hawkins, K (ed) *The Uses of Discretion* (1991) 11; Galligan, D J, *Discretionary Powers: A Legal Study of Official Discretion* (1986); Black, J, *Rules and Regulators* (1997); Bell, J, 'Discretionary Decision-Making: A Jurisprudential View' in Hawkins, K (ed) *The Uses of Discretion* (1991) 89; Schnieder, C E, 'Discretion and Rules: A Lawyer's View' in Hawkins, K (ed) *The Uses of Discretion* (1991).

102 Bell, above n 97, 94.

103 Hawkins, K, 'The Use of Legal Discretion: Perspectives from Law and Social Science' in Hawkins, K (ed) *The Uses of Discretion* (1991) 11, 18.

limited,[104] and therefore rebuts the assumption that discretion necessarily correlates with uncertainty.

These assertions are supported by the operation of the directions power under section 101. The wide discretion conferred upon the Minister has in fact been exercised narrowly, as shown above, to create a set of detailed rules contained in the Schedule which have operated as 'substitute regulations'. This is supported by the fact that specific directions to individual companies seem virtually non-existent.[105] The Schedule is attached to all titles at their issue, transfer, or renewal, and is intended to apply generally to all titleholders and related parties. This fact, coupled with the virtual non-use of section 101 to direct specific individuals, reflects the motivation to treat 'like cases alike' while avoiding the formal oversight mechanisms mandated by regulations.

The legal limitations on the power can be found both in the words of the provision and the purpose of the Act. As explained above, the power does not appear limited to any significant extent by the particular words of the section. The requirement that directions be issued only in respect of matters to which regulations can be made does not impose any effective limits on the power. This is because the regulation-making provision encompasses virtually anything connected to the exploration and exploitation of petroleum (the apparent objective of the Act).[106] The bare procedural requirements are that the direction is in writing and served upon the titleholder. Consultation with the Joint Authority is required if the direction is of a standing nature. In terms of non-legal constraints, the apparent mentality of the DA is that issuing directions is a convenient method for regulating matters which would in other contexts be covered by regulations, such as safety and environmental protection, without suffering the burden of formal oversight mechanisms that regulations mandate.[107]

The fact that this has been allowed to continue since the 1960s illustrates that while the political system and its institutions theoretically ensure accountability, those controls are not necessarily reliable. Consequently, the issue becomes to what extent legal values and institutions can be put in place to influence and constrain the exercise of administrative power.[108] If the repeal of section 101 is unpalatable to both government and industry, a modification of the provision is offered below in order to structure and confine the discretion, and increase its transparency. When the Schedule is completely replaced with regulations, and the role of section 101 as a 'stop-gap' is defunct, the issue becomes how administrators will use that discretion.[109] This question cannot be answered with any clarity, and generates uncertainty for both industry and overseas investors.

Rules, on the other hand, prima facie uphold the rule of law by encouraging certainty, predictability, reliability and efficiency.[110] The assumption has long been that there is an inverse

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104 Ibid, 45.

105 At least at the Western Australian level. The Western Australian DOIR could only provide evidence of one specific direction, the Direction as to Discharge of Ballast Water issued in 1993 to Ampolex (Legendre) Limited and Wandoo Petroleum Pty Ltd dated 6 January 1997, and one of the administrators could only recall, and not locate, one other direction that was issued to an individual company: WA DOIR communications, 15 September 2004.

106 Although there is no 'objects provision' in the PSLA, the facilitation of petroleum exploration and exploitation as the aim of the Act can be ascertained from surrounding provisions such as section 157 and section 58.

107 WA DOIR communications, 15 August 2004.

108 Bell, above n 97, 110.

109 Julia Black, 'Managing Discretion' (Paper presented at the Penalties: Policies, Principles and Practice in Government Regulation Conference, Sydney, 7-9 June 2001), 3.

110 Davis most famously advocated the legalistic case for rules: Baldwin, R, *Rules and Government* (1995), 19.

correlation between discretion and rules: the more rules there are, the less discretion there is.[111] More recently, however, this view has been challenged.[112] In point is Susan Long's analysis of US tax laws. She found that the complexity of such detailed provisions in the legislation did not decrease but rather increased the agency's effective discretion.[113] Paradoxically, writing more and more rules will not, as intended, reduce discretion, but may actually expand it as decision-makers have more determinants from which to choose.

This argument strikes to the heart of section 101, and to the narrow exercise of discretion under that provision. As explained above, section 101 has been used almost solely to create 'surrogate regulations' in the form of a Schedule abundant with detailed rules resembling regulations in content, yet which escape Parliamentary inspection. Prior to their revocation, the majority of those 435 directions contained in the Schedule gave scope to the administrator to make an individual discretionary decision in respect of each direction. There still remain a number of significant powers under the Schedule, such as direction 609(1) explained below. Furthermore, the Commonwealth has failed to consistently revoke obsolete directions once regulations are passed.[114] In this way, the proliferation of directions in the Schedule overlap with the Act, and are a resource to expand discretion, not a limitation upon it.[115]

The problem of overlap, as complained about by industry in the Senate Report, is no better illustrated than by the interface between section 58 of the PSLA and paragraph 609 of the Schedule. Interestingly, while industry expressed concern about section 58 at the Senate Review, they made no comment on section 101.[116] This reflects the acceptance of section 101 as a 'stop-gap' measure, reinforced by initially cautious approaches to the use of the power.[117]

Under section 58 of the PSLA, the JA may 'for reasons that it thinks sufficient' (which may include protection of Commonwealth revenue) direct a title-holder to vary production rates, the limitation being that the direction is not contrary to good oilfield practice. However, paragraph 609(1) of the Schedule also makes provision in this respect, stating that:

> For a fully developed reservoir, the annual rate of recovery of petroleum from that reservoir shall be subject to approval [by the Director on behalf of the DA] unless the rate of recovery of petroleum from that reservoir is the subject of a direction given to the licensee under section 58 of the principal Act.

Paragraph 609(1) operates to significantly enlarge the power contained in section 58(3) of the PSLA. There are two sources of statutory power in relation to rates of petroleum production, therefore, and it is questionable whether the direction is valid if it was intended by the legislators that section 58 covered the field. Although paragraphs 609(1) and 601 (consent for production equipment and recovery of petroleum) currently provide the method of ensuring compliance with

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111 Braithwaite, '"Rules and Principles: A Theory of Legal Certainty,"' (2002) *Australian Journal of Legal Philosophy* 47, 50; Black, above n 109, 2.

112 See, for example, Bardach and Kagan, *Going by the Book* (Philadelphia, Temple University Press, 1982); Baldwin and Hawkins, 'Discretionary Justice: Davis Reconsidered' [1984] *Public Law* 570-599; Diver, 'The Optimal Precision of Administrative Rules,' (1983) 93 *Yale Law Journal* 65-109; Braithwaite, 'Rules and Principles: A Theory of Legal Certainty,' (2002) 27 *Australian Journal of Legal Philosophy* 47-82.

113 Baldwin, above n 110, 23.

114 WA DOIR communications, 28 August 2004.

115 Braithwaite, above n 112, 64.

116 Senate Committee, above n 5, [7.73-7.7], [7.85].

117 Department of National Development, Commonwealth, *Petroleum (Submerged Lands) Act 1967-1968: Protection of the Great Barrier Reef* (Internal advice, 11 September 1969).

field development plans, as explained above,[118] it is intended that the resource management regulations currently in progress will absorb those directions, and provide the power to ensure compliance with field development plans.[119]

7. CLASSIFICATION OF COMMONWEALTH DIRECTIONS POWERS

In this section of the article a comparative legislative analysis is conducted, the purpose being to set section 101 within the general context of Commonwealth direction powers. First, the provisions are classified into four major groupings: intra-governmental; mechanical; judicial or quasi-judicial directions; and a miscellaneous category, containing provisions resembling those of section 101. Secondly, the rationale for directions powers in those various circumstances is explored.

This article does not offer a treatise on directions powers and as such, does not examine *all* Commonwealth directions powers, arguably an impossible task. It is intended that the examination of these categories of directions powers will reveal their justification and proper use. The rationale is that if directions powers found in these distinct groupings are not as wide in their application as section 101 is in its, or that the justification for those powers does not resonate in the petroleum context, that section 101 ought to be repealed. The search for directions powers was not limited to primary legislation, although most of the powers were located in that sphere, but extended to legislative instruments such as regulations, rules and orders. For pragmatic reasons, the paper confines itself to an analysis of Commonwealth directions powers. Similar principles apply to the power of ministerial direction in respect of State and Territory directions powers.[120]

7.1 Intra-governmental directions[121]

Ministers usually head departmental, regulatory and other Executive structures and as such have legal or statutory powers to direct the policies and performance of agencies within their portfolios.[122] Integral to this power is the concept of ministerial responsibility; the accountability, that is, of the Minister for the affairs of his or her department(s). Perhaps the most conventional form of directions powers in this category is the conferral upon the Minister of a wide power to direct a statutory authority with regards to the 'performance of its functions' or 'exercise of its powers'.[123]

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118 See Introduction above at p. 4-5.

119 DOIR communications, 28 August 2004.

120 C Mantziaris, 'Interpreting Ministerial Directions to Statutory Corporations: What Does a Theory of Responsible Government Deliver?' (1998) 26 *Federal Law Review* 309, 311.

121 See M Aronson, 'Ministerial Directions: The Battle of the Prerogatives' (1995) 6 *Public Law Review* 77; See Administrative Review Committee, *Commonwealth Administrative Review Committee Report Parliamentary Paper No 144 of 1971* (1971).

122 Ibid, 77, 79.

123 Ibid, 79. See for example *Telecommunications Act 1997* (Cth), s 440(1); *Health Insurance Commission Act 1973* (Cth), s 8J; *Environment Protection (Alligator Rivers Region) Act 1978* (Cth), s7; *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth), s10; *Australian Communications Authority Act 1997* (Cth), s12; *Commonwealth Services Delivery Agency Act 1997* (Cth), s13; *Air Services Act 1995* (Cth), s16; *Construction Industry Reform and Development Act 1992* (Cth), s54; *Fisheries Administration Act 1991* (Cth), s91; *Australian Trade Commission Act 1985* (Cth), s10; *Australian Hearing Services Act 1991* (Cth), s12; *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth), s10; *Australian Council for International Agricultural Research Act 1982* (Cth), s16; *Administrative Appeals Tribunal Act 1975* (Cth), s51A; *Trade Practices Act 1974* (Cth), s29; *Australian Film Commission Act 1975* (Cth), s8.

The purpose of directions powers in the intra-governmental context is to provide a means of ministerial control over statutory authorities.[124] Realistically, operational control increasingly rests with senior public officials due to the growing size and complexity of bureaucracies, suggesting that the greater independence of statutory authorities has resulted in a weakening of ministerial responsibility. However, there is a constitutional need to match power with responsibility, and ministers require the maintenance of control over statutory authorities because it is they who are ultimately accountable for the affairs of their department(s).[125] This principle of ministerial responsibility justifies ministerial powers of direction to relevant departments, but has little application in relation to section 101, in that the Minister is given the power to direct *private* parties, rather than statutory authorities.

It is impossible to establish a general formula for the interpretation of directions powers.[126] In terms of the literal construction of the power, one approach is to distinguish between legislative phrasing that enables ministers to make directions with respect to particular cases and problems, and phrasing which restricts these powers to more general directions, akin to binding guidelines.[127] The recent legislative trend is to reduce ministerial directions powers to general or policy matters, rather than individual specific decisions. Aronson suggests that most debates as to the legality of particular directions could be reduced if legislatures were more specific.[128]

For example, the Minister can only give directions to the Australian Broadcasting Authority (ABA) if they are of a general nature.[129] The directions have to be gazetted,[130] and it is stipulated that the ABA is otherwise free from ministerial directions. [131] Legislative grants of limited independence from Commonwealth ministerial directions are also to be found outside the broadcasting area.[132] Some directions require the Minister to consult with the relevant body before giving the direction;[133] others are limited by a 'public interest' requirement.[134]

It is noted that such accountability and transparency is lacking in the context of petroleum. Virtually all of the intra-governmental directions powers identified provide for a fairly rigorous

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124 Mantziaris, above n 120, 322.

125 A Abadee, 'Keeping Government Accountable for Its Promises: The Role of Administrative Law' (1998) 5 *Australian Journal of Administrative Law* 191, 193; Aronson, above n 121, 77, 94.

126 Mantziaris, above n 120, 83-84.

127 Ibid, 338; See also: *Aboriginal Development Commission v Hand* (1988) 15 ALD 410; *New South Wales Farmers' Federation v Minister for Primary Industries and Energy* (1990) 21 FCR 332; *National Aboriginal and Torres Strait Islander Legal Services Secretariat Ltd v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCR 287.

128 M Aronson and B Dyer, *Judicial Review of Administrative Action*, (2nd ed, 2000), 241.

129 Ibid, 83; *Broadcasting Services Act 1992* (Cth), s 162(1). See also *Telecommunications Act 1997* (Cth), s 440(3).

130 *Broadcasting Services Act 1992*, (Cth) s161(2).

131 *Broadcasting Services Act 1992* (Cth), s163.

132 Aronson, above n 121, 83. For example the Civil Aviation Safety Authority is subject to ministerial directions "as to the performance of [its] regulatory functions", but such directions "shall be only of a general nature": *Civil Aviation Act* 1988 (Cth), s12(2). Any direction has to be published in the CASA's annual report: s12(3). Similarly, ministerial directions to the National Health and Medical Research Council "must be of a general nature only" and cannot interfere with research funding decisions or with the manner in which the Council treats "particular scientific, technical or ethical issues". Directions have to be tabled: *National Health and Medical Research Council Act 1992* (Cth), s10; *Australian Maritime Safety Authority Act 1990* (Cth), s8;

133 *Australian Federal Police Act 1979* (Cth), s37(2); *Australian Tourist Commission Act 1987* (Cth), s29; *Food Standards Australia and New Zealand Act 1991* (Cth), s11; *Australian Sports Drug Agency Act 1990* (Cth), s68; *Australian Postal Corporation Act 1989* (Cth), s49; *Australian Sports Commission Act 1989* (Cth), s11.

134 *Australian Radiation Protection and Nuclear Safety Act 1998* (Cth), s16; *Special Broadcasting Act 1981* (Cth), s11; *Australia Council Act 1975* (Cth), s6B; *Australian Nuclear Science and Technology Act 1987* (Cth), s11; *Export Finance and Insurance Corporation Act 1991* (Cth), s9.

system of accountability, which subject directions to procedural requirements such as disallowance, publication and reporting. It appears that the legislative trend is to make directions more accountable to Parliament. The net effect of the *Legislative Instruments Act 2003* (Cth), operational from January 2005,[135] is to turn directions into regulations by mandating disallowance, registration, and consultation requirements.[136] However, Ministerial directions, such as those given under section 101 remain exempt from the disallowance requirement.[137]

7.2 'Mechanical' directions

The second category relates to purely mechanical directions. These directions do not involve the application of a broad discretion. The most prevalent examples are directions on forms, or on ballot papers.[138] The use of directions powers seems justified in these circumstances for two reasons. First, there is not an application of a broad discretion, and these types of directions apply uniformly to all voters involved. Secondly, such directions do not impinge on the voter's substantive rights. Essentially these directions are a procedural formality to ensure legal effectiveness and regularity. Section 101, on the other hand, contains a wide discretion which has the potential to impact severely on a private party's substantive rights. The reasons justifying 'mechanical' directions fall drastically short of justifying the retention of section 101.

7.3 Judicial or quasi-judicial directions

The purpose of judicial or quasi-judicial directions is to provide guidance as to the particular course of action that certain court or tribunal proceedings should take. Perhaps the most common form is a wide power that allows the decision-maker (such as a Commissioner) to give directions as to 'practice and procedure', or which give him or her the power to direct persons to attend conferences and/or produce documents.[139]

It is argued that the use of directions powers is warranted in this context because of the need to serve 'individualised justice'.[140] The submissions made by the Australian Law Reform Commission in relation to the *Administrative Review Tribunal Bill 2000* (Cth) support this view.[141] The Commission stressed that wide discretion in relation to case management and procedure was critical to the efficient functioning of the tribunal and cautioned against a system of prescriptive general procedure rules as part of a practice direction regime. A critical view was taken of the Family Court system, where a series of rigid rules and procedures were applied in a 'lock-step' fashion to all cases, leading to the insufficient management of cases and unnecessary case events

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135 *Legislative Instruments Act 2003* (Cth), s2, Note 1.

136 *Legislative Instruments Act 2003* (Cth), s38, s20, s17. See also Explanatory Memoranda, Legislative Instruments Bill 2003 (Cth) 11, 12, 20.

137 *Legislative Instruments Act 2003* (Cth), s44(2).

138 *Conciliation and Arbitration Regulations (Amendment) 1986* (Cth), reg 4; *Futures Industry Regulations (Amendment) 1989,* sch 1; *Securities Industry Regulations (Amendment) 1989* (Cth), regs 8-10; *Insurance Regulations (Amendment) 1996* (Cth), reg 2; *Corporations Regulations 2001* (Cth), reg 1.0.04.

139 *Disability Discrimination Act 1992* (Cth), s 74; *Family Law Regulations 1984* (Cth), reg 4 ; *Supreme Court (Corporations) Rules 2003* Rule 1.8.

140 See generally Baldwin, above n 110, especially at 21.

141 The *Administrative Review Tribunal Bill* 2000 (Cth) was rejected by the Senate in February 2001, and on 6 February 2003, the Government announced that it would not seek to re-introduce the Bill. However, the submissions of the Commission remain relevant as they scrutinised administrative review by tribunals generally. See Australian Law Reform Commission, *Administrative Review Tribunal Bill 2000*, Submission to Senate Legal and Constitutional Legislation Committee (2000).

(specifically, appearances). The system was inflexible, inefficient and unable to deliver 'individualised justice'.[142]

Tailoring responses to the needs of the parties is a concept generally reserved for the judicial and quasi-judicial context, where rules and procedures are complex, and parties require guidance. This justifies the use of directions powers in this realm, but cannot support the justification of section 101. Petroleum industry participants do not submit themselves exclusively to the jurisdiction of the relevant administrator. They seek a guiding hand rather than one that constantly directs, whereas a person seeking justice demands the opposite. The petroleum industry has matured considerably since the early days of its inception. It does not need such a level of direction nor could the business autonomy of those participants survive with it.

8. MISCELLANOUS DIRECTIONS – DIRECTIONS RESEMBLING SECTION 101

As shown above, the bulk of the powers examined fell into the 'intra-governmental' category, while the rest could be classified as 'mechanical' or 'judicial or semi-judicial' directions. However, a number of powers were identified that could not be classified in this way. These powers, at face value, confer discretions similar to those of section 101, in that they can impinge on the rights of private parties, and much less frequently, extend to third parties. More importantly, these directions exist in a comparable industry, the Australian uranium mining industry.

8.1 Uranium Mining

The Australian uranium and petroleum regimes, for the purposes of analogy, are similar. They both explore and mine critical resources in Australia. If wrongly treated or handled, uranium has a devastating potential to threaten safety, the environment, and national security. These reasons provide a convincing rationale for extensive governmental controls. Petroleum, if not effectively regulated, poses, arguably, a lesser threat.[143] Intuitively, one would expect the uranium industry, with its potential to cause harm, to create the need for a power that not only equals section 101, but surpasses it.

There are a number of State and Commonwealth acts which regulate the mining of uranium. At the State level, these acts relate primarily to safety and environment. The Commonwealth counterpart is the *Environmental Protection and Biodiversity Conservation Protection Act 1999* (Cth). Remarkably, this Act contains nothing even resembling the discretion contained in section 101.

A directions power does exist, however, under section 41 of the *Australian Radiation Protection and Nuclear Safety Authority Act 1998* (Cth). This section permits the Minister's delegate, the CEO,[144] to issue directions to a 'controlled person' if they do not comply with the Act or regulations, or if the exercise of such powers is necessary to protect the health and safety of people or avoid damage to the environment.[145] It is unlikely, however, that mining companies would fall within the definition of 'controlled person', as this, unlike the definition in section 101, does not

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142 Ibid, Submission 10.

143 Although events such as the Alpha Piper Disaster demonstrate the disastrous effects of an oil spill, it is the nuclear aspect of uranium that warrants closer examination.

144 Defined to mean the Chief Executive Officer of ARPANSA (the Australian Radiation Protection and Nuclear Safety Authority), which is a part of the Department of State administered by the Minister: *Australian Radiation Protection and Nuclear Safety Act 1998* (Cth), s14.

145 *Australian Radiation Protection and Nuclear Safety Act 1998* (Cth), s41(1).

extend to *any* third party, but rather is limited to Commonwealth entities, contractors, employees or persons in a prescribed Commonwealth place.[146] In any event, the power to direct Commonwealth subjects here is limited in its terms to a delinquent actor. Alternatively, the power may be exercised only for the specific purposes of health, safety and environmental protection. Although admittedly, these purposes are wide in scope, they do not equate to a power to issue a direction for any reason the Designated Authority thinks fit as in section 101. Furthermore, the power is highly transparent: a copy of the direction must be presented as soon as possible to the Minister,[147] the direction must be tabled in Parliament,[148] and a review procedure must be provided for aggrieved parties.[149]

While there may have been legitimate reasons for section 101 in the past, the validity of the section today cannot be justified in the sense that there are no powers of direction at all comparable in the uranium mining context to section 101. It is argued that the petroleum industry cannot be regarded as being so 'unique' as to require such unconstrained powers to direct private parties. The directions power in section 101 patently exceeds the weak and limited power found in the uranium context; it does not list any defined criteria for its exercise, nor does it contain a system of accountability. Yet, astoundingly, it can relate to almost anything, and has the potential to bind anyone acting in the adjacent area. One could be forgiven for asking why the uranium industry does not possess such a power. The answer is simple: it does not need it. Therefore the petroleum industry does not need it either.

8.2 Justification for Other Miscellaneous-type Directions

Other grounds of 'special circumstance' justifying a power to direct individuals exist at least for the purposes of national emergency, financial stability, and safety. However, an analysis of such powers leads to a similar outcome as the uranium case above. Moreover, the powers observed are contained within a defined framework outlining objective criteria for their exercise, and behind these controls lie formal oversight mechanisms.

(a) Emergency

Consistent with the requirement of a 'special circumstance' attaching to their operation, emergency powers are reserved for out of the ordinary situations, and are rarely used. A good illustration is regulation 2 of the *Liquid Fuel Emergency Regulations 1984* (Cth),[150] an emergency power that has not yet been invoked. [151] That provision gives the Minister the power to implement a system of demand restraint at all levels of petroleum supply during times of national emergency, as declared by the Governor-General.[152] The Minister achieves this by issuing directions regarding prescribed products, which covers the class of users who may purchase fuel and the quantity they may purchase. This impacts most heavily on oil companies and service station operators.[153] The

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146 Defined in the *Australian Radiation Protection and Nuclear Safety Act 1998* (Cth), s13 to mean any of the following: (a) a Commonwealth entity; (b) a Commonwealth contractor; (c) a person in the capacity of an employee of a Commonwealth contractor; (d) a person in a prescribed Commonwealth place.

147 *Australian Radiation Protection and Nuclear Safety Act 1998* (Cth), s41(4).

148 *Australian Radiation Protection and Nuclear Safety Act 1998* (Cth), s41(5).

149 *Australian Radiation Protection and Nuclear Safety Act 1998* (Cth), s42.

150 *Liquid Fuel Emergency Regulations 1984* (Cth), reg 2. See also Lee, H P, 'Emergency Powers' (1984).

151 DITR communications, 11 August 2004.

152 A declaration of 'national emergency' must be made by the Governor-General: *Liquid Fuel Emergency Regulations 1984* (Cth), reg 2.

153 ational Oil Supplies Emergency Committee, DITR communications, 11 August 2004.

regulation allows the Australian Government to comply with their international obligations under the International Energy Agreement.[154] Such a directions power is justified in this 'crisis' context simply because it is in the public interest that emergency situations are swiftly resolved. More importantly, it goes without saying that it is difficult to determine with certainty the extent of an emergency and the proportionate action in response.

The PSLA already contains provision for the expansion of power in times of emergency.[155] Emergency powers, it seems, at least require a 'trigger', a declaration of emergency, for their exercise. Section 101 seems to extend beyond this, as it may be invoked at the whim of an administrator, and largely remains unnecessary in relation to day-to-day operations.

(b) Financial Sector

Wide directions powers are also evident in the financial sector.[156] The Australian Prudential Regulatory Authority (APRA) has the power to issue directions if there is a contravention of an industry code or standard, or if a specific event threatens the stability of the industry in general.[157] The provision is a general and preventative power intended to enable the correction of institutional behaviour so as to ensure financial system stability.[158] APRA has a broad power to direct the way the affairs of a body corporate are being conducted, thus potentially impinging on substantive rights. However, the relevant power details a comprehensive list which outlines what type of conduct the relevant party can be expected to carry out under a direction, and so industry has some certainty as to how their rights may be affected. If a direction impacts upon their rights or obligations under a contract, there is an avenue of appeal. Furthermore, stipulation is made for the publication and provision of the direction to the Treasurer and the Reserve Bank, thus providing a further layer of transparency to the process. Once again, corresponding comfort measures such as these are not enjoyed by petroleum industry participants in relation to section 101.

In addition to APRA's transparent and accountable use of its discretion, its powers protect against real mischief. Similar to the emergency provisions outlined above, it is difficult for APRA to prescribe rules before the relevant event occurs, and so a directions power provides for flexibility while allowing responsiveness to changed circumstances or valid objections by affected parties. One need only think of the severe consequences that may ensue for the confidence and stability of the financial system if the safety of deposits is not ensured.[159] During the Royal Commission into the collapse of HIH, it was stressed that APRA needs to gain a better understanding of its powers under the legislation, and its basic approach to prudential supervision. While Owen J specifically noted that APRA was not to blame for the downfall of HIH, [160] perhaps if they had exercised their intervention powers at an earlier stage, the damage could have been minimised. He recommended that APRA be given wider powers,[161] and suggested they adopt a more "…sceptical, questioning,

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154 *greement on an International Energy Program*, opened for signature 18 November 1974, 1979 ATS 7, entered into force in Australia 27 May 1979; DITR communications, 11 August 2004.

155 SLA, s140B.

156 *inancial Sector Reform (Amendments and Transitional Provisions) Act 1998* (Cth), Schedule 2, Division 1BA, amending the *Banking Act 1959* (Cth).

157 OHC are non-operating holding companies.

158 xplanatory Memorandum, Financial Sector Reform (Amendments and Transitional Provisions) Bill 1998 (Cth) [6.27-6.31].

159 See also *Corporations Act* 2001 (Cth), s 823E; *Insurance Act 1973 (Cth)*.

160 Commonwealth, Royal Commission into the Failure of HIH Insurance, *Volume 1 A Corporate Collapse and its Lessons*, (2003)

161 Ibid, see for example recommendation [42] which recommends that the Commonwealth Government amend the *Insurance Act 1973* to extend prudential regulation to all discretionary insurance-like products—to the extent that it is

and sometimes aggressive approach where necessary to its prudential supervision…".[162] Events such as this one make it clear what an important role discretionary powers serve in certain contexts.

None of these justifications apply to section 101. It is not limited in giving directions to a breach, nor does it protect against any real mischief in light of the promulgation of objective based regulations.

9. CONCLUSION

It is clear that the discretion in section 101 does not quite fit into any of the categories previously outlined. A common theme amongst the categories explored is that discretion appears palatable when it is in the public interest that the relevant risk be eliminated as quickly as possible. The issue of safety can be excised from this public interest due to the enactment of objective-based regulations. Therefore, all that is left is the characterisation of the petroleum industry participant as a public actor, that is, as a person who must act in the public interest. This aspect of the article requires analysis of whether section 101 really does confer a power to direct *private* parties. It also raises the issue of the extent to which the role of permittee or licensee is 'private' or 'public'.

In concessionary regimes such as Australia, petroleum *in situ* is owned by the state and title does not pass to the permittee or licensee until it is exploited at the wellhead. It could be argued that the role of the titleholder is a public one, given that the public owns the resource until the wellhead. Moreover, the permittee or licensee arguably has the interest of the public on trust during this period; petroleum royalties and taxes are a lucrative source of public revenue, and if it is not recovered efficiently, the public will lose part of these valuable returns. The State, representing the public, must ensure that petroleum is extracted successfully. Therefore, the State quite rightly may argue that it requires an absolute power to direct a party in any way it sees fit so as to maximise its revenue from the process.[163]

This argument, however, is greatly weakened when it is recognised that the risk in exploiting the resource is not shared between the parties: the titleholder bears all the costs and risks of exploration. This militates against the idea of the miner acting 'on behalf' of the state. Therefore it is assumed that the permittee or licensee in the petroleum regime is a 'private' party for the purposes of this article.

The relationship between the state and petroleum miner is best classified as a commercial partnership. This article argues that a distinction can be drawn between legislation that strictly regulates regimes such as occupational health and safety, or environmental protection; and the PSLA, where a private body is moving into a quasi-public position. This arrangement certifies both parties to something of tangible benefit to the government in the form of royalties and other payments, and to the petroleum miner by way of exploration and production rights and profits. The PSLA system, as opposed to a formal 'regulator versus regulated' mentality characterising safety regimes, for example, relies heavily on both formal and informal methods of consultation,

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possible to do so within constitutional limits; and recommendation [43] which recommends that s. 462(3) of the *Corporations Act 2001* be amended so that the Australian Prudential Regulation Authority may apply to wind up a company that is an authorised insurer if any of the criteria specified in s. 52(1)(aa), (ab) or (a) of the *Insurance Act 1973* are met.

162 Ibid, at recommendation [26].

163 Thompson, above n 27, 393.

negotiation, and co-operation.[164] A unilateral power to issue directions, such as section 101, with no right of consultation on the part of the miner, sits uncomfortably with this notion of a commercial 'partnership'. How the relationship is characterised does not really matter; neither a regulatory nor commercial relationship requires a vast, unchecked and unappealable power.

Two proposals for reform are suggested. The first, and preferable option, is to entirely repeal section 101. In this way, it is assumed incremental change will follow, extending reform to other aspects of the legislation and therein reducing its overall uncertainty. It is hoped that the repeal of section 101 will encourage 'streamlining' of the Act as suggested by the consultants ACIL as part of the National Competition Policy Review in 1999-2000.[165] The alternative is to modify section 101 on the basis of the miscellaneous-type directions powers examined above. The provision would have to be substantially overhauled in order to:

(a) Limit its exercise to specific and objective-based purposes;
(b) Make it accountable to Parliament;
(c) Provide a system of review, and a right to consult on the part of the petroleum miner;
(d) Clarify the class of persons to whom directions could apply;
(e) Remove the issues associated with the service of directions.

It is my view that such an overhaul would realise little benefit. There is no purpose in fundamentally rewriting a section that serves no purpose in the scheme of the Act. It is difficult to prescribe what matters section 101 should now regulate, considering that safety and environmental protection is covered extensively by regulations. The only avenue of reform, it seems, is repeal.

Perhaps the most glaring indictment against section 101 and indeed the Act was revealed over 30 years ago by the Senate Committee. The "…almost non-existent debate that accompanied the [PSLA]…",[166] a trend that continued in relation to the second constitutional settlement in 1980,[167] mirrors the low level of public interest in the power. This disinterest appears, at least in the intervening years, to have caused interest in the PSLA to decline to almost non-existent proportions. Recently, however, there has been renewed interest in the Act; an interest reflected by the National Competition Policy Review in 1999-2000.

The Review Committee left it open to industry to choose between either a plain English rewrite of the PSLA, or a substantive review of it, while strongly recommending the latter. Despite this, industry seems to have adopted the former approach, arguably because they have become accustomed to the Act over the past 30 years, and being used to 'the devil they know', do not want to change it. It has been shown above that section 101 has passed its 'use by date', and merely adds to uncertainty. Given that the 'old, fat and ugly'[168] PSLA has been amended, on average at

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164 WA DOIR communications, 28 August 2004.

165 While endorsing the 1996 Coalition platform commitment to rewrite the PSLA in "plain English", ACIL Consultants added: "it is probable that what is required is a detailed review of all processes generated by the legislation with a view to removing as many as possible and streamlining the remainder": ACIL Consulting, *National Competition Policy Review of the Petroleum (Submerged Lands) Legislation: Report to the Petroleum (Submerged Lands) Review Committee* (Canberra, April 2000), para 4.10.6.

166 Ibid, 60-61.

167 Ibid, 63, 64: Reid notes that during the Offshore Constitutional Settlement, there was no opportunity for public, industry or Opposition submissions. In fact, submissions by APEA on improvements to the regime, following nine years of experience of the PSLA, were considered 'too sensitive politically' and ignored.

168 Daintith, T, 'A Critical Evaluation of the Petroleum (Submerged Lands) Act as a Regulatory Regime' (2000) *AMPLA Yearbook 2000* 91, 92.

least once yearly since its enactment, surely section 101 has evaded the net of accountability, efficiency and simplicity for long enough. The next amendment should, without doubt, include a repeal of section 101.

APPENDIX

Section 101 Directions

(1) The Designated Authority may, by instrument in writing served on the registered holder of a permit, lease, licence, infrastructure licence, pipeline licence, special prospecting authority or access authority, give to the registered holder a direction as to any matter with respect to which regulations may be made.

(2) A direction given under this section to a registered holder applies to the registered holder and may also be expressed to apply to:

(a) a specified class of persons, being a class constituted by or included in one or both of the following classes of persons:
(i) servants or agents of, or persons acting on behalf of, the registered holder;
(ii) persons performing work or services, whether directly or indirectly, for the registered holder; or

(b) any person (not being a person to whom the direction applies otherwise than in accordance with this paragraph) who is in the adjacent area for any reason touching, concerning, arising out of or connected with the exploration of the sea-bed or subsoil of the adjacent area for petroleum or the exploitation of the natural resources, being petroleum, of that sea-bed or subsoil or is in, on, above, below or in the vicinity of a vessel, aircraft, structure or installation, or equipment or other property, that is in the adjacent area for a reason of that kind;

and where a direction so expressed is given, the direction shall be deemed to apply to each person included in that specified class or to each person who is in the adjacent area as mentioned in paragraph (b), as the case may be.

(2A) Where a direction under this section applies to a registered holder and to a person referred to in paragraph (2)(a), the registered holder shall cause a copy of the instrument by which the direction was given to be given to that other person or to be exhibited at a prominent position at a place in an adjacent area frequented by that other person.

Penalty: 50 penalty units.

(2B) Where a direction under this section applies to a registered holder and to a person referred to in paragraph (2)(b), the registered holder shall cause a copy of the instrument by which the direction was given to be exhibited at a prominent position at a place in an adjacent area.

Penalty: 50 penalty units.

(2C) Where a direction under this section applies to a registered holder and to a person referred to in paragraph (2)(b), the Designated Authority may, by notice in writing given to the registered holder, require the registered holder to cause to be displayed at such places in an

adjacent area, and in such manner, as are specified in the notice, copies of the instrument by which the direction was given, and the registered holder shall comply with that requirement.

Penalty: 50 penalty units.

(3) The Designated Authority shall not give a direction under subsection (1) of a standing or permanent nature except with the approval of the Joint Authority, but the validity of a direction of the Designated Authority shall not be called in question by reason of this subsection.

(4) A direction under this section has effect and shall be complied with notwithstanding any previous direction under this section.

(5) A direction under this section has effect and shall be complied with notwithstanding anything in the regulations or the applied provisions.

(6) Subsections 157(2A) and (2B) apply in relation to directions made under this section in like manner as those subsections apply to the regulations.

(7) A person who fails to comply with a direction in force under subsection (1) that applies to the person is guilty of an offence punishable, upon conviction, by a fine not exceeding $10,000.

(7A) An offence against subsection (7) is an offence of strict liability.

(8) Where:

(a) a direction given under this section applies to a registered holder and another person and that other person is prosecuted for an offence against subsection (7) in relation to the direction; and

(b) the person adduces evidence that the person did not know, and could not reasonably be expected to have known, of the existence of the direction;

the person shall not be convicted of the offence unless the prosecutor proves that the person knew, or could reasonably be expected to have known, of the existence of the direction.