

CRC 2/91

CENTRE FOR NATIONAL CORPORATE LAW RESEARCH

DISCUSSION PAPER 1/1993



**CORPORATE CRIME AND
CORPORATIONS LAW ENFORCEMENT
STRATEGIES IN AUSTRALIA**

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A Discussion Paper based upon an empirical research project on
"Corporate Law Sanctions and the Control of White Collar Crime"
funded by the Criminology Research Council

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This is a further paper in a series of Discussion Papers issued by the Centre for National Corporate Law Research.

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Part 1:

Corporate Crime: A Review of the Literature

1. Introduction

Corporate crime has assumed significant dimensions as a matter of public and official concern in Australia and elsewhere over the past two decades.¹ Although by the early 1990s there were over 850,000 Australian registered companies which occupy a significant position in the economic and social structure of this country,² systematic analysis of corporate misconduct and control has received relatively little attention from lawyers and criminologists, at least when a comparison is made with other types of criminal conduct. Whilst this has begun to change, the complexity of corporate life and corporate law has meant that few have sought to assess the nature and consequences of corporate criminality in Australia, especially as it applies to large or complex corporate groups.³ In the first part of this discussion paper, an effort is made to chart the parameters of corporate crime as a phenomenon and to explain why this phenomenon has been so difficult for the legal system, researchers and the wider community to grapple with. This paper will examine a number of key general problems involved in dealing with corporate crime as a concept and as a phenomenon and illustrate these by reference of a number of recent topical areas of corporate crime and misconduct.

2. The Problem of Definition

Before proceeding much further, it is important to seek to clarify the notion of corporate crime which is the basis of this part of the discussion paper. Over the years some sociologists and criminologists have sought to broaden the concept of corporate crime to include any misconduct involving a corporation, whether it is a breach of a criminal or civil law or regulatory rule. Some have even seen the concept of corporate crime as covering any announced legal actions against a corporation. Schlegel has recently pointed to the dangers of too wide a conceptualisation of corporate crime and has adopted a definition of corporate crime as "any act that violates the criminal law."⁴ As Bauchus and Dworkin have also argued, many conceptualisations of corporate crime blur the important distinction between corporate crime and illegal corporate behaviour.⁵ It is important to note that not all illegal corporate behaviour is criminal. Although corporate crime is a sub-set of illegal corporate behaviour, its parameters are to some extent relatively clear. White collar crime has long been distinguished from other crimes like street crime.⁶ It should also be noted that corporate crime is a sub-set of white collar crime, with occupational crime being the other principal type of white collar crime.⁷ After reviewing literature on corporate crime, Kramer concluded by offering the following definition of corporate crime as involving:

"... criminal acts (of omission or commission) which are the result of deliberate decision making (or culpable negligence) by persons who occupy structural positions within the organisation as corporate executives or managers. These decisions are organisational in that they are organisationally based - made in accordance with the operative goals (primarily corporate profit), standard operating procedures, and cultural norms of the organisation - and are intended to benefit the corporation itself."⁸

This definition is useful in so far as it goes, but it needs to be stressed that some of the best known forms of corporate crime in Australia over the last two decades have involved manipulations of the corporation or of the corporate form itself and have not been committed for the corporation's benefit. In other words, not only is the corporation responsible for the commission of what we call corporate crime, the corporation has as often been the arena in which corporate crimes such as insider trading, corporate tax evasion and the manipulation of corporate treasuries, has taken place. Abuse of the corporate form by officers, associates or advisers of the corporation in situations involving an element of moral turpitude therefore calls for a more complex definition of corporate crime than might otherwise arise. Most of the academic literature on corporate crime has tended to focus upon criminal actions by the corporation or its agents and not upon corporate crimes which rely upon the corporation or its securities as a vehicle for corporate crime.⁹ It is of course just as important to focus upon the use of the legal form of the corporation as a means of criminal activity.

For the purposes of this part, corporate crime is therefore also taken to refer to a breach of the corporate criminal law by a corporation or its agents or a breach of corporate criminal law involving the manipulation of the corporate form itself. Such breaches need to be proved before the courts beyond reasonable doubt. Usually, a breach of the criminal law is punishable by either a term of imprisonment or a fine. Thus, a provision of the law which provides for the imposition of a fine or a term of imprisonment against the corporation or its controllers will be described as a corporate crime provision. Imprisonment would of course not be possible for a corporation, as an artificial person, but it may be appropriate for officers or agents of the corporation who have breached a criminal law provision upon behalf of, or in relation to, the corporation. Many commercial statutes criminalise certain types of conduct and provide for fines or for terms of imprisonment for their breach. For example, Schedule 3 to the *Corporations Law* lists over 160 contraventions of that *Law* which are punishable by both terms of imprisonment and/or fines. In addition, the various state and federal *Crimes Acts* provide criminal penalties for offences by corporations or their officers, such as the offence of dishonesty.

However, as noted above, much of the criminological literature on corporate crime deals with criminal offences such as environmental offences by the corporation, breach of health and safety regulations, corporate tax evasion, and breach of consumer and trade practices provisions. To these should be added crimes of dishonesty committed by officers or agents of the corporation, such as breaches of the directors' duties provisions of the *Corporations Law* and offences involving the manipulation of the securities and assets of the corporation.

Different enforcement strategies will inevitably emerge out of different conceptualisations of corporate crime.¹⁰ Similarly, it is also probably the case that theorisations which have been developed from a study of corporate crime by the corporation may not be readily applicable to the study of corporate crime involving manipulation of the corporation or of the corporate group. Perhaps the latter situation in some ways presents a simpler problem in that more traditional criminal law notions may be able to apply more readily to such conduct. But, there have been relatively few successful criminal prosecutions for such manipulations. Except in cases of fraud, there have also been persistent efforts to treat manipulations of the corporate form itself as involving civil rather than criminal liability.

Sometimes the dividing line between criminal and civil provisions may not be very clear or precise. For example, in some commercial statutes, such as the *Corporations Law*, provision is made for both civil and criminal actions to be undertaken in relation to the same conduct. Consequently, where a director of a company has misused his or her position as a director or acted dishonestly, a civil action can be brought by the company (or in the name of the company) to recover damages or compensation for the loss suffered. Indeed, corporations and their advisers often seek to blur this distinction by seeking to have matters dealt with under civil law provisions, so avoiding the stigma of criminality which might otherwise arise. Some even argue that what is called corporate crime is not serious crime.¹¹ By the use of some of the best lawyers, accountants and other advisers, corporations have been very skilled in persuading corporate regulatory bodies and legislators to redefine the character of corporate criminal conduct by resort to processes of negotiation, the use of protracted legal proceedings or by making some concession to the law enforcement agency which does not lead to any criminal action being taken.¹² Over longer periods of time, corporations and their advisers have also sought to change the character of corporate criminal law itself by lobbying the legislature to decriminalise various areas of the law applying to corporations.¹³ This of course is not something that is readily available to those who commit street crimes and it illustrates the fact that the boundaries of corporate crime are to some extent politically determined and class based. However, although the law may impact differently upon corporations when compared with other offenders, it is dangerous to stray too far from a formal legal definition of corporate crime, despite the fact that this definition clearly has some limitations. Social justice issues need to be considered separately from an assessment of corporate crime as the term is used here.

At the same time, criminal actions can be brought in relation to the same conduct where the case can be proved to the criminal standard of proof. This approach to legislative drafting has sometimes caused confusion and judges have occasionally been reluctant to find a breach of the civil law provision as to do so may leave a defendant open to criminal proceedings. This has sometimes been done by reading the civil law provision far more narrowly than might otherwise be done, as has occurred in cases where directors continue to allow the company to trade on knowing that the company will be unable to pay its debts as and when these are due.¹⁴

Compounding the ambiguity which is often a feature of corporate law is the fact that the legislature has from time to time sought to improve the range of sanctions for corporate misconduct and made provision for the imposition of what are known as civil penalty orders which may involve the imposition of heavy fines which parallel fines which may be imposed for a breach of a corporate criminal law provision. This is the case under the *Corporations Law* where a civil penalty of up to \$200,000 may be imposed under s 1317EA for a breach, such as a breach of the directors' duties provisions. However, the court may impose such a civil penalty order where the case has been proved only to satisfy the civil and not the criminal standard of proof, that is, where the case is proved on the balance of probabilities and not beyond reasonable doubt.¹⁵

Finally, it should be noted that the consequences of the imposition of some civil or administrative remedies may sometimes be as, or even more, severe than the imposition of a non-custodial criminal penalty. For example, the application of the disqualification provisions of the *Corporations Law* applying to such persons as directors, liquidators, securities dealers and investment advisers may prevent such persons from being employed in such a position again. Where it is used, this administrative sanction may be a far more severe penalty than a small fine. Furthermore, where a regulatory agency forces a corporation to make a payment either to the agency or to persons affected by the actions of the corporation, the payment may be far greater than any fine which might be imposed by resort to criminal proceedings. This has occurred as a result of settlements reached with corporations by the Trade Practices Commission and by the old National Companies and Securities Commission where a breach a corporate law statute may have occurred.

All of this suggests that whilst it is important to have a fairly sharp concept of corporate crime when discussing this topic, there are often points of convergence between what may also be described as illegal corporate behaviour and corporate crime. This in part derives for the fact that there may not necessarily be any clear moral turpitude attaching to a breach of a corporate criminal law provision. As Kadish noted some three decades ago: "[w]ithout moral culpability there is in a democratic community an explicable and justifiable reluctance to affix the stigma of blame."¹⁶ Herbert Packer has also argued that in areas where there is moral neutrality concerning the offence, such as with many economic offences, there is a tendency to see "a compromise with the idea of criminality. The formal indications of criminality are all there, but the outcome is typically a fine, rather than an actual or even conditional sentence of imprisonment."¹⁷ For example, some would quite seriously suggest that, although insider trading is a criminal offence, it is nevertheless an acceptable form of conduct as it improves the efficiency of securities markets and there is no obvious victim, such as there is with street crime. It is this very ambiguity that has from time to time led to calls for the decriminalisation of large areas of corporate criminal law, so as to retain the corporate criminal sanction only for cases of obvious fraud or deceit.¹⁸

Finally, it has to be noted that corporate criminal laws dealing with actions by or on behalf of the corporation are a curious hybrid of provisions which have evolved over time from a model which was more appropriate to dealing with individuals than with complex corporate groups. This means that the formal

legal conception of corporate crime is actually poorly developed. As Christopher Stone, a leading American authority on corporate social control, has observed:

"To understand why we are not doing a better job of it, we must look to legal history. When the law was forming, it was individual, identifiable persons who trespassed, created nuisances, engaged in consumer frauds. The law responded with contemporary notions about individuals - what motivated them, terrified them, and constituted justice toward them. Later, as corporations became the dominant vehicle for social action, only rarely did the law meet with specifically tailored adaptations. Since a body of law addressed to 'persons' already existed, it was simply transferred to corporations without distinction.

Today's giant corporations, however, are much more than persons who just happen to be especially large and powerful. They are complex sociotechnical organisms - not just men, or even men-and-machines-groups, but men, machines, patterns of reward, ways of doing things, all divided up into loosely coordinated clusters of cells. There is no reason to believe (as the law implicitly does) that the way 'it' will respond and adapt to external threats, the way 'it' will scan the environment for information, the way 'it' will calculate and weigh 'its' pleasures against 'its' pains is like that of an actual person."¹⁹

Interestingly, in relation to alleged failures to comply with securities market rules regarding the Australian Stock Exchange listing of companies, the courts have displayed a similar lack of realism and have taken a narrowly legalistic position to the effect that these rules only apply to the corporation and not to the controllers of the corporation, such as its directors.²⁰

It may be appropriate to conclude this section by providing the following typology of corporate criminality. The typology is organised around the beneficiaries of the criminal activity (either the corporation or some other person or persons) and the perpetrators of the criminal conduct (either the corporation or its agents). The typology therefore postulates that there are at least four clear types of corporate crime. Looking at the typology, it is clear that Types A and B (crime by or on behalf of the corporation) have much in common as do Types C and D (corporate crime against the interests of the corporation). One consequence of this differentiation is that it may be necessary to consider different principles, enforcement strategies and sanctions for each type of corporate criminal conduct or cluster of types of corporate crime.

A Typology of Corporate Criminal Conduct

	Corporate Crime Committed by a Corporation itself	Corporate Crime Committed by the Agents or Controllers of a Corporation
Corporate Crime Committed for the Benefit of a Corporation	<p>TYPE A</p> <p>Corporate Crime by a Corporation for its own benefit</p>	<p>TYPE B</p> <p>Corporate Crime by the Agents or Controllers of a Corporation for the benefit of that Corporation</p>
Corporate Crime Committed Against the Interests of a Corporation	<p>TYPE C</p> <p>Corporate Crime against a Corporation but for the benefit of another Corporation</p>	<p>TYPE D</p> <p>Corporate Crime against a Corporation but for the benefit of its Agents or Controllers</p>

3. Corporate Crime and the Aims of Corporate Criminal Law

Traditionally, criminal law usually has had a number of objectives, such as incarceration, retribution, rehabilitation and deterrence. Incarceration or incapacitation is obviously irrelevant when dealing with an artificial entity such as the corporation, although imprisonment is widely seen as a real stigma for corporate officers and advisers. Retribution presents different problems as it is far from easy to establish the moral blameworthiness or the desert of the corporation because a corporation "has no soul to be damned, and no body to be kicked."²¹ There are nevertheless those who see considerable merit in the deserts based approach to criminal law.²² It has been suggested that just deserts as a basis for the punishment of corporate crime is counter-productive as those deserving the greatest punishment for white collar crimes tend to receive the least punishment due to the vagaries of the processes of prosecuting corporate crime.²³ However, some have argued that corporations should not be treated differently from other criminal actors and that a punitive policing strategy is necessary and desirable when dealing with corporations.²⁴

In the case of rehabilitation, the corporation and its officers are not easy subjects for treatment aimed at reducing the criminal propensities of the offender.²⁵ Often such offences are rarely repeated and do not obviously reflect a career of criminal conduct as corporate law cases are usually brought before the courts as a

first offence. Although rehabilitation may have failed in relation to non-corporate crime, it has been increasingly argued recently that there is scope for greater effort at internal reform and rehabilitation within the corporation.²⁶ One way of achieving this is through improved mechanisms of self regulation.²⁷ Deterrence has however come to be seen as the principal goal of the enforcement of corporate criminal provisions because, apart from deterrence, these other traditional goals are widely seen as being ill-suited to dealing with corporate crime. Having noted this, Packer observed some years ago that we know very little about the deterrent effects of corporate criminal law.²⁸ More recently, Schlegel has noted that "... while deterrence is commonly accepted as the primary reason for imposing criminal sanctions on the corporation and on individuals acting on the corporation's behalf, there is little agreement as to the type and severity of punishment that best achieves that goal."²⁹ The focus upon deterrence as the principal goal of corporate criminal law does not mean that rehabilitation and incapacitation are entirely irrelevant, for, as Fisse has argued in respect of corporate crime by, or on behalf of, the corporation, "[p]olicy revision, internal disciplinary control, and procedural action - the forms of rehabilitation and incapacitation that are most practical and useful in preventing corporate crime - are sub-goals of deterrence."³⁰

At a broader level, the focus upon achieving deterrence has traditionally largely relied upon legalism, through the criminal law, as a mechanism of achieving compliance. Alternatively, it is often argued by business that a more appropriate measure of compliance is not the degree of adherence to legalistic standards or "red tape", but conformity to broad economic performance measures or output standards. For example, such economic approaches would measure the amount of pollutants released from a chemical plant over a period of time and not whether particular anti-pollution measures are in place at any particular time. Another economic approach is to provide incentives or disincentives, such as taxes or tax relief, to meeting broad performance standards. Braithwaite has shown that although both legalism and economism have limitations in dealing with corporate misconduct, the limits of economism are more profound.³¹ He notes that the principal defect of performance standards is to be found in their retrospectivity. This means that they are "inappropriate where society is prepared to tolerate even very high levels of economic inefficiency to build up guarantees that disasters are prevented *before* they occur. More specifically, in areas involving great hazards, it is important to punish risky behaviour which fortuitously does not result in any harm."³²

In contrast, Braithwaite suggests that a "profound advantage of direct regulation [through legalism] is that it can change corporate conduct within a short time frame."³³ Specific legal standards are also more readily monitored than economic performance standards. Also, the former approach more readily allows the imposition of penalties sufficient to achieve deterrence whilst appropriate penalties for a failure to meet a performance requirement may, in catastrophic situations such as a major oil spill, be such as to put the company out of business, the so-called "deterrence trap". The deterrence trap is also a problem for specific legal standards, but it is a far greater problem for policing performance standards.³⁴ However, this is not to suggest that there is no place for performance standards in dealing with corporate misconduct, so long as they

are backed up by effective legalistic measures. Furthermore, there may be some areas where performance standards may be more appropriate than traditional command and control measures, such as in dealing with noise from aircraft near airports.³⁵ Obviously, the optimal mix of such regulatory strategies will vary depending upon the context or the type of corporate crime that is involved.

4. Corporate Sanctions and Law Enforcement

Allied to this debate on the goals of corporate criminal law is the debate concerning the most appropriate sanctions to devise for the special circumstances of the corporation. Although breaches of corporate law have usually only been dealt with by the application of fines or imprisonment, if they have been dealt with at all, a range of alternative sanctions have been widely discussed in the literature. These alternative sanctioning strategies are likely to provide the courts with significantly more realistic and effective sentencing options than they currently have available when dealing with actions by the corporation.³⁶ They include such sanctions as the so-called equity fine, which would see the allocation of some of the shares of the corporation to a public entity or some like group;³⁷ corporate probation;³⁸ community service orders;³⁹ the introduction of internal corporate compliance programs,⁴⁰ what has been called enforced corporate responsive adjustment,⁴¹ and adverse publicity orders.⁴² Australian law makers have yet to take seriously this extensive range of sentencing options which might be used in dealing with corporate crime by the corporation.⁴³ However, some of these alternatives may be less appropriate or effective when dealing with corporate crimes by corporate officers, advisers or controllers.

Many have repeatedly pointed to the failure of traditional corporate crime control strategies and the need to refashion both the law and enforcement strategies in this area.⁴⁴ All too often corporate criminal offences are simply not prosecuted.⁴⁵ This is due to a variety of reasons such as the problems of proof and the capacities of offenders to make it difficult for the criminal justice process to function effectively when dealing with powerful and well resourced offenders. Alternatively, the sanction imposed may bear little relation to the harm inflicted or the profits made by the corporation in breaching the particular law⁴⁶ or sanctions may not deter where they fall upon the relatively blameless.⁴⁷ A further problem relates to the nature of accountability under corporate criminal law itself.⁴⁸

Consequently, it has been argued that new concepts of corporate responsibility need to be evolved to deal with corporate crime by the corporation. For example, Stone has developed the concept of "enterprise liability" by combining rules of liability and agency in such a way that accountability is sought by threatening corporate profits.⁴⁹ Also, Fisse has proposed the concept of "reactive corporate fault" which would examine the fault of the corporation both at the time of the commission of the offence as well as by reference to its actions after the offence. In this way "blame can be allocated on the basis of both pre and post-actus reus corporate policy."⁵⁰ Fisse has argued that:

"The attribution of criminal liability to corporations is an intractable subject; indeed, it is one of the blackest holes in criminal law... The

common law principle of personal corporate responsibility, as developed in *Tesco Supermarkets Ltd v Natrass* [1972] AC 153], has been roundly criticised. The *Tesco* principle is unsatisfactory mainly because it restricts corporate criminal liability to the conduct or fault of high-level managers, a restriction that makes it difficult to establish liability against large companies. Offences committed on behalf of large organisations often occur at the level of middle or lower-tier management yet the *Tesco* principle requires proof of fault on the part of the top-tier manager or a delegate in the very restricted sense of a person given full discretion to act independently of instructions in relation to part of the functions of the board. Perversely, the *Tesco* principle works best in the context of small companies, where fault on the part of a top manager is usually much easier to prove and where there is relatively little need to improve corporate criminal liability.⁵¹

It has repeatedly been argued in the literature that we need to get away from the individualistic approach to the problem of corporate criminality and focus upon the organisational nature of the problem.⁵² A related strategy is to focus upon the corporate ethos as a standard for corporate criminal responsibility, so that a corporation can be convicted where it can be shown that its ethos,⁵³ or its corporate practices and policies,⁵⁴ have encouraged the commission of the criminal act. Further, it has been suggested that penalties should be focused upon the decision maker and not upon the corporation.⁵⁵ Finally, it has been argued that the key to the control of corporate crime is the integration of corporations within the community so that they become amenable to informal social controls.⁵⁶ This of course means moving away from individualism as the primary legal basis for dealing with large bureaucratic organisations such as the modern corporate group.⁵⁷ Peer group control is also of great value in dealing with offences against the corporation by directors or by other corporate controllers.⁵⁸ Law reform bodies in Australia have fallen far short of adopting this wide body of learning. This applies especially to the reports of the Gibbs Committee appointed by the Commonwealth to review *Commonwealth Criminal Law*.⁵⁹

4. Some Illustrations of Corporate Criminality

It is appropriate to turn finally to a number of brief illustrations of the operation of corporate criminal law provisions in Australia which have been a matter of special concern over the last decade. Inevitably, this discussion must be very selective. The number of Australian case studies of corporate crime which benefit the corporation is now relatively quite extensive as, for example, the work of Braithwaite,⁶⁰ Hopkins⁶¹ and Grabosky and Sutton⁶² attests. Reference will therefore be made to the areas of securities fraud, abuses of director's duties, auditing and the abuse of the corporate accounts provisions. Reference could be made to other corporate financial crimes such as money laundering and insolvency fraud involving the use of corporate entities.⁶³

Abuse of the Corporate Form

During the decade of the 1980s an especially disturbing form of corporate crime arose out of the plundering of central corporate treasuries by controllers of corporate groups. The growth of complex corporate structures with central treasury operations has allowed the funds of individual companies within these groups to be centrally located and manipulated to serve the ends of group corporate controllers. The prevalence of "round robin" transactions between the members of the group of companies or between associated companies has long been documented and was evident in the late 1950s and early 1960s, such as with the Korman group of companies.⁶⁴ Similar transactions occurred, for example, with the Spedley and Bond group of companies during the 1980s. Often, as with the Qintex⁶⁵ and Bond companies, significant "service" fees were paid to the officers of the companies controlling the group. The McCusker investigation into Rothwells,⁶⁶ the TEA investigation by the National Companies and Securities Commission⁶⁷ and the Royal Commission of Inquiry into the State Bank of South Australia,⁶⁸ also revealed the extent to which a corporation's accounts could be manipulated, especially where use was made of questionable financial transactions with related companies.

The somewhat cavalier manner in which funds were channelled within a group of companies was especially evident in relation to the Qintex group of companies as was illustrated in the 1990 case of *Qintex Australia Finance Ltd v Schroders Australia Ltd*,⁶⁹ a case in which there was great difficulty in identifying which company in the Qintex group had been the company on whose behalf a futures contract had been entered into. In that case, Rogers CJ was critical of the use made of subsidiary companies and called for legislative intervention to deal with the manipulations which could occur in such situations. His Honour added that "... creditors of failed companies encountered difficulty when they have to select from among the moving targets the company with which they consider they concluded a contract."

However, the very complexity of these cases has meant that criminal proceedings have rarely been completed.⁷⁰ Many of the cases involving the abuse of the corporate form involved some misuse of audited accounts and some involved allegations of lack of an arms length relationship between management and the supposedly independent auditors of the company.⁷¹ In some cases, the auditors were simply extraordinarily negligent.⁷² Another common abuse of the corporate form which occurred over the last decade or so has been the action of directors moving their activities from one company to another after each company is financially wrecked. Although laws were eventually introduced to facilitate the banning of directors who engaged in such conduct from the management of companies, few criminal proceedings have been brought for breach of what are known as the insolvent trading provisions, although the disqualification proceedings have been heavily relied upon in some jurisdictions. An increasing number of criminal actions for insolvent trading are now being investigated by the Australian Securities Commission.⁷³ However,

where these involve complex fact situations and a multitude of transactions, the problems of proof are such that these cases take years to complete.⁷⁴ This problem of delay was also evident from the so-called "bottom of the harbour" tax avoidance cases which largely took place in the late 1970s. These cases also involved the abuse of the corporate form by corporate controllers, but here the controllers transferred the assets from the company to another entity and left the original company in the hand of "straw directors" and only in the possession of tax losses.⁷⁵ Unfortunately, we have had difficulties in learning from the lessons of the past in dealing with such abuses of the corporate form.

Abuse of Directors' Duties

Directors and other corporate officers are subject to potential criminal liability under the *Crimes Acts* and under the *Corporations Law* where they act dishonestly. Where a director acts dishonestly with intent to deceive or defraud the company, s 232(3) of the *Corporations Law* now provides for a penalty of imprisonment of up to 5 years or a fine of up to \$200,000, or both. Higher gaol sentences are available under corresponding *State Crimes Act* provisions. Directors are also obliged not to make improper use of their positions as directors or to make improper use of information obtained as a result of being a director. Similar penalties to the above are provided for such conduct and the corporation may also seek to recover damages or compensation from the offending director.

Until recently, few criminal actions had been brought for breach of the directors' duties provisions, although many investigations have been commenced.⁷⁶ The fact that in 1992 a ten-fold increase in fines for the breach of these provisions occurred, suggests a lack of deterrent impact of the earlier fines. Some of the key problems with application of the directors' duties provisions has been the difficulty of obtaining information about the conduct in question, the problems of proving many of these cases beyond reasonable doubt and the widely held perception that it was inappropriate to seek to criminalise the directors' duties provisions.⁷⁷ As a result, the Commonwealth Government in the *Corporate Law Reform Act 1992* sought to partially decriminalise the directors' duties provisions and introduced the remedy of a civil penalty order allowing the banning of persons from being directors and the imposition of fines of up to \$200,000, but without the requirement that the case be brought as a criminal case. The effectiveness of these new provisions remains to be assessed.

Insider Trading and Securities Market Abuses

Another important area of corporate crime involves the abuse of the securities of the company, such as its shares, by resort to practices such as the manipulation of the prices of these securities, market rigging, misleading statements aimed at inducing persons to invest in such securities and insider trading. Heavy criminal penalties apply to such cases, but few legal actions have been successful. For example, in one prosecution against Alan Bond for inducing a person to invest in securities in relation to the attempted rescue of Rothwells in 1987, a conviction was originally recorded against Bond, who served a short term of imprisonment. However, this conviction was quashed on appeal. In another

similar case, involving an attempt to induce investors to buy shares in a company called the Private Blood Bank, apart from some civil proceedings which had been brought by the corporate regulators, the prosecution against the accused commenced in 1987, but it was not until the end of 1992 that the case was dealt with criminally, and in this case for a *Crimes Act* and not a *Companies Code* charge.⁷⁸ This case well illustrates the difficulties of seeking to enforce corporate criminal law provisions in the area of securities law.

Insider trading has also been a widespread form of corporate criminal conduct over the last two decades, as is evident from the findings of the Senate Committee on Securities and Exchange in 1974 (the Rae Committee),⁷⁹ and was evident from research undertaken more recently.⁸⁰ Insider trading has been found to be commonly committed by corporate officers or controllers, but there has not been one successful prosecution for this crime during the 1980s against a corporation or its officers or controllers, despite some vigorous efforts to do so. Once again, the principal obstacles to conviction involved overcoming problems created by the criminal standard of proof and problems with the capacity of judicial officers to comprehend the nature and seriousness of insider trading conduct. Also, finding evidence of insider trading, which was usually only available to the accused, was another serious obstacle to successful prosecutions. This parallels the experience in other jurisdictions.⁸¹

5. Conclusions

This part has sought to sketch a number of key conceptual and practical problem areas in regard to our understanding of corporate crime. It is clear that, although legal and criminological research on this topic has been relatively limited, this is an area rich in research potential, especially in Australia. It is important however to be mindful of the different types of corporate crime and the different enforcement strategies which need to be devised for dealing with each type. As we have seen, the historical bases of corporate criminal law have been such that notions of corporate criminal responsibility in the law have failed to come to terms to the nature of the modern complex corporation, whether this involves the corporate group structure or decision making processes within the corporation itself. Also, law enforcement and research attempts to come to terms with corporate crime against the corporation, such as abuses of the corporate form or abuses of directors' duties or abuses of the securities market provisions, have fallen far short of what might be desirable. To a large degree this may be attributed to a failure upon the part of researchers, the legal system and the community to come to terms with the nature of corporate criminality of this kind. The situation is not helped by the deliberate obfuscation which is evident in the law and practices in this area. Consequently, we seem to be destined to have to re-learn the lessons of the past as many of the corporate financial abuses of each decade parallel similar misconduct or offences which were treated as isolated events or not worthy of provoking any fundamental re-assessment of the manner in which corporate crime should be treated.⁸² However, even in those areas where the corporate crime literature has become relatively well developed, particularly in relation to corporate crimes by the corporation, the legislature and regulatory practice have been slow to absorb this learning.

The second part of this discussion paper looks at some of the underlying social factors which serve to inhibit or affect effective corporate law enforcement.

- 1 In the United States, for example, an extensive Congressional inquiry into white collar crime took place in 1978: Subcommittee on Crime of the Committee of the Judiciary, House of Representatives, *White Collar Crime: The Problem and the Federal Response*, Washington, US Government Printer, 1978. In regard to Australia see for example: Grabosky, PN and A Sutton, *Slains on a White Collar: Fourteen Studies on Corporate Crime or Corporate Harm*, Sydney, Federation Press; Grabosky, PN, *Complex Commercial Fraud: Conference Proceedings*, Canberra, Australian Institute of Criminology, 1992. Also see Fisse, B, "Recent Developments in Corporate Criminal Law and Corporate Liability to Monetary Penalties", (1990) 13 *UNSW Law Journal* 1.
- 2 Australian Securities Commission, *Annual Report 1991/92*, Canberra, AGPS, 1992, at p 80.
- 3 In an earlier paper the author sought to offer some elements for such an assessment; See further, Tomasic, R, "Corporate Crime: Making the Law More Credible", (1990) 8 *Company and Securities Law Journal* 369.
- 4 Schlegel, K, *Just Deserts for Corporate Criminals*, Boston, Northeastern University Press, 1990 at p 5.
- 5 Baucus, MS and TM Dworkin, (1991) "What is corporate crime? It is not illegal corporate behavior," 13 *Law & Policy* 231 at 232-34.
- 6 Sutherland, E, *White Collar Crime*, New York, Dryden, 1949.
- 7 Clinard, M and R Quinney, *Criminal Behavior Systems: A Typology*, New York, Holt, Rhinehart and Winston, 1973 at p 188.
- 8 Kramer, RC, "Corporate Criminality: The Development of an Idea", *Corporations as Criminals* (Ed by E Hochstedler), Beverley Hills, Sage, 1984 at p 18.
- 9 For example, Professor Fisse has tended to focus upon punitive measures involving offences by the corporation itself, rather than the manipulation of the corporate form: see for example: Fisse, B, "Sentencing Options against Corporations", (1990) 1 *Criminal Law Forum* 211 at 212, fn 1.
- 10 See for example, Kagan, RA and JT Scholz, "The 'Criminology of the Corporation' and Regulatory Enforcement Strategies", in *Enforcing Regulation* (ed by Hawkins, K and JM Thomas) Boston, Kluwer-Nijhoff Publishing, 1984 at pp 67-95.
- 11 For a discussion of such arguments, see Kramer, *ibid*, at pp 21-27.
- 12 See generally, Snider, L, "The Regulatory Dance: Understanding Reform Processes in Corporate Crime", (1991) 19 *International Journal of the Sociology of Law* 209; Snider, L, "Towards a Political Economy of Reform, Regulation and Corporate Crime", (1987) 9 *Law & Policy* 37.
- 13 See further: Tomasic, R, "Sanctioning Corporate Crime and Misconduct: Beyond Draconian and Decriminalization Solutions", (1992) 2 *Australian Journal of Corporate Law* at p 82. For analysis and critique of the argument that business regulatory offences should be decriminalized see: Levi, M, "Business Regulatory Offences and the Criminal Law", (1984) 5 *The Company Lawyer* at p 252.
- 14 For example, in *Group Four Industries Pty Ltd v Brosnan and Anor* (1991) 5 ACSR 649, Duggan J was dealing with a civil case to recover unpaid debts brought under the insolvent trading provision of the Corporations Law (what is now s 592). In interpreting this legislative provision which provided for both civil and criminal actions to be brought, the judge took the view (at 661) that "the existence of a severe penal sanction reinforces my view that a

narrower interpretation [of the civil provision] is called for." It might also be noted that the Senate Committee on Legal and Constitutional Affairs examined the duties of directors provisions and concluded that:

"If the breach is criminal in nature, criminal penalties should follow. But it is draconian to apply such penalties in the absence of criminality. This appears to be the case with section 229 of the Companies Code (Corporations Act, s 232)... When gaol terms are provided for breach of the law but the courts are disinclined to impose them because they seem too draconian, the law tends to fall into disrepute. The modest fines which are imposed instead cause some discontent in the community." (Cooney Committee), *Directors' Duties, Report on the Social and Fiduciary Obligations of Company Directors*, Canberra, AGPS, at p 188 and pp 16-17.

- 15 Where fraud is alleged in a civil case, the courts will apply what is known as the test in *Briginshaw v Briginshaw* (1938) 60 CLR 336 which requires a more stringent proof of the case than would be required in the usual civil case, where proof would be on the balance of probabilities.
- 16 Kadish, SH, "Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations", (1963) 30 *University of Chicago Law Review* 423 at p 437.
- 17 Packer, HL, *The Limits of the Criminal Sanction*, Stanford, Stanford University Press, 1969 at pp 357-58. It should be noted however that in the United States in 1967, the President's Commission on Law Enforcement and Administration of Justice concluded that "most white-collar crime is not at all morally neutral": extracted in Johnson, JM and JD Douglas (Eds), *Crime at the Top: Deviance in Business and the Professions*, Philadelphia, JB Lippincott Company, 1978 at p 351.
- 18 See generally: Tomasic, R, "Sanctioning Corporate Crime and Misconduct: Beyond Draconian and Decriminalization Solutions", (1992) 2 *Australian Journal of Corporate Law* 82.
- 19 Stone, CD "Corporations and Law: Ending the Impasse", in Johnson, JM and JD Douglas (Eds), *Crime at the Top: Deviance in Business and the Professions*, Philadelphia, JB Lippincott Company, 1978 at pp 350-51. See also: Stone, CD, "The Place of Enterprise Liability in the Control of Corporate Conduct", (1980) 90 *The Yale Law Journal* 1. A similar theme has been taken up in Fisse, B, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions", (1983) 56 *Southern California Law Review* 1141 at pp 1143-44; and in Silets, HM and SW Brenner, "The Demise of Rehabilitation: Sentencing Reform and the Sanctioning of Organizational Criminality", (1986) 13 *American Journal of Criminal Law* 329 at pp 331-349.
- 20 An illustration of this approach is to be found in the decision of the Full Court of the Supreme Court of Queensland in *Hillhouse & Ors v Gold Copper Exploration NL & Ors (No 3)* (1988) 14 *ACLR* 423 at p 429.
- 21 Attributed to Baron Thurlow, *Oxford Dictionary of Quotations, 2nd Edition*, 1966 at 547. See further, Coffee, J, " 'No Soul to Damn: No Body to Kick' : An Unscandalised Inquiry into the Problem of Corporate Punishment", (1981) 79 *Michigan Law Review* 386 and, "Developments in the Law: Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions," (1979) 92 *Harvard Law Review* 1227.
- 22 See for example, Van den Haag, E, *Punishing Criminals*, New York, Basic Books 1975; Von Hirsch, A *Doing Justice: The Choice of Punishments*, New York, Hill and Wang, 1976; The just deserts approach has provoked some debate in recent years: Braithwaite, J, "Challenging Just Deserts: Punishing White-Collar Criminals (1982) 73 *The Journal of Criminal Law and Criminology* 723; Van Den Haag, E, "The Criminal Law as a Threat System", (1982) 73 *The Journal of Criminal Law and Criminology* 769; Braithwaite, J,

- "Comment on 'the Criminal Law as a Threat System'", (1982) 73 *The Journal of Criminal Law and Criminology* 786.
- 23 Braithwaite, J, "Challenging Just Deserts: Punishing White-Collar Criminals" (1982) 73 *The Journal of Criminal Law and Criminology* 723.
- 24 Pearce, F, and S Tombs, "Ideology, Hegemony, and Empiricism: Compliance Theories of Regulation", (1990) 30 *British Journal of Criminology* 423. See however, Hawkins, K, "Compliance Strategy, Prosecution Policy, and Aunt Sally: A Comment on Pearce and Tombs", (1990) 30 *British Journal of Criminology* 444.
- 25 See further: Silets, HM and SW Brenner, "The Demise of Rehabilitation: Sentencing Reform and the Sanctioning of Organizational Criminality", (1986) 13 *American Journal of Criminal Law* 329.
- 26 See for example: Coffee, JC, "Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response", (1977) 63 *Virginia Law Review* 1099 at 1147-1156; Braithwaite, J and G Geis, (1982) *Crime & Delinquency* 292 at pp 309-311. Also see Fisse, B and J Braithwaite, *The Impact of Publicity on Corporate Offenders*, Albany, State University of New York Press, 1983.
- 27 This argument has been well developed by John Braithwaite in "Enforced Self-Regulation: A New Strategy for Corporate Crime Control", (1982) 80 *Michigan Law Review* 1466. Also see Stone, C, *Where the Law Ends: The Social Control of Corporate Behavior*, New York, Harper & Row, 1975; Braithwaite, J, *Crime, Shame and Reintegration*, Cambridge, Cambridge University Press, 1989 at pp 124-151 and De Mott, DA, "Reweaving the Corporate Veil: Management Structure and the Control of Corporate Information," (1977) 41 *Law and Contemporary Problems* 182. See however, Kraakman, RH, "Corporate Liability Strategies and the Costs of Legal Controls", (1984) 93 *Yale Law Journal* 857.
- 28 Packer, HL, *The Limits of the Criminal Sanction*, Stanford, Stanford University Press, 1969 at p 356.
- 29 Schlegel, K, *Just Deserts for Corporate Criminals*, Boston, Northeastern University Press, 1990 at p 17.
- 30 Fisse, B, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions", (1983) 56 *Southern California Law Review* 1141 at p 1159.
- 31 Braithwaite, J, "The Limits of Economism in Controlling Harmful Corporate Conduct", (1981-82) 16 *Law & Society Review* 481 at p 482.
- 32 *Ibid* at p 489.
- 33 *Ibid* at p 489.
- 34 *Ibid* at pp 490-91.
- 35 *Ibid* at p 501.
- 36 See generally, Fisse, B, "Sentencing Options against Corporations", (1990) 1 *Criminal Law Forum* 211. Also see Fisse, B and J Braithwaite, "The Allocation of responsibility for Corporate Crime: Individualism, Collectivism and Accountability", (1988) 11 *Sydney Law Review* 468.
- 37 Coffee, J, "'No Soul to Dams: No Body to Kick': An Unscandalised Inquiry into the Problem of Corporate Punishment", (1981) 79 *Michigan Law Review* 386 at p 413.
- 38 Coffee, JC, R Gruner and CD Stone, "Standards for Organizational Probation: A Proposal to the United States Sentencing Commission", (1988) *Whittier Law Review* 77; Gruner, R, "To

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- Let the Punishment Fit the Organization: Sanctioning Corporate Offenders Through Corporate Probation" (1988) 16 *American Journal of Criminal Law* 1.
- 39 Fisse, B, "Community Service as a Sanction Against Corporations" (1981) *Wisconsin Law Review* 970.
- 40 See Trade Practices Commission, Forum on compliance programs (1992) No 64 *Trade Practices Commission Bulletin* 5-19.
- 41 French, P.A, "Enforced Corporate Responsive Adjustment" (1989) 13 *Legal Studies Forum* 115 .
- 42 See generally: Fisse, B and J Braithwaite, *The Impact of Publicity on Corporate Offenders*, Albany, State University of New York Press, 1983. Also see Fisse, B, "The Use of Publicity as a Criminal Sanction Against Business Corporations", (1971) 8 *Melbourne University Law Review* 107.
- 43 See further the disappointing treatment of this matter by the Senate Standing Committee on Legal and Constitutional Affairs (the Cooney Committee), *Company Directors' Duties, Report on the Social and Fiduciary Obligations of Company Directors*, Canberra, AGPS, 1989. Also see The Law Reform Commission, *Sentencing, Report No 44*, Canberra, AGPS, 1988.
- 44 One of the most influential writers in this area has been Christopher Stone: see for example, Stone, CD, "The Place of Enterprise Liability in the Control of Corporate Conduct", (1980) 90 *The Yale Law Journal* 1.
- 45 See for example: Shapiro, SP, "The Road Not Taken: The Elusive Path to Criminal Prosecution for White-Collar Offenders," (1985) 19 *Law & Society Review* 179.
- 46 See for example: Stone, C, "Controlling Corporate Misconduct", (1977) 48 *Public Interest*, (Summer) 55 at 64-65.
- 47 Coffee, J, " 'No Soul to Dams: No Body to Kick' :An Unscandalised Inquiry into the Problem of Corporate Punishment", (1981) 79 *Michigan Law Review* 386 at p 387 and pp 388-407. Also see: Snider, L, "Traditional and Corporate Theft: A Comparison of Sanctions", in *White-Collar and Economic Crime* (Ed by Wickman, P and T Dailey), Lexington, Lexington Books at pp 235-258.
- 48 For an account of the emergence of this body of law see: Brickley, KF, "Corporate Criminal Accountability: A Brief History and an Observation," (1982) 60 *Washington University Law Quarterly* 393.
- 49 Stone, CD, "The Place of Enterprise Liability in the Control of Corporate Conduct", (1980) 90 *The Yale Law Journal* 1 at p 8.
- 50 Fisse, B, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions", (1983) 56 *Southern California Law Review* 1141 at p 1200.
- 51 Fisse, B, "The Attribution of Criminal Liability to Corporations: A Statutory Model", (1991) 13 *Sydney Law Review* 277.
- 52 See for example, Lim Wen Ts'ai, "Corporations and the Devil's Dictionary: The Problem of Individual Responsibility for Corporate Crimes," (1990) 12 *Sydney Law Review* 311.
- 53 Bucy, PH, "Corporate Ethos: A Standard for Imposing Corporate Criminal Liability", (1991) *Minnesota Law Review* 1095.
- 54 Foerschler, A, "Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct", (1990) 78 *California Law Review* 1287.

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- 55 Coffee, J, " 'No Soul to Dams: No Body to Kick': An Unscandalised Inquiry into the Problem of Corporate Punishment", (1981) 79 *Michigan Law Review* 386 at p 409.
- 56 Braithwaite, J, *Crime, Shame and Reintegration*, Cambridge, Cambridge University Press, 1989 at p 144.
- 57 *Ibid* at pp 168-174. See further: Wheeler, S and ML Rothman, "The Organization as Weapon in White-Collar Crime", (1982) 80 *Michigan Law Review* 1403. In a study of white collar crime Wheeler, and Rothman found (at p 1411) that "[o]ffences committed in an organization's name occurred more frequently, and over a longer period of time, than those where an organizational element was lacking."
- 58 See further, Tomasic, R and S Bottomley, *Directing the Top 500: Corporate Governance and Accountability in Australian Public Companies*, Sydney, Allen & Unwin, 1993 (forthcoming April).
- 59 For a critique of this body of work see: Fisse, B, "Corporate Criminal Responsibility", (1991) 15 *Criminal Law Journal* 166. Also see Tomasic, R, "Sanctioning Corporate Crime and Misconduct: Beyond Draconian and Decriminalization Solutions", (1992) 2 *Australian Journal of Corporate Law* 82 at pp 93-96.
- 60 See for example, Braithwaite, J, *To Punish or Persuade: Enforcement of Coal Mine Safety*, Albany, State University of New York Press, 1985. Also see further Grabosky, P and J Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies*, Melbourne, Oxford University Press, 1986; Braithwaite, J and P Grabosky, *Occupational Health and Safety Enforcement in Australia*, Canberra, Australian Institute of Criminology, 1985.
- 61 Hopkins, A and N Parnell, "Why Coal Mine Safety Regulations in Australia are not Enforced", (1984) 12 *International Journal of the Sociology of Law* 179. Also see Hopkins, A, *Crime, Law and Business: The Sociological Sources of Australian Monopoly Law*, Canberra, Australian Institute of Criminology, 1978.
- 62 See further the case studies collected in Grabosky, PN and A Sutton, *Stains on a White Collar: Fourteen Studies on Corporate Crime or Corporate Harm*, Sydney, Federation Press.
- 63 See further: Weston, R, *Combating Commercial Crime*, Sydney, Law Book Co Ltd, 1987.
- 64 See further, Victorian Legislative Assembly, Final Report of an Investigation under Division 4 of Part VI of the Companies Act 1961 into the Affairs of Stanhill Development Finance Ltd and Other Companies, *Votes and Proceedings*, 1967-68.
- 65 Gotterson, QC, RW, Report of a Special Investigation into the Affairs of Ariadne Australia Limited and Ors, Vol 1, Canberra, 1989.
- 66 McCusker, MJ, Report of Inspection on a Special Investigation into Rothwells Limited, WA Government Printer, Perth, 1990.
- 67 NCSC Special Investigations into Affairs of the Trustees Executors & Agency Company Limited and Related Corporations and Affairs of Petane Holdings Pty Limited and Lenlord Nominees Pty Limited; Fourth Interim Report, 18 November 1985, Melbourne, National Companies and Securities Commission.
- 68 *The use of so-called "off-balance" sheet companies was a device which found particular favour with the State Bank of South Australia.*
- 69 (1990) 3 ACSR 267 at 269. Also see *ANZ Executors & Trustee Company Ltd v Qintex Australia Ltd (Recs and Mgrs apptd)* (1990) 2 ACSR 676.
- 70 In the Spedley case, it has been possible for the accused to successfully delay proceedings by claiming that their has been a denial of natural justice. Alternatively, due process

arguments calling for the delay of related proceedings have been relied upon or arguments have been launched to prevent access to records of the accused on grounds such as legal professional privilege. Of the many recent cases involving Spedley, see further, *Yuill v Spedley Securities Ltd (in liq) and Others* (1992) 8 ACSR 272; *Spedley Securities Ltd (in liq) v BR Yuill and Ors* (No 4) (1991) 5 ACSR 758; *Corporate Affairs Commission of New South Wales v Yuill and Others* (1991) 4 ACSR 624.

- 71 See further Tomasic, R, "Auditors and the Reporting of Illegality and Financial Fraud" (1992) 20 *Australian Business Law Review* 198.
- 72 See further *AWA Limited v Daniels* (1992) 10 ACLC 933. Reference might also be made to manipulation of the company, the National Safety Council of Australia Victorian Division by John Friedrich: see further: *Commonwealth Bank v Friedrich & Ors* (1991) 5 ACSR 115.
- 73 Australian Securities Commission, Annual Report, 1991-92, Canberra, AGPS, 1992 at p 6.
- 74 This has been suggested by the main prosecuting agency, the Commonwealth DPP; see further: Director of Public Prosecutions, Annual Report, 1991-92, Canberra, AGPS, 1992 at p 68.
- 75 See further, Sutton, A, "The Bottom of the Harbour Tax Evasion Schemes", in Grabosky, PN and A Sutton, *Stains on a White Collar: Fourteen Studies on Corporate Crime or Corporate Harm*, Sydney, Federation Press at p 1.
- 76 See further, Tomasic, R, "Corporate Crime: Making the Law More Credible", (1990) 8 *Company and Securities Law Journal* 369.
- 77 See further Tomasic, R and S Bottomley, *Directing the Top 500: Corporate governance and accountability in Australian public companies* Sydney, Allen & Unwin, 1993.
- 78 See further: *Corporate Affairs Commission (NSW) v Walker & Ors* (1987) 11 ACLR 884. See further Ferguson, A, "Walker may face jail term", *The Australian* 4 February 1993 at p 27; Ferguson, A. "Former blood bank chief jailed", *The Australian*, 5 February 1993 at p 17.
- 79 Senate Select Committee on Securities and Exchange, *Report*, Canberra, AGPS, 1974.
- 80 Tomasic, R, *Casino Capitalism? Insider Trading in Australia*, Canberra, Australian Institute of Criminology, 1991.
- 81 Shapiro, SP, "The Road Not Taken: The Elusive Path to Criminal Prosecution for White-Collar Offenders," (1985) 19 *Law & Society Review* 179.
- 82 See generally: Sykes, T, "Two Centuries of Panic: A History of Corporate Collapses in Australia", Sydney, Allen & Unwin, 1988.

Part 2:**Corporations Law Enforcement Strategies in Australia:****The Influence of Professional, Corporate and Bureaucratic Cultures¹****1. Introduction**

Corporate law enforcement strategies have become a matter of considerable debate in Australia in recent years, and especially during 1992. This debate is likely to continue for some time yet. Some of the earlier debate was reviewed in a 1992 article² and this debate can be traced back in Australia at least to a 1987 discussion paper published by the Australian Law Reform Commission³. Prior to, and contemporaneously with, these efforts, work by a variety of Australian academic researchers has sought to draw attention to the importance of this area.⁴ Other bodies such as the National Crime Authority,⁵ the Australian Institute of Criminology⁶ and bodies such as the Australian Institute of Company Directors⁷ have all sought to make some contribution to this important, but largely unresolved, public debate.

This debate came to a head in 1992 in the public clash between the then Australian Securities Commission chairman Tony Hartnell and the newly appointed Commonwealth Director of Public Prosecutions, Michael Rozenes. Most will recall that this debate led to the intervention of Commonwealth Attorney-General, Michael Duffy, in September 1992 with the issue of a directive to the ASC to, in effect, place more emphasis on criminal prosecutions than had been apparent up until that time.⁸ Whilst this political intervention may have resolved the public disagreements between the then ASC chair and the DPP, the basic issues concerning the most effective and appropriate corporate law enforcement strategy are far from being resolved. These issues are somewhat more complex and intractable than the narrow images which fuelled the public debate between the DPP and the ASC. In essence, the DPP criticism was summed up in Michael Rozenes' colourful reference to the "gentleman regulator" who preferred to focus upon easier civil actions rather than harder criminal prosecutions.⁹ In evidence before the Joint Committee on Corporations and Securities in September 1992, the following exchange took place between members of the Committee and DPP Rozenes:

Senator Spindler - Mr Rozenes, you said before that, as a general rule, where there is money it becomes a civil case and where there is none it is much more likely that a criminal prosecution results. Could you enlarge on that and explain why, please?

Mr Rozenes - This is a perception that we have...

Mrs Crosio - Excuse me. That is just the perception of the DPP?

Mr Rozenes - Yes. It is a perception of the DPP, but it is brought about as a result of public statements made by Mr Hartnell and statements that he has made to this Committee. This is their first choice.

Senator Spindler - But why?

Mr Rozenes - Because they see themselves as being gentlemen regulators. They see themselves as protecting the interests of the injured corporation or the disadvantaged shareholder, and they honestly believe that, if they impose a commercial penalty, then that by itself will act as a major deterrent to corporate crime. It will not.

Mrs Crosio - That is obviously where the major difference is between the two organisations, is it not?

Mr Rozenes - Yes, absolutely.¹⁰

A Committee member then quoted from a statement made by the ASC chairman to the effect that the Commission was not a "criminal enforcement agency" but a "commercial regulatory agency" and that the Commission would regard criminal investigative proceedings as ancillary to its mainstream activities as a commercial regulator. After rejecting this distinction, DPP Rozenes went on to observe:

Mr Rozenes - I recall on several occasions hearing this proposition advanced on behalf of the ASC. They say that there is nothing that a corporate criminal fears more than being stripped of his ill-gotten gain. I say to you, as a criminal barrister specialising in white-collar crime for the last 15 or so years, that is the last thing the corporate criminal is afraid of because he believes that by the time someone wakes up to the fact that he is a corporate criminal there will hardly be a dollar left in the jurisdiction that the regulator can grab and strip from him. What the corporate criminal is really afraid of is going to prison. That is what deters people from committing crime...¹¹

Earlier, Rozenes had cautioned that:

"... there is no doubt that, if someone performs in a highly dishonest way, you can freeze all the assets you like, you can impose all the administrative penalties you like, but ultimately that conduct must be visited by the criminal law."¹²

In contrast, the ASC's position was seen in terms of a preference for the recovery of funds, the preservation of assets, the institution of civil actions and only then might criminal actions be resorted to. As The ASC Chairman observed in March 1992:

"The preference [of the ASC] for pursuing civil litigation over prosecutions is in many circumstances a response to temporal demands. The speed and flexibility of the civil/administrative action,

particularly in obtaining preservative interim relief, has obvious attraction. The burden of proof, and the evidentiary advantages in gathering and using evidence in the face of claims for the privilege against self-incrimination are also strong indicators of the practical advantages in favour of civil enforcement strategies. Combined with the deterrent net cast by the surveillance programmes is the deterrent effect achieved by the prospect of the personal and often immediate liability of defendants for compensation and damages."¹³

In evidence before the Joint Committee on Corporations and Securities in August 1992, ASC Chairman Hartnell dealt with this issue in a number of exchanges with members of the Committee:

Mr Punch - Is there a tendency for the ASC to be seeking civil remedies rather than criminal remedies?

Mr Hartnell - Yes. It is a very clear policy.

Mr Punch - Could you expand on what criteria you have used in terms of the choice between the two?

Mr Hartnell - Having identified and investigated a situation, the very first thing we do is take civil action, assuming there is some action available. Then we preserve property obviously if there is property, sue for damages if that is relevant, restrain conduct or get mandatory injunctions to oblige conduct - some way to deal with the commercial situation that we are faced with today. The objective of that is that, if something happens in August 1992, we would like ideally to deal with it at least preliminarily in August 1992 or in September 1992. Having done that, investigations can continue and evidence will come out of the civil case anyway which may result in criminal charges. Contrast that with the situation that is urged upon me by some people. Criminal charges come first. Something happens in August 1992 and we investigate it through to the point that we have a criminal brief prepared. Remember, a criminal brief is almost a unique thing. It is not a question of knowing the facts and being able to prove them in any way; you have to prove them in a particular way. You have to prove them on the day you commence the action. You have to hand-up proof. So if it happens in August 1992, we investigate, do all the technical briefs, get to the DPP and answer all the requisitions. If we are lucky, we will have action commenced within 18 months."¹⁴

From the perspective of the media and bureaucratic posturing, the DPP probably had the better script, even though the ASC was probably acting upon a broader appreciation of the nature and limits of corporate law enforcement. However, the issues on both sides of this somewhat artificial debate were in reality considerably more complex and intractable than media stereotypes could convey. The fact that corporations law must be implemented in the social context of professional, organisational and business values and cultures must be taken into account.

The notion of justice as fairness and of treating all like cases similarly has been interpreted by criminal lawyers to mean that all cases of dishonesty should be treated similarly, regardless of the context in which the conduct in question occurs. When addressing the Joint Committee on Corporations and Securities, DPP Rozenes saw this in terms of treating corporate criminals in the same way as other criminals. Thus, when asked whether the priority should be placed upon stripping the criminal of his or her ill-gotten gains, Rozenes replied:

"We do not offer that to our drug dealers, our murders, our rapists and our bank robbers. Why would we offer it to our corporate criminals? What sort of justice is that?"¹⁵

By reference to broader values and cultural attitudes within the regulatory community and key legal and other professional actors, this part seeks to show that this debate is considerably more complex and will not be finally resolved by the political expedient of a Direction from the Attorney-General to the heads of two government agencies. What is required is a major overhaul of the values and attitudes of the principal actors in the field of corporate law itself, something that is more easily said than done.

2. The ASC's Enforcement Record

Before going on to consider the empirical evidence collected in this study of corporate sanctions, some reference should be made to current ASC enforcement policies and achievements. Much has been heard of the 16 matters designated as areas of national priority in September 1990. Of the 13 of these which were referred to the DPP in 1991-92, eight of these resulted in the commencement of criminal proceedings and one matter was resolved by civil action.¹⁶ The ASC's 1991-92 Annual Report notes that:

"In 1991/92 the ASC commenced legal proceedings in 668 new cases, comprising 90 significant civil actions and 39 other civil actions, 80 significant criminal prosecutions and 459 other criminal prosecutions (most of which related to the failure of directors of insolvent companies to lodge statements of affairs with liquidators). At 30 June 1992, 571 legal proceedings were in progress: 77 civil actions and 494 criminal prosecutions... Of the litigation completed in 1991/92, 55 per cent of major civil actions (42 cases) were settled in the ASC's favour and 53 per cent of major criminal matters (37 cases) resulted in convictions."¹⁷

Regarding the enforcement priorities of the ASC, the 1991-92 annual report seeks to provide a balance between civil and criminal actions, taking into account the September 1992 ministerial directive to the Commission. As the Commission explains:

"During 1991/92 the ASC's mandate has been enforcement of the Corporations Law. Its expertise has, of necessity, been totally focused on matters within the Law. Some of these matters might also fall within other laws, for example, State Crimes Acts. Where this has occurred, the ASC has referred these matters to the appropriate prosecuting

authorities under those laws. Matters completely outside the ambit of the Law have been referred to the relevant law enforcement agencies. (This enforcement focus will be extended in line with the Ministerial direction of 30 September 1992 which requires the ASC to give the same consideration to breaches of general criminal law as it gives to breaches of the Corporations Law.)¹⁸

The ASC went on to add that:

"Wherever appropriate, the ASC has given first priority in 1991/92 to civil action to preserve property and obtain other civil remedies to protect the public. These remedies include recovery of property in cases of public interest where private litigants have been unable to do so...

Criminal action has been undertaken in national priority matters, other serious offences and prosecution programs directed at specific classes of activity - particularly failure to lodge annual returns, failure to make timely reports as to affairs of companies under administration, and activities arising out of ASC surveillance programs."¹⁹

The ASC's assessment of its enforcement record needs to be contrasted with the picture which emerges for this period from the position of the Commonwealth DPP. In the 1991-92 Annual Report of the Director of Public Prosecutions reference was made to the ASC's sixteen national priority matters. The Annual Report noted that:

"Recent reports have indicated that the investigation of these matters would be substantially complete by 30 June [1992]. However, while much of the investigative work has been completed these cases will require considerable resources to complete investigations and, where appropriate, lay charges. Further, the time required to complete the process in relation to these prosecutions is likely to be measured in years rather than months. This is due to the level of complexity of the alleged crimes."²⁰

It is interesting to contrast this level of activity with the pace of prosecutions for the "bottom of the harbour" company tax avoidance cases of the early 1980s. As the 1991-92 DPP Annual Report also noted, the last of the comparatively fewer number of tax cases from this period was still before the courts until August 1992, although the jury was unable to agree upon a verdict, leading to the decision by the DPP not to call for a retrial.²¹

To some degree, the DPP's recognition of the difficulties of corporate criminal prosecutions parallels perceptions held in the ASC, although of course quite different conclusions were drawn from their respective experiences. In its 1991-92 Annual Report, the DPP provided some further details concerning its record of recent corporations law prosecutions in relation to cases which ranged from large complex ones to the relatively minor. It observed:

"It is appropriate, at least in what is the initial phase of this function, to give further details on the efforts of both the ASC and DPP in this area.

The statistics are for an 18 month period - 1 January 1991 to 30 June 1992. During this period the ASC referred 147 separate matters to the DPP...In this context the term 'matter' refers to an allegation, or incomplete brief, or briefs, of evidence to a collection of papers requesting advice as to possible criminality. In some matters multiple briefs of evidence have been referred. Of the 147 matters referred, 49 have been completed... [No charges were laid in 18 matters; the defendant was found guilty in 21 matters; the defendant was acquitted in 4 matters and there were 6 other matters]...

In relation to the 98 matters that are still current, charges have been laid in 47. In the other 51 matters, the ASC and DPP are working together to finalise the work necessary to enable a decision as to prosecutions to be made."²²

Whatever may be said about the slow pace of corporate criminal prosecutions, it is clear that there has been a significant level of such prosecutions over the last two years. This is particularly clear when a comparison is made with the record of enforcement in this area prior to the formation of the ASC and the subsequent assumption of responsibility for corporate prosecutions by the DPP.²³

3. Empirical Research on Corporate Social Control

There is a dearth of empirical research on the legal control of corporate conduct in Australia. The problem of corporate social control can be approached from at least two directions, internal control and external control. An internal focus upon the problems of corporate social control incorporates a wide range of matters, including business ethics and the impact of legal rules, such as the duties of directors provisions, and the consciousness and conduct of corporate officers. This largely involves looking internally within the corporation at its "private government" structures as the basis of social control and accountability. In 1992, the Centre for National Corporate Law Research supported a study which in part adopted such an internal orientation: to be published shortly as *Directing the Top 500: Corporate Governance and Accountability in Australian Public Companies*.²⁴ Another approach is to focus upon the external environment of the corporation and the manner in which externally generated sanctions, whether civil or criminal, impact upon the corporation. Corporations obviously operate within a wider social structure and the problem of corporate social control needs to be related to broader legal frameworks aimed at achieving this goal. The current research largely seeks to contribute to an understanding of this external environment in which the corporate law enforcement debate takes place.

It should be said that this paper is part of a larger study of the use corporate law sanctions and the control of white collar crime in Australia. The study was funded by the Criminology Research Council and involved a national series of 130 interviews with judicial officers, private lawyers, liquidators, regulators and prosecutors in five Australian cities.²⁵ The interviews for the study commenced in early 1992 and were completed in June 1992. Table 1 sets out the distribution of interviewees for the study. A total of 22 judicial officers were interviewed, including District or County Court judges, Supreme and Federal Court judges

and magistrates. Rarely have so many Australian judges agreed to be interviewed for a research study.²⁶ An equal number of barristers were interviewed, most of whom were Queen's Counsel. The largest group interviewed comprised 34 partners from large corporate law firms. This group mostly comprised senior corporate lawyers from private law firms. A smaller number of liquidators and accountants from larger accounting firms and boutique insolvency practices were also interviewed. Finally, 12 senior prosecutors and 25 regulatory officials were interviewed. The prosecutors mainly comprised senior Commonwealth DPP officers and state Crown prosecutors. The regulators were drawn from capital city offices and national offices of the ASC, from the Trade Practices Commission and from the Australian Stock Exchange.²⁷

5. The Goals of Corporate Law Enforcement

Perceptions of the appropriate goals of corporate law enforcement must obviously have a significant effect upon the strategies which are adopted to enforce these goals. Although regulatory agencies have been perceived as being some of the principal players in fashioning the goals of enforcement, this is to ignore the fact that other groups such as judges, barristers, defence lawyers, insolvency practitioners and prosecutors all have a significant contribution to make in fashioning the enforcement strategies which eventually impact upon the corporate context. What is clear is that there is a wide diversity of attitudes amongst these groups concerning the appropriate enforcement philosophy to be adopted in regard to corporation law.

Moreover, it should be stressed that regulatory agencies, especially large agencies which span a geographically dispersed country the size of Australia and which have been built upon a variety of earlier local traditions, are far from being monolithic and that, within these bodies, there is an on-going debate concerning the appropriate approach to be adopted. Rhetoric emerging from the Office of the Chairman or from other senior agency officers is but one feature of the agency's views, although the more official one. No chairperson can seek to impose a particular enforcement philosophy if there are strong alternative philosophies in currency within the organisation. It is useful to focus upon the views of some of these groups to illustrate this point²⁸.

Table 1: Distribution of Interviewees for the Corporate Law Sanctions project

	Adelaide	Brisbane	Canberra	Melbourne	Sydney	Total
Judicial Officers	3	4	0	7	8	22
QCs/ Barristers	5	3	1	5	8	22
Large Law Firm Partners	3	4	4	9	14	34
Liquidators/ Accountants	3	2	1	4	5	15
State and Federal Prosecutors	2	2	1	4	3	12
ASC, TPC and ASX Officials	3	3	4	6	9	25
TOTAL	19	18	11	34	47	130

Amongst judges, barristers and large law firm lawyers there is a dominance of what might be called a civil culture in their approach to corporate law and its enforcement. To be sure, honesty and the maintenance of ethical standards are seen as being important, but there is generally little enthusiasm for the use of punitive measures as a reliable mechanism for the achievement of these broad purposes. This dominant civil law culture is a significant determinant of the types of corporate law enforcement strategies which will be likely to be effective.

The View from the Bench

If we begin with the judiciary, it is evident from the responses to this study that deterrence, one of the traditional goals of the criminal law does not feature highly in judicial perceptions of corporate law enforcement. Even less significant are other goals such as retribution and rehabilitation. Instead, judicial attitudes are expressed at a more general level, such as the need to ensure that persons act honestly and adhere to proper standards of conduct. As one Victorian Supreme Court judge observed: "the primary goal is to achieve morality in business with a view to protecting shareholders and the investing public." That this was not just a view held by Supreme Court judges was clear when a magistrate in Melbourne added that the primary goals of corporate law enforcement were: "to regulate the market, to make sure it runs straight and to give the public confidence in the corporate area. Similarly, a District Court judge in Sydney noted that the goals of corporate law enforcement were "to secure legal and moral practices in the corporate life of the nation."

A New South Wales Supreme Court judge also said, in this regard, that "whether it is civil or criminal you are looking to guiding corporations into proper conduct, that is, as a means of encouraging corporate activities." One such means of operation was to ensure that the standards of corporate officers remained high. Thus, a Brisbane magistrate saw the goals of corporate law as "trying to get the corporations to operate in a way so as to keep out the riff raff." As a judge of the Supreme Court of Queensland added: "it is hard to pick a primary goal; I guess it is to achieve a reasonable standard of honesty among corporate managers." Thus, whilst corporate law was seen to be aimed at achieving proper standards of conduct within the corporation, this was often related to the need to maintain public confidence in the corporation. One Appeals Court judge saw this in terms of ensuring that "people dealing with companies know what they are dealing with." A Sydney judge saw the goals of corporate law enforcement as seeking to ensure that those "who wish to trade with Australian institutions can be confident that they are honest." A Federal Court judge emphasised the importance of seeking to "ensure the level of honesty which the unsuspecting public assume will be exercised by those in charge of the companies that they invest in."

The View from the Bar

Most barristers in private practice who undertake commercial law litigation rarely see the goals of corporate law enforcement as being punitive in character, although some clearly do. As one Sydney Queen's Counsel explained:

"Corporate law enforcement must have the regular administration of corporations as an end goal, that is, for directors to properly look after shareholders and to ensure that creditors are paid by corporations. If corporations are properly administered these ends should be achieved."

A Melbourne QC observed that: "the main purpose [of corporate law enforcement] should be to protect investors and creditors and not to be obsessed with punishing the baddie," although a silk with a criminal law practice thought

that "the twin goals are to maintain the market and to punish offenders." Other Sydney silks saw the primary goals of corporate law enforcement as being to "improve corporate morality" and to "deal with abuses of limited liability." Like a number of judges, some barristers saw it as being important that the privilege of incorporation was not abused. However, sanctions were rarely given much emphasis by senior counsel. The principal purposes of corporate law enforcement were generally seen in terms of the maintenance of boundaries and standards and the protection of the assets of shareholders and creditors. As a Melbourne silk noted, the purpose of corporate law enforcement was "erecting boundaries to ensure that lines are drawn beyond which those with shareholder's money should not go above or below. He added, "if you transgress, it should be seen that there is a penalty to pay." More commonly, corporate law enforcement was seen in facilitative terms of providing "a statutory framework for the economy to function" (Brisbane QC), and creating "a stable and certain environment in which business can operate effectively" (Adelaide QC). Thus, whilst most senior barristers would agree that the maintenance of honesty in relation to the corporation was important, few placed great stress upon a heavy reliance on the criminal law in achieving this goal. Perhaps this is because most of those interviewed were primarily civil and not criminal lawyers, but this view is consistent with the views held by judges and senior lawyers practising in larger law firms.

The Large Law Firm Perspective

If one turns to those practitioners with the greatest degree of expertise in the area of corporate law, the partners in the large commercial law firms around Australia, the perception of corporate law enforcement as a mechanism for setting boundaries for ethical conduct with a view to creating investor and creditor confidence in regard to corporations becomes even more apparent. At the same time, there is a strong view that the corporate form should not be abused, especially to the disadvantage of creditors. As one Canberra corporate lawyer noted, the goal of corporate law enforcement is "to develop a system that the public can have faith in; to ensure that a corporate entity is not being used as a vehicle for nefarious conduct and to prevent people being able to stand behind the corporate veil." Market confidence in corporations was stressed time and again as a basic purpose of corporate law. As a Sydney based partner of a national firm noted, the purpose of corporate law enforcement "is to ensure that investors have confidence in the probity of our markets and that the safety of investors is not prejudiced." Whilst it was often said that honesty in corporate life was important and that this should be sought to be achieved "to the extent that you can" (Sydney partner), others saw honest directors as being the principal victims of corporate law enforcement. As one Sydney based corporate lawyer exclaimed, "the law basically penalises the honest". Consequently, many were content with existing corporations laws and did not see the need for more law reform. Moreover, corporations law was seen as merely setting the "outer boundaries or limits of commercial morality to deal with unacceptable conduct" so that within these boundaries "breaches of the law should best be dealt with by the private parties themselves."

Basically, then, the establishment of a framework or a system of boundaries was seen as a fundamental purpose of corporate law enforcement, but the basic purposes of this were explained in facilitative terms, such as the facilitation of the "aggregation of capital" (Melbourne national law firm partner), "improving the manner in which the corporate practice is conducted in, it is not a punishment or morals thing" (Brisbane national firm partner); the maintenance of "minimum standards of commercial practice" (Melbourne law firm partner); "the regulation of corporate activities and not the prosecution of people" (Brisbane national firm partner); "to ensure that business can function effectively by creating an environment of confidence and trust" (Adelaide law firm partner) and "to effect a structure and a framework within which the orderly business of the community can be undertaken in the hope that investors can expect that the outer parameters can be respected" (Melbourne law firm partner). Fairly typical of this group, a Brisbane law firm partner saw the goals of corporate law enforcement in the following terms:

"I would see it as being to facilitate business being done well and properly. It is not a retribution system, except in so far as is necessary to instil confidence."

Thus, for the corporate law partners of larger law firms, corporate law enforcement is again rarely seen in punitive or criminological terms but rather tends to be seen in facilitative terms, as a means of creating market confidence and ensuring that business operates smoothly. This is clearly consistent with the civil law paradigm which dominates this area of law.

The Perceptions of Liquidators

In contrast, liquidators and accountants in large firms dealing with corporations in distress have a less benign approach to corporate misconduct than do large law firm lawyers, largely because the former probably see many more examples of the worst types of corporate conduct. Many liquidators do speak in terms of achieving deterrence with corporate law enforcement, or as one Adelaide based liquidator observed unsympathetically, the goal of corporate law enforcement was "to keep the bastards honest". However, even amongst this group it was said that "an overriding consideration is to have efficient capital markets. If the markets are not run honestly they are not run efficiently" (Sydney big six accounting firm partner). As a well known Sydney liquidator also put it, a goal of corporate law enforcement was "to enforce and direct corporate behaviour." He added: "when I say that, I am talking about a commercial climate with its own ethics and morality in which the law must reinforce the better end of these ethics." Similarly, a liquidator in a Melbourne liquidation practice thought that the goal of corporate law enforcement was "primarily to create an environment of trust and a corporate environment in which corporations can operate for the purpose of taking risks to achieve economic gain."

The Regulatory Perspective

It was tempting for many of those in the ASC to see the primary goals of corporate law enforcement in terms of the ASC's own corporate or bureaucratic goals and its mission statement. The more experienced corporate regulatory officials had no difficulties in conceptualising the ASC's role in traditional policing terms. A more relaxed view was given by an experienced corporate regulator who saw the goals of corporate law enforcement as being "to obtain compliance with the law, it is a policing role." However, he went on to balance this by adding that this could be reduced to "getting proper standards and self regulatory regimes and providing support and assistance in the establishment of regulatory organisations." Another ASC officer, a lawyer, stated that although there was a real lack of focus in the goals of corporate law enforcement, "the primary aim can only be to bring into the fore an efficient market place where you have honest participation so that the players are not prejudiced." Another senior regulatory official, with experience in private practice, noted that the meaning of corporate law enforcement was far from straight forward. This official saw the goals of enforcement in this area as being "to ensure fair and proper markets so that the risks are only proper business risks and not wide risks." Another ASC lawyer summarised the goals of corporate law enforcement as follows:

"It is all to do with the credibility, integrity and efficiency of the markets. This is the ultimate goal and all else has to feed from this, including punishment and retribution."

Sometimes this was seen as requiring the existence of:

"flexibility to allow the black letter of the law to be modified and to allow a commercial result to be achieved, which a strict application of the law would not allow."

The creation of an efficient and credible market were often seen as keys to the ASC's regulatory stance. Once again this illustrates the dominance of a market facilitation approach to corporate law enforcement. One senior Canberra legal official observed that:

"Corporate law enforcement means different things to different people. In the strict sense it is keeping the corporate marketplace clean to ensure confidence."

This goal was expressed by one regional commissioner of the ASC as ensuring "that capitalism works properly; to ensure that people will have confidence in corporations to create a market for shares." Another experienced regulator also saw the goals of corporate law enforcement as being primarily economic in nature. As he put it, this was "to enable the community to make the most efficient use of the corporate form." Another senior corporate regulator observed that the goal of corporate law enforcement had to be:

"The creation of a commercial climate where certainty and investor confidence are fostered for the efficient use of capital and the resources of the community as a whole."

Others saw corporate law enforcement as a means of reinforcing tendencies and values already in the marketplace. Thus, one senior regulator saw the goals of enforcement as being "to support the ethical, the honest and the moral and to make being good worthwhile." Another senior regulator also emphasised the effect of enforcement on attitudes when he added that the goal was "to make the market a self regulating one so that... [the commercial community]... know not to overstep the line."

It is interesting to contrast the perspective of Trade Practices Commission officials with that of those in the ASC. The Trade Practices Commission is another corporate regulatory agency with many similarities to the ASC, although the former is a much smaller agency with a somewhat narrower legislative mission. Those in the TPC have obviously had considerably more time to refine that agency's enforcement strategies and to apply these. Thus, one TPC officer saw the primary goals of corporate law enforcement as being the achievement of "long term compliance." Another TPC official expressed this goal in terms of achieving "a broader ranging compliance with relevant legislation and with accepted norms." Expressed more metaphorically, another experienced TPC officer saw the purposes of corporate law enforcement as:

"the maintenance of a framework for corporations, not as a leash, but as a fence, by drawing the outer limits and, inside it, encouraging vigorous competition between enterprises."

A goal of market facilitation such as this may, however, sometimes be at odds with the goal of prosecuting individual cases.

In contrast, the Australian Stock Exchange has different corporate regulatory goals. For one senior officer of that body, the aim of corporate law enforcement was to achieve "disclosure, leading to an improvement in ethics." Another ASX official saw a tension between the achievement of a number of goals. These were: "Firstly, protecting investors, fostering the economic efficiency of Australia, and containing economic power. Secondly, compliance with a set of standards." The creation of commercial certainty was also emphasised by another ASX officer as being an important goal of corporate law enforcement.

The Prosecution Perspective

The functions and backgrounds of prosecutors are usually quite different from those of the other groups taking part in this study. Not surprisingly, prosecutors see the goals of corporate law enforcement in far starker terms than any other group. For example, unlike many of the private lawyers interviewed, they had little difficulty in relating corporate misconduct to other types of criminality or misconduct. Their views clearly placed corporate law enforcement in a wider criminal law context than that adopted by most other groups. As one Sydney Crown Prosecutor observed: "Why do we prosecute people? To preserve the

society in which we live in. It is the preservation of our society." A Melbourne based prosecutor saw the role of corporate law enforcement as the regulation of commercial activity and the imposition of the criminal justice system to an area that previously has not been exposed to this. A senior Melbourne prosecutor saw the goal of corporate law enforcement as having "the same aims as the criminal law, namely, the regulation of fraud."

Another prosecutor employed by a federal agency felt that there was some confusion in the community about the goals of corporate law enforcement. He added that "the honesty test is not unique to corporations law. It is a general phenomena as in 90% of [corporate law matters] you can draw a count under a State Crimes Act provision." This approach was encapsulated in the response of another senior prosecutor who noted that the perception that one has of the goals of corporate law enforcement will depend upon the role that is given to the corporate regulator. He added that there was no doubt that "once fraud has been discovered it has to be dealt with as part of the criminal justice system as it is naive to just engage in proaction."

Perceptions of the goals of corporate law enforcement

It is clear that there is a diversity of perceived goals of corporate law enforcement amongst professionals working in the broad area of corporate law. The clearest differences which were evident are between the views of corporate lawyers working in large law firms, on the one hand, and the views of prosecutors. For the former group, the facilitation of commerce and not the prosecution of offenders was clearly an underlying goal of corporate law enforcement. The group nearest to prosecutors are the liquidators, largely because they, like prosecutors, probably see what might be described as the worst instances of corporate failure. However, prosecutors clearly come from a different legal culture than do most other groups interviewed for this study. These different cultural patterns are most clearly evident from the fact that most of those interviewed felt that criminal law should have marginal significance in regard to corporate conduct and that much of *Corporations Law* should actually be decriminalised. There is clearly a dominant civil law culture which serves to moderate or deflect the impact of criminal law strategies in response to *Corporations Law* breaches. In contrast, prosecutors who are engaged in a broad range of criminal prosecution work see little difference between criminal conduct occurring in relation to corporations and other criminal conduct. This minority view is however, probably much closer to broad community expectations of the manner in which corporate law offenders should be dealt with. However, as will be seen later in this paper, this view is not consistent with a victims perspective of corporate crime and misconduct which is more concerned with compensation than with retribution.

It is useful to compare other fundamental differences in the cultures of corporate regulation and enforcement which were revealed by this study.

6. The Reactive-Proactive Regulation Dilemma

The appropriate regulatory mix between reactive and proactive enforcement strategies has been a subject of long standing debate within regulatory and other circles. Ultimately, this debate turns upon the best use that can be made of limited regulatory resources, as regulatory resources will obviously always be finite. Sometimes this debate may also be expressed in terms of the deterrent effect of different strategies, although this has rarely been uppermost in the minds of corporate law enforcement officers, although judges have been somewhat more conscious of this issue. It is useful to contrast agency and judicial views with those of private practitioners concerning the appropriate mix between these strategies.

The Agency Perspective

Most regulators acknowledged that the vast bulk of current corporate regulatory activity was reactive in nature, although there were perceived to be definitional problems concerning the distinction between the reactive and proactive strategies. The definitional issues involved in this area were repeatedly referred to. For example, one Trade Practices Commission official highlighted this definitional problem when he noted that "a lot of day to day Trade Practices Commission work with the public, if done properly, is proactive as we equip them with general principles. Proactive work is as high as 50% if you take this into account at the TPC." One very senior DPP official also pointed to this definitional problem when he noted that corporate law offences "... have a difficulty as to where you draw the line. The easiest thing is to regulate. The hard thing is to prosecute where there is serious fraud." He added that "if our authorities won't prosecute because there is no money, it leads to a law for the rich and a law for the poor." In the case of the Australian Securities Commission, one senior official near the top of that agency provided a breakdown of the allocation of resources within that body when he noted that:

"We divide the ASC budget into three: (1) the executive; (2) the information division; and (3) enforcement. Only the third is relevant here. The first and second consume 40% of the budget and the third consumes 60%. Of that 60% we spend over half (maybe 60% : 40%) on proactive action. Also, we are just as often sued as we are the plaintiff. Someone has to pay for that."

Obviously, corporate regulators need to seriously engage in both forms of enforcement strategy. As one Adelaide based regulator explained, "there has to be a significant proactive component. You also have to make a reasonable assessment of the matters referred to you." However, the civil liberties aspect of proactive enforcement were also apparent to some regulators, as they were to judges. For example, one ASX lawyer noted that "the balance is not so much between being reactive or proactive, it is between being overly intrusive into civil liberties." He added that "it is always too late to be simply reactive. The ASC should not be heavily proactive, but there needs to be enough of it to ensure that there can't be a Chris Skase position."

There are wide divergences of viewpoint among regulators concerning the appropriate regulatory mix between reactive and proactive strategies. A senior ASC official thought that the mix should be "40% reactive and 60% proactive, but this is a matter of definition." A Trade Practices Commission official in Canberra thought that there should be mix of 80% reactive enforcement and 20% proactive enforcement. In contrast, an Australian Stock Exchange investigator thought that there should be a 50:50 mix between these two types of strategy. One Australian Securities Commission lawyer thought that, as "you get better results being proactive", the mix should be about 70% proactive and 30% reactive, although he believed that the reverse of this mix was actually occurring. An ASC regional commissioner also gave similar percentages when he said "I would be looking for seventy per cent proactive and thirty per cent reactive." He added that most ASC surveillance was now proactive.

In practice, a focus upon reactive enforcement is difficult to avoid. As one TPC official noted: "theory and practice are very different. The practical reality is phone ringing and people writing in, you will be reactive to external pressures." He added however, that any corporate regulating body needs to do some form of proactive work all the time." However, cost constraints will always inhibit the amount of proactive enforcement. As a senior state DPP official noted, "as an administrator you will always have resource problems. It would be ideal to have a considerable proactive posture. A proactive role which did not inhibit the proper function of markets is acceptable." Another perceptive opinion was offered by a very experienced corporate regulator in Melbourne who observed that:

"The reactive aspect of enforcement is determined for you by external forces. It is better to nip things in the bud if you can, you inform the market by so doing. There is a resource issue here. It is not good to run the ASC with entrenched large investigatory teams. It is better to have private sector hit squads and to pass on the costs. All government regulators are by nature reactive."

The case for proactive corporate law enforcement was nevertheless a strong one, where this could be implemented. One senior TPC official argued that corporate law enforcement:

"... is going to be vastly more efficient and effective where problems are spotted earlier. There is a real role of partnership with the community and business groups. By focusing on network building and liaison you get a lot of information about what is happening, such as by favouring more targeted intervention, like cease and desist orders. Selective intervention pays huge dividends."

The educative aspects of proactive corporate regulation were emphasised by a number of officials. One state ASX official painted a stark picture of the regulatory environment, noting that one aspect of the role of the ASX was to:

"help to inform companies, as people are pretty ignorant. There is a reactive ingredient here, but there is a need to educate people rather than play policeman. There is a good percentage that are dishonest. At

the bottom are the idiots and in the middle are those who are just ignorant and have no idea of what the ASX is about. Consequently, you need to be more proactive than reactive."

Despite a desire to be more proactive, there are perceived to be substantial obstacles facing greater proactive activity upon the part of corporate regulatory agencies. These difficulties were well explained by a senior ASC official who observed that:

"There is no question about the desire of the ASC to be more proactive rather than reactive. But I see that the ASC has been incredibly inhibited from doing so by the complexity of the laws and the obligations put on the ASC to make the law work by reacting to exemptions and modifications and the incredible burden of administrative law and the appeals system which stifles the ASC from being proactive."

Another factor limiting the extent of proactive activity is the amount of expertise available to the ASC. One prosecutor in Melbourne thought that the ASC was "not up to proactive methods as competence is lacking." He added that "some ASC people are less than useful, as the *Estate Mortgage* case illustrated." In this regard, an ASX official also noted that "one of the difficulties in Australia is that there is not the depth or continuity of experience in the ASC as some inoffensive responsibility becomes offensive in the hands of people who don't have much business experience." Similarly, a corporate prosecutor in Brisbane supported a more proactive stance, but added that "for any regulator, proactive programs are very difficult. In the case of ASC personnel, there could be more training and experience."

The cost of proactive policing was also frequently emphasised as an inhibiting factor. As one prosecutor in Brisbane summarised this problem: "the only problem is that if the cost is a factor, it is difficult to be proactive if you are snowed under with reactions." Measuring the success of proactive enforcement is another difficulty. This was referred to by one ASC regional commissioner who observed that:

"It is hard to measure the success of the things that you do proactively. What performance indicator is there for proactive actions? You can measure activity but not effectiveness. It is hard to be proactive in some areas of law... In different states there are different levels of resources, but small matters in a small state, if reported nationally, can have a wider effect."

The Judicial Perspective

Judges around Australia were sharply divided about the desirability of a more intrusive regulatory approach by the state, through proactive enforcement, in the activities of the corporation. Many, however, saw the value of a limited proactive role for corporate regulatory agencies, provided that they were adequately funded to pursue such a role. Of those judges who were cautious

about a more proactive regulatory stance, the following comment by a New South Wales Supreme Court judge is typical of the predominant attitude of judicial caution on this matter:

"In general terms it is desirable that there be rules so that people will know what will be the result [if rules are breached]. However, if you give regulatory authorities too much power it prejudices rules. It is very hard to say what the mix should be although there is some merit in random checks to keep people on their toes."

A judge from the same Court also warned that there was "not much hope of the ASC being proactive" and that instead "it should be an avenging angel when things go wrong - It should be an enforcement agency." An Adelaide based Supreme Court judge expressed similar sentiments when he cautioned that: "it is very difficult for [the ASC] to be proactive without jeopardising the financial or general standing of a corporation." A Queensland Supreme Court judge said that he was "against a proactive policy as it generally doesn't work." He added that the ASC "should react to the cases they hear about." Similarly, another senior Queensland judge noted that he would "... perceive very serious difficulties if the government assumes responsibility for aggressive intervention more than now occurs. Predominantly, they should be reactive."

On the other hand, some judges pointed to the failure of reactive enforcement and, as one experienced Victorian Supreme Court judge put it:

"Proactive activities should get more of their resources because if you follow a reactive approach, by then the horse has bolted... A lot of this could have been foreseen (as with the *Estate Mortgage* case)... However, a reaction did not occur until *Estate Mortgage* collapsed."

A District Court judge in New South Wales similarly urged:

"I am inclined to favour a concept of attempting regulation rather than waiting for things to happen... I am a great believer in 'little prosecutions', that is, minor regulation. The ASC should be constantly up their backs for minor matters. The fact of that supervision has its own enforcement effect."

A magistrate in Brisbane also thought that "there should be more proactive activity" by corporate regulatory authorities. Similarly, a Federal Court judge thought that:

"The days have gone when corporate watch-dogs can only be reactive. It must be proactive, it is hard to put a percentage on the level of this. If you can shut the door on the past, the ASC should be mainly proactive as to be eighty per cent reactive is a confession of failure."

Financial constraints facing regulatory agencies were frequently alluded to by judges as a reason for the lack of a greater level of proactive regulatory activity. As a Victorian Supreme Court judge noted: "the only reason the NCSC didn't do its job was because the Commonwealth didn't give it the money. The ASC is not

different, but it now has the money from the Commonwealth. Obviously it has a proactive role and it should keep its eye on things like prospectuses." Similarly, a Chief Justice added that he "would not accept that the CAC's were mainly reactive as resources were an issue." A Melbourne magistrate also remarked in this context that "you get used to the expression 'there is not enough money.'"

Some judges urged that greater use ought to be made of preventative and educational strategies rather than responding to breaches after they have occurred. For example, a Supreme Court judge in Sydney expressed this sentiment, saying that "in the longer term you can do more with preventative rather than curative strategies. The positive side would be better in the long term." A Melbourne magistrate also argued that it "is helpful to have education as a proactive approach."

The Practitioner Perspective

Practitioners, whether large law firm lawyers, liquidators or barristers were suspicious of purely proactive strategies and preferred to see an emphasis on reactive modes of corporate law enforcement, although most acknowledged that there had to be some proactive enforcement. One reason for this was explained by a liquidator in Canberra who observed that corporate law enforcement should be mainly "... reactive, because you try to get people to conduct themselves in a proper manner voluntarily as it all comes back to individuals having a good attitude. The majority of offences are small so we need a good attitude." However, a partner in a large Sydney law firm warned that if enforcement "... is purely reactive it won't work as it will always be catching up after the event. It is important to have people like Hartnell involved so they can anticipate rather than react." On the other hand, a Melbourne partner in a national law firm was opposed to proactive methods as was evident from his blunt observation that "if you favour a police state you will favour more proactivity. If you favour our rights and activities you will say, 'not a bit.'"

Insolvency practitioners were more likely than other private practitioners to push the case for greater proactive enforcement, but this was probably due to the fact that they tended to see cases only after the company has collapsed or was in difficulties. However, even with insolvency practitioners, there were those who opposed greater use of proactive methods, such as the Adelaide based liquidator who observed that he would not like the ASC to be "... too intrusive, as it might be after the wrong people as they are easier targets to hit." Similarly, a Melbourne lawyer in a national law firm suggested that proactive enforcement "penalises the honest." A Brisbane partner in a national law firm expressed the view that "proactive enforcement has to be reasonable as there is an awful lot of interference in companies."

The limits of proactive enforcement were highlighted by a Canberra based corporate lawyer who thought that:

"It is desirable to be proactive, but the reality is that it gets into all sorts of trouble with pragmatic restraints, like the skill and resources you

have available. Therefore, within certain limits it ought to be proactive."

Similar cautious support for proactive enforcement in this area was given by a corporate lawyer who remarked that the ASC should be proactive because, if "the ASC is not proactive, there would be a great danger that the Commission will always be patching holes after the horse has bolted." One reason for this caution was the commonly expressed view that the ASC was not a policing agency but a regulatory one. Another criticism of proactive policies was that they often led to injustice, as a partner in a large Adelaide law firm suggested. That practitioner added that "the number of gung-ho proactive actions which fail is alarming. I have no confidence in the ability of the ASC to get it right." On the other hand, another view is that proactive enforcement may have positive consequences. As a Melbourne law firm partner observed, "my clients might not like me for saying so, but proactive enforcement creates a productive tension when you get a call from the ASC. They resent it at first but it creates a useful tension."

Barristers, especially those from Sydney, were particularly suspicious of the use of proactive corporate law enforcement by the ASC. For example, a Sydney Queen's Council noted that the balance between proactive and reactive enforcement will depend upon the area involved because:

"... on certain kinds of conduct it is impossible to be proactive without being thought police. In other areas, for example, in regard to capital markets where there is unlikely to be a complainer, the ASC needs to take a proactive stance."

Another Sydney silk doubted that proactive enforcement could be taken very far when he observed that he was "...not sure that there is much of a role for the ASC in proactive work but there is room for education." However, another QC said that he was "suspicious of purely reactive strategies as they are a cop-out for dealing with the hard cases." Another QC saw "a danger of being bureaucratic in proactiveness." On the other hand, a Brisbane Queen's Council thought that "the reactive approach just encourages the public service to shuffle paper."

There was a general reluctance upon the part of barristers to accept the ASC operating as a corporate policeman using proactive enforcement methods. This led one Sydney QC to suggest that if the ASC was to be proactive this role should be limited, for example, to the issuing of guidelines. To some extent the style of proactive enforcement adopted by the NCSC during the 1980s led to the view that proactive enforcement was questionable. As another Sydney Queen's Council concluded, "proactive law has been discredited. It is difficult to see how the ASC can be anything other than reactive, except in so far as it sets out standards."

However, an Adelaide based QC argued that the ASC should be "mainly proactive as to be reactive is to be too late to have any sensible impact on people in charge of the corporation." Another Adelaide based QC saw the enforcement problem as not being a matter of whether the ASC was reactive or proactive, but rather the manner in which the Commission deals with matters. As he explained:

"They are reactive, slow, cumbersome and unwieldy. If they are to be effective, they have to speed up the process. Those that the ASC deals with have good advisers and are cunning and have resources. The down-side of the ASC joining a civil case is always too great. They want to move more carefully and document things to cover themselves. They do not select their staff for this very well. The right mix is very important for the current system to work. The sanction has to be applied at the right time and place to be effective. The real skills for this are in the private profession."

The need for timely and sufficiently harsh reactive approaches to corporate law enforcement by the ASC was also stressed by other practitioners. Some went on to argue that there ought to be more proactivity if resources permitted and that, to assist in this regard, the ASC should seek to attract better staff from the private sector, such as through staff exchanges with private firms.

A number of Melbourne silks were also critical of the effects of reactive corporate law enforcement. One experienced criminal barrister observed that one of "the great failures of the 1980s was the failure to be proactive. Invariably the prosecution took place after the collapse." This QC added that when reactive methods were used, "invariably it is too late to get the assets or collect evidence as it does not exist any longer. It gives them a long lead time to dispose of the assets so that you can't touch them. Reaction should be the last resort." Similarly, another Melbourne Queen's Counsel who had wide commercial experience remarked that:

"having regard to what happened in the past, there is an obligation on regulators to be proactive; what if there had been an investigation before the balloon went up in some cases. Reaction just hasn't worked. The problem is at what point in time does regulation become proactive. The ASC should be doing what the ASX does when it asks for information."

A similar view was adopted by another Melbourne QC who said boldly: "I believe in proactive law enforcement. We can't afford to wait until shareholders lose their money. At the end of the day you can only go so far with proactive methods; you have to deal with transgressors." However, another Melbourne silk, with considerable commercial experience, cautioned that "realistically, it is hard to be anything but reactive. It is a question of when and how you react as it will always be last year's problem you are dealing with." Brisbane Queen's Counsel adopted similar views to those of their Melbourne counterparts, generally supporting greater resort to proactive corporate law enforcement methods. As one Brisbane based Queen's Counsel, for example, said:

"There should be more proactive action taken than was the case in the past. Previously it was totally inadequate. It is important to be proactive. You shouldn't be able to buy your way out of crime simply because it occurs in a corporate environment."

There was however a recognition upon the part of practitioners that, as a Sydney lawyer put it, "the nature of any regulatory body is such that they are forced to be

primarily reactive." He added that "they are forced to react due to political and other pressures." A Melbourne based law partner also noted that the ASC "cannot be too proactive as it is too costly and stifling." He added that "law enforcement is always mainly reactive." Such sentiments were expressed by other practitioners. However, the practical difficulties facing proactive enforcement cannot be ignored. These were nicely expressed by a former regulator, who now worked in a large law firm, when he observed that the ASC:

"... will always have more in the in-tray on the reactive side than they can cope with, such as liquidators' reports...They only deal with the worst of these. There is a need for a proactive unit in the market place to ensure market integrity; listening to people, listening to gossip so you know when to start a proactive inquiry. These two classes of people will not mix well in the organisation. They therefore need a different criterion for success..."

The level of regulatory proactivity was sometimes seen to depend upon the nature of the company and the nature of the area. For example, a partner in a national law firm thought that proactive enforcement was more appropriate in regard to public companies than private companies, except where creditors are prejudiced. A partner in a leading Melbourne law firm also thought that the answer to the proactive-reactive question would depend on the area that you are talking about. He thought that regulators "have to be proactive in terms of prospectus breaches but less so in takeovers as there are plenty of people able to argue all sides of the argument." However, he added that he was "...not sure that the ASC are able to understand the thing until it has been in the market for a while due to the ASC's lack of expertise. A Brisbane Queen's Counsel also pointed out that resort to proactive strategies of enforcement would "depend on whether you are dealing with deliberate criminality, such a major fraud, or acts which are minor or not part of a systematic breach of the law. There is more scope for proactive strategies in the latter than the former type of case."

Clearly, once again, there is a wide diversity of views about the corporate law enforcement mix available to the ASC. Certain views tended to be more commonly held among some groups or in some locations, suggesting the influence of sub-cultural or peer group pressures in fashioning the nature of acceptable regulatory conduct. These various groups constitute what might be called the constituency of corporation law in Australia, as they have a continuing involvement in this area of law and its administration. Consequently, the views and prejudices held by this constituency are important factors in making this body of law and its administration effective and in fashioning their real character. However, despite the reservations expressed by some of those interviewed for this study, there seems to be considerable scope for greater use of non-intrusive proactive regulatory strategies. The use of such strategies provides a further reason for avoiding a heavy reliance upon the criminal prosecution process in dealing with corporate law breaches, especially where these may have occurred some time ago.

7. According Priority to Civil over Criminal Actions

As we have seen, 1992 saw the debate concerning the priority given by the ASC to civil actions over criminal prosecutions come to a head. Although this debate was resolved by a formal political directive that priority was to be given to criminal matters where matters of corporate criminality arose, there is still a widespread recognition that according priority to civil matters is generally a more pragmatic and efficient use of limited regulatory resources, especially in areas where issues of proof are likely to cause significant problems for the prosecution. Interviewees in this study were asked whether they supported a regulatory strategy which favoured civil over criminal actions in regard to Corporations Law breaches.

The typical response was once again to support a regulatory emphasis upon civil actions rather than criminal proceedings. Often this was subject to some qualifications. It tended to be said that an emphasis on civil actions was "sensible tactically" (Canberra law firm partner); "partly a question of resources" (Sydney law firm partner); "by and large a sound move as it is the best way the ASC can get results" (Sydney law firm partner); "it is rational to do this, but there are difficulties where a company is insolvent" (Adelaide judge). A similar view was expressed by a South Australian Supreme Court judge who said that:

"Yes, a civil remedy is best. It has all happened already, that is the money has already gone. A civil remedy is quicker, there is a lower burden of proof and you have better evidence gathering by private people who know what they are doing..."

There was a view held by many professionals that it was inappropriate to imprison too many corporate offenders. As one liquidator, who supported priority being given to civil over criminal actions, said, "we should not be filling gaols with white collar people; it's not the only penalty." However, others believed that it is difficult to generalise and that each case should be looked at on a case by case basis.

Those who supported giving priority to civil over criminal proceedings generally took the view that it was important to preserve the assets and return funds to shareholders. For example, one Crown Prosecutor thought that the focus upon civil actions has "an obvious attraction as people just want to know where their money went and how to get it back." This point was put a little differently by a large law firm partner in Adelaide who supported the focus upon civil actions "... because the parties who are hurt most are creditors and shareholders." He added that "putting someone in gaol only frustrates the liquidator's task." However, merely appointing a receiver may be an inadequate civil action because, as one liquidator explained, the receiver "... will ultimately close the corporation down, shareholders will lose money and people will be out of a job." A law partner in a large Melbourne firm also thought that "there is a lot of merit... [in the use of civil actions], but the booty should go back to the shareholders." Similarly, an experienced Trade Practices Commission official thought that the use of civil actions was:

"... a rational strategy, because if there is a realistic opportunity to gain a civil remedy that attacks the motive for the wrongdoing and reduces its profitability, this provides a real sanction."

A District Court judge in New South Wales also saw the focus upon civil actions as being a "realistic" strategy. He added that "it is about time we looked at the victims of corporate crime, that is, those who have lost their money."

Of course, prosecutors were generally concerned that a focus upon civil cases at the expense of criminal prosecutions for corporate offences could lead to a different treatment of offenders in different areas of the law. This approach was based on a wider public policy view on corporate law enforcement which gave priority to recovery of funds or damages. As a senior DPP official expressed this point, "we can't afford to have one law for one person and then a different law for the rest of us." This is in part a question of community expectations. As a senior enforcement officer with the Trade Practices Commission also noted: "the ASC has far more flexibility with the civil approach than we have, but it is a question of whether it satisfies the community."

It should be noted that the debate about the use of civil or criminal actions has tended to be reduced to an argument about dichotomies. However, this makes a number of assumptions. One of these questionable assumptions is that the civil-criminal action distinction is always a clear cut one. The fact that many offences have both types of remedies attached to them has distorted the picture and, as with the old insolvent trading provisions in s 592, has led some Courts to be reluctant to impose civil remedies due to the implications which this may have for subsequent criminal actions.²⁹ Furthermore, it can be argued that a focus upon this dichotomy may see civil and criminal proceedings as alternates, rather than as potentially parallel actions. This was a point made by a senior DPP official who observed that these procedures "go hand in hand and are not alternatives." He added that the ASC had "major budgetary problems with prosecutions as they locked themselves into having to go to the Department of Finance for prosecutions."

Barristers tended to favour the use of criminal remedies for corporate law breaches. For example, a Sydney Queen's Counsel thought that although an emphasis upon civil actions might be "a necessary evil", he went on to stress that "the ASC's role is to enforce the law without regard to monetary consequences." Similarly, an Adelaide Queen's Counsel stated it was "... an abrogation of responsibility for the regulator to leave it for the parties to fight it out and enforce the Corporations Law, unless the parties were happy with this." A Melbourne criminal law barrister also argued that "shonky directors like nothing more than to hear that the ASC will concentrate on civil recovery; but goal is something that people worry about."

However, it was also argued that the civil-criminal priorities debate was to some extent unrealistic because, as one Sydney law firm partner explained: "the ASC has tended to wash its hands of things that are too hard." Another Sydney corporate lawyer also noted that the ASC "did not have a huge number of 'runs on the board' with civil or criminal actions." Another problem with the focus upon civil actions for corporate law breaches was that the results of such actions

were not communicated to the general public. As one Sydney Queen's Counsel, who supported the use of civil actions, explained "... a lot of this [ASC] strategy is good, but it failed as a public relations exercise as there were no results."

One senior official in the Commonwealth Attorney-General's Department acknowledged that a focus on civil cases "may be the most practical course of action", even though he thought that such an approach was wrong in principle. A small minority of practitioners also opposed giving priority to civil actions. Thus, a lawyer in one Canberra firm noted:

"... people have to learn it is not on. You can't do it in the name of the company and get away with it just because it is a corporation. We have to have swift civil remedies, but you can't leave it there."

Obviously, this debate has some way further to run. Although most would agree that criminal remedies should be used for the more serious cases, determining what these serious cases are is far from being clear. For the remainder of cases there seems to be a de facto acceptance of the need to give priority to civil actions, to some extent for pragmatic reasons, but also because of a genuinely held belief that civil actions are more suited to dealing with corporate law breaches. This once again reflects the dominance of a civil law culture in the formulation of regulatory responses to corporate law breaches.

8. Making Greater Use of Civil rather than Criminal Penalties

If one turns away from the priorities of the ASC and looks generally at the use of civil and criminal penalties, a slightly different picture emerges. The *Corporate Law Reform Act 1992* introduced the concept of the civil penalty order for breaches of certain provisions, such as s 232(2), (4), (5) and (6) of the *Corporations Law*. Pursuant to s 1317EA of the Law, the court is now empowered to prohibit a person from managing a corporation and/ or to impose a pecuniary penalty of up to \$200,000 upon that person. Apart from penalty orders, a large number of other civil remedies are of course also available under the *Corporations Law*.

Those interviewed for this study were also asked if greater use should be made of civil rather than criminal penalties for corporate law offences. Some of the arguments in favour of such an approach are set out below.

Firstly, problems of proof were an important reason for the preference for civil penalties. As an Attorney-General's Department official stated, he preferred this option "due to difficulties in proving criminal cases in Australia". The complexity of corporate law cases was seen as an additional barrier to successful criminal prosecutions. A Supreme Court judge in Sydney supported the use of civil penalties "due to the difficulty of proving complicated matters beyond reasonable doubt." He added that, "if money can be got at, the availability of civil remedies would be better."

Secondly, and related to the first point, was the widespread view that the criminal justice system was a poor mechanism for dealing with corporate law offences. For example, a leading ASX official took the view that "the criminal [justice] system is close to unworkable." One reason for this was the perceived

reluctance of the courts to convict white collar or corporate offenders. As one Sydney government lawyer explained: "people in suits are usually not seen as candidates for gaol." An Adelaide law firm partner was also critical of the attitudes of the courts in corporate criminal cases, saying that "they are too cautious in sending people to gaol for white collar offences; and then there are the evidentiary problems."

The complexity of criminal trials was also a matter of concern to some prosecutors. One experienced Crown prosecutor observed:

"Looking back over the years and the frustrations we have had and the length of time involved in finishing criminal matters, civil remedies have greater utility, but the criminal provision should not be forgotten due to its deterrent effect."

A Federal Court judge also supported greater use of civil remedies as "it is too difficult to prosecute under the current system." He added that "it depends upon the offence and upon which court and from whom you extract the penalties." A Brisbane lawyer in a large firm supported the use of civil actions "because criminal offences are not prosecuted as it is too difficult and too expensive." He added that he would "rather achieve something rather than nothing."

Thirdly, the availability of compensation in civil proceedings made them more attractive than criminal proceedings where a fine might go to the state. However, one Sydney barrister warned that there had to be funds remaining to make the use of civil penalties worthwhile. This was a very common qualification to this answer. Nevertheless, where there are funds available, another experienced Queen's Counsel noted that "the one thing a villain doesn't like is to be deprived of ill gotten gains, to account and pay interest." A similar view was expressed by a well known Sydney liquidator who observed that "a civil win can be more hurtful than a criminal win if you pick your mark." In South Australia, where some efforts were made to apply criminal penalties to corporate law offenders, one regulator reflected upon this experience and added that "it is more appropriate to go down the civil road as we denied ourselves one aspect of enforcement, that is, denying the individual the fruits of his wrongdoing as little was done to recover these."

Fourthly, civil penalties were preferred due to the view that criminal proceedings should only be used in cases of misappropriation, fraud or deceit. One Canberra lawyer noted that if the offence "happens in the ordinary course of business, it should not be a criminal law matter, meaning that civil penalties should apply." Similarly, a Sydney Queen's Counsel saw particular merit in civil actions in respect of "innocent but negligent breaches." Another Sydney Queen's Counsel reported that "there is concern about the inappropriateness of the present penal system for dealing with corporate crime." Again, a Sydney corporate lawyer urged that the criminal law should be "reserved for gross acts of dishonesty." He added that "people should not be made criminally liable just for bad business decisions."

Fifthly, it was said that it was better to make an offender personally liable. As a law partner in a large Canberra law firm noted, "to make a person personally accountable is more productive; for example, in terms of restitution."

Sixthly, and finally, the view was sometimes put that civil penalty proceedings were to be preferred due to the fact that they may be quicker in producing results. One DPP official noted that "the advantage of civil proceedings is that in theory it may be possible to respond more quickly, but mostly you shut the gate after the horse has bolted." However, one ASC regional commissioner remarked that he was "not sure that civil remedies will be quicker." Nevertheless, where civil proceedings could be expeditiously brought, one Adelaide Queen's Counsel observed that:

"Civil law remedies produce better outcomes. In the civil law we should try to find a quick review of decisions. In cases involving large corporations the criminal law only gives a sense of vengeance and not much money. So, it is better to focus on civil law. The role of the criminal law is to have sanctions sufficient to allow regulatory authorities to get the information they want. The real problem is not the really dishonest people but the zealot-type decisions of management and the board which are not in the interests of shareholders. Civil law is best to attack this, but this has to be done quickly."

A Federal Court judge also noted that "civil remedies have the advantage of flexibility and speed in the court." He added that "if there is a morally serious wrong it is a proper subject for criminal enforcement." However, where this line was to be drawn was not always clear. As one senior DPP official noted, "there is a cut off point somewhere, but it is a question of fixing it." A New South Wales Supreme Court judge also believed that civil actions had the advantage of speed and the availability of more potential plaintiffs, although he added that "the public is appalled by the amount of matter which is not being dealt with."

The speed and flexibility which the use of civil remedies provided was often emphasised by Trade Practices Commission officials. One such official observed:

"Often you can get quicker results by taking civil actions. Fines are finite but damages may not be. You have much greater flexibility with civil actions, they can be extended much further to cover other areas and you can control the result of a civil action more than you can do with a criminal action."

On the other hand, many of those who disagreed with the proposition that greater use should be made of civil penalties thought that the use of such penalties should go hand in hand with the use of criminal penalties. As one leading Sydney barrister observed:

"Much greater use should be made of civil penalties, but it doesn't follow that less use be made of criminal remedies. Civil remedies are essential, but fear of gaol is a powerful sanction."

A regulator made a similar point when he observed:

"I was never bitten by a Crimes Act when I was young, so I don't view it with suspicion. You must use both. When the money is gone there is no point in talking about civil remedies. But the most effect is gained by bringing civil actions in a timely manner."

This is not to say that the use of criminal penalties needs to be widespread to achieve the goals of deterrence. This point was well made by a Victorian Queen's Counsel who observed that:

"There should be greater use of criminal penalties as it will wipe it out. Putting three fellows in gaol will get you a generation of peace, as occurred with the ATO. Criminal sanctions only deter the middle and upper classes who have something to lose by gaol."

Another difficulty with resort to civil actions involves the finding of the funds to support such actions. This was a problem which was especially real for liquidators and accountants. As one accountant in a large Sydney firm of accountants remarked: "I have some difficulties with civil actions, as who draws the cheque?" Similarly an Adelaide insolvency partner in a large accounting firm noted that "the trouble with [civil actions] is that it is the liquidators and creditors who bring these and they don't have the funds, so they run out of puff." The problem of funding civil actions is really a crucial one, especially if information is not readily available to support such actions. This is a matter which was dealt with extensively elsewhere in this study. However, the ASC is in a position to provide information to assist such civil litigation.

Also, a Supreme Court judge added that "the trouble with civil remedies is that those who really milked the company have had advice and shielded their assets." He went on to ask: "Do you really win either way?" This sense of frustration was echoed by a Victorian County Court judge who observed:

"This is the big question. We have to do something and do it differently from the way we were doing it in the past. Most of the scallywags of the 1980s will get away with it as it is too expensive to prosecute them in the traditional way. It does nothing to bolster public confidence in the administration of justice if it appears that corporations can expiate wrongdoing by paying a sum of money, unless this is enormous."

The above discussion largely confirms the suspicion of the DPP that civil remedies will generally be preferred where sufficient funds remain to justify such an action being undertaken. Short of the availability of such funds, it is likely that little will occur, except in very serious and clear-cut corporate criminal cases. However, as we have seen, very few of these cases are actually simple or clear-cut, with the consequence that there is a tendency to see criminal remedies as too difficult to impose.

9. The Deterrent Effect of Imprisonment

The 1992 debate between the Commonwealth DPP, Michael Rozenes, and the ASC Chairman, Tony Hartnell, was premised in part upon the perceived effects of the threat of imprisonment. Certainly the DPP saw this as an important deterrent to corporate law offences. There were mixed views amongst those interviewed for this study concerning this matter, with some experienced barristers taking a very different view from that expressed by Michael Rozenes.³⁰ For example, as noted earlier, one Queen's Counsel said that "the one thing a villain doesn't like is to be deprived of ill gotten gains, to account and pay interest." Whilst imprisonment was seen as a real concern, this was so only if there was a good reason to fear this. The main fears were seen to be the stigma associated with imprisonment and the interference that prison would have with an offender's business career. However, as one criminal lawyer pointed out, some do not fear prison at all because "if they can look to a business career and lifestyle after they get out, many are prepared to offend."

While the fear of imprisonment may be significant for some individuals, it is obviously of no consequence for the corporation itself. Even with individuals, one Sydney lawyer suggested that corporate law offenders "fear bankruptcy more" than they fear imprisonment. Nevertheless, as one Canberra large firm lawyer noted "...if you are bankrupt you can still interact in the business community." The fear of imprisonment seemed to be focussed upon the loss of reputation and position in the community and the fear of mixing with, as one corporate lawyer put it, "real criminals." One Federal Court judge thought that the stigma of imprisonment was real as "few survive gaol, but a lot survive fines." There is inadequate evidence from this study to draw any firm conclusions regarding the effect of imprisonment upon individual corporate offenders. This is compounded by the rarity of prison sentences being handed down in relation to corporations law offences. However, it is clear that there are a variety of alternative views which are widely held concerning the utility of imprisonment as a sanction for corporate law offences.³¹ Obviously, this is an area for further research as little systematically collected evidence is currently available.

10. The Perceived Failure of Corporate Litigation

There is a widespread perception that the number of civil and criminal actions in response to corporate law breaches has not been as high as might have been expected given the widespread corporate law abuses of the recent past. Those interviewed for this study were asked a number of questions concerning this matter and some reference to the answers received is appropriate in the light of the above discussion.³² The failure to successfully litigate cases involving breaches of Australian corporations laws have largely been attributed to the costs of bringing such actions and the evidentiary difficulties facing those bringing these cases.

One Canberra based large law firm partner pointed to a variety of reasons for this failure, such as the "destruction of records" by offenders and the establishment of corporate structures or transactions which made it "very difficult to follow up

later on." A Queensland Supreme Court judge also noted that "where the matter is deliberately made complicated" the jury was inadequate in handling a complex commercial case.

A Sydney corporate lawyer blamed judges and regulators for the low level of legal action in Australia in relation to corporate crime or misconduct. He exclaimed:

"Judges always have regarded directors as somehow different. You could be an idiot so long as you are an honest idiot. There was always a lot of negotiation between regulators and companies which avoided prosecution because the evidentiary burden was too great. Regulators say, what is the point of spending \$50,000 and using five ASC people for years and only getting a \$10,000 fine."

A senior Queen's Counsel saw the lack of a successful pattern of legal actions for breaches of corporations law provisions as being due to the fact that an inadequate number of cases have been litigated. As he explained:

"It is a percentage business. If you are winning all your cases, you are not running enough cases, but if courts continually throw out prima facie cases, you are too gung ho. If you lose before a jury that is not so bad."

Other explanations for the lack of actions regarding corporate law breaches were offered by a DPP officer in Sydney who pointed to a lack of resources for criminal cases, the problem of the lack of evidence and cultural factors. He added that "the fact that a section is untested is always a barrier. On the civil side, a lot of sections are untested." A DPP officer in Adelaide referred to the fact that corporate "matters are so complex that investigators themselves have real difficulties."

Similar responses were obtained when interviewees were asked why the number of prosecutions against directors for breaches of the directors duties provisions were so uncommon until very recently. Problems of costs, the burden of proof, evidence and poor expertise within the old Corporate Affairs Commissions were frequently alluded to. In addition, it was said by one ASC officer that the old Companies Code in New South Wales was not often used as "the good cases were dealt with under the Crimes Act." Another ASC officer noted that "in the past in NSW we had the power to lay charges under the State Crimes Act, so no one ever worried about s 229 [of the Companies Code] as the Crimes Act penalty was greater." This was a view confirmed by prosecutors in New South Wales. Similar approaches were reportedly taken in other states. A Victorian Queen's Counsel working in the area of criminal law also noted that:

"It is odd that you have crimes of dishonesty that are partly dealt with in the Corporations Law but substantially in the State laws where the penalties are higher. So corporate offences are seen in the alternative. Under the Victorian Crimes Act theft is punishable with ten years, falsifying documents with seven and a half years and secret commissions with ten years. I do not understand the Commonwealth philosophy of having lower Corporations Law penalties. It seems

stupid as no one gets the maximum, as the worst case gets four years and a non parole period. It gives you two years for a \$500 million offence. The fact that penalties are so light adds weight to the view that the philosophy of corporate law is only regulatory." (emphasis added)

On the other hand a New South Wales Supreme Court judge said that he could not understand this as "the old s 229 is so simple and the concept of dishonesty is so easy." However, another prosecutor noted that while "s 229 offences should have been easier to prosecute, you were caught up in the corporation's documentation." A large law firm lawyer confirmed this when he referred to onus of proof problems and observed that "it is very hard just to prove where the head office is where a return has not been filed." Another New South Wales Supreme Court judge referred to the "extreme difficulty that existed in establishing and proving a case to the criminal standard." He added that "the difficulty starts with inadequate records of event and the attribution of responsibility to the real decision maker." Delay was frequently referred to as accentuating these problems.

Frequent references were made to the court system itself as a reason for the lack of enforcement of this legislation. One Sydney Queen's Counsel thought that the explanation lay in:

"...an outdated committal procedure before a magistrate who does not understand corporate law. We have an outdated jury system. It has to be a judge alone trial, provided that the judge gives reasons. The public interest in fair trials needs to be given equal weight with the protection of creditors. I am sceptical of the old criminal law rules in this area."

A Federal Court judge also thought that "the rules of procedure are too favourable to the accused." Another Sydney silk added that in cases involving corporate law breaches:

"there are enormous difficulties of proof as it is terribly subjective. If there is a big trial there are a lot of factors to take into account and even 'simple' cases are not simple. There is a huge difficulty in front of the court jury. The use of juries is indefensible with corporate crime."

The attitudes of judges and magistrates were again referred to as one of the reasons that the court system has failed in this area. One senior ASC official exclaimed:

"It is extraordinarily difficult to prove, and then there is the way judges and magistrates perform their duty. All you have to do is to put on a decent suit and tie and say: 'I did it for the company.' There has been a warped judicial thinking where magistrates excuse directors when they say this."

Finally, corporate regulatory agencies were often criticised for the failure to bring more criminal actions for breaches of the director's duties provisions. Some of these responses included the following:

"It gets down to the ASC people being paid a lot less than is paid in private practice, with the best brains being in private practice" (Sydney lawyer);

"The problem has been that the NCSC was not enforcing the law as they did not have the money" (Sydney large firm lawyer);

"The old CAC's were not organised and funded to permit such enforcement action to be taken" (Sydney large firm lawyer);

"Deficient enforcement is a symptom of deficient investigation, due to the lack of funding and the lack of the right people. I can't seriously say there were no contraventions" (Sydney large firm lawyer);

"The attitude of the ASC people is quite appalling as no one wants to take responsibility" (ASX official);

"The bureaucratic nature of the public service does not help with law enforcement; that is, a nine to five attitude and red tape" (Melbourne barrister);

"Because regulators are not as strategic in their thinking as they should be" (TPC official);

"We never had the balls the SEC had, ie trying to sheet home responsibility to directors. The CAC people just did not understand what was going on; it was too hard" (Melbourne magistrate);

"There is a lack of willingness on the part of the regulator. There are stacks of examples where they should have had a go" (Melbourne large firm lawyer);

"I don't think the police or the ASC investigators are trained to do it or have the skills or determination to do so" (Brisbane liquidator).

Despite the widely held criticism of the limitations of the regulatory agencies in bringing criminal actions for corporate law breaches, the ASC is more highly regarded, although this is probably because it is a new agency, so that it is too early to judge that body as yet.

Having said this, it is interesting to note that corporations and liquidators have also been less than effective in bringing civil actions for damages or compensation for losses suffered as a result of breaches of the directors' duties provisions. In these cases, similar reasons were frequently referred to, such as the cost of litigation, difficulties of proof and a perception that the chances of success were low. As one Sydney law partner put it "...having lost money they are not prepared to spend good money chasing after bad." Another large firm lawyer in Sydney noted that management "won't rake over the coals if it is a new management." An ASC official also noted that "very often corporations do not want to get involved in protracted litigation as it is a distraction and it does not give them a return on their investment. Liquidators lack the resources to bring actions." Finally, a South Australian Supreme Court judge noted that "it is

probably part of the attitude of business to write it off to expenses and to get on with business."

Also, where the wrongdoer was in control of the company it was recognised that it was unlikely for that person to bring action against himself or herself. Consequently, as one Queen's Counsel in Sydney noted, civil actions might only be brought when control of the company changed. That barrister warned however that "it may be futile and it is not very commercial behaviour as there may be no money there." Moreover, it was said by an ASX official that it was usually the case that "the current management of the company is concerned to make a profit and not with past events." A TPC officer also thought that companies wished to avoid any bad publicity which might arise from initiating such litigation. This was a view which was also shared by a State DPP officer who remarked that Boards took the view that it "is important to project a good image of a corporation and not bare your dirty linen in public as that could affect the financial viability of a company."

Boards were also seen as being reluctant to bring actions against one of their members because, as one Sydney lawyer explained,

"Boards are pretty matey things; by downing one person you may bring it down upon yourself, it is like spilt milk. "

Another Sydney lawyer added that "many directors are not men of great substance and it brings you no great joy to sue."

A further factor which makes such civil actions more difficult is that, if fraud is alleged, a higher standard of proof applies in such civil cases as a result of the test in *Briginshaw v Briginshaw*.³³ This difficulty was frequently alluded to by lawyers, barristers and prosecutors interviewed in this study.

Also, the lack of organisation amongst most shareholders to support such actions was seen as another reason for the low level of civil actions in this area. Of course, the fact that shareholders were usually prevented by the Rule in *Foss v Harbottle* from taking an action in their own name created further difficulties for them. In the case of institutions, it was noted that they preferred to sell their shares in a company rather than to prosecute. Alternatively, one ASC official thought that institutions found it "easier to persuade management rather than to prosecute." Where shareholders did seek to bring actions, it was suggested by one ASX official that such shareholders tended to be "written off as a looney fringe and so do not have a lot of support."

In the case of actions by liquidators, a DPP official provided a good overview of the reasons for the lack of civil actions brought by liquidators for breaches of director's duties provisions when he observed:

"Look at it from a cost-benefit analysis perspective. Liquidators will not act unless there is cash in the kitty. Creditors will not throw good money after bad as the money [of the director] is stashed away and so the chances of recovery are low, despite the high cost of proceedings."

A liquidator in Sydney confirmed this when he observed "we are not out for a pound of flesh but to get a return for creditors." A lawyer in a large Adelaide firm emphasised why liquidators have problems in bringing such recovery actions when he observed that:

"If I was acting for directors who ripped off their corporations, the best advice is to leave nothing in the pot for the liquidator and to destroy the records. I would not give that advice of course, but it is the strategy that corporations embark upon."

10. Conclusions

Drawing together the diverse strands of this paper is not easy. The subject of corporate law enforcement is obviously a difficult one for both regulators and those seeking to bring private actions. Regulators themselves also have different bureaucratic objectives and constraints which cannot be ignored. The Australian criminal and civil justice systems are under enormous pressure when faced with processing complex corporate law cases. Whilst it appeals to notions of fairness and equal treatment to argue that corporate cases be subject to criminal proceedings where there is an element of criminality involved, there are other public policy goals of the justice system which need to be balanced against this objective of fairness. Of particular importance is the maintenance of an accessible and operable justice system which is not beyond the ability of the litigant or the community to afford. It is unrealistic to impose goals upon a system where these goals only lead to the discrediting of the system. It is also important to place the issue of the sanctioning of corporate offenders within the context of the cost of justice and the ability of the justice system to produce sensible results in such cases.

Moreover, the sanctions debate needs to be looked at in terms of the most realistic methods of achieving deterrent effects as well as compensating the victims of corporate crime, such as shareholders, creditors and the corporation. Unfortunately, the quest for retribution, even though this may be fundamentally flawed, has tended to ignore the perspective of such victims, which has been largely lost in the debate on sanctions. This is at odds with the importance that victims are now assuming as a concern within the criminal justice system. The need for this debate to incorporate the role of victims, whether they be shareholders, creditors or others is essential if this debate is to be a more balanced one and less ideologically driven. Furthermore, compliance strategies which focus upon the victim perspective and the costs of justice need to be given must greater support by regulators and the professions. This has begun to occur in relation to the work of the Trade Practices Commission and there is no reason why similar strategies should not evolve in relation to breaches of Corporations Law offences. Even though traditional criminal law sanctions must continue to be available, there are often alternative remedies which need to be considered for corporate law offenders. However, this is the subject of another paper.

Nevertheless, it has been argued here that the dominance of a civil law culture in the application of Australian corporate law makes it very difficult, and indeed sometimes counter-productive, to seek to impose a criminal justice system

model upon most corporate law offences. The resort to such a criminal justice model should be reserved for only the most flagrant cases in this area, and only after civil and administrative remedies have clearly failed. Consequently, it is argued that much more vigorous efforts need to be made to use civil and administrative remedies than has occurred to date. This needs to go hand in hand with efforts to streamline the judicial process itself, as it is clearly ill-equipped to deal with complex commercial matters in a timely way.

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- 1 During the course of this research project, invaluable research and administrative assistance was provided by a variety of persons associated with the Centre for National Corporate Law Research, including Richard Chadwick, Kate Dalrymple, Lloyd Weedall, Daniel Lovric and Catherine Reid. The assistance and support which they were able to provide at different phases of the study is greatly acknowledged, although of course responsibility for the research is entirely that of the author.
 - 2 Tomasic, R, "Sanctioning Corporate Crime and Misconduct: Beyond Draconian and Decriminalization Solutions", (1992) 2 *Australian Journal of Corporate Law* 82.
 - 3 Australian Law Reform Commission, Sentencing Penalties: Discussion Paper No 30, Sydney, ALRC, 1987.
 - 4 See, for example, the extensive work on this area by Professor Brent Fisse, Dr John Braithwaite and Dr Peter Grabosky.
 - 5 For example, in June 1992 the National Crime Authority organised the National Complex White Collar Crime Conference.
 - 6 The Australian Institute of Criminology sponsored two major conferences which sought to refine the issues in dispute in this debate: see further Grabosky.
 - 7 The contributions of the AICD have been made mainly through the media and through submissions to government and Parliamentary committees.
 - 8 In his direction, Attorney-General Duffy stated:

"Noting that co-operation and collaboration between the ASC and the DPP has, in certain respects, fallen short of the Government's expectations, I Michael Duffy, the Attorney-General of the Commonwealth, hereby direct, in pursuance of s 12 of the *Australian Securities Commission Act 1989* and s 8 of the *Director of Public Prosecutions Act 1983*, the ASC and DPP to develop and implement policies for the exercise and discharge of their respective powers and functions so as to comply with the following guidelines.

....

1. The ASC and DPP shall put in place forthwith and maintain in each State and mainland Territory standing arrangements for the fullest collaboration and co-operation at all levels between the two organisations in the discharge of their respective functions in relation to the investigation and prosecution of corporate wrongdoing.

....

Investigation of general criminal law offences

3. In the course of an investigation into apprehended serious wrongdoing, the ASC shall give the same consideration to identifying breaches of the general criminal law of

the Commonwealth or a State or Territory as it gives to the examination of conduct that is a breach of the Corporations Law.

Co-operation in respect of investigations

4. Where, in the course of an investigation, the ASC concludes that the preponderance of corporate wrongdoing constitutes a serious offence or offences under the general criminal law rather than a serious offence or offences under the Corporations Law, and seeks the agreement of another more appropriate agency to the transfer of the investigation to that agency, the ASC shall continue the investigation into such serious offence or offences under the general criminal law unless and until that other agency accepts the transfer of the investigation.

Consultations in respect of civil proceedings

5. Except where the exigencies of the particular case prevent prior consultation, the ASC before taking civil enforcement action on any matter in respect of which it considers that serious corporate wrongdoing of a criminal nature may have occurred, consult with the DPP regarding the appropriateness of taking such civil proceedings in the light of the possibility that criminal enforcement action may also be available.

....

8. The ASC, the DPP and the Attorney-General's department shall collaborate in the establishment of a National Steering Committee on Corporate Wrongdoing.

9. The Committee shall consist of the Secretary to the Attorney-General's department, who shall be the Convener, the Chairman of the ASC and the DPP.

10. The functions of the Committee will be to oversee, and report to the Attorney-General, on compliance with these guidelines and to seek to resolve all disputes referred to the Committee in accordance with these guidelines"

- 9 Joint Committee on Corporations and Securities; Reference: Briefing with the Director of Public Prosecutions; *Official Hansard Report*, 7 September 1992 at p 45.
- 10 *Ibid* at pp 44-45.
- 11 *Ibid* at p 45.
- 12 *Ibid* at p 34.
- 13 See generally: "Regulatory Enforcement by the ASC; an interrelationship of strategies", Address by Tony Hartnell on 3 March 1992, to the Australian Institute of Criminology Conference, The Future of Regulatory Enforcement in Australia, *ASC Digest*, Update 49 at p 48.
- 14 Joint Committee on Corporations and Securities; Reference: Briefing with the Australian Securities Commission; *Official Hansard Report*, 6 August 1992 at pp 11-12.
- 15 Joint Committee on Corporations and Securities; Reference: Briefing with the Director of Public Prosecutions; *Official Hansard Report*, 7 September 1992 at p 46.

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- 16 Australian Securities Commission, *Annual Report 1991/92*, Canberra, AGPS, 1992, at pp 5-6.
 - 17 *Ibid* at p 6.
 - 18 *Ibid* at p 6.
 - 19 *Ibid* at p 7.
 - 20 Commonwealth Director of Public Prosecutions, *Annual Report 1991-92*, Canberra, Australian Government Publishing Service, 1992 at p 68.
 - 21 *Ibid* at p 64.
 - 22 *Ibid* at p 68.
 - 23 See further Tomasic, R, "Sanctioning Corporate Crime and Misconduct: Beyond Draconian and Decriminalization Solutions", (1992) 2 *Australian Journal of Corporate Law* 82 at pp 102-105.
 - 24 *Directing the Top 500: Corporate Governance and Accountability in Australian Public Companies*, Sydney, Allen & Unwin, 1993 (forthcoming May).
 - 25 Each interview was conducted in person by the author in the offices, chambers or conference room of the interviewee. Each interview was about one hour in duration, although some were considerably longer than this. Answers to a series of prepared questions were written down by the interviewer during the course of each interview. These were subsequently cleaned up and transcribed onto computer disk for subsequent analysis.
 - 26 However, a similar number of judges were interviewed for a study of takeover litigation which was undertaken in 1989 and 1990: see further Tomasic, R and B Pentony, "Judicial Technique in Takeover Litigation in Australia" (1989) 12 *University of New South Wales Law Journal* 240.
 - 27 As a condition of the study it was agreed that interviewees would not be identified by name in the report of the study. However, all of those interviewed were leading figures in their respective fields.
 - 28 All interviewees were asked the question: "What do you see as being the primary goals of corporate law enforcement?"
 - 29 In *Group Four Industries Pty Ltd v Brosnan and Anor* (1991) 5 ACSR 649, Duggan J (at first instance) had occasion to interpret what is now s 592 of the Corporations Law. In considering the defence in what was then s 556(2)(a) of the Companies Code, his Honour took the view (at 661) that "[t]he existence of a severe penal sanction reinforces my view that a narrower interpretation is called for." A higher standard of proof than the normal civil standard also applies in these cases: see further the test laid down in *Briginshaw v Briginshaw* (1938) 60 CLR 336 and followed in many cases since.
 - 30 Interviewees were asked two questions on this matter, but useful answers were not received from all of those interviewed. The difficulty with these questions was that the rarity of imprisonment for corporate law breaches made it difficult to offer informed views on this matter. Firstly, interviewees were asked: "Would you agree with the view that corporate actors are more likely to fear the threat of imprisonment than they fear other sanctions?" Secondly, they were asked: "In your experience what is it about a term of imprisonment that corporate officers most fear?"
 - 31 It should also be noted that there is a well developed criminological literature which has cast doubt concerning the utility for many other kinds of criminal conduct: see further, Tomasic, R and I Dobinson, *The Failure of Imprisonment: An Australian Perspective*, Sydney, George Allen & Unwin, 1979.

32 These questions were as follows:

11. Criminal actions against directors under s 232 of the Corporations Law for the improper exercise of their powers have been uncommon. Why do you think this has been so?

12. Why do you think corporations themselves have not brought civil actions against directors and other officers more often under the directors' duties provisions in s 232?

18. Very few investigations for breaches of our corporations laws have lead to cases being successfully litigated. Why do you think this has been so?"

21. What do you see as the main problems involved in the bringing of actions against directors under the insolvent trading provisions in s 592?

22. In your experience, in what circumstances are liquidators likely to bring actions against directors or corporate controllers?

33 (1938) 60 CLR 336.

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Professor Peter Little, "The Policy Underlying Financial Disclosure by Corporations and its Effects upon Legal Liability", *Australian Journal of Corporate Law*, Volume 1 Number 2 (1991) p 87.