

**THE POLICY AND PRACTICE OF
ENFORCEMENT OF DIRECTORS' DUTIES BY
STATUTORY AGENCIES IN AUSTRALIA:
AN EMPIRICAL ANALYSIS**

JASPER HEDGES,* HELEN BIRD,**
GEORGE GILLIGAN,† ANDREW GODWIN‡
AND IAN RAMSAY‡‡

The enactment of the civil penalty regime in 1993 introduced a new approach to the enforcement of directors' duties by statutory agencies in Australia. The policy considerations that led to the regime, and which continue to inform current policies on corporate law enforcement, require that: civil enforcement be given primacy over criminal enforcement, with the latter reserved for more serious misconduct; a range of sanctions be calibrated to the severity of the misconduct in accordance with a pyramidal model of enforcement; and sanctions be set at a sufficient level to deter misconduct. This article analyses the extent to which these policies have been applied in practice by reference to a 10-year dataset of 27 civil, 72 criminal and 199 administrative directors' duties matters (involving 360 defendants) brought by the Australian Securities and Investments Commission and the Commonwealth Director of Public Prosecutions. The dataset, which includes data obtained from ASIC and the CDPP that has not previously been published,

* BA, JD (Melb), BCL (Oxf); Research Fellow, Melbourne Law School, The University of Melbourne. Funding for this research was provided by the Centre for International Finance and Regulation (Grant T021) and The University of Melbourne. This article was submitted for publication in June 2016. The authors thank Katharine Kilroy for research assistance in relation to disqualification orders and Lev Bromberg for providing helpful comments on drafts of the article.

** BCom, LLB (UQ), GradDipCorpLaw (Melb); Research Fellow, Melbourne Law School, The University of Melbourne.

† MA (LaTrobe), MPhil, PhD (Cantab); Senior Research Fellow, Melbourne Law School, The University of Melbourne; Visiting Fellow, Faculty of Law, UNSW Sydney.

‡ BA, LLB, LLM (Melb); Associate Professor, Director, Transactional Law, Director, Graduate Program in Banking and Finance Law, Associate Director, Asian Law Centre, Melbourne Law School, The University of Melbourne.

‡‡ BA, LLB (Macq), LLM (Harv); Harold Ford Professor of Commercial Law, Director of Studies, Commercial Law, Corporations and Securities Law for the Melbourne Law Masters Program, Director, Centre for Corporate Law and Securities Regulation, Melbourne Law School, The University of Melbourne.

indicates that such policies have, to a large extent, not been applied in practice. These are significant findings given the central role that enforcement of directors' duties performs in the regulation of corporate activity in Australia and the impact of such activity on society and the economy.

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I INTRODUCTION

The enactment of the civil penalty regime¹ in 1993 introduced a new approach to the enforcement of directors' duties by statutory agencies in Australia.² Prior to the 1993 reforms, enforcement of directors' duties by statutory agencies predominantly involved criminal enforcement by the Commonwealth Director of Public Prosecutions ('CDPP').³ The Australian Securities Commission ('ASC')⁴ had limited civil and administrative powers in relation to the enforcement of directors' duties prior to the 1993 reforms.⁵ The civil penalty regime empowered the ASC to bring civil proceedings involving a broader range of duties and sanctions⁶ and this was followed by the expansion of the ASC's administrative powers.⁷ Since the enactment of the civil penalty regime, enforcement of directors' duties by statutory agencies in Australia has thereby evolved from a predominantly criminal law approach into a multi-

¹ The civil penalty regime was one of several sets of amendments made to the predecessor of the *Corporations Act 2001* (Cth), the *Corporations Act 1989* (Cth), by the *Corporate Law Reform Act 1992* (Cth). The regime initially applied only to directors' duties but has subsequently been expanded to incorporate an additional 43 civil penalty provisions of the *Corporations Act 2001* (Cth): s 1317E. Items 1, 3 and 6 in s 1317E are referred to in this article as 'directors' duties' provisions and attract civil penalties: see below Part II(B). The regime is currently set out in pt 9.4B of the *Corporations Act 2001* (Cth).

² The *Companies Act 1958* (Vic) was the first legislation in Australia and the English-speaking world to provide for public enforcement of directors' duties: Rosemary Teele Langford, Ian Ramsay and Michelle Welsh, 'The Origins of Company Directors' Statutory Duty of Care' (2015) 37 *Sydney Law Review* 489, 511. Public enforcement of directors' duties is to be contrasted with enforcement by private litigants. For a recent empirical study on the enforcement of directors' duties by private litigants in Australia see Jenifer Varzaly, 'The Enforcement of Directors' Duties in Australia: An Empirical Analysis' (2015) 16 *European Business Organization Law Review* 281.

³ The Commonwealth Director of Public Prosecutions is an independent statutory agency established under the *Director of Public Prosecutions Act 1983* (Cth) that provides a criminal prosecution service in accordance with the Prosecution Policy of the Commonwealth: Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (2016).

⁴ Predecessor to the Australian Securities and Investments Commission ('ASIC'). ASIC is an independent statutory agency established under the *Australian Securities and Investments Commission Act 1989* (Cth) (now repealed) and continuing in existence under the *Australian Securities and Investments Commission Act 2001* (Cth) s 261. It administers legislation relating to corporate governance, financial services and market integrity.

⁵ See below Part II(A) for a brief explanation of the sanctions that could be sought in criminal and civil proceedings prior to the enactment of the civil penalty regime in 1993.

⁶ For ease of expression, the term 'sanction' is used throughout this article to refer to all enforcement outcomes, including remedial outcomes such as compensation or reparation.

⁷ See below Part II(A) for a brief explanation of the additional civil and administrative powers that were introduced during and subsequent to 1993.

jurisdictional system of overlapping criminal, civil and administrative sanctions.⁸

The policy considerations that led to the enactment of the civil penalty regime continue to inform current policies on the enforcement of corporate law.⁹ The regime was enacted in response to the Senate Standing Committee on Legal and Constitutional Affairs' *Report on the Social and Fiduciary Duties and Obligations of Company Directors* ('Cooney Report').¹⁰ The Committee, chaired by Senator Bernard Cooney ('Cooney Committee'), considered that existing criminal sanctions for the enforcement of directors' duties were unsatisfactory for a number of reasons, including that: criminal sanctions were inappropriate for misconduct that was not 'genuinely criminal';¹¹ 'draconian' custodial sentences were a disincentive to prospective directors;¹² and 'modest' fines were bringing the law into disrepute.¹³ Civil sanctions were recommended with a view to creating a "pyramid of enforcement" ... with civil measures at the base of the pyramid for the general run of cases, and criminal liability at the apex for the more exceptional instances of law-breaking.¹⁴ The Committee emphasised that '[p]enalties must suit the offence' and '[t]hey will have no deterrent value if their level is insufficient'.¹⁵

Three key policy considerations can be distilled from the *Cooney Report* and other extrinsic material surrounding the enactment of the civil penalty regime. First, civil enforcement should be given primacy as the mode of enforcement applicable to the bulk of directors' duties matters, while criminal enforcement should be reserved for more serious misconduct.¹⁶ Second, a

⁸ For further explanation, see below Part II(A).

⁹ See below Part III for a detailed discussion of these policy considerations.

¹⁰ Key recommendations were outlined at Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (1989) xi [7], xv [22]–[23]. See also Commonwealth, *Parliamentary Debates*, Senate, 28 November 1991, 3615–17, 3620 (Graham Richardson); Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth) [113]–[114].

¹¹ *Cooney Report*, above n 10, 190 [13.12].

¹² *Ibid* 188 [13.6]; see also at 188 [13.7].

¹³ *Ibid* 188 [13.6].

¹⁴ *Ibid* 190 [13.13], quoting Brent Fisse, Submission No 29 to Cooney Committee, *Inquiry into the Social and Fiduciary Duties and Responsibilities of Company Directors*, 22 November 1989, 15. See below Part III(B) for an explanation of pyramidal enforcement models, which form part of responsive regulation theory.

¹⁵ *Cooney Report*, above n 10, 191 [13.16].

¹⁶ See below Part III(A).

range of different sanctions should be tailored to the circumstances of the misconduct, in accordance with a pyramidal model of enforcement. Third, sanctions should be set at a sufficient level to deter corporate misconduct, both by the defendant ('specific deterrence') and the public at large ('general deterrence').¹⁷ Part III of this article discusses these original policy considerations in more detail and explains how they continue to inform current policies on the enforcement of corporate law.

This article analyses the extent to which these policy considerations have been applied in practice by reference to a 10-year dataset of civil, criminal and administrative directors' duties matters brought by the Australian Securities and Investments Commission ('ASIC') and the CDPP that were finalised between 1 January 2005 and 31 December 2014. The dataset, which includes data obtained directly from ASIC and the CDPP that has not previously been published, indicates that these policies have, to a large extent, not been applied in practice in relation to the enforcement of directors' duties. Civil enforcement was significantly less prevalent than criminal enforcement, despite the ostensible primacy of civil enforcement.¹⁸ Civil enforcement accounted for only 19.23 per cent of matters in which contraventions of directors' duties that attracted both civil and criminal forms of liability were proven.¹⁹ The majority of sanctions were incapacitative,²⁰ which is contrary to a pyramidal model of enforcement, as such a model requires that more lenient enforcement measures be considered prior to incapacitation.²¹ Incapacitative sanctions — encompassing custodial sentences involving a minimum period of incarceration, civil disqualification orders and administrative disqualification outcomes²² — collectively accounted for at least²³ 78.81 per cent of all sanctions.²⁴

¹⁷ See below Part III(C).

¹⁸ See below Part IV(B)(1).

¹⁹ See Table 4 in below Part IV(B)(1).

²⁰ See below Part IV(B)(2). Incapacitation is one of six contemporary rationales of enforcement, along with deterrence, rehabilitation, retributivism, social theories of sentencing, and restoration and reparation: Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 6th ed, 2015) 80–100. Incapacitation involves incapacitating wrongdoers so that they are incapable of engaging in further wrongdoing for a period of time. The two main forms of incapacitation are imprisonment and disqualification: at 88–9.

²¹ See below Part III(B).

²² The term 'disqualification' is used throughout this article to refer to disqualification from managing corporations, with the exception of disqualification outcomes arising from enforceable undertakings, some of which relate to the provision of financial services: see below Parts II(B)(3), IV(A)(2). Where directors are involved in providing financial services or engaging in consumer credit activities and they, inter alia, contravene or are deemed likely to contravene financial services or consumer credit laws, they may be the subject of

Monetary sanctions and custodial sentences were set well below the statutory maxima, casting doubt on their deterrence value.²⁵ The median civil pecuniary penalty imposed on defendants who engaged in a single contravention of a directors' duty was \$25 000 (12.5 per cent of the statutory maximum of \$200 000 per contravention),²⁶ while 46.43 per cent of custodial sentences imposed for contraventions of directors' duties were fully suspended.²⁷

These research findings are significant given the central role that enforcement of directors' duties performs in the regulation of corporate activity in Australia and the impact of such activity on society and the economy. Directors' duties regulate the conduct of individuals who exert significant influence on the actions of corporations,²⁸ which collectively command substantial social and economic power. There are 2 429 200 companies registered in Australia²⁹ and the private sector's share of gross value added has been estimated at 85 per cent.³⁰ The lawful and responsible management of companies is therefore vital for the wellbeing of the nation. As Middleton J commented in *Australian Securities and Investments Commission v Healey*,³¹ '[t]he role of a director is significant as their actions may have a profound effect on the community, and not just shareholders, employees and credi-

administrative or civil disqualification orders that prohibit them from providing financial services or engaging in credit activities: *Corporations Act 2001* (Cth) pt 7.6 div 8; *National Consumer Credit Protection Act 2009* (Cth) pt 2-4. This article focusses on disqualification from managing corporations, as it is the form of disqualification typically imposed for contraventions of directors' duties.

²³ Based on currently available data, it is not possible to determine the exact number of administrative disqualification outcomes that involved contraventions of directors' duties: see below Part IV(A)(2).

²⁴ See the discussion following Table 5 in below Part IV(B)(2).

²⁵ See below Part IV(B)(3).

²⁶ See Table 6 in below Part IV(B)(3).

²⁷ See the discussion following Table 7 in below Part IV(B)(3).

²⁸ Section 198A(1) of the *Corporations Act 2001* (Cth) provides that '[t]he business of a company is to be managed by or under the direction of the directors.'

²⁹ ASIC, *2017 Company Registration Statistics* (1 February 2017) <<http://asic.gov.au/regulatory-resources/find-a-document/statistics/company-registration-statistics/2017-company-registration-statistics/>>. This figure is true as of January 2017.

³⁰ Deloitte Access Economics, *The Economic Contribution of the Private Sector*, 16 March 2012, 3 <[http://www.companydirectors.com.au/~media/resources/director-resource-centre/research/dae-aicd-report_16032012_final.ashx?la=en](http://www.companydirectors.com.au/~/media/resources/director-resource-centre/research/dae-aicd-report_16032012_final.ashx?la=en)>.

³¹ (2011) 196 FCR 291.

tors.³² Senator Cooney similarly emphasised the link between responsible corporate governance and the nation's wellbeing in 1993:

The modern corporate sector has a profound effect on our life. It is crucial to the creation of the nation's wealth. Society looks to it to produce that wealth ethically and in accordance with community values. Directors are the mind and soul of the corporate sector. They are crucial to how its great power is exercised. They can weaken and even suppress markets. They can disturb and destroy an environment. Their actions can have a profound effect on the lives of the shareholders, employees, creditors and the public generally.³³

The research findings presented in this article are also significant from the perspective of comparative law and policy. Unlike some other common law jurisdictions in which enforcement of directors' duties by statutory agencies (as opposed to private litigants) is limited, such as the United States³⁴ and the United Kingdom,³⁵ public enforcement of directors' duties has occupied a central role in Australia for many years. Proceedings brought by ASIC and the CDDP account for approximately half of all judicial matters involving directors' duties.³⁶ In addition, ASIC is responsible for a significant number of administrative actions involving directors' duties, principally in the form of disqualification orders.³⁷ Australia pioneered a number of key developments in relation to the enforcement of directors' duties by statutory agencies. It was the first common law jurisdiction to enact statutory directors' duties in 1896³⁸ and to introduce public enforcement of such duties in 1958.³⁹ Scholars have encouraged other jurisdictions, including the United States,⁴⁰ the United Kingdom,⁴¹ Hong Kong,⁴² Singapore⁴³ and New Zealand,⁴⁴ to look to Austral-

³² Ibid 297 [14].

³³ Commonwealth, *Parliamentary Debates*, Senate, 22 November 1989, 3070.

³⁴ See generally Renee M Jones and Michelle Welsh, 'Toward a Public Enforcement Model for Directors' Duty of Oversight' (2012) 45 *Vanderbilt Journal of Transnational Law* 343.

³⁵ See generally Andrew Keay and Michelle Welsh, 'Enforcing Breaches of Directors' Duties by a Public Body and Antipodean Experiences' (2015) 15 *Journal of Corporate Law Studies* 255.

³⁶ See Varzaly, above n 2, 300, 305, 307. Varzaly identifies 112 judicial directors' duties matters brought by private litigants from 2001 to 16 April 2013 (12.3 years), while this article identifies 99 judicial directors' duties matters brought by statutory agencies from 1 January 2005 to 31 December 2014 (10 years).

³⁷ See below Parts II(B)(3), IV(A)(2), IV(B)(2) and Table 5 in below Part IV(B)(2).

³⁸ Langford, Ramsay and Welsh, above n 2, 490.

³⁹ Ibid 511. See also Keay and Welsh, above n 35, 257.

⁴⁰ Jones and Welsh, above n 34, 394.

⁴¹ Keay and Welsh, above n 35.

ia's enforcement regime in regard to establishing, expanding or refining their own public enforcement regimes.

This article also provides a timely contribution to the current policy debate on the enforcement of corporate law in Australia. In 2014, the report of the Financial System Inquiry recommended that '[t]he maximum civil and criminal penalties for contravening ASIC legislation should be substantially increased to act as a credible deterrent for large firms'.⁴⁵ In response to this recommendation, the Australian government has committed to reviewing ASIC's enforcement regime and penalties in 2017.⁴⁶ This review follows a number of other recent initiatives targeted at improving corporate law enforcement, including the 2013–14 Senate Inquiry into the Performance of ASIC⁴⁷ and the 2015 Capability Review of ASIC,⁴⁸ the latter being conducted to 'ensure that ASIC has the appropriate governance, capabilities and systems to meet [its] objectives and future regulatory challenges'.⁴⁹ Most recently, the Senate Economics References Committee has conducted an inquiry into the 'inconsistencies and inadequacies of current criminal, civil and administrative penalties for corporate and financial misconduct or white-collar crime' in

⁴² Julie Cassidy, 'Directors' Duty of Care in Australia — A Reform Model?' (2008) 16 *Asia Pacific Law Review* 19.

⁴³ Pey-Woan Lee, 'Regulating Directors' Duties with Civil Penalties: Taking a Leaf from Australia's Book' (2006) 35 *Common Law World Review* 1.

⁴⁴ Susan Watson and Rebecca Hirsch, 'Empty Heads, Pure Hearts: The Unintended Consequences of the Criminalisation of Directors' Duties' (2011) 17 *New Zealand Business Law Quarterly* 302, 321–7.

⁴⁵ Financial System Inquiry Committee, *Financial System Inquiry: Final Report* (2014) 250. As the terms of reference provide, the Financial System Inquiry, chaired by David Murray AO, was established by the Australian government to 'examin[e] how the financial system could be positioned to best meet Australia's evolving needs and support Australia's economic growth': at vii.

⁴⁶ Australian Government, *Improving Australia's Financial System: Government Response to the Financial System Inquiry* (2015) 24.

⁴⁷ Senate Economics References Committee, Parliament of Australia, *Performance of the Australian Securities and Investments Commission* (2014).

⁴⁸ Australian Government, *Fit for the Future: A Capability Review of the Australian Securities and Investments Commission — A Report to Government* (2015) <<http://www.treasury.gov.au/~media/Treasury/Publications%20and%20Media/Publications/2016/Fit%20for%20the%20future/Downloads/PDF/ASIC-Capability-Review-Final-Report.ashx>>.

⁴⁹ Josh Frydenberg, 'Capability Review of the Australian Securities and Investments Commission' (Media Release, 24 July 2015) <<http://jaf.ministers.treasury.gov.au/media-release/036-2015/>>.

2015–16.⁵⁰ The findings presented in this article build on these developments and contribute to evidence-based discourse on the appropriate policy settings in regard to corporate law enforcement in Australia.

The structure of this article is as follows. Part II briefly discusses the enforcement of directors' duties prior and subsequent to the civil penalty regime and provides an overview of the current directors' duties provisions and sanctions in the *Corporations Act 2001* (Cth). Part III discusses in more detail the policy considerations that led to the enactment of the civil penalty regime in 1993 and explains how these considerations continue to inform current policies on the enforcement of corporate law. Part IV presents the findings of the empirical study of civil, criminal and administrative directors' duties matters, which reveal that, to a large extent, the policy considerations that ostensibly inform the enforcement of directors' duties by statutory agencies have not been applied in practice.

II DIRECTORS' DUTIES PROVISIONS AND SANCTIONS IN THE *CORPORATIONS ACT 2001* (Cth)

A Enforcement of Directors' Duties Prior and Subsequent to the Civil Penalty Regime

The enactment of the civil penalty regime in 1993 introduced a new approach to the enforcement of directors' duties by statutory agencies in Australia. Prior to the 1993 reforms, enforcement of directors' duties by statutory agencies predominantly involved criminal enforcement by the CDPP. The sanctions that could be sought in criminal proceedings included custodial sentences,⁵¹ fines⁵² and compensation orders⁵³ under the *Corporations Act 1989* (Cth)⁵⁴ in

⁵⁰ Parliament of Australia, *Penalties for White-Collar Crime* <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/White_collar_crime>. This Inquiry was due to report by 27 July 2016 but it lapsed as a result of the dissolution of the Senate and the House of Representatives on 9 May 2016 for a general election on 2 July 2016. On 11 October 2016, this Inquiry was re-adopted in the 45th Parliament and the committee is due to report by 23 March 2017: Parliament of Australia, *Criminal, Civil and Administrative Penalties for White-Collar Crime* <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/WhiteCollarCrime45th>.

⁵¹ *Corporations Act 1989* (Cth) s 1311, sch 3, predecessors to *Corporations Act 2001* (Cth) s 1311, sch 3.

⁵² *Corporations Act 1989* (Cth) s 1311, sch 3, predecessors to *Corporations Act 2001* (Cth) s 1311, sch 3.

⁵³ *Corporations Act 1989* (Cth) s 232(7), predecessor to *Corporations Act 1989* (Cth) s 1317HB and *Corporations Act 2001* (Cth) s 588K.

addition to the sanctions ordinarily available for federal offences pursuant to the *Crimes Act 1914* (Cth).⁵⁵ Defendants who received criminal convictions for contraventions of directors' duties were also subject to automatic disqualification from managing corporations for a period of five years from the date of conviction or, if the defendant was sentenced to imprisonment, release from prison.⁵⁶

The ASC had limited civil and administrative powers in relation to the enforcement of directors' duties prior to the 1993 reforms. These included the power to seek civil disqualification orders for repeated contraventions of the *Corporations Act 1989* (Cth),⁵⁷ contraventions of the duties to exercise reasonable care and diligence and to act honestly,⁵⁸ and involvement in two or more failed corporations,⁵⁹ as well as the power to impose administrative disqualification orders on directors as a result of adverse reports from liquidators.⁶⁰ The civil penalty regime empowered the ASC to bring civil proceedings involving a broader range of duties⁶¹ and sanctions, including pecuniary penalties⁶² and compensation orders⁶³ in addition to disqualification orders.⁶⁴ The civil penalty regime was followed by the expansion of administrative enforcement powers, with the introduction of enforceable

⁵⁴ Predecessor to the *Corporations Act 2001* (Cth).

⁵⁵ These included, for example, bonds without conviction, bonds with conviction, fully suspended sentences, community service orders, periodic detention orders and reparation orders: *Crimes Act 1914* (Cth) ss 19B, 20, 20AB, 21B. For further explanation of the sanctions that can be imposed under the *Crimes Act 1914* (Cth) for contraventions of directors' duties, see below Part II(B)(2).

⁵⁶ *Corporations Act 1989* (Cth) s 229(3), predecessor to *Corporations Act 2001* (Cth) s 206B.

⁵⁷ *Corporations Act 1989* (Cth) ss 230(1)(a)–(c), predecessor to *Corporations Act 2001* (Cth) s 206E.

⁵⁸ *Corporations Act 1989* (Cth) s 230(1)(d), predecessor to *Corporations Act 1989* (Cth) s 1317EA(3)(a) and *Corporations Act 2001* (Cth) s 206C.

⁵⁹ *Corporations Act 1989* (Cth) s 599, predecessor to *Corporations Act 2001* (Cth) s 206D.

⁶⁰ *Corporations Act 1989* (Cth) s 600, predecessor to *Corporations Act 2001* (Cth) s 206F.

⁶¹ *Corporations Act 1989* (Cth) s 1317DA, predecessor to *Corporations Act 2001* (Cth) s 1317E. Section 1317DA of the former Act was inserted by *Corporate Law Reform Act 1992* (Cth) s 17.

⁶² *Corporations Act 1989* (Cth) s 1317EA(3)(b), predecessor to *Corporations Act 2001* (Cth) s 1317G. Section 1317EA of the former Act was inserted by *Corporate Law Reform Act 1992* (Cth) s 17.

⁶³ *Corporations Act 1989* (Cth) s 1317HA, predecessor to *Corporations Act 2001* (Cth) s 1317H. Section 1317HA of the former Act was inserted by *Corporate Law Reform Act 1992* (Cth) s 17.

⁶⁴ *Corporations Act 1989* (Cth) s 1317EA(3)(a), predecessor to *Corporations Act 2001* (Cth) s 206C.

undertakings in 1998⁶⁵ and the application of disqualification orders imposed by the ASC to company officers as well as directors in 1999.⁶⁶

Civil and administrative sanctions have, for the most part, supplemented rather than displaced existing criminal sanctions, with the exception of the decriminalisation of the duty to exercise reasonable care and diligence in 1999.⁶⁷ The power of criminal courts to order compensation under s 588K of the *Corporations Act 2001* (Cth) has also been limited to contraventions of the duty to prevent insolvent trading pursuant to s 588G(3). However, this has had little practical impact as the CDPP is able to seek reparation orders under s 21B of the *Crimes Act 1914* (Cth) for contraventions of directors' duties. Since the enactment of the civil penalty regime in 1993, enforcement of directors' duties by statutory agencies in Australia has thereby evolved from a predominantly criminal law approach into a multi-jurisdictional system of overlapping criminal, civil and administrative sanctions.

B *Current Directors' Duties Provisions and Sanctions in the Corporations Act 2001 (Cth)*

The empirical study presented in this article encompasses the following directors' duties provisions: ss 180–4, 191, 195, 209 and 588G of the *Corporations Act 2001* (Cth) and their predecessors, ss 232(4), 232(2), 232(6), 232(5), 231, 232A, 243ZE and 588G of the *Corporations Act 1989* (Cth). For ease of expression, this article herein refers to these duties by their current section numbers in the *Corporations Act 2001* (Cth), rather than citing both the current sections and their predecessors in the *Corporations Act 1989* (Cth).

Table 1 summarises the substantive content of the directors' duties, the applicable civil and criminal section numbers, and the persons to whom the duties apply. The duty to exercise reasonable care and diligence pursuant to s 180 only attracts civil liability, while ss 191 and 195, which deal with conflicts of interest, only attract criminal liability. The remaining duties attract both civil and criminal liability. Criminal liability is subject to additional fault elements, with the exception of s 195, which is a strict liability offence.

⁶⁵ *Australian Securities and Investments Commission Act 2001* (Cth) s 93AA, as inserted by *Financial Sector Reform (Amendments and Transitional Provisions) Act 1998* (Cth) sch 1 item 11.

⁶⁶ *Corporations Act 2001* (Cth) s 206F, as inserted into its predecessor, the *Corporations Act 1989* (Cth), by *Corporate Law Economic Reform Program Act 1999* (Cth) sch 1 item 1. This Act also repealed *Corporations Act 1989* (Cth) s 600.

⁶⁷ *Corporate Law Economic Reform Program Act 1999* (Cth) sch 1.

Table 1: Directors' Duties Provisions in the Corporations Act 2001 (Cth)

Duty	Civil section	Civil application	Criminal section	Fault elements	Criminal application
Duty to exercise reasonable care and diligence					
Must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they: (a) were a director or officer of a corporation in the corporation's circumstances; and (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.	180(1)	Directors or other officers	N/A	N/A	N/A
Duty to act in good faith in the best interests of the corporation and duty to act for proper purposes					
Must exercise their powers and discharge their duties: (a) in good faith in the best interests of the corporation; and (b) for a proper purpose.	181(1)	Directors, other officers (s 181(1)), or persons involved in a contravention of s 181(1) (caught under s 181(2))	184(1)	Recklessness or intentional dishonesty	Directors or other officers

Duty	Civil section	Civil application	Criminal section	Fault Elements	Criminal application
Duty not to improperly use position					
Must not improperly use their position to: (a) gain an advantage for themselves or someone else; or (b) cause detriment to the corporation.	182(1)	Directors, secretaries, other officers, employees (s 182(1)), or persons involved in a contravention of s 182(1) (caught under s 182(2))	184(2)	Dishonesty and intention, or dishonesty and recklessness	Directors, other officers or employees
Duty not to improperly use information					
Must not improperly use information that has been obtained because the person is or has been a director or other officer or employee of a corporation to: (a) gain an advantage for themselves or someone else; or (b) cause detriment to the corporation.	183(1)	Directors, other officers, employees (s 183(1)), or persons involved in a contravention of s 183(1) (caught under s 183(2))	184(3)	Dishonesty and intention, or dishonesty and recklessness	Directors, other officers or employees

Duty	Civil section	Civil application	Criminal section	Fault elements	Criminal application
Duty to disclose material personal interests					
Must give other directors of the company notice in accordance with s 191(3) of any material personal interest the director has in a matter that relates to the affairs of the company unless an exception pursuant to s 191(2) applies.	N/A	N/A	191(1)	Combination of strict liability (s 191(1A)) and intention (<i>Criminal Code Act 1995</i> (Cth) sch 1 items 4.1, 5.1, 5.6)	Directors other than sole directors of proprietary companies (ss 191(1), (5))
Duty not to be present at meetings and vote on matters involving a material personal interest					
Must not, in relation to a material personal interest the director has in a matter that is being considered at a directors' meeting: (a) be present while the matter is being considered at the meeting; or (b) vote on the matter (unless an exception pursuant to s 195(1A) applies).	N/A	N/A	195(1)	Strict liability	Directors of public companies

Duty	Civil section	Civil application	Criminal section	Fault elements	Criminal application
Duty not to give a financial benefit to a related party of a public company without member approval					
A public company, or an entity that the public company controls, must not give a financial benefit to a related party of the public company without obtaining member approval pursuant to s 208(1)(a) unless an exception pursuant to s 208(1)(b) applies.	208 and 209(2)	Persons involved in a contravention of s 208 (caught under s 209(2))	208 and 209(3)	Dishonesty	Persons involved in a contravention of s 208 (caught under s 209(3))
Duty to prevent insolvent trading by company					
Must prevent the company from incurring a debt if the company is insolvent or becomes insolvent by incurring that debt, or debts including that debt, and there are reasonable grounds for suspecting that the company is insolvent or would so become insolvent and the director is aware that there are such grounds or a reasonable person in a like position in a company in the company's circumstances would be so aware.	588G(2)	Directors	588G(3)	Combination of absolute liability, strict liability, actual suspicion rather than actual or constructive awareness of reasonable grounds for suspicion, and dishonesty	Directors

For convenience, the duties examined in this article are referred to collectively as ‘directors’ duties’. However, as can be seen from Table 1, some of the duties apply to ‘officers’,⁶⁸ employees and ‘person[s] ... involved in a contravention’⁶⁹ of the duty as well as directors. The directors’ duties provisions that attract criminal liability also apply to persons who are subject to the extensions of criminal responsibility in pt 2.4 of the schedule of the *Criminal Code Act 1995* (Cth). Using the term ‘directors’ duties’ to identify the duties set out in Table 1 is a common convention in academic and professional literature.⁷⁰

1 *Civil Sanctions for Contraventions of Directors’ Duties*

All of the duties outlined in Table 1 are civil penalty provisions except ss 191 and 195. If a court is satisfied that a person has contravened a civil penalty provision, the court must make a declaration of contravention.⁷¹ ASIC can then seek a pecuniary penalty order,⁷² a disqualification order⁷³ or a compensation order.⁷⁴ Civil rules of evidence and procedure apply to the proceedings.⁷⁵ This means that there must be proof on the balance of probabilities⁷⁶

⁶⁸ The definition of ‘officer’ in s 9 of the *Corporations Act 2001* (Cth) applies to the following persons: a director or secretary of the corporation; a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; a person who has the capacity to affect significantly the corporation’s financial standing; a person in accordance with whose instructions or wishes the directors of the corporation are accustomed to act; a receiver, or receiver and manager, of the property of the corporation; an administrator of the corporation; an administrator of a deed of company arrangement executed by the corporation; a liquidator of the corporation; and a trustee or other person administering a compromise or arrangement made between the corporation and someone else.

⁶⁹ The term ‘person ... involved in a contravention’ applies to persons who have aided, abetted, counselled, procured or induced the contravention, as well as those who have been knowingly concerned in or party to the contravention and those who have conspired with others to effect the contravention: *ibid* s 79.

⁷⁰ See, eg, Robert Austin, Harold Ford and Ian Ramsay, *Company Directors: Principles of Law and Corporate Governance* (LexisNexis Butterworths, 2005); Rosemary Teele Langford, *Directors’ Duties: Principles and Application* (Federation Press, 2014).

⁷¹ *Corporations Act 2001* (Cth) s 1317E(1).

⁷² *Ibid* s 1317G.

⁷³ *Ibid* s 206C. In addition to disqualification orders for contraventions of civil penalty provisions, ASIC can also seek such orders on the basis of, *inter alia*, involvement in two or more failed corporations pursuant to s 206D and repeated contraventions of the Act pursuant to s 206E.

⁷⁴ *Ibid* s 1317H.

⁷⁵ *Ibid* s 1317L.

⁷⁶ *Ibid* s 1332. The principle in *Briginshaw v Briginshaw* (1938) 60 CLR 366 has often been applied to the civil standard of proof in proceedings for contraventions of directors’ duties, which has effectively meant that in many civil matters the standard of proof has been higher

that there has been a contravention rather than proof beyond reasonable doubt, which is the higher standard of proof that applies to criminal proceedings.⁷⁷

Where a court has declared that a person has contravened a civil penalty provision, the court may order that person to pay a pecuniary penalty of up to \$200 000 to the Commonwealth if the contravention: materially prejudices the interests of the corporation or its members; materially prejudices the corporation's ability to pay its creditors; or is serious.⁷⁸ The court may also disqualify that person from managing corporations for a period that the court considers appropriate if the court is satisfied that the disqualification is justified.⁷⁹ In determining whether the disqualification is justified, the court may have regard to: the person's conduct in relation to the management, business or property of any corporation; and any other matters that the court considers appropriate.⁸⁰ If the corporation has suffered damage resulting from the contravention, the court may order the person to compensate the corporation for the damage.⁸¹ The damage suffered by the corporation for the purposes of making a compensation order includes profits made by any person resulting from the contravention.⁸²

than the balance of probabilities: see Tom Middleton, Thomson Reuters, *ASIC Corporate Investigations and Hearings* (at Update 109) 80-4309 [8.1520]; R P Austin and I M Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (LexisNexis Butterworths, 16th ed, 2015) 108-9; Vicky Comino, 'James Hardie and the Problems of the Australian Civil Penalties Regime' (2014) 37 *University of New South Wales Law Journal* 195, 225; Keay and Welsh, above n 35, 268.

⁷⁷ *Criminal Code Act 1995* (Cth) sch 1 item 13.2(1); CDP, *Steps in Prosecution* <<https://www.cdpp.gov.au/prosecution-process/steps-prosecution>>.

⁷⁸ *Corporations Act 2001* (Cth) s 1317G. The maximum civil pecuniary penalty of \$200 000 is the maximum for a single contravention of a civil penalty provision. Where defendants have engaged in multiple contraventions of civil penalty provisions, the court can impose civil pecuniary penalties greater than \$200 000. In practice, however, courts rarely impose civil pecuniary penalties greater than \$200 000 for contraventions of directors' duties, even in matters involving multiple contraventions: see below Part IV(B)(3) and Table 6 in below Part IV(B)(3).

⁷⁹ *Corporations Act 2001* (Cth) s 206C(1).

⁸⁰ *Ibid* s 206C(2). There is no statutory limit on the duration of disqualification orders made pursuant to ss 206C and 206E, whereas orders made pursuant to s 206D are subject to a statutory maximum of 20 years.

⁸¹ *Ibid* s 1317H(1).

⁸² *Ibid* s 1317H(2).

2 Criminal Sanctions for Contraventions of Directors' Duties

All of the duties outlined in Table 1 are subject to criminal sanctions except s 180. Contraventions of directors' duties provisions that attract criminal liability are prosecuted by the CDPP in accordance with the *Prosecution Policy of the Commonwealth*, which requires that, inter alia, there be sufficient evidence to prosecute and that prosecution be in the public interest.⁸³ Sections 184(1)–(3), 209(3) and 588G(3) of the *Corporations Act 2001* (Cth) are subject to the same sanctions. A person who contravenes any of these provisions may be fined up to 2000 penalty units (\$360 000),⁸⁴ or imprisoned for up to five years, or both.⁸⁵ A contravention of s 191 can entail a fine of up to 10 penalty units (\$1800) or imprisonment for three months, or both, while a contravention of s 195 can entail a fine of up to five penalty units (\$900).⁸⁶

In addition to criminal sanctions that are imposed for contraventions of directors' duties under the *Corporations Act 2001* (Cth), defendants are usually subject to an automatic five-year period of disqualification from managing corporations pursuant to s 206B. Convictions for contraventions of the *Corporations Act 2001* (Cth) that are punishable by imprisonment for a period greater than 12 months, and convictions for any offences that involve dishonesty and are punishable by imprisonment for at least three months,⁸⁷ result in an automatic five-year period of disqualification from managing corporations commencing either on the day on which the person was convicted, if the person does not serve a term of imprisonment, or the day on which they are released from prison, if the person does serve a term of imprisonment.⁸⁸ Thus, convictions for contraventions of all of the duties outlined in Table 1, except ss 191 (provided the offence does not involve

⁸³ CDPP, *Prosecution Policy of the Commonwealth*, above n 3, 4–7 [2.1]–[2.14].

⁸⁴ The penalty unit is currently set at \$180: *Crimes Act 1914* (Cth) s 4AA.

⁸⁵ *Corporations Act 2001* (Cth) s 1311, sch 3. The maximum fine of \$360 000 and maximum custodial sentence of five years are the maxima for a single offence against ss 184, 209(3) and 588G(3). Where defendants have committed multiple offences, the court may impose fines greater than \$360 000 and custodial sentences greater than five years. In practice, however, courts rarely (if ever) impose fines greater than \$360 000 or custodial sentences greater than five years for contraventions of directors' duties, even in matters involving multiple contraventions: see below Part IV(B)(3) and Tables 6, 7 in below Part IV(B)(3).

⁸⁶ *Corporations Act 2001* (Cth) s 1311, sch 3.

⁸⁷ *Ibid* s 206B(1)(b)(ii) applies to offences against a law of the Commonwealth or a State or Territory (s 9 (definition of 'offence')) and offences against the law of a foreign country: at s 206B.

⁸⁸ *Ibid* s 206B(2).

dishonesty) and 195 of the *Corporations Act 2001* (Cth), result in a prohibition from managing corporations for a five-year period.

Criminal sanctions for contraventions of directors' duties can also be imposed pursuant to the *Crimes Act 1914* (Cth). The sanctions that were imposed for contraventions of directors' duties during the 10-year study period included: discharge without conviction subject to a bond (s 19B); release without passing sentence subject to a bond (s 20(1)(a)); custodial sentence with release forthwith or after serving a specified period of imprisonment subject to a bond (s 20(1)(b)); community service order (s 20AB(1AA)(v)); periodic detention (s 20 AB(1AA)(xi)); and reparation to the Commonwealth or persons who have suffered loss by reason of the offence (s 21B).⁸⁹ Orders pursuant to ss 19B, 20(1)(a) and 20(1)(b) were mostly subject to good behaviour bonds⁹⁰ but can also involve conditions that the defendant make reparation,⁹¹ pay pecuniary penalties (in the case of ss 20(1)(a) and 20(1)(b)),⁹² and other conditions as the court thinks fit to specify in the order.⁹³ For ease of expression, orders pursuant to s 19B are herein referred to as 'bonds without conviction', orders pursuant to s 20(1)(a) as 'bonds with conviction', and orders pursuant to s 20(1)(b) that involve immediate release subject to a bond as 'fully suspended' custodial sentences.⁹⁴

3 *Administrative Sanctions for Contraventions of Directors' Duties*

Contraventions of all of the duties outlined in Table 1 may form the basis, or a part of the basis, for administrative enforcement actions by ASIC. The two main types of administrative actions relevant to enforcement of directors' duties are disqualification orders pursuant to s 206F of the *Corporations Act 2001* (Cth) and enforceable undertakings pursuant to s 93AA of the *Australian Securities and Investments Commission Act 2001* (Cth).

Section 206F provides that ASIC may disqualify a person from managing corporations for up to five years if certain conditions are met and ASIC considers that disqualification is justified. These conditions include that,

⁸⁹ *Crimes Act 1914* (Cth) ss 19B(1)(d)(ii), 20(1)(a)(ii), 20(1)(b) provide that reparation can also be required as part of orders pursuant to ss 19B and 20.

⁹⁰ *Ibid* ss 19B(1)(d)(i), 20(1)(a)(i), 20(1)(b).

⁹¹ *Ibid* ss 19B(1)(d)(ii), 20(1)(a)(ii), 20(1)(b).

⁹² *Ibid* ss 20(1)(a)(iii), 20(1)(b).

⁹³ *Ibid* ss 19B(1)(d)(iii), 20(1)(a)(iv), 20(1)(b).

⁹⁴ These expressions are consistent with terminology used by the CDPP: see CDPP, *Federal Sentencing in Victoria* (31 January 2017) 47 [179] <<https://www.cdpp.gov.au/sites/g/files/net2061/f/Federal%20Sentencing%20in%20Victoria.pdf>>.

within the previous seven years, the person has been an officer of two or more corporations that have been wound up and liquidator reports under s 533(1) have been lodged in relation to the corporations' inability to pay their debts.⁹⁵ In determining whether disqualification is justified, ASIC must have regard to whether any of the corporations were related and may have regard to the person's conduct in relation to the management, business or property of any corporation, whether disqualification would be in the public interest, and any other matters that ASIC considers appropriate.⁹⁶ Section 206F gives ASIC a broad power that does not depend on contraventions of any particular provision. Accordingly, the basis for a disqualification order pursuant to s 206F may or may not include contraventions of directors' duties provisions.

Enforceable undertakings are technically an administrative enforcement action in that they are accepted by ASIC pursuant to a statutory power.⁹⁷ However, ASIC cannot impose enforceable undertakings unilaterally, meaning that they are effectively a negotiated enforcement mechanism. Section 93AA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) provides that: 'ASIC may accept a written undertaking given by a person in connection with a matter in relation to which ASIC has a function or power under [that] Act.' If ASIC considers that the person has breached the undertaking, it may apply to the court for various orders, including specific performance, disgorgement, compensation or any other order the court considers appropriate.⁹⁸ Enforceable undertakings are broad in scope, applying to a range of persons and types of misconduct, and as such, may or may not involve contraventions of directors' duties. While enforceable undertakings can result in a wide range of obligations, undertakings involving contraventions of directors' duties predominantly entail disqualification outcomes.⁹⁹

The rules of evidence do not apply to administrative hearings by ASIC.¹⁰⁰ Thus, it is not necessary for ASIC to prove factual matters (eg, contraventions of directors' duties) on the balance of probabilities or beyond a reasonable doubt in order to make disqualification orders pursuant to s 206F of the *Corporations Act 2001* (Cth) or accept undertakings pursuant to s 93AA of the

⁹⁵ *Corporations Act 2001* (Cth) s 206F(1).

⁹⁶ *Ibid* s 206F(2).

⁹⁷ *Australian Securities and Investments Commission Act 2001* (Cth) s 93AA(1).

⁹⁸ *Ibid* ss 93AA(3)–(4).

⁹⁹ See below Part IV(A)(2).

¹⁰⁰ *Australian Securities and Investments Commission Act 2001* (Cth) s 59(2)(a).

Australian Securities and Investments Commission Act 2001 (Cth). Instead, findings of fact must be based on material that is 'relevant, credible and probative'.¹⁰¹

III POLICY CONSIDERATIONS RELATING TO THE ENFORCEMENT OF DIRECTORS' DUTIES BY STATUTORY AGENCIES IN AUSTRALIA

The enactment of the civil penalty regime in 1993 introduced a new approach to the enforcement of directors' duties by statutory agencies in Australia.¹⁰² This Part of the article discusses the policy considerations that led to the enactment of the civil penalty regime and explains how they continue to inform current policies on the enforcement of corporate law. Three key policy considerations can be distilled from the *Cooney Report* and other extrinsic material — giving civil enforcement primacy over criminal enforcement, imposing sanctions in accordance with a pyramidal model of enforcement, and setting sanctions at a sufficient level to deter corporate misconduct — each of which is addressed in turn.

A *Giving Civil Enforcement Primacy over Criminal Enforcement*

The primary motivation for the enactment of the civil penalty regime was the perception that existing criminal sanctions for the enforcement of directors' duties were unsatisfactory. The Cooney Committee had three main concerns with criminal sanctions.

First, the Committee considered that it was 'draconian' to impose criminal sanctions in the absence of criminality,¹⁰³ and 'only appropriate' to impose such sanctions where the misconduct was 'genuinely criminal in nature'.¹⁰⁴ In response to the tabling of the government response to the *Cooney Report*, Senator Cooney remarked that '[i]t is quite unfair that any sort of criminal penalty be attached to an act which really is not criminal in the sense that we understand it'.¹⁰⁵ By 'genuinely criminal' the Cooney Committee was referring

¹⁰¹ ASIC, *Hearings Practice Manual*, Regulatory Guide 8, March 2002, 7.

¹⁰² See above Part II(A).

¹⁰³ *Cooney Report*, above n 10, 17 [2.37]; see also at 188 [13.6].

¹⁰⁴ *Ibid* 190 [13.12].

¹⁰⁵ Commonwealth, *Parliamentary Debates*, Senate, 28 November 1991, 3624.

to conduct that is fraudulent or dishonest, as opposed to negligent.¹⁰⁶ The inappropriateness of criminal sanctions for conduct that was not fraudulent or dishonest was raised on several occasions in submissions and evidence to the Cooney Committee.¹⁰⁷

Second, the Committee was concerned that the 'draconian' nature of criminal sanctions, particularly custodial sentences, may deter people from pursuing directorships.¹⁰⁸ The *Cooney Report* stated that 'the increased risk of going to gaol that comes with being a director is a disincentive to take on that role. People who would otherwise make good directors may decline a directorship because of this risk.'¹⁰⁹ The Committee cited the evidence of Robert Baxt, then Chairman of the Trade Practices Commission, on this point.¹¹⁰

Third, the Committee took the view that criminal enforcement of directors' duties had caused the law to 'fall into disrepute' as a result of judicial reluctance to impose 'draconian' custodial sentences and the use of 'modest fines' instead.¹¹¹ Prior to the 1993 reforms, fines for contraventions of directors' duties were subject to statutory maxima ranging from \$1000 to \$20 000.¹¹² The rarity of custodial sentences and insufficient levels of

¹⁰⁶ *Cooney Report*, above n 10, 142 [10.14], 162–3 [11.38], 175 [12.27], 188 [13.5], 189–90 [13.11]. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 1992, 2400–1 (Michael Duffy, Attorney-General).

¹⁰⁷ See, eg, Fisse, above n 14, 14; Trade Practices Commission, Submission to Cooney Committee, *Inquiry into the Social and Fiduciary Duties and Responsibilities of Company Directors*, 31 August 1988, 20; Evidence to Cooney Committee, Parliament of Australia, Canberra, 10 March 1989, 356 (Robert Baxt, Chairman, Trade Practices Commission); Institute of Directors in Australia, Submission No 19 to Cooney Committee, *Inquiry into the Social and Fiduciary Duties and Responsibilities of Company Directors*, 22 November 1989, 6; Business Council of Australia, Submission No 20 to Cooney Committee, *Inquiry into the Social and Fiduciary Duties and Responsibilities of Company Directors*, 22 November 1989, 30.

¹⁰⁸ *Cooney Report*, above n 10, 17 [2.37], 188 [13.6].

¹⁰⁹ *Ibid* 188 [13.7].

¹¹⁰ Evidence to Cooney Committee, Parliament of Australia, Canberra, 10 March 1989, 357 (Robert Baxt, Chairman, Trade Practices Commission), cited in *ibid* 187–8 [13.4]. See also Business Council of Australia, above n 107, 20. On the balance between regulation and entrepreneurialism generally, see *Cooney Report*, above n 10, 27 [3.21]–[3.22]; Evidence to Cooney Committee, Parliament of Australia, Melbourne, 22 March 1989, 415–18 (Ian Weber, Managing Director, Mayne Nickless Ltd), 423–4 (John Stone); Commonwealth, *Parliamentary Debates*, Senate, 17 December 1992, 5300 (Siegfried Spindler).

¹¹¹ *Cooney Report*, above n 10, 188 [13.6].

¹¹² *Corporations Act 1989* (Cth) s 1311, sch 3.

finances were noted a number of times in submissions and evidence to the Committee.¹¹³

The Cooney Committee viewed the civil penalty regime as the solution to the above concerns regarding existing criminal sanctions. Civil sanctions were seen as more appropriate for misconduct that was not genuinely criminal,¹¹⁴ and as less of a disincentive to prospective directors.¹¹⁵ In addition, civil sanctions were expected to overcome judicial reluctance regarding criminal sanctions — civil sanctions would be imposed more often than ‘draconian’ custodial sentences¹¹⁶ and pecuniary penalties would be set higher than ‘modest fines’, as a result of the new \$200 000 statutory maximum for civil pecuniary penalties.¹¹⁷ Civil enforcement was to replace criminal enforcement as the predominant mode of enforcement for the ‘general run of cases’¹¹⁸ and criminal liability would be reserved for more serious instances of misconduct.¹¹⁹ The policy of using criminal enforcement for more serious misconduct was also reflected in the terms of the 1992 Memorandum of Understanding between the ASC and the CDPP, which stated that ‘civil proceedings will not be used in substitution for criminal proceedings in matters of serious corporate crime.’¹²⁰

Current policy statements on the balance between civil and criminal enforcement continue to reflect the policy considerations that led to the enact-

¹¹³ See, eg, Evidence to Cooney Committee, Parliament of Australia, Sydney, 15 February 1989, 102 (Christopher Peters, Chief Executive, Company Directors’ Association of Australia), 155–6 (Neville Head, Chairman, New South Wales Branch Council of the Institute of Directors in Australia); Fisse, above n 14, 31; Evidence to Cooney Committee, Parliament of Australia, Canberra, 10 March 1989, 357 (Robert Baxt, Chairman, Trade Practices Commission); Evidence to Cooney Committee, Parliament of Australia, Melbourne, 22 March 1989, 416 (Richard Alston).

¹¹⁴ *Cooney Report*, above n 10, 80 [5.57], 142 [10.14], 190–1 [13.14]–[13.16]. See also above n 107 and accompanying text.

¹¹⁵ See *Cooney Report*, above n 10, 191 [12.13].

¹¹⁶ *Cooney Report*, above n 10, 188 [13.6], 190 [13.13]. See also above n 113 and accompanying text.

¹¹⁷ *Cooney Report*, above n 10, 188 [13.6], 191 [13.16]; Evidence to Cooney Committee, Parliament of Australia, Melbourne, 22 March 1989, 420 (Robert Hill). See also Commonwealth, *Parliamentary Debates*, Senate, 28 November 1991, 3617, in which Senator Graham Richardson incorporated the government’s response to the *Cooney Report* in Hansard.

¹¹⁸ *Cooney Report*, above n 10, 190 [13.13], quoting Fisse, above n 14, 15.

¹¹⁹ *Ibid* 189–90 [13.11], 190 [13.13], quoting Fisse above n 14, 13–15.

¹²⁰ ASC and CDPP, *Memorandum of Understanding between the Australian Securities Commission and the Director of Public Prosecutions* (22 September 1992) 1 [1.3] <http://download.asic.gov.au/media/1336904/DPP_MOU_1992.pdf>.

ment of the civil penalty regime. The 2006 Memorandum of Understanding between ASIC and the CDPP, like its 1992 predecessor, states that '[c]ivil proceedings will not be used in substitution for criminal proceedings in matters of serious corporate or financial services crime.'¹²¹ Similarly, ASIC's 2013 enforcement policy states that it 'pursue[s] substantial criminal remedies for the most serious misconduct'.¹²² Consistent with the rationale underpinning the *Cooney Report*, the Explanatory Memorandum to the Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 (Cth) states that '[t]he intention of the dual regime [of civil and criminal sanctions] is to give primacy to the civil penalty regime and retain criminal penalties for serious breaches of the Act.'¹²³ This policy consideration is also implicit in the text of the *Corporations Act 2001* (Cth), which, as detailed in Table 1, requires proof of additional fault elements (ie, more serious misconduct) in order to establish criminal liability.¹²⁴

B *Imposing Sanctions in Accordance with a Pyramidal Model of Enforcement*

Responsive regulation theory underpinned the enactment of the civil penalty regime in 1993. The *Cooney Report* emphasised the need to have a range of civil¹²⁵ and criminal¹²⁶ sanctions of varying degrees of severity which can be

¹²¹ ASIC and CDPP, *Memorandum of Understanding: Australian Securities and Investments Commission and Commonwealth Director of Public Prosecutions* (1 March 2006) 2 [2.5] <http://download.asic.gov.au/files/mou_dpp_mar_2006.pdf>. The Memorandum of Understanding between ASIC and the CDPP is aimed at, *inter alia*, ensuring that all matters that are suitable for criminal prosecution are the subject of criminal prosecution rather than only civil enforcement. The Memorandum requires that ASIC consult with the CDPP prior to making an application for a civil penalty order and that ASIC refer all matters where it believes a criminal offence may have been committed to the CDPP to assess whether the matter is suitable for prosecution: at 2–3 [4]–[5].

¹²² ASIC, 'ASIC's Approach to Enforcement' (Information Sheet No 151, ASIC, September 2013) 5.

¹²³ Explanatory Memorandum, Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 (Cth) 60 [2.128]. This Bill inserted s 601UAA(1) into the *Corporations Act 2001* (Cth). Section 601UAA(1) sets out the duties of officers of licensed trustee companies, which closely resemble the directors' duties contained in ss 180–4.

¹²⁴ See, eg, ASIC, Submission No 49 to Senate Economics References Committee, *Inquiry into Penalties for White-Collar Crime*, April 2016, 18 [65], stating that ASIC 'undertake[s] civil penalty proceedings where the evidence indicates that the defendants have engaged in serious misconduct, but where there is no evidence of the additional elements (such as dishonesty) necessary to establish a criminal offence.'

¹²⁵ *Cooney Report*, above n 10, 142 [10.14], 189–90 [13.11], 190–1 [13.14], 194 [13.27].

¹²⁶ *Ibid* 142 [10.14], 189 [13.8]–[13.9], 189–90 [13.11], 193 [13.23].

tailored to the circumstances of the misconduct.¹²⁷ In particular, it was envisaged that sanctions would be imposed in accordance with a pyramidal model of enforcement.¹²⁸ This Part of the article briefly explains responsive regulation and pyramidal enforcement and discusses how they continue to inform current policies on the enforcement of corporate law.¹²⁹

The basic concept of responsive regulation is that regulation is most likely to be effective when it is responsive to the regulatory environment and the actions of the regulated entity.¹³⁰ Responsive regulation theory has been applied in a range of different areas of regulation in Australia and overseas, including public health and safety, social services and welfare, environmental protection, transport, communications and media, and corporations and finance.¹³¹ Pyramidal enforcement models, which form part of the broader theory of responsive regulation,¹³² are comprised of two core concepts, one prescriptive and the other predictive.

The prescriptive concept (which is the vertical aspect of the pyramid) is that a regulator should possess a range of sanctions and regulatory strategies that are hierarchically ordered according to their degree of interventionism

¹²⁷ Ibid 142 [10.14], 189 [13.9], 191 [13.14], 192–4 [13.24], [13.27].

¹²⁸ Ibid 190 [13.13]; Fisse, above n 14, 15, citing one of the foundational texts on responsive regulation: John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (State University of New York Press, 1985). See also Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, 1993) 140–5.

¹²⁹ For a full explanation, see Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992); Braithwaite, *To Punish or Persuade*, above n 128. For some more recent expositions of responsive regulation theory, see, eg, Christine Parker, 'Twenty Years of Responsive Regulation: An Appreciation and Appraisal' (2013) 7 *Regulation and Governance* 2; John Braithwaite, 'Limits on Violence; Limits on Responsive Regulatory Theory' (2014) 36 *Law and Policy* 432; Jonathan Kolieb, 'When to Punish, When to Persuade and When to Reward: Strengthening Responsive Regulation with the Regulatory Diamond' (2015) 41 *Monash University Law Review* 136; John Braithwaite, 'The Essence of Responsive Regulation' (2011) 44 *University of British Columbia Law Review* 475; Robert Baldwin and Julia Black, 'Really Responsive Regulation' (2008) 71 *Modern Law Review* 59; John Braithwaite, 'Responsive Regulation and Developing Economies' (2006) 34 *World Development* 884.

¹³⁰ Ayres and Braithwaite, above n 129, 4.

¹³¹ Mary Ivec et al, 'Applications of Responsive Regulatory Theory in Australia and Overseas: Update' (Occasional Paper No 23, Regulatory Institutions Network, Australian National University, March 2015).

¹³² See generally Braithwaite, 'The Essence of Responsive Regulation', above n 129; Parker, above n 129, 4.

(ie, severity or intensity) and, as a general presumption,¹³³ should attempt sanctions and strategies of a lesser degree of interventionism before escalating to more interventionist sanctions and strategies, which are only used if the less interventionist sanctions and strategies fail.¹³⁴ The regulator escalates up the hierarchy of sanctions and strategies only as necessary to achieve compliance on the part of the regulated entity.¹³⁵

The predictive concept is the horizontal aspect of the enforcement pyramid. If a regulator follows the prescriptive aspect of pyramidal enforcement, the theory predicts that there will be an inverse correlation between the severity of the sanction or strategy and the frequency with which the sanction or strategy is applied (ie, the more severe the sanction or strategy, the less frequently it is applied).¹³⁶ This prediction is, broadly speaking, based on rational choice theory, which assumes that most actors are rational and that rational actors will weigh the gains of breaking the law against the costs of being subjected to law enforcement. As the sanctions become more severe, the rationality of breaking the law decreases and the frequency of misconduct that attracts such sanctions decreases accordingly.¹³⁷

The following is a basic example of a pyramid of sanctions, depicting the prescriptive vertical aspect and predictive horizontal aspect.

¹³³ Braithwaite, 'Responsive Regulation and Developing Economies', above n 129, 886–7; Braithwaite, 'The Essence of Responsive Regulation', above n 129, 482–3; Ayres and Braithwaite, above n 129, 29.

¹³⁴ Ayres and Braithwaite, above n 129, 5–6, 35–7.

¹³⁵ Ibid; Braithwaite, 'The Essence of Responsive Regulation', above n 129, 483–4.

¹³⁶ Ayres and Braithwaite, above n 129, 35, 39–41.

¹³⁷ See *ibid* 19–53; Braithwaite, 'Responsive Regulation and Developing Economies', above n 129, 888. On rational choice theory in relation to corporate misconduct generally, see, eg, Raymond Paternoster and Sally Simpson, 'A Rational Choice Theory of Corporate Crime' in Ronald V Clarke and Marcus Felson (eds), *Routine Activity and Rational Choice: Advances in Criminological Theory* (Transaction Publishers, 2004) vol 5, 37; Raymond Paternoster and Sally Simpson, 'Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime' (1996) 30 *Law and Society Review* 549; Nicole Leeper Piquero, M Lyn Exum and Sally S Simpson, 'Integrating the Desire-For-Control and Rational Choice in a Corporate Crime Context' (2005) 22 *Justice Quarterly* 252.

Figure 1: Example of a Pyramid of Sanctions.

This image comes from Ian Ayres and John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (Oxford University Press, 1992) 35

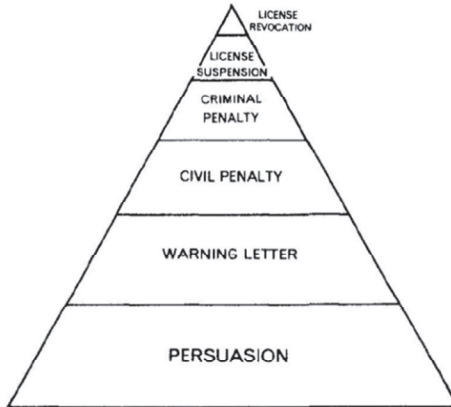


Figure 2.1. Example of an enforcement pyramid. The proportion of space at each layer represents the proportion of enforcement activity at that level.

Pyramidal enforcement theory is concerned only with the severity and frequency of sanctions, as depicted in Figure 1, and regulatory strategies.¹³⁸ ‘Sanction’ refers to the particular enforcement outcome, while ‘regulatory strategy’ refers to the regulatory method via which the outcome was achieved, such as: ‘command regulation with non-discretionary punishment’ (eg, mandatory sanctions imposed pursuant to legislation); ‘command regulation with discretionary punishment’ (eg, sanctions imposed pursuant to legislation but subject to judicial discretion); ‘enforced self-regulation’ (eg, enforceable undertakings); and ‘self-regulation’ (eg, organisational codes of conduct).¹³⁹ Pyramidal enforcement theory is not concerned with legal jurisdictions, such as criminal, civil and administrative law. Jurisdictions are only relevant to the extent that they reflect upon the severity of the sanctions and regulatory strategies utilised within jurisdictions. In Figure 1 ‘criminal penalty’ is situated above ‘civil penalty’ based on the assumption that criminal penalties will typically be more severe than civil ones, not based on the nature of the

¹³⁸ Ayres and Braithwaite, above n 129, 35–41. For an example of a pyramid of regulatory strategies, see at 39.

¹³⁹ *Ibid* 39.

jurisdictions. Indeed, as Figure 1 shows, sanctions that can be imposed via administrative means, such as licence suspensions and revocations,¹⁴⁰ may be regarded as more severe than criminal and civil sanctions. In designing a model pyramid of sanctions, the relevant criterion is the severity of each type of sanction, not the jurisdictions to which they belong.¹⁴¹

The Cooney Committee was strongly influenced by responsive regulation theory, in particular by the concept of a pyramidal model of sanctions. Civil sanctions were recommended with a view to creating a ‘pyramid of enforcement ... with civil measures at the base of the pyramid for the general run of cases, and criminal liability at the apex for the more exceptional instances of law-breaking.’¹⁴² It was envisaged that civil sanctions, which were assumed to be less severe than criminal sanctions,¹⁴³ would occupy a lower rung on the enforcement pyramid and therefore be imposed more frequently than criminal sanctions, as discussed in Part III(A). The *Cooney Report* and other extrinsic material also indicated an intention that, within the criminal and civil jurisdictions, the particular sanctions would be hierarchically ordered according to the severity of the misconduct. Standalone declarations of contravention would be imposed for ‘non-serious’ breaches, while civil pecuniary penalties or disqualification orders would be imposed for ‘serious’ breaches.¹⁴⁴ Criminal sanctions would range from fines, to community service orders, to custodial sentences, depending on the severity of the offence.¹⁴⁵

Responsive regulation and pyramidal enforcement theory continue to inform current policies on the enforcement of corporate law. ASIC’s enforcement policy states that it ‘can pursue a variety of enforcement remedies, depending on the seriousness and consequences of the misconduct’ and ‘will

¹⁴⁰ See ASIC, *Licensing: Administrative Action against Financial Services Providers*, Regulatory Guide 98, July 2013; ASIC, *Licensing: Administrative Action against Persons Engaging in Credit Activities*, Regulatory Guide 218, November 2010.

¹⁴¹ See Figure 5 in below Part IV(B)(2) for an example of a model pyramid of sanctions for contraventions of directors’ duties provisions of the *Corporations Act 2001* (Cth). For the reasons discussed, the sanctions are not arranged along strictly jurisdictional lines in Figure 5.

¹⁴² *Cooney Report*, above n 10, 190 [13.13], quoting Fisse, above n 14, 15.

¹⁴³ Criminal sanctions imposed for contraventions of directors’ duties are typically more severe than civil sanctions, although one exception is defendants who are discharged without conviction subject to a bond: see the discussion following Figure 5 in below Part IV(B)(2).

¹⁴⁴ Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth) [39]; Attorney-General’s Department (Cth), *Corporate Law Reform Bill 1992: Draft Legislation and Explanatory Paper* (Australian Government Publishing Service, 1992) 296–8.

¹⁴⁵ *Cooney Report*, above n 10, 189 [13.8]–[13.9], 193 [13.23], quoting Fisse above n 14, 13, 31.

pursue the enforcement remedies best suited to the circumstances of the case'.¹⁴⁶ Recent reports and submissions by ASIC have emphasised that it is '[c]entral to effective enforcement' to have a 'range of penalties' that allow 'ASIC to calibrate [its] response with sanctions of greater or lesser severity commensurate with the misconduct'.¹⁴⁷ ASIC has recently commented that:

the introduction of civil penalties provided another step in the 'pyramid of enforcement' whereby serious misconduct (such as director negligence) could be met with substantial penalties, but without the moral opprobrium of a criminal conviction or a custodial sentence.¹⁴⁸

The role that responsive regulation and pyramidal enforcement play in ASIC's current enforcement policy is recognised in the final report of the Senate Economics References Committee's 2014 Inquiry into the Performance of ASIC:

The sanctions made available to ASIC in legislation, and the enforcement policy developed and published by ASIC, reflect many aspects of responsive regulation. ASIC's enforcement pyramid includes: punitive action (prison sentences, criminal or civil monetary penalties), protective action (such as disqualifying orders), preservative action (such as court injunctions), corrective action (such as corrective advertising), compensation action and negotiated resolution (such as an enforceable undertaking).¹⁴⁹

The report further notes that '[t]he enforcement pyramid model of sanctions of escalating severity is a sound foundation for enabling a regulator to address corporate misconduct. The application of this model to Australia's corporate laws has generally proven effective'.¹⁵⁰ The role of responsive regulation in relation to ASIC's enforcement policies and practices has also been widely acknowledged by academic commentators, in particular the idea that sanctions should be imposed in accordance with a pyramidal model of enforcement.¹⁵¹

¹⁴⁶ ASIC, 'ASIC's Approach to Enforcement', above n 122, 4.

¹⁴⁷ ASIC, 'Penalties for Corporate Wrongdoing' (Report No 387, ASIC, March 2014) 4 [2]; ASIC, Submission to Financial System Inquiry Committee, *Financial System Inquiry*, April 2014, 45 [165].

¹⁴⁸ ASIC, Submission No 49 to Senate Economics References Committee, above n 124, 17 [58].

¹⁴⁹ Senate Economics References Committee, above n 47, 29–30 [4.12] (citations omitted).

¹⁵⁰ *Ibid* 279 [17.50].

¹⁵¹ See, eg, Michelle Welsh, 'Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia' (2014) 42 *Federal Law Review* 217, 231–2; Comino,

C *Setting Sanctions at a Sufficient Level to Deter Corporate Misconduct*

A key expectation underlying the Cooney Committee's reasoning in recommending the civil penalty regime was that civil monetary sanctions would be set at a higher level than the 'modest fines' that had previously been imposed by the judiciary.¹⁵² The *Cooney Report* emphasised that penalties 'will have no deterrent value if their level is insufficient'.¹⁵³ The government's response to the *Cooney Report* similarly emphasised the importance of setting civil monetary sanctions at an appropriate level:

the Government is concerned to demonstrate clearly the seriousness with which it regards directors' duties. The Government accordingly proposes that the maximum monetary penalty for breach of section 232 [the predecessor of ss 180–3] should be set at \$200 000 ...¹⁵⁴

Concerns were also raised in evidence to the Cooney Committee regarding the level of custodial sentences and the prospect of recidivism, with a number of witnesses and committee members suggesting that civil penalties may prove to be a more effective deterrent than custodial sentences.¹⁵⁵ Senator Robert Hill noted that it had been put to the Committee that 'these matters

'James Hardie', above n 76, 202–5; Matthew Lees, 'Civil Penalties and Procedural Protections' (2013) 87 *Australian Law Journal* 404, 412–14; Michelle Welsh, 'Civil Penalties and Responsive Regulation: The Gap Between Theory and Practice' (2009) 33 *Melbourne University Law Review* 908 (in this article, the author examines public enforcement of ss 181–4 of the *Corporations Act 2001* (Cth) to argue that this enforcement is inconsistent with responsive regulation); Peta Spender, 'Negotiating the Third Way: Developing Effective Process in Civil Penalty Litigation' (2008) 26 *Company and Securities Law Journal* 249, 250–1; Vicky Comino, 'High Court Relegates Strategic Regulation and Pyramidal Enforcement to Insignificance' (2005) 18 *Australian Journal of Corporate Law* 48, 57–60; Helen Bird et al, 'Strategic Regulation and ASIC Enforcement Patterns: Results of an Empirical Study' (2005) 5 *Journal of Corporate Law Studies* 191.

¹⁵² *Cooney Report*, above n 10, 188 [13.6], 191 [13.16]; Evidence to Cooney Committee, Parliament of Australia, Melbourne, 22 March 1989, 420 (Robert Hill); Commonwealth, *Parliamentary Debates*, Senate, 28 November 1991, 3611, 3617. See also above n 113 and accompanying text.

¹⁵³ *Cooney Report*, above n 10, 191 [13.16].

¹⁵⁴ The response was incorporated in Hansard by Graham Richardson and the quote appears in Commonwealth, *Parliamentary Debates*, Senate, 28 November 1991, 3617.

¹⁵⁵ Evidence to Cooney Committee, Parliament of Australia, Sydney, 15 February 1989, 155–7. Relevant witnesses and committee members were: Colin Harper, President, Institute of Directors in Australia; Neville Head, Chairman, New South Wales Branch Council of the Institute of Directors in Australia; Bernard Cooney; and Patricia Giles. See also Evidence to Cooney Committee, Parliament of Australia, Sydney, 15 February 1989, 102 (Christopher Peters, Chief Executive, Company Directors' Association of Australia).

[directors' duties matters] should really be seen more as a civil type of action than a criminal action and that large monetary penalties would probably prove the most effective deterrent for breach.¹⁵⁶

It remains a central focus of current enforcement policies that sanctions be set at a sufficient level to deter corporate misconduct, with a particular emphasis on general deterrence.¹⁵⁷ ASIC's enforcement policy states that it 'use[s] enforcement to deter misconduct',¹⁵⁸ and stresses the 'high [civil] penalties that apply if the case is proved'¹⁵⁹ and 'high monetary penalties'¹⁶⁰ imposed in response to serious misconduct. The policy states that civil pecuniary penalties can be up to \$200 000¹⁶¹ and dishonest breaches of the duty of good faith may incur fines of up to \$340 000.¹⁶² In its submission to the Financial System Inquiry, ASIC asserted that '[c]entral to effective enforcement are penalties set at an appropriate level',¹⁶³ and recommended, among other things, a review of the \$200 000 statutory maximum for civil penalties, which was set in 1993 and has not been adjusted for inflation.¹⁶⁴

Current policy statements also emphasise the magnitude and deterrence value of custodial sentences. ASIC's enforcement policy highlights the 'substantial criminal remedies' that are imposed for 'the most serious misconduct', giving the example of imprisonment for up to five years as a result of

¹⁵⁶ Evidence to Cooney Committee, Parliament of Australia, Melbourne, 22 March 1989, 420.

¹⁵⁷ For a detailed discussion of specific and general deterrence, see Ashworth, above n 20, 83–8, 105–9.

¹⁵⁸ ASIC, 'ASIC's Approach to Enforcement', above n 122, 1.

¹⁵⁹ Ibid 5. This statement is incongruous with ASIC's submission to the 2015–16 Senate Economics References Committee's Inquiry into Penalties for White-Collar Crime, which states, '[h]istorically, the courts have tended to apply civil penalties well below the maximum possible, reducing their impact and creating gaps between the levels of sanction the community expects should be handed down and what is given in practice': ASIC, Submission No 49 to Senate Economics References Committee, above n 124, 15 [46].

¹⁶⁰ ASIC, 'ASIC's Approach to Enforcement', above n 122, 4.

¹⁶¹ Ibid 6. In theory, civil pecuniary penalties can be significantly higher than \$200 000, as this is the statutory maximum for a *single* contravention of a civil penalty provision of the *Corporations Act 2001* (Cth). However, pecuniary penalties imposed on defendants who have engaged in multiple contraventions of directors' duties rarely rise above the maximum for a single contravention: see Part IV(B)(3) and Table 6 in below Part IV(B)(3).

¹⁶² ASIC, 'ASIC's Approach to Enforcement', above n 122, 5. The figure of \$340 000 is based on a superseded version of the *Crimes Act 1914* (Cth). The maximum fine for a contravention of the duty of good faith is 2000 penalty units, as set out in the sch 3 of the *Corporations Act 2001* (Cth), and the penalty unit is currently set at \$180 pursuant to s 4AA of the *Crimes Act 1914* (Cth). Therefore, the current statutory maximum fine is \$360 000.

¹⁶³ ASIC, Submission to Financial System Inquiry Committee, above n 147, 45 [165].

¹⁶⁴ Ibid 46 [167].

insolvent trading or a breach of the duty of good faith.¹⁶⁵ In its submission to the 2015–16 Senate Inquiry into Penalties for White-Collar Crime, the CDDP commented that “general deterrence” is the primary sentencing objective’ and that, as a result of sentencing principles associated with this objective, ‘individuals who are convicted of serious white-collar crimes are routinely sentenced to significant terms of imprisonment with time to serve.’¹⁶⁶ The CDDP went on to state that ‘[a]rguably, nothing deters would-be white-collar criminals more than a realistic prospect of imprisonment.’¹⁶⁷

The following Part of this article examines the above policy statements with reference to the empirical evidence, along with those relating to the primacy of civil enforcement and the application of a pyramidal model of sanctions, as discussed in Parts III(A) and III(B) respectively. The evidence indicates that the enforcement of directors’ duties by statutory authorities diverged significantly from these policy considerations during the 10-year study period.

IV EMPIRICAL STUDY ON THE ENFORCEMENT OF DIRECTORS’ DUTIES BY STATUTORY AGENCIES IN AUSTRALIA

This Part of the article empirically analyses the extent to which the policy considerations relating to the enforcement of directors’ duties by statutory agencies, as discussed in Part III, have been applied in practice. This analysis is conducted by reference to a 10-year dataset of civil, criminal and administrative matters brought by ASIC and the CDDP that were finalised between 1 January 2005 and 31 December 2014. It begins with an explanation of the method used to collect and classify the data and then presents the research findings as they relate to each of the three key policy considerations discussed in Part III.

¹⁶⁵ ASIC, ‘ASIC’s Approach to Enforcement’, above n 122, 5.

¹⁶⁶ CDDP, Submission No 53 to Senate Economics References Committee, *Inquiry into Penalties for White-Collar Crime*, 13 April 2016, 3. The judgments cited in support of this statement are mostly insider trading and fraud-related matters, although one of the fraud matters also involved contraventions of directors’ duties. The data presented in below Part IV(B)(3) suggests that this statement is not an accurate representation of criminal enforcement as it relates to directors’ duties, due to the high proportion of custodial sentences that were fully suspended.

¹⁶⁷ CDDP, Submission No 53 to Senate Economics References Committee, above n 166, 3 (citations omitted).

A Research Method

1 Civil and Criminal Matters

The authors' research located 27 civil matters (involving 78 defendants) and 72 criminal matters (involving 83 defendants)¹⁶⁸ brought by ASIC and the CDPP in which a final judicial determination was made between 1 January 2005 and 31 December 2014 as to whether or not there was a contravention of the following provisions: ss 180–4, 191, 195, 209 and 588G of the *Corporations Act 2001* (Cth). The dataset of civil and criminal matters only includes those matters in which a final judicial determination was made; it does not include interlocutory proceedings or matters that were discontinued or settled.

The relevant date for the purposes of inclusion in the dataset was the date of the final judicial determination, not the date of commencement of proceedings. In a number of instances, the proceedings commenced prior to the study period (ie, prior to 1 January 2005), as the enforcement processes in directors' duties matters can be protracted. In respect of superior court matters, the average duration of the civil and criminal enforcement processes from the date of the earliest contravention documented in the judgment to the final determination was 6.9 and 7.9 years respectively.¹⁶⁹

In order to achieve comprehensive coverage of civil and criminal directors' duties matters, it was necessary to collect the data using case law databases and freedom of information legislation. An alternative method would have been to rely on ASIC's media releases. However, the authors' research shows that, while 100 per cent of civil matters were covered in ASIC's media releases, only 88.88 per cent of criminal matters were covered. Furthermore, the information contained in ASIC's media releases is general in nature and a number of discrepancies between media releases and court judgments were

¹⁶⁸ See Table 3 in below Part IV(B)(1). The ratio of defendants to matters was higher in respect of civil matters because civil matters often had multiple defendants whereas criminal matters usually only had one.

¹⁶⁹ The term 'superior court' refers to supreme courts, courts of appeal and federal courts. Data on the total duration of the enforcement process from the earliest contravention to the final judgment was not available in regard to matters in inferior courts, that is, district or county courts and local or magistrates' courts. Data on inferior court matters, which was obtained via an application to the CDPP under the *Freedom of Information Act 1982* (Cth), indicated the date the matters were received by the CDPP and the date they were completed, but did not include the dates of the contraventions. The average time period between the CDPP's receipt and completion of inferior court matters was 3.1 years. ASIC does not have the power to bring civil proceedings for contraventions of directors' duties in inferior courts: see below n 170.

identified. As such, ASIC's media releases cannot be regarded as a comprehensive source of data on the civil and criminal enforcement of directors' duties.

The dataset contains judgments from superior courts, encompassing supreme courts, courts of appeal and federal courts, and judgments from inferior courts, encompassing district or county courts and local or magistrates' courts. Superior court judgments were identified using the LexisNexis AU, Westlaw AU, Australasian Legal Information Institute ('AustLII') and JADE Professional case law databases. A freedom of information request to the CDPP pursuant to the *Freedom of Information Act 1982* (Cth) was used to obtain data in relation to inferior court judgments, as such judgments are not usually available on case law databases.¹⁷⁰ In some instances, ASIC's media releases were consulted to confirm or supplement the data obtained via the case law research and freedom of information application.

In total, the dataset contains 51 superior court matters (involving 107 defendants) and 48 inferior court matters (involving 54 defendants).¹⁷¹ 'Matters' and 'defendants' have been classified as follows. Directors' duties proceedings are typically divided into separate judgments for liability and penalties. Consequently, the judgments fall into three broad categories: 'unproven liability judgments' (ie, judgments in which ASIC or the CDPP fails to establish the liability of any of the defendants); 'proven liability judgments' (ie, judgments in which ASIC or the CDPP succeeds in establishing the liability of all or some of the defendants); and 'penalty judgments' (ie, judgments in which sanctions are imposed on defendants who were found liable in proven liability judgments). The 99 'matters' in the dataset are comprised of 'penalty judgments'¹⁷² — which are referred to throughout the article as

¹⁷⁰ ASIC does not have the power to bring civil proceedings for contraventions of directors' duties in inferior courts. Section 58AA in conjunction with ss 1317E, 1317G, 1317H and 206C–206E of the *Corporations Act 2001* (Cth), provides that only superior courts may make civil declarations of contravention and pecuniary penalty, compensation and disqualification orders in relation to contraventions of directors' duties.

¹⁷¹ The ratio of defendants to matters was higher in respect of superior court matters because civil matters (which were only litigated in superior courts) often had multiple defendants whereas criminal matters usually only had one: see below Part IV(B)(1).

¹⁷² To avoid inflation of the number of proven matters, the dataset does not separately count penalty judgments that were handed down separately but substantively constituted a single judgment. For example, the three penalty judgments in the proceedings involving Elm Financial Services Pty Ltd, handed down on 11, 13 and 21 of October 2005, have been counted as one rather than three proven matters: *Australian Securities and Investments Commission v Elm Financial Services Pty Ltd* (2005) 55 ACSR 411; *Australian Securities and Investments Commission v Elm Financial Services Pty Ltd* [2005] NSWSC 1033

'proven matters' — and 'unproven liability judgments' — which are referred to as 'unproven matters'. 'Proven liability judgments' have not been included in the number of matters, as this would artificially inflate the number of matters by counting each proven matter twice, once for the 'proven liability judgment' and once for the 'penalty judgment'. However, where a 'proven liability judgment' involved some defendants who were not found liable, these defendants have been counted in the number of defendants. Defendants have been classified as follows: 'liable defendants in proven matters' (indicating defendants in 'penalty judgments'); 'non-liable defendants in proven matters' (indicating defendants who were not found liable in 'proven liability judgments'); and 'defendants in unproven matters' (indicating defendants in 'unproven liability judgments').¹⁷³

Only 'penalty judgments' and 'unproven liability judgments' that involved a final judicial determination as to the penalty to be imposed on the defendant (in the case of 'penalty judgments') or the defendant's liability (in the case of 'unproven liability judgments') have been counted as 'matters'. Thus, 'penalty judgments' and 'unproven liability judgments' that were overridden by subsequent appeals have not been counted as separate 'matters'. For example, in the proceedings involving Fortescue Metals Group Ltd, CEO Andrew Forrest was found not liable at first instance,¹⁷⁴ liable on appeal to the Full Federal Court,¹⁷⁵ and not liable on appeal to the High Court.¹⁷⁶ These proceedings have been counted as one 'unproven matter' for the final 'unproven liability judgment' of the High Court.

In relation to proceedings in which some defendants appealed but others did not, each judgment that was the final judgment for one or more of the defendants was counted as a separate 'matter'. For example, in the proceedings relating to James Hardie Industries Ltd, the CEO Peter MacDonald did not appeal the first instance decision¹⁷⁷ and the CFO Phillip Morley only appealed to the New South Wales Court of Appeal,¹⁷⁸ while the remaining

(13 October 2005); *Australian Securities and Investments Commission v Elm Financial Services Pty Ltd* (2005) 55 ACSR 544.

¹⁷³ See Tables 3 and 4 in below Part IV(B)(1).

¹⁷⁴ *Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5]* (2009) 264 ALR 201.

¹⁷⁵ *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364.

¹⁷⁶ *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486.

¹⁷⁷ This is set out in *Gillfillan v Australian Securities and Investments Commission* (2012) 92 ACSR 460, 471 [39], 472 [50].

¹⁷⁸ *Ibid* 471 [39], 474 [55]–[57].

eight defendants (the seven non-executive directors and the defendant who was both the company secretary and general counsel) appealed to the High Court.¹⁷⁹ These proceedings have been counted as three ‘proven matters’, one for the MacDonald ‘penalty judgment’, one for the Morley ‘penalty judgment’, and one for the ‘penalty judgment’ relating to the eight remaining defendants.

2 Administrative Matters

As discussed in Part II(B)(3), the two main types of administrative enforcement actions relevant to enforcement of directors’ duties are disqualification orders pursuant to s 206F of the *Corporations Act 2001* (Cth) and enforceable undertakings pursuant to s 93AA of the *Australian Securities and Investments Commission Act 2001* (Cth). The authors’ research identified 199 administrative matters (involving 199 defendants) that expressly involved contraventions of directors’ duties,¹⁸⁰ including 191 final disqualification orders made pursuant to s 206F and eight enforceable undertakings accepted pursuant to s 93AA.

Data on the overall number of s 206F orders was requested from ASIC and provided in the form of a ‘Corporations Register’ setting out company directors and other officers that have been disqualified under the *Corporations Act 2001* (Cth).¹⁸¹ Based on this ‘Corporations Register’ and the case law data described in Part IV(A)(1), it is estimated that there were 610 final disqualification orders made pursuant to s 206F of the *Corporations Act 2001* (Cth) during the 10-year study period.¹⁸² Of these 610 final orders, 15 were identi-

¹⁷⁹ Ibid 471 [39], 474 [55]–[57], 474–5 [61]–[63].

¹⁸⁰ Orders pursuant to s 206F of the *Corporations Act 2001* (Cth) appear to be made on an individual basis, which explains why the number of defendants is the same as the number of matters: at s 206F(3); *Corporations Regulations 2001* (Cth) sch 2 form 587. Enforceable undertakings pursuant to s 93AA of the *Australian Securities and Investments Commission Act 2001* (Cth) sometimes involve multiple individuals but each of the eight undertakings in the dataset involved only one individual.

¹⁸¹ Section 1274AA of the *Corporations Act 2001* (Cth) provides that ASIC must keep a register of persons who have been disqualified from managing corporations under ss 206C–206F. The ‘Corporations Register’ provided by ASIC did not expressly mention s 1274AA but it states that the ‘Corporations Register refers to disqualified company directors and other officers and banned securities representatives or futures representatives under the *Corporations Act 2001* (Cth)’. Presumably the ‘Corporations Register’ provided by ASIC is therefore sourced from the register that ASIC is required to keep pursuant to s 1274AA.

¹⁸² The number of s 206F orders was estimated by subtracting the number of civil disqualification orders identified in the case law research described in above Part IV(A)(1) from the total number of disqualification orders listed in the ‘Corporations Register’ provided by ASIC. While contraventions of directors’ duties are not a legal precondition for civil disqualification orders pursuant to ss 206C–206EB of the *Corporations Act 2001* (Cth), the case law indicates

fied¹⁸³ as appeals to the Administrative Appeals Tribunal and one as an appeal to the Full Federal Court.¹⁸⁴ However, the 'Corporations Register' provided by ASIC did not identify the basis for the s 206F orders, which, as discussed in Part II(B)(3), may or may not involve contraventions of directors' duties.

ASIC's media releases are the only currently available source of data on the basis for orders made pursuant to s 206F, with the exception of appeals, some of which are reported on case law databases.¹⁸⁵ During the study period, there were 263 orders made pursuant to s 206F that were reported in ASIC's media releases and a further six orders reported on case law databases that were not reported in media releases. Of these 269 reported orders, contraventions of

that these powers are rarely employed in matters that do not involve contraventions of directors' duties. Thus, the number of s 206F orders can be estimated with a reasonable degree of accuracy by subtracting civil disqualification orders in directors' duties matters from the total number of orders listed in the 'Corporations Register'. The estimate of 610 final disqualification orders made pursuant to s 206F (during a 10-year period) is broadly proportional to the number of s 206F orders reported in ASIC's annual reports. ASIC's annual reports in 2008–9, 2011–12, 2012–13, 2013–14 and 2014–15 specifically identified the number of orders made by ASIC pursuant to s 206F, which came to a total of 292 (during a five-year period), a little under half of 610.

¹⁸³ There is no comprehensive source of publicly available data on appeals of s 206F orders. Three sources were searched for appeals of s 206F orders, including: (1) ASIC's 'Corporations Register'; (2) the case law databases referred to in above Part IV(A)(1); and (3) ASIC's media releases. Each of these sources identified some appeals that were not identified in the other two sources, indicating that there is not one single source that covers all of the appeals. It also seems unlikely that the three sources collectively provide comprehensive coverage of appeals. One would expect the true number of appellate disqualification orders pursuant to s 206F to be higher than 16 out of 610, given the high stakes involved for the disqualified persons.

¹⁸⁴ In addition to these 16 appeals, which either affirmed or varied ASIC's first instance decisions, it was possible to identify five appeals to the Administrative Appeals Tribunal in which ASIC's first instance orders were quashed. It seems unlikely that this represents the true number of appeals that resulted in ASIC's first instance orders pursuant to s 206F being quashed.

¹⁸⁵ In regard to first instance orders made by ASIC pursuant to s 206F of the *Corporations Act 2001* (Cth), the form 587s ('Notice of Disqualification from Managing Corporations') — issued to each of the defendants by ASIC pursuant to s 206F(3) — are available online from the ASIC Connect website at a price of \$38 per certified copy: see ASIC, *Banned and Disqualified Register* (27 June 2016) <<http://asic.gov.au/online-services/search-asics-registers/banned-and-disqualified/>>. However, form 587 does not indicate the basis for the disqualification order: see *Corporations Regulations 2001* (Cth) sch 2 form 587. The basis for the order is instead set out in form 5249 ('Notice to Demonstrate Why Disqualification Should Not Occur') issued to the defendants pursuant to s 206F(1)(b)(i): see *Corporations Regulations 2001* (Cth) sch 2 form 5249. Yet the form 5249s are not available on the ASIC Connect website, which is why ASIC's media releases are the only available source of data on the basis for s 206F orders.

directors' duties were expressly identified¹⁸⁶ as the basis, or a part of the basis, for the order in relation to 191 of the orders. Thus, there were *at least* 191 final orders made pursuant to s 206F involving contraventions or suspected¹⁸⁷ contraventions of directors' duties. However, given the significant proportion of the 269 reported orders that expressly involved contraventions of directors' duties (191 of 269, or about 71 per cent), it is likely that the true number of s 206F orders involving contraventions of directors' duties was considerably higher than 191, keeping in mind that the 269 reported orders represent only about 44 per cent of the estimated total of 610 orders. Since the main precondition for an order pursuant to s 206F is that the person in question has been an officer of two or more failed corporations within the previous seven years,¹⁸⁸ it is not surprising that a significant proportion of such matters involve contraventions of directors' duties.

The data on enforceable undertakings presented in this article was collected from ASIC's Enforceable Undertakings Register.¹⁸⁹ From 1 January 2005 to 31 December 2014, ASIC accepted 26 enforceable undertakings from directors and 16 enforceable undertakings from directors in conjunction with companies. Of the 26 enforceable undertakings given by directors, eight of the undertakings (each involving one director) expressly identified contraventions of directors' duties as the misconduct, or a part of the misconduct, that gave rise to the undertaking.¹⁹⁰ None of the 16 enforceable undertakings given by directors in conjunction with companies expressly identified contraventions of directors' duties as a basis for the undertaking.

¹⁸⁶ ASIC's media releases rarely cited the statutory section numbers (eg, ss 180 or 588G) but it was clear from the terminology used in the relevant media releases (eg, 'breach of duty of care and diligence' or 'insolvent trading') that the orders in the dataset involved contraventions or suspected contraventions of directors' duties. Many of the other orders reported in ASIC's media releases implied that there had been contraventions of directors' duties, but these have not been included in the dataset due to lack of certainty.

¹⁸⁷ As administrative hearings by ASIC are not subject to the rules of evidence, contraventions of directors' duties do not need to be proven on the balance of probabilities or beyond a reasonable doubt in order to form part of the basis for an order pursuant to s 206F of the *Corporations Act 2001* (Cth): see above Part II(B)(3).

¹⁸⁸ See above Part II(B)(3).

¹⁸⁹ The data on enforceable undertakings presented in this article is a subset of the data presented in the following working paper: Helen Bird et al, 'An Empirical Analysis of the Use of Enforceable Undertakings by the Australian Securities and Investments Commission between 1 July 1998 and 31 December 2015' (Working Paper No 106, Centre for International Finance and Regulation, April 2016).

¹⁹⁰ The statutory section numbers were cited in six of these enforceable undertakings, while in the other two undertakings the descriptions of the misconduct expressly indicated contraventions of directors' duties.

The eight enforceable undertakings involving contraventions of directors' duties resulted in various disqualification outcomes, including undertakings not to: manage corporations; give financial advice; deal in financial services; operate a registered managed investment scheme; carry on a financial services business; be involved in the management of a financial services business; apply for an Australian Financial Services Licence; and be an authorised representative of an Australian Financial Services Licensee. The duration of the disqualification outcomes ranged from 18 months to permanent disqualification. Only two of the undertakings involved outcomes other than disqualification (one training requirement and one peer review requirement). Thus, enforceable undertakings primarily served as another administrative avenue, in addition to s 206F of the *Corporations Act 2001* (Cth), via which ASIC sought to achieve disqualification outcomes.

B *Research Findings*

The data indicates that the three key policy considerations discussed in Part III have, to a large extent, not been applied in practice: civil enforcement was significantly less prevalent than criminal enforcement, despite the ostensible primacy of civil enforcement; the majority of sanctions were incapacitative, which is contrary to a pyramidal model of enforcement; and monetary sanctions and custodial sentences were set well below the statutory maxima, casting doubt on their deterrence value. This Part of the article analyses each policy consideration in turn by reference to the empirical data.

1 *Giving Civil Enforcement Primacy over Criminal Enforcement: Research Findings*

Policy statements on the enforcement of corporate law indicate that civil enforcement is to be given primacy over criminal enforcement and that the latter is to be used for more serious misconduct. As noted in Part III(A), this policy is also implicit in the text of the *Corporations Act 2001* (Cth), which requires proof of additional fault elements (ie, more serious misconduct) in order to establish criminal liability. Such policy statements suggest that civil enforcement ought to be more prevalent than criminal enforcement;¹⁹¹

¹⁹¹ See ASIC, Submission No 49 to Senate Economics References Committee, above n 124, 16 [50], noting that 'a higher volume of cases [of less serious misconduct] is expected, relative to instances of more serious misconduct'. This comment was made in the context of ASIC's infringement notice regime but the same logic applies to the relationship between less serious civil misconduct and more serious criminal misconduct, which is that the former presumably

however, the data indicates that criminal enforcement is the more prevalent mode of enforcement.

The most basic indicator of the prevalence of civil and criminal enforcement of directors' duties is how frequently contraventions of civil and criminal provisions are proven. Table 2 displays the number of times that a contravention of each of the directors' duties provisions was proven. The 'number of times' refers to the number of matters in which a contravention of each provision was proven. This should not be confused with the number of proven matters, as set out in Table 3.¹⁹²

occurs more frequently than the latter and therefore would be expected to attract more frequent enforcement. By way of example, ASIC's enforcement report for the first half of 2015 indicates that, in the context of illegal phoenix activity in the construction industry, reports of civil contraventions of directors' duties were far more frequent than reports of criminal contraventions: ASIC, 'ASIC Enforcement Outcomes: January to June 2015' (Report No 444, ASIC, August 2015) 12 [34].

¹⁹² In some proven matters, contraventions of multiple directors' duties provisions were proven. Therefore, the 'number of times' that a contravention of each provision was proven is higher than the number of proven matters. For example, if there were three matters, and in each of the three matters contraventions of both ss 180 and 181 were proven, this would amount to only three proven matters but six times that a contravention of a directors' duties provision was proven — three times that a contravention of s 180 was proven, and three times that a contravention of s 181 was proven.

Table 2: Number of Times a Contravention of Each Directors' Duties Provision Was Proven

Section(s)	No of times civil duty contravened	No of times criminal duty contravened
180	18	N/A
181/184(1)	11	13
182/184(2)	10	50
183/184(3)	2	0
191	N/A	0
195	N/A	0
209(2)/209(3)	3	0
588G(2)/588G(3)	1	2
Total	45	65

Table 2 shows that a contravention of a criminal provision was proven 65 times, while a contravention of a civil provision was only proven 45 times. This disparity is even greater based on a direct comparison between provisions that attract both civil and criminal liability. Excluding ss 180, 191 and 195, which do not attract both types of liability, criminal enforcement accounted for 65 of 92 times that a contravention of a directors' duties provision was proven (70.65 per cent). Figure 2 presents the data from Table 2 in chart form.

Figure 2: Number of Times a Contravention of Each Directors' Duties Provision Was Proven

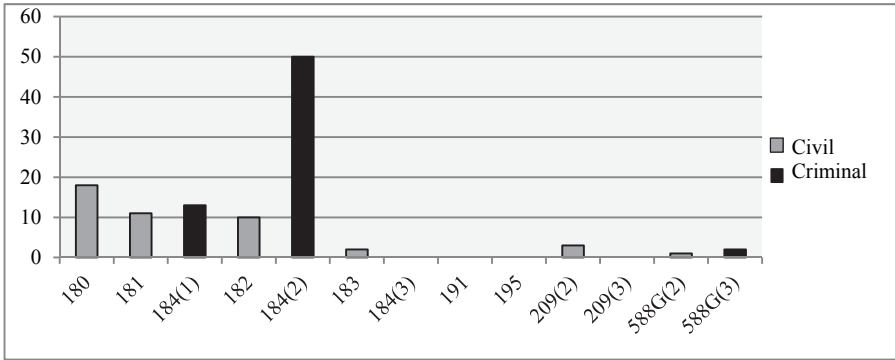


Table 3 presents a more detailed comparison of civil and criminal enforcement in the form of an analysis of the number and percentage of matters and defendants within each jurisdiction.

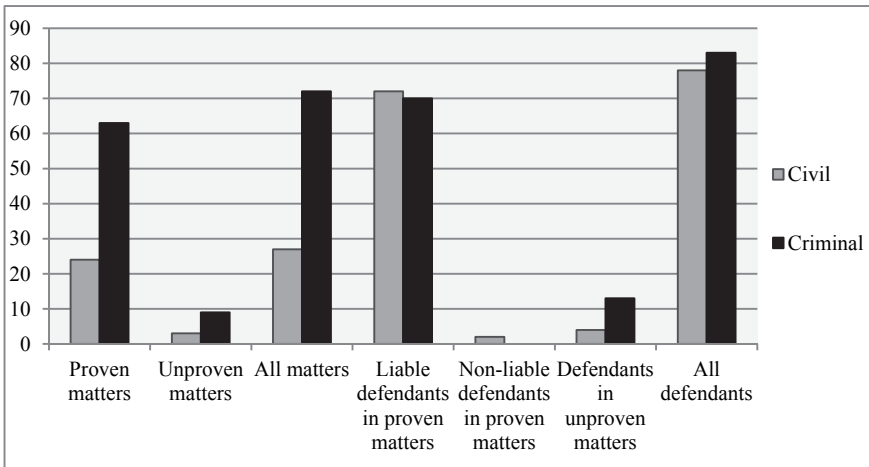
Table 3: Number and Percentage of Directors' Duties Matters and Defendants within Civil and Criminal Jurisdictions

Matters and defendants	Civil	Criminal	Total
Proven matters	24 (27.59%)	63 (72.41%)	87
Unproven matters	3 (25%)	9 (75%)	12
All matters	27 (27.27%)	72 (72.73%)	99
Liable defendants in proven matters	72 (50.7%)	70 (49.3%)	142
Non-liable defendants in proven matters	2 (100%)	0 (0%)	2
Defendants in unproven matters	4 (23.53%)	13 (76.47%)	17
All defendants	78 (48.45%)	83 (51.55%)	161

Table 3 indicates that criminal enforcement was more prevalent than civil enforcement when the data is analysed according to the number of matters. Almost three quarters of proven matters were criminal (63 of 87, or 72.41 per cent). There is less of a disparity between civil and criminal enforcement when

the data is analysed according to the number of defendants. A little over half of the liable defendants were civil (72 of 142, or 50.7 per cent). The reason for this difference is that civil matters often involved multiple defendants, whereas criminal matters usually only involved one defendant. Figure 3 sets out the data on the total number of matters and defendants in chart form.

Figure 3: Number of Directors' Duties Matters and Defendants within Civil and Criminal Jurisdictions



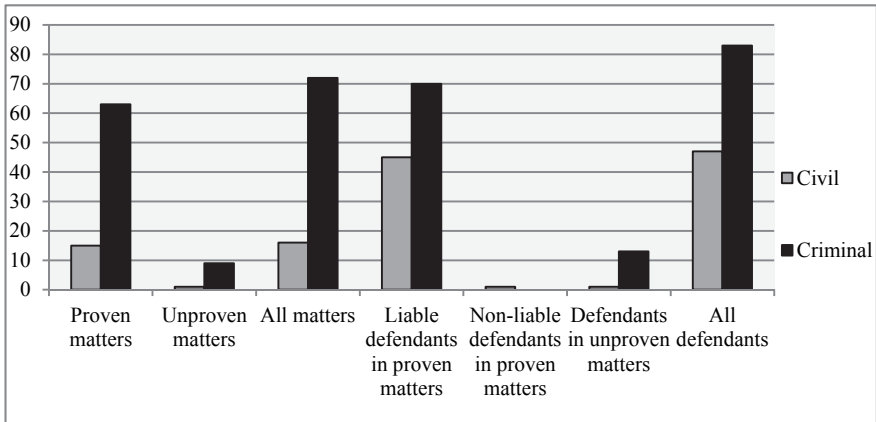
While Table 3 shows that the overall number of civil defendants found liable was slightly higher than the number of criminal defendants found liable, this is only due to the significant number of matters involving s 180, which does not attract criminal liability. Based on a direct comparison of directors' duties provisions which attract both civil and criminal liability, criminal enforcement was significantly more prevalent in all of the data categories. Table 4 is a variation on Table 3 which excludes matters in which ss 180, 191 and 195 were the only directors' duties provisions contravened or allegedly contravened, as these provisions do not attract both types of liability.

Table 4: Number and Percentage of Directors' Duties Matters and Defendants within Civil and Criminal Jurisdictions (Excluding Sections 180, 191 and 195)

Matters and defendants (excluding sections 180, 191 and 195)	Civil	Criminal	Total
Proven matters	15 (19.23%)	63 (80.77%)	78
Unproven matters	1 (10%)	9 (90%)	10
All matters	16 (18.18%)	72 (81.82%)	88
Liable defendants in proven matters	45 (39.13%)	70 (60.87%)	115
Non-liable defendants in proven matters	1 (100%)	0 (0%)	1
Defendants in unproven matters	1 (7.14%)	13 (92.86%)	14
All defendants	47 (36.15%)	83 (63.85%)	130

Table 4 indicates that criminal enforcement was significantly more prevalent than civil enforcement based on a direct comparison of provisions that attract both types of liability. Sixty-three of 78 proven matters were criminal (80.77 per cent), while 70 of 115 liable defendants were criminal (60.87 per cent). Figure 4 sets out these results in chart form.

Figure 4: Number of Directors' Duties Matters and Defendants within Civil and Criminal Jurisdictions (Excluding Sections 180, 191 and 195)



Based both on the number of proven contraventions¹⁹³ and the number of matters and defendants within each jurisdiction,¹⁹⁴ it is clear that civil enforcement does not occupy a position of primacy over criminal enforcement.¹⁹⁵ The practice of enforcement is therefore inconsistent with the stated policies, as discussed in Part III(A), in respect of the balance between civil and criminal enforcement of directors' duties by statutory agencies.

¹⁹³ See Table 2 in above Part IV(B)(1).

¹⁹⁴ See Tables 3 and 4 in above Part IV(B)(1).

¹⁹⁵ One factor that could have contributed to this result is the availability of cheaper and quicker administrative enforcement mechanisms: see ASIC, *Annual Report 2014–2015* (2015) 10. Administrative disqualification orders certainly perform a significant role in the enforcement of directors' duties by statutory agencies: see above Part IV(A)(2), below Part IV(B)(2) and Table 5 in below Part IV(B)(2). However, the statutory limitations on s 206F orders mean that they are not a seamless substitute for civil sanctions. Orders pursuant to s 206F can only be imposed on defendants who have been involved in two failed companies, among other conditions, and the maximum disqualification period is five years: see above Part II(B)(3). ASIC does not have the power to impose pecuniary penalty orders, disqualification orders exceeding five years, or compensation orders for contraventions of directors' duties; it must seek a court order to achieve these outcomes. Thus, it would be an oversimplification to suggest that administrative enforcement has usurped the position of primacy ostensibly given to civil enforcement.

2 Imposing Sanctions in Accordance with a Pyramidal Model of Enforcement: Research Findings

As discussed in Part III(B), a key policy consideration that led to the enactment of the civil penalty regime, which continues to inform current policies on the enforcement of corporate law, is that there should be a range of sanctions of varying levels of severity and that the severity of the sanctions should be calibrated to the severity of the misconduct. Pyramidal enforcement theory predicts that, if a range of sanctions is calibrated in this manner, enforcement activity will be distributed in a 'pyramid of enforcement' in which the severity of sanctions is inversely correlated with the frequency with which they are applied (ie, the more severe the sanctions, the less frequently they are applied). This Part of the article analyses whether, as one would expect based on the stated policies, enforcement activity is distributed in accordance with a pyramidal model of enforcement.

The starting point for this analysis is to determine the model pyramid of sanctions with which the imposition of sanctions ought to comply, as set out in Figure 5. The vertical aspect of the pyramid arranges the civil, criminal and administrative sanctions that were imposed for contraventions of directors' duties during the 10-year study period in order of their severity. As discussed in Part III(B), pyramidal enforcement theory is concerned with the severity of the sanctions, not the legal jurisdictions to which the sanctions belong, which explains why the sanctions are not arranged along strictly jurisdictional lines in Figure 5.

Figure 5: Model Pyramid of Sanctions for Contraventions of Directors' Duties Provisions of the Corporations Act 2001 (Cth)



The severity of the sanctions set out in Figure 5 has been determined according to the severity of the primary sanctions, without taking into account the potential secondary sanctions that could be imposed for failure to comply with the primary sanctions. For example, failure to comply with a bond without conviction could potentially result in imprisonment,¹⁹⁶ as could failure to comply with a disqualification order made by ASIC pursuant to s 206F of the *Corporations Act*.¹⁹⁷ It is not possible to design a model pyramid of primary sanctions that factors in the potential 'additional severity' of secondary sanctions, as the additional severity will be present in some cases but not others, contingent on whether the defendant complies with the

¹⁹⁶ *Crimes Act 1914* (Cth) s 20A(5)(a)(i).

¹⁹⁷ *Corporations Act 2001* (Cth) ss 206A(1), 1311, sch 3 item 49.

primary sanctions. It would in theory be possible to design a *separate* model pyramid of secondary sanctions applying only to the subset of defendants who do not comply with primary sanctions. However, this would be a fruitless exercise from the perspective of pyramidal enforcement theory, which is premised on the assumption that most actors are rational and will weigh up the benefits and costs of non-compliance.¹⁹⁸ If the subset of defendants is wholly comprised of those who have breached primary sanctions, the assumption of rationality no longer holds true and so a pyramid of secondary sanctions is unlikely to be the best method of preventing further reoffending.

Custodial sentences involving a minimum period of incarceration¹⁹⁹ are the most severe sanctions that can be imposed for contraventions of directors' duties, as deprivation of liberty is the strongest possible enforcement outcome available in Australia. The next most severe group of sanctions is criminal sanctions that involve convictions but not incarceration. These sanctions entail the following: the sanction itself, such as a fine,²⁰⁰ reparation order,²⁰¹ community service order,²⁰² fully suspended sentence,²⁰³ or standalone bond;²⁰⁴ an automatic five-year period of disqualification pursuant to s 206B of the *Corporations Act 2001* (Cth) (with the exception of offences against ss 191 and 195);²⁰⁵ and potential disadvantages associated with a criminal conviction, such as stigmatisation, discrimination and restrictions in relation to employment.²⁰⁶ Fines are situated above reparation as they constitute an additional punitive monetary penalty, rather than simply compensation for losses caused by the offence. Community service orders are placed above fully suspended sentences and standalone bonds, as they involve positive duties, whereas fully suspended sentences and standalone bonds typically involve

¹⁹⁸ See above Part III(B).

¹⁹⁹ *Corporations Act 2001* (Cth) s 1311, sch 3; *Crimes Act 1914* (Cth) 20(1)(b).

²⁰⁰ *Corporations Act 2001* (Cth) s 1311, sch 3.

²⁰¹ *Crimes Act 1914* (Cth) ss 19B(1)(d)(ii), 20(1)(a)(ii), 20(1)(b), 21B.

²⁰² *Ibid* s 20AB(1AA)(a)(v).

²⁰³ *Ibid* s 20(1)(b).

²⁰⁴ *Ibid* s 20(1)(a). The term 'standalone' distinguishes bonds without a sentence pursuant to s 20(1)(a) from bonds that form part of a fully suspended sentence pursuant to s 20(1)(b), both of which involve criminal convictions and typically impose similar requirements, namely, that the defendants be of good behaviour.

²⁰⁵ See above Part II(B)(2).

²⁰⁶ See generally Bronwyn Naylor, Moira Paterson and Marilyn Pittard, 'In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record Employment Checks' (2008) 32 *Melbourne University Law Review* 171.

only a negative duty to refrain from unlawful behaviour.²⁰⁷ The secondary sanctions applying to breach of a fully suspended sentence may be more severe than those applying to breach of non-custodial criminal orders,²⁰⁸ however, as discussed above, the pyramid of enforcement assumes compliance with primary sanctions, so the potentially greater severity of secondary sanctions applying to fully suspended sentences is not a relevant consideration for present purposes.

Non-criminal incapacitative sanctions (ie, disqualification outcomes) are the next most severe group of sanctions, as incapacitation is typically regarded as a stronger enforcement outcome than outcomes that are solely monetary.²⁰⁹ Civil disqualification orders are the most severe of the disqualification outcomes, as they involve significant legal costs and there is no maximum period of disqualification pursuant to s 206C(1). Administrative disqualification orders pursuant to s 206F(1) involve fewer legal costs and have a maximum duration of five years. Negotiated disqualification outcomes resulting from enforceable undertakings are less severe than disqualification orders pursuant to s 206F of the *Corporations Act 2001* (Cth) in the sense that, although they are not limited in duration, they cannot be unilaterally imposed by ASIC.²¹⁰

The least severe group of sanctions are those that are solely monetary (ie, civil pecuniary penalties²¹¹ or compensation orders)²¹² or those that entail

²⁰⁷ Fully suspended sentences pursuant to s 20(1)(b) and standalone bonds pursuant to s 20(1)(a) of the *Crimes Act 1914* (Cth) can also involve conditions that require the defendant to make reparation (s 20(1)(a)(ii)), pay pecuniary penalties (s 20(1)(a)(iii)) and other conditions as the court thinks fit to specify in the order (s 20(1)(a)(iv)). However, these powers were rarely used in relation to defendants who had contravened directors' duties during the 10-year study period; in effect, fully suspended sentences and standalone bonds were almost always good behaviour bonds without any positive duties.

²⁰⁸ See Lia McInnis and Craig Jones, 'Trends in the Use of Suspended Sentences in NSW' (Issue Paper No 47, New South Wales Bureau of Crime Statistics and Research, May 2010) 2, 4.

²⁰⁹ See Figure 1 in above Part III(B); Fisse and Braithwaite, above n 128, 141–2; George Gilligan, Helen Bird and Ian Ramsay, 'Civil Penalties and the Enforcement of Directors' Duties' (1999) 22 *University of New South Wales Law Journal* 417, 425–8. Ashworth provides a useful discussion of incapacitation in the context of persistent and 'dangerous' offenders: Ashworth, above n 20, 88–91. Criminal fines have not been classified as 'solely monetary' because they entail incapacitation in the form of automatic disqualification pursuant to s 206B of the *Corporations Act 2001* (Cth), with the exception of fines imposed as a result of convictions for offences against ss 191 and 195: see above Part II(B)(2).

²¹⁰ *Australian Securities and Investments Commission Act 2001* (Cth) s 93AA(1).

²¹¹ *Corporations Act 2001* (Cth) s 1317G.

²¹² *Ibid* s 1317H. Criminal fines are not 'solely monetary' because they also usually entail automatic disqualification pursuant to s 206B: see above n 209 and Part II(B)(2).

minimal substantive detriment to the defendant (ie, criminal bonds without conviction²¹³ and standalone civil declarations of contravention).²¹⁴ Civil pecuniary penalties are situated above civil compensation orders for the same reason that criminal fines are situated above reparation. Bonds without conviction are placed above standalone declarations of contravention, as they at least require a negative duty on the part of the defendant to refrain from unlawful behaviour, whereas declarations of contravention do not impose any duties.²¹⁵

Having set out the model enforcement pyramid, the next step in the analysis is to determine whether the sanctions that were imposed during the study period conform to that pyramid. Table 5 presents the number of defendants upon whom each type of sanction was imposed. The order of the rows in Table 5 corresponds to the rungs of the pyramid set out at Figure 5.

²¹³ *Crimes Act 1914* (Cth) s 19B.

²¹⁴ *Corporations Act 2001* (Cth) s 1317E. The term 'standalone' refers to bare declarations of contravention pursuant to s 1317E that are not accompanied by disqualification orders pursuant to s 206C, pecuniary penalty orders pursuant to s 1317G or compensation orders pursuant to s 1317H.

²¹⁵ Bonds without conviction pursuant to s 19B of the *Crimes Act 1914* (Cth) may also require the defendant to make reparation (s 19B(1)(d)(ii)) and other conditions as the court thinks fit to specify in the order (s 19B(1)(d)(iii)).

Table 5: Number of Sanctions Imposed for Contraventions of Directors' Duties

Sanction	Defendants
Custodial sentence with a minimum period of incarceration (criminal)	43 ²¹⁶
Fine (criminal)	4
Reparation order (criminal)	7
Community service order (criminal)	1
Fully suspended custodial sentence (criminal)	20
Standalone bond with conviction (criminal)	1
Disqualification order (civil)	63
Disqualification order pursuant to s 206F (administrative)	At least 191 ²¹⁷
Disqualification outcome via enforceable undertaking (administrative)	8
Pecuniary penalty (civil)	34
Compensation order (civil)	5
Bond without conviction (criminal)	3
Standalone declaration of contravention (civil)	7
Total	387 ²¹⁸

Table 5 shows that the sanctions imposed during the study period do not conform to the model pyramid of sanctions set out at Figure 5. There was a predominance of imprisonment and disqualification (ie, incapacitative

²¹⁶ Two of these defendants were ordered to serve their sentences by way of periodic detention pursuant to s 20AB(1AA)(a)(xi) of the *Crimes Act 1914* (Cth).

²¹⁷ As discussed in Part IV(A)(2), it is not possible to determine the exact number of s 206F orders that involve contraventions of directors' duties based on available data. Media releases and case reports indicate that there were at least 191 such orders that involved contraventions of directors' duties, but the true number is likely to be considerably higher.

²¹⁸ Based on the uncertainty surrounding the exact number of s 206F orders, it is not possible to determine the exact total number of sanctions. See the discussion of this issue in above Part IV(A)(2).

sanctions) and relatively infrequent use of other forms of sanctions. The total number of civil and criminal sanctions imposed was 188. Of these sanctions, 106 were custodial sentences involving a minimum period of incarceration and civil disqualification orders collectively, meaning that over half of all civil and criminal sanctions were incapacitative (56.38 per cent). If administrative sanctions are included in the sample, disqualification alone accounted for at least 67.7 per cent of all sanctions (262 of 387) and disqualification and custodial sentences involving a minimum period of incarceration collectively accounted for at least 78.81 per cent of all sanctions (305 of 387). This data runs contrary to a pyramidal model of enforcement, as incapacitative sanctions are typically situated at the peak of enforcement pyramids and therefore ought to be imposed the least frequently.²¹⁹

Figure 6 sets out the data in Table 5 in chart form, facilitating comparison with the model pyramid of sanctions depicted at Figure 5. If the sanctions had been imposed in accordance with a pyramidal model of enforcement, the rows of Figure 6 would increase in length from the top to the bottom of the chart.

²¹⁹ See Figure 1 in above Part III(B); Fisse and Braithwaite, above n 128, 141–2; Gilligan, Bird and Ramsay, above n 209, 425–8.

Figure 6: Number of Sanctions Imposed for Contraventions of Directors' Duties

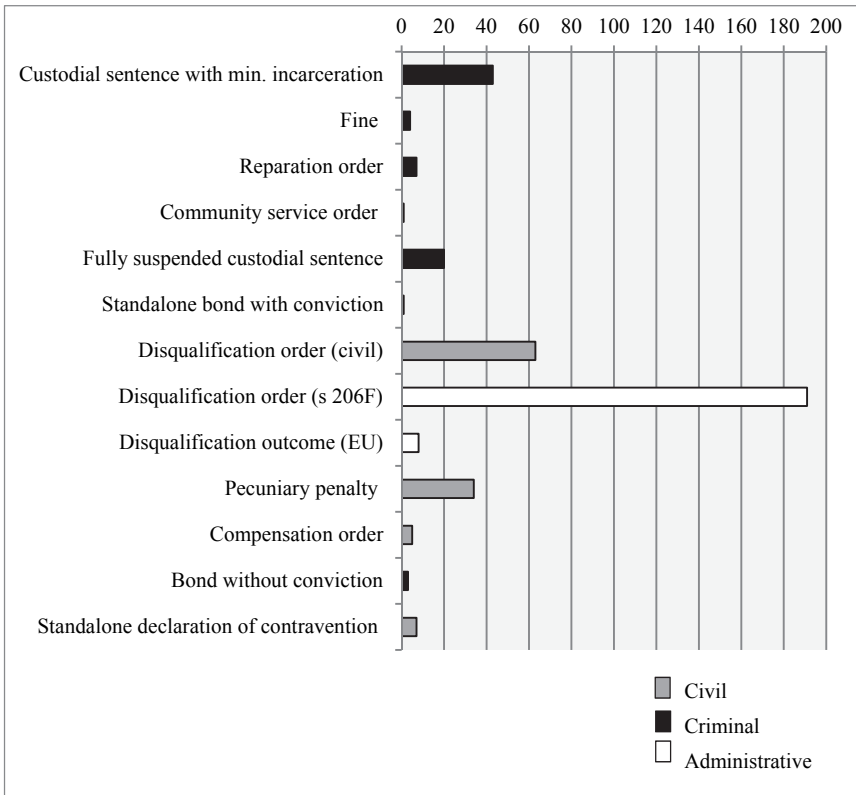


Figure 6 clearly shows that the application of sanctions for contraventions of directors' duties during the 10-year study period did not conform to a pyramidal model of enforcement. For the reasons discussed in Part III(B), that the bulk of incapacitative sanctions were administrative sanctions has little bearing on whether the application of sanctions is consistent with pyramidal enforcement, which is concerned with the severity of sanctions, not legal jurisdictions. The data therefore reveals a rift between the stated policies on responsive regulation and pyramidal enforcement theory, as discussed in Part III(B), and the reality of enforcement of directors' duties by statutory agencies in Australia.

3 *Setting Sanctions at a Sufficient Level to Deter Corporate Misconduct: Research Findings*

One of the Cooney Committee's key expectations in recommending the civil penalty regime was that civil pecuniary penalties would be set at a higher level than previously 'modest' criminal fines. Concerns were also raised in evidence to the Committee as to the adequacy of the duration of custodial sentences.²²⁰ The *Cooney Report* emphasised that penalties 'will have no deterrent value if their level is insufficient.'²²¹ Deterrence remains a central focus of current policies on corporate law enforcement, as discussed in Part III(C), with ASIC's enforcement policy stressing the 'high monetary penalties'²²² that are imposed and the CDPP stating that 'individuals who are convicted of serious white-collar crimes are routinely sentenced to significant terms of imprisonment with time to serve.'²²³ This Part of the article empirically analyses the magnitude of monetary sanctions and custodial sentences against the statutory maxima to determine the extent to which enforcement of directors' duties by statutory agencies is consistent with this policy of deterrence.

Table 6 presents the average, median and highest civil pecuniary penalties and criminal fines that were imposed on defendants who contravened directors' duties provisions (but did not contravene any other provisions that attract pecuniary penalties or fines).

²²⁰ See above Part III(C).

²²¹ *Cooney Report*, above n 10, 191 [13.16].

²²² ASIC, 'ASIC's Approach to Enforcement', above n 122, 4.

²²³ CDPP, Submission No 53 to Senate Economics References Committee, above n 166, 3. The judgments cited in support of this statement are mostly insider trading and fraud-related matters, although one of the fraud matters also involved contraventions of directors' duties. The data presented in this Part of the article suggests that this statement is not an accurate representation of criminal enforcement as it relates to directors' duties: see the discussion following Table 7 in below Part IV(B)(3).

Table 6: Magnitude of Monetary Sanctions Imposed for Contraventions of Directors' Duties

Magnitude of monetary sanctions	Civil pecuniary penalties	Criminal fines
Defendants with a single contravention or count		
Average	\$25 000 (<i>n</i> =11)	Insufficient data
Median	\$25 000 (<i>n</i> =11)	Insufficient data
Highest	\$40 000	\$10 000
Defendants with multiple contraventions or counts		
Average	\$177 875 (<i>n</i> =16)	Insufficient data
Median	\$145 000 (<i>n</i> =16)	Insufficient data
Highest	\$500 000	\$75 000
All defendants		
Average	\$115 593 (<i>n</i> =27)	\$42 500 (<i>n</i> =2)
Median	\$50 000 (<i>n</i> =27)	\$42 500 (<i>n</i> =2)
Highest	\$500 000	\$75 000

The reason for confining the sample for Table 6 to defendants who contravened directors' duties provisions but did not contravene any other provisions that attract pecuniary penalties or fines is that, in matters where the defendants had contravened other such provisions, it was not usually possible to identify the proportion of the sanction that was attributable to the directors' duties contraventions as distinct from the contraventions of the other provisions. In some cases, the judgments imposed a global sanction for all of the contraventions, while in others the sanctions imposed for individual contraventions were partly cumulative and partly concurrent, meaning that it was not possible to identify the precise proportion of the final sanction attributable to the directors' duties contraventions. This means that, although civil pecuniary penalties were imposed on 34 defendants in total,²²⁴ only 27 of those defendants have been included in the data sample for Table 6.

²²⁴ See Table 5 in above Part IV(B)(2).

The term ‘multiple contraventions’ in Table 6 refers to the number of contraventions of civil provisions, not the number of civil provisions contravened. Thus, civil defendants who committed ‘multiple contraventions’ may have committed multiple contraventions of the same provision or multiple contraventions of different directors’ duties provisions. In most of the matters where civil defendants had committed multiple contraventions, it was not possible to identify the precise number of contraventions. This was typically because the unlawful incidents were numerous and tended to be bundled together into groups of contraventions, making it unclear whether the group of incidents constituted a ‘contravention’ or whether each incident within the group constituted a ‘contravention’. It was only possible to identify with precision the number of contraventions in relation to five of the 16 civil defendants who had committed multiple contraventions included in Table 6. Of this sample of five defendants, the average number of contraventions per defendant was five to six. In regard to criminal matters, the term ‘count’ refers to counts on the indictment, which may, in some instances, be ‘rolled-up’ counts of multiple contraventions.²²⁵ Therefore, an individual with a single count may have in fact committed multiple contraventions.²²⁶

Table 6 indicates that the civil pecuniary penalties imposed were low relative to the statutory maximum of \$200 000, keeping in mind that this is the maximum for a single contravention and the majority of defendants had committed multiple contraventions (16 out of 27, or 59.26 per cent). The average and median pecuniary penalties imposed on defendants for a single contravention were both \$25 000, amounting to only 12.5 per cent of the maximum.²²⁷ The average and median pecuniary penalties imposed on defendants with multiple contraventions were significantly higher, at \$177 875 and \$145 000 respectively, but they were still less than the maximum penalty for a single contravention, even though, as explained above, these defendants had typically engaged in numerous incidents of unlawful conduct such that it

²²⁵ See, eg, *DPP (Cth) v Gaw* [2006] VSCA 51 (15 March 2006) [3] (Callaway JA). In this matter, the 24 individual charges laid against the defendant were reduced to eight counts on the indictment, each of an offence against s 184(2) of the *Corporations Act 2001* (Cth).

²²⁶ See, eg, *DPP (Cth) v Morris* [2010] VSCA 149 (25 June 2010). In this matter, both defendants pleaded guilty to one rolled-up count of conduct contrary to s 184(1) of the *Corporations Act 2001* (Cth).

²²⁷ This sample may not be representative of the typical pecuniary penalty, as the sample size is small and seven of the 11 defendants within the sample were the non-executive directors in the James Hardie proceedings, all of whom received penalties of either \$20 000 or \$25 000: *Gillfillan v Australian Securities and Investments Commission* (2012) 92 ACSR 460, 533 [331] (Sackville AJA).

was not possible to identify the precise number of individual contraventions. The average penalty imposed on all defendants was \$115 593, but the median penalty was much lower, at \$50 000, due to the large number of penalties at the lower end of the scale. Ten of the 27 penalties ranged from \$20 000 to \$25 000. Only five of the penalties (imposed on defendants who had committed multiple contraventions) exceeded the statutory maximum of \$200 000 for a single contravention, which were penalties of \$201 000, \$220 000, \$350 000, \$390 000 and \$500 000.

In regard to criminal fines, the sample size was too small to yield any meaningful conclusions on the average magnitude of fines, with just four fines imposed during the 10-year study period.²²⁸ Two of these defendants contravened only directors' duties provisions, while two contravened other laws attracting criminal fines and were excluded from Table 6. The fines imposed were very low relative to the maximum fines available pursuant to sch 3 of the *Corporations Act 2001* (Cth). The fine imposed on the defendant with a single directors' duties count (\$10 000) was only 4.55 per cent of the applicable maximum fine of \$220 000 for a single offence at the time.²²⁹ The fine imposed on the defendant with multiple directors' duties counts was \$75 000, which was still well below the statutory maximum fine of \$340 000 for a single offence at the time.²³⁰ The two defendants who were excluded from Table 6 were fined \$4000 and \$10 000.

The civil penalty regime has not become the solution to the problem of 'modest' criminal fines envisaged by the Cooney Committee. Instead, both criminal fines and civil pecuniary penalties continue to be low relative to the statutory maxima. While civil pecuniary penalties were higher than criminal fines, they were still low relative to the \$200 000 statutory maximum for a single contravention. This casts doubt on the extent to which such sanctions give effect to the policy of deterrence discussed in Part III(C). While it is difficult to measure the deterrent effect of sanctions, one factor that is likely to be relevant in the case of monetary sanctions is the resources available to the defendant. The defendants included in Table 6 were directors or officers of

²²⁸ See Table 5 in above Part IV(B)(2).

²²⁹ This fine was imposed in August 2007, at which time the relevant maximum fine in *Corporations Act 2001* (Cth) sch 3 was 2000 penalty units and the 'penalty unit' was worth \$110: *Crimes Act 1914* (Cth) s 4AA. The current maximum fine is \$360 000, as the 'penalty unit' is now set at \$180.

²³⁰ This fine was imposed in May 2013, at which time the relevant maximum fine in *Corporations Act 2001* (Cth) sch 3 was 2000 penalty units and the 'penalty unit' was worth \$170: *Crimes Act 1914* (Cth) s 4AA. Thus, the maximum fine at the time was \$340 000.

significant commercial enterprises, not small businesses. Eighteen of the 27 defendants were directors or officers of listed public companies, four were directors of a formerly listed public company, and the remaining five were directors or officers involved in sophisticated corporate groups combining several proprietary and public companies. It is reasonable to assume that such defendants would typically be well resourced and, therefore, there is a question as to whether monetary sanctions set at a small percentage of the maximum would provide sufficient deterrence.²³¹

Table 7 presents the average and highest custodial sentences imposed on defendants who contravened only directors' duties provisions. For the same reason given above in relation to monetary sanctions — to attempt to isolate the sanctions imposed for contraventions of directors' duties from those imposed for other offences — defendants who committed offences other than contraventions of directors' duties have been excluded from Table 7.

²³¹ In assessing the deterrence value of sanctions, it is important to consider how sanctions are typically combined. All but one of the 27 civil defendants included in Table 6 in above Part IV(B)(3) also received disqualification orders and all of the defendants who received criminal fines were subject to automatic disqualification periods of five years pursuant to s 206B of the *Corporations Act 2001* (Cth). Thus, monetary sanctions arguably perform a merely supplementary role to disqualification, with the latter being the primary form of sanction. There is some judicial authority suggesting that civil disqualification orders are to be treated as the default sanction and that pecuniary penalty orders are only to be imposed where disqualification would be an inadequate or inappropriate remedy: see Austin and Ramsay, above n 76, 103. The fact that monetary sanctions are typically accompanied by disqualification may compensate to some extent for the low magnitude and questionable deterrence value of monetary sanctions.

Table 7: Magnitude of Custodial Sentences Imposed for Contraventions of Directors' Duties

Magnitude of custodial sentences	Maximum sentence (in months)	Minimum sentence (in months)
Defendants with a single count		
Average	25.78 (<i>n</i> =9)	9.56 (<i>n</i> =9)
Highest	51	36
Defendants with multiple counts		
Average	27.84 (<i>n</i> =19)	8.53 (<i>n</i> =19)
Highest	48	48
All defendants		
Average	27.18 (<i>n</i> =28)	8.86 (<i>n</i> =28)
Highest	51	48

The 'maximum' custodial sentence in Table 7 refers to the maximum prison time that the defendant was sentenced to serve and is not to be confused with the statutory maximum sentence, which is five years per offence for all of the directors' duties provisions except ss 191 and 195.²³² The average maximum sentence imposed on defendants with a single count was 25.78 months, which is 42.97 per cent of the statutory maximum of five years per offence. The average maximum imposed on defendants with multiple counts was only marginally higher, at 27.84 months. This suggests that, unlike monetary sanctions,²³³ there was not any particular correlation between the number of counts and the severity of the sentences.²³⁴

²³² See above Part II(B)(2).

²³³ See Table 6 in above Part IV(B)(3), showing that civil pecuniary penalties imposed on defendants who had engaged in multiple contraventions were significantly higher than those imposed on defendants with a single contravention.

²³⁴ Because a single count can involve a rolled-up course of conduct involving multiple individual contraventions (see the discussion following Table 6 in above Part IV(B)(3)), the distinction between single count and multiple count criminal matters may not be as significant as the distinction between single contravention and multiple contravention civil matters.

Table 7 shows that the average minimum sentence imposed on all defendants (8.86 months) was significantly lower than the average maximum sentence (27.18 months). The reason for this is that 13 of the 28 custodial sentences were fully suspended,²³⁵ meaning that these 13 sentences had a minimum sentence of zero.²³⁶ The fact that almost half of the custodial sentences imposed on defendants who contravened only directors' duties were fully suspended (13 of 28, or 46.43 per cent) raises concerns as to whether the sentences are giving effect to the policy of using enforcement as a means to deter corporate misconduct.²³⁷ Contrary to the policy statements discussed in Part III(C), which emphasise the magnitude of sanctions imposed and the importance of deterrence, the empirical evidence shows that both monetary sanctions and custodial sentences were set well below the statutory maxima.

V CONCLUSION

This article has argued that the enforcement of directors' duties by statutory agencies in Australia does not reflect the stated policy considerations that ostensibly inform such enforcement. In identifying this divergence between policy and practice, the findings presented in this article contribute to evidence-based discourse on the appropriate policy settings and how best to achieve increased convergence between the normative and applied aspects of corporate law enforcement in the future.

Beginning with the enactment of the civil penalty regime in 1993, the Australian system for the enforcement of directors' duties has become increasingly complex, with the addition of a range of civil and administrative sanctions that overlap with each other and with pre-existing criminal sanctions. The transition to an increasingly multi-jurisdictional approach was motivated by three key policy considerations which continue to inform

²³⁵ Pursuant to *Crimes Act 1914* (Cth) s 20(1)(b). See above Part II(B)(2).

²³⁶ An alternative method of calculating the average minimum sentence would be to exclude fully suspended sentences from the sample (ie, to treat such sentences as non-values rather than zero values). Excluding fully suspended sentences, the average minimum sentence was 16.53 months ($n=15$).

²³⁷ This discussion is contained in above Part III(C). However, see above n 231 regarding the importance of considering the combined deterrent effect of different sanctions. While 46.43 per cent of the custodial sentences included in Table 7 in above Part IV(B)(3) were fully suspended, these sentences all entailed automatic five-year disqualification periods pursuant to s 206B of the *Corporations Act 2001* (Cth). Disqualification pursuant to s 206B may compensate to some extent for any deterrence deficit resulting from the significant number of fully suspended custodial sentences.

current policies on the enforcement of corporate law. First, it had become apparent that much of the misconduct that is the subject of directors' duties involves negligence rather than dishonesty or intent; therefore, primacy was to be given to civil enforcement, with criminal enforcement reserved for more serious instances of misconduct that were 'genuinely criminal'. Second, the addition of civil sanctions was designed to enable a more responsive system of regulation, with a range of both civil and criminal sanctions tailored to the severity of the misconduct in accordance with a pyramidal model of enforcement. Third, the new civil regime promised to enhance the deterrence value of enforcement, as the availability of less 'draconian' alternatives to custodial sentences was expected to encourage more enforcement activity and the \$200 000 statutory maximum would allow for more significant pecuniary penalties to be imposed than previously 'modest' criminal fines.

Current policy statements continue to reflect these imperatives: the primacy of civil enforcement over criminal enforcement, with the latter used for more serious misconduct; responsive regulation theory and a pyramidal model of sanctions calibrated to the severity of the misconduct; and the magnitude and deterrence value of sanctions. As the Explanatory Memorandum to the Financial Services Modernisation Bill 2009 (Cth) states, '[t]he intention of the dual regime [of civil and criminal sanctions] is to give primacy to the civil penalty regime and retain criminal penalties for serious breaches of the Act.'²³⁸ In its submission to the 2015–16 Senate Inquiry into Penalties for White-Collar Crime, ASIC observes that:

The introduction of civil penalties provided another step in the 'pyramid of enforcement' whereby serious misconduct (such as director negligence) could be met with substantial penalties, but without the moral opprobrium of a criminal conviction or a custodial sentence.²³⁹

ASIC's 2013 enforcement policy emphasises the 'high [civil] penalties that apply if the case is proved'²⁴⁰ and the CDPP's submission to the 2015–16 Senate Inquiry states that serious white-collar offenders are 'routinely sentenced to significant terms of imprisonment with time to serve' in order to achieve, *inter alia*, general deterrence.²⁴¹

²³⁸ Explanatory Memorandum, Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 (Cth) 60 [2.128].

²³⁹ ASIC, Submission No 49 to Senate Economics References Committee, above n 124, 17 [58].

²⁴⁰ ASIC, 'ASIC's Approach to Enforcement', above n 122, 5.

²⁴¹ CDPP, Submission No 53 to Senate Economics References Committee, above n 166, 3 (citations omitted).

The findings presented in this article indicate that, to a large extent, the practice of enforcement of directors' duties does not reflect such policy statements. Civil enforcement was significantly less prevalent than criminal enforcement, accounting for only 19.23 per cent of matters in which contraventions of directors' duties that attract both types of liability were proven. The data points against the application of a pyramidal model of sanctions, with incapacitative sanctions (custodial sentences involving a minimum period of incarceration, civil disqualification orders and administrative disqualification outcomes) collectively accounting for at least 78.81 per cent of all sanctions imposed. The evidence also casts doubt on the deterrence value of monetary sanctions and custodial sentences, with the median civil pecuniary penalty amounting to just 12.5 per cent of the \$200 000 maximum and 46.43 per cent of custodial sentences being fully suspended.²⁴² These research findings are significant given the 'profound effect' that the actions of directors have on shareholders, employees, creditors and the general public,²⁴³ and the consequent importance of ensuring that such actions are lawful and responsible via appropriate enforcement practices.

²⁴² See above Part IV(B) for a full explanation of these research findings.

²⁴³ *Australian Securities and Investment Commission v Healey* (2011) 196 FCR 291, 297 [14] (Middleton J); Commonwealth, *Parliamentary Debates*, Senate, 22 November 1989, 3070 (Bernard Cooney).