

# CIVIL PENALTIES AND RESPONSIVE REGULATION: THE GAP BETWEEN THEORY AND PRACTICE

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*[In theory it is possible to map the civil penalty provisions contained in Corporations Act 2001 (Cth) part 9.4B on to an enforcement pyramid in a manner envisaged by responsive regulation. However, the data examined in this article reveals that there is a gap between theory and practice. If the civil penalty regime were being utilised in a manner envisaged by responsive regulation, the Australian Securities and Investments Commission ('ASIC') would consider whether or not a civil penalty application was an adequate regulatory response prior to considering a criminal prosecution in the majority of cases. More civil penalty proceedings than criminal prosecutions would be issued in relation to the same types of contraventions. Neither of these is occurring. The examination of ASIC's use of the civil penalty regime reveals that its decision-making process is different from that suggested by responsive regulation.]*

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## I INTRODUCTION

The civil penalty regime contained in part 9.4B of the *Corporations Act 2001* (Cth) ('*Corporations Act*') came into operation on 1 February 1993.<sup>1</sup> It was adopted on the recommendation of the Senate Standing Committee on Legal and

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<sup>1</sup> *Corporate Law Reform Act 1992* (Cth) ss 2(3), 17, inserting pt 9.4B into *Corporations Act 1989* (Cth) s 82 ('*Corporations Law*'); Commonwealth, *Gazette: Special*, No S 25, 27 January 1993. *Corporations Law* pt 9.4B became *Corporations Act* pt 9.4B.

Constitutional Affairs (then known as the 'Cooney Committee').<sup>2</sup> Its purpose was to overcome apparent deficiencies in the law relating to the enforcement of the statutory directors' duties.<sup>3</sup> Prior to the introduction of the civil penalty provisions, the directors' duties provisions were criminal provisions.<sup>4</sup> The civil penalty provisions are designed to provide the regulator with an enforcement regime that complies with responsive regulation theory.<sup>5</sup> Responsive regulation defines the regulator's goal as the need to secure compliance with the law and offers guidelines as to the best method of securing that compliance.<sup>6</sup>

This article examines the Australian Securities and Investments Commission's ('ASIC's') use of the civil penalty regime for the purpose of determining whether or not ASIC utilises that regime in a manner envisaged by responsive regulation. The examination is limited to a consideration of criminal and civil penalty applications issued in relation to alleged contraventions of the directors' duties contained in *Corporations Act* ss 181, 182 and 183. These provisions have been selected because both civil penalty applications and criminal prosecutions are available for their enforcement. While other provisions of the *Corporations Act* may give rise to both civil penalty proceedings and criminal prosecutions, the majority of the civil penalty applications issued by ASIC have alleged a contravention of the directors' duties provisions.<sup>7</sup> The number of civil penalty proceedings issued alleging contravention of other provisions is so small as to render a comparison with criminal prosecutions meaningless.

The examination undertaken in this article reveals that, in situations where a criminal prosecution is available, the civil penalty regime is not being utilised in a manner envisaged by responsive regulation. If ASIC were following an enforcement strategy which was consistent with the guidelines suggested by responsive regulation, two consequences would follow. First, in relation to

<sup>2</sup> 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) 191 (commonly known as the 'Cooney Report').

<sup>3</sup> Australian Law Reform Commission ('ALRC'), *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2002) 77; Commonwealth, *Parliamentary Debates*, Senate, 28 November 1991, 3616 (Graham Richardson). See also Roman Tomasic, 'Corporate Crime' in Duncan Chappell and Paul Wilson (eds), *The Australian Criminal Justice System: The Mid 1990s* (1994) 253, 267–8.

<sup>4</sup> *Corporations Law* s 232, later amended by *Corporate Law Reform Act 1992* (Cth) s 11.

<sup>5</sup> 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; ALRC, above n 3, 76–7; Michael Gething, 'Do We Really Need Criminal and Civil Penalties for Contraventions of Directors' Duties?' (1996) 24 *Australian Business Law Review* 375, 379–80.

<sup>6</sup> For an explanation of responsive regulation, see generally John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (1985); Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992).

<sup>7</sup> For example, 30 of the 43 applications for civil penalty orders issued between 1 February 1993 and 31 December 2006 alleged that contraventions of the directors' duties provisions had occurred, according to ASIC media releases (ASIC, *Media Releases and Advisories* (June 2010) <<http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Media%20and%20information%20releases%20Home%20Page>>) and the author's examination of civil penalty judgments (to identify relevant civil penalty judgments, the author searched the AustLII (Australasian Legal Information Institute, *Advanced Search* <<http://www.austlii.edu.au/forms/search1.html>>), CCH (CCH, *IntelliConnect* (2010) <<http://intellconnect.wkasiapacific.com>>) and LexisNexis (LexisNexis, *LexisNexis: General* (2010) <<http://www.lexisnexis.com/au/legal/>>) electronic databases).

alleged contraventions of the directors' duties provisions, ASIC would consider whether or not a civil penalty application was an appropriate regulatory response prior to issuing a criminal prosecution in the majority of cases. Secondly, ASIC would issue more civil penalty applications than criminal prosecutions. Neither of these is occurring.

The examination of ASIC's enforcement of *Corporations Act* ss 181, 182 and 183 reveals that its decision-making process is different from that suggested by responsive regulation. The regulator is acting in a political environment where vigorous public and political debate about its actions needs to be taken into consideration. The environment in which ASIC works requires it to provide strong justification for any decision not to prosecute criminally. Responsive regulation does not consider in detail how the political and social environment in which a regulator operates might influence the regulatory strategy adopted by it. Partly due to this political and social pressure, it is only after a criminal prosecution has been ruled out that ASIC's decision-making process begins to resemble the model that is envisaged by responsive regulation.

A consequence of ASIC's enforcement strategy may be that an optimal level of voluntary compliance with the directors' duties provisions is not being achieved. The data examined in this article does not provide any information about compliance levels. Therefore, this article cannot comment on the effect, if any, that ASIC's enforcement strategy has on compliance. Nonetheless, an empirical analysis of ASIC's enforcement strategy is of itself worthwhile as it may challenge the ability of responsive regulation to explain ASIC's actions and can form the basis of further research regarding compliance.

## II RESPONSIVE REGULATION

Responsive regulation theory was developed and expanded by Ian Ayres and John Braithwaite.<sup>8</sup> This theory recognises that it is not possible for any regulatory agency to detect and enforce every contravention of the law that it administers. Therefore it is vital that regulatory agencies are able to encourage actors to comply with the law voluntarily. The goal of responsive regulation is 'to stimulate maximum levels of regulatory compliance.'<sup>9</sup>

### A *A Range of Sanctions*

Responsive regulation relies on the premises that the actions of individual actors are motivated by different factors and that a successful regulatory agency needs to have a range of enforcement options available to enable it to deal with actors who are subject to those different motivational factors.<sup>10</sup> Business actors who are motivated by a sense of social responsibility could be regulated effectively by a regime that relies on persuasion or self-regulation. A regime

<sup>8</sup> See, eg, Braithwaite, *To Punish or Persuade*, above n 6; Ayres and Braithwaite, above n 6.

<sup>9</sup> Gilligan, Bird and Ramsay, 'Civil Penalties and the Enforcement of Directors' Duties', above n 5, 426.

<sup>10</sup> Ayres and Braithwaite, above n 6, 24.

based on punishment would be required to regulate business actors who are influenced solely by economic considerations.<sup>11</sup>

In 2001, Darryl Brown applied responsive regulation in the context of corporate crime in the United States and stated that:

The rationales behind the Ayres–Braithwaite proposal are now widely accepted in regulatory debate and increasingly characterize enforcement practice. A driving motivation of this approach is to reduce the ‘psychology of resentment,’ the prospect that firms and individuals confronted with inflexible commands and harsh punishments adopt a critical, noncooperative posture toward compliance goals and enforcement personnel. Those attitudes foster norms and legitimacy problems that work against legal compliance. Conversely, new regulatory strategies aim to foster self-regulation, voluntary compliance, and a sense of social responsibility. Cooperative, nonconfrontational approaches begin enforcement with dialogue and efforts to coax voluntary responses, followed only later, for a recalcitrant subgroup, with warnings, civil sanctions, and criminal prosecution. They strengthen the legitimacy of the legal rules and social influences that support them. Regulators and scholars have become increasingly sensitive to the importance of such informal, nonlegal means of fostering compliance; the goal is to design enforcement strategies that foster social norms, corporate cultures, and market contexts in which ‘corporate virtue’ can develop and be maintained.<sup>12</sup>

Todd Lochner and Bruce Cain applied responsive regulation in the context of the enforcement of US campaign finance laws.<sup>13</sup> They argue that

the ability ... to impose — or threaten to impose — a variety of enforcement sanctions ensur[es] that the [regulatory] agency is not forced to choose between low-cost, low-impact remediation and high-cost, high-impact criminal sanctions.<sup>14</sup>

Ayres and Braithwaite argue not only that regulatory agencies require a variety of enforcement mechanisms but also that those enforcement mechanisms must be ordered correctly. Compliance is most likely to be achieved when a regulatory agency is able to display an explicit ‘enforcement pyramid’ that contains a variety of enforcement measures escalating in severity in proportion to the nature of the contravention committed.<sup>15</sup>

The base of the pyramid should contain mechanisms that allow the regulator ‘to coax compliance by persuasion’.<sup>16</sup> The next level of the enforcement pyramid

<sup>11</sup> Ibid 25–6.

<sup>12</sup> Darryl K Brown, ‘Street Crime, Corporate Crime, and the Contingency of Criminal Liability’ (2001) 149 *University of Pennsylvania Law Review* 1295, 1313–14, citing Ayres and Braithwaite, above n 6, 27; Fiona Haines, *Corporate Regulation: Beyond ‘Punish or Persuade’* (1997) 36–40, 220; Lawrence W Sherman, ‘Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction’ (1993) 30 *Journal of Research in Crime and Delinquency* 445, 452; Peter Cleary Yeager, ‘Industrial Water Pollution’ in Michael Tonry and Albert J Reiss Jr (eds), *Beyond the Law: Crime in Complex Organizations* (1993) 97, 138.

<sup>13</sup> Todd Lochner and Bruce E Cain, ‘Equity and Efficacy in the Enforcement of Campaign Finance Laws’ (1999) 77 *Texas Law Review* 1891.

<sup>14</sup> Ibid 1901–2.

<sup>15</sup> Ayres and Braithwaite, above n 6, 35.

<sup>16</sup> Ibid.

may include measures such as the sending of a warning letter.<sup>17</sup> If the warning letter fails to secure compliance, the next level of the enforcement pyramid may allow for the imposition of a civil monetary or other penalty.<sup>18</sup> The penultimate level of the pyramid may contain sanctions such as criminal fines and other non-custodial sentences for individuals as well as temporary plant shutdown or licence suspension for bodies corporate.<sup>19</sup> Incarceration for individuals and permanent licence cancellation or deregistration for bodies corporate may be at the apex of the pyramid.<sup>20</sup>

One of the reasons the civil penalty regime was introduced was to provide ASIC with an enforcement regime that complied with responsive regulation.<sup>21</sup> The civil penalty regime deems certain provisions of the *Corporations Act* to be civil penalty provisions.<sup>22</sup> The deemed civil penalty provisions include, but are not limited to, provisions relating to directors' duties, share capital, insolvent trading, duties owed by entities responsible for managed investment schemes, duties of officers and employees of those entities and market misconduct.<sup>23</sup>

If ASIC believes that a civil penalty provision has been contravened, it can issue proceedings seeking a declaration of contravention, a pecuniary penalty, a disqualification and/or a compensation order.<sup>24</sup> Civil penalty proceedings (such as proceedings for a declaration of contravention and for civil penalty orders) differ from criminal prosecutions in that they are treated as civil proceedings for the purpose of the rules of evidence and procedure.<sup>25</sup> The standard of proof is proof 'on the balance of probabilities'.<sup>26</sup>

The civil penalty provisions can be divided into two categories. The first category contains those provisions that may under certain circumstances be enforced by a criminal prosecution in addition to a civil penalty application. The directors' duties contained in *Corporations Act* ss 181, 182 and 183 are examples of civil penalty provisions that are subject to criminal sanctions.<sup>27</sup> The second category contains those civil penalty provisions that are not enforceable through the criminal regime: the non-criminal civil penalty provisions. If a non-criminal civil penalty provision is contravened, a civil penalty application is the most severe enforcement action that ASIC can instigate. The directors' duty of care

<sup>17</sup> Ibid 35–6.

<sup>18</sup> Ibid 36.

<sup>19</sup> See *ibid*.

<sup>20</sup> See *ibid*.

<sup>21</sup> Gilligan, Bird and Ramsay, 'Civil Penalties and the Enforcement of Directors' Duties', above n 5, 425; ALRC, above n 3, 76–7; Gething, above n 5, 379–80.

<sup>22</sup> *Corporations Act* s 1317E.

<sup>23</sup> *Corporations Act* ss 180–4 (directors' duties provisions), 254L, 256D, 259F, 260D (share capital provisions), 588G (insolvent trading provisions), 601FC (duties of entities responsible for managed investment schemes), 601FD–601FE (duties of officers and employees of managed investment schemes), 1041A–1041D, 1043A (market misconduct provisions), 1317E(1) (deeming provision).

<sup>24</sup> *Corporations Act* ss 206C (disqualification orders), 1317G (pecuniary penalty orders), 1317H–1317HA (compensation orders), 1317J (standing to apply).

<sup>25</sup> *Corporations Act* ss 1317L, 1332.

<sup>26</sup> *Corporations Act* s 1332.

<sup>27</sup> *Corporations Act* s 184. See below n 80.

and diligence contained in *Corporations Act* s 180 is an example of a non-criminal civil penalty provision.<sup>28</sup>

To comply with responsive regulation, the introduction of the civil penalty regime had to provide ASIC with a range of enforcement options that escalate in severity and are capable of being displayed on an explicit enforcement pyramid.<sup>29</sup> Commentators argue that, prior to the introduction of the civil penalty regime, the range of sanctions available to ASIC to enforce contraventions of the directors' duties provisions did not accord with the enforcement pyramid: there was a gap in the middle range of sanctions.<sup>30</sup> The civil penalty regime was enacted in an attempt to fill that gap. When the regime was introduced, it was intended that civil penalties for contraventions of the directors' duties provisions would occupy the middle to higher levels of the enforcement pyramid for individuals.<sup>31</sup> Criminal penalties would occupy the apex of the pyramid.<sup>32</sup>

Research has been undertaken into the Australian Securities Commission's<sup>33</sup> use of the civil penalty regime in the early years.<sup>34</sup> The research revealed that the original civil penalty regime did not map on to the enforcement pyramid in a manner envisaged by responsive regulation.<sup>35</sup> One of the reasons for this was that the law provided<sup>36</sup> that the commencement of proceedings for a civil penalty order was a bar to a subsequent prosecution for the corresponding criminal offence.<sup>37</sup> It has been argued that the bar against subsequent criminal prosecutions meant that criminal and civil penalties sat at 'the same level of the pyramid because they are mutually exclusive sanctions ... [such that] the selection of one operates as a bar to the use of the other.'<sup>38</sup>

On 13 March 2000, the *Corporate Law Economic Reform Program Act 1999* (Cth) ('*CLERP Act*') commenced operation.<sup>39</sup> Amongst other things, it removed

<sup>28</sup> See *Corporations Act* s 184 and below n 115.

<sup>29</sup> See above nn 15–20 and accompanying text.

<sup>30</sup> Gething, above n 5, 386. See also George Gilligan, Helen Bird and Ian Ramsay, 'Regulating Directors' Duties — How Effective Are the Civil Penalty Sanctions in the Australian *Corporations Law*?' (Research Report, Centre for Corporate Law and Securities Regulation, The University of Melbourne, 1999) 7–8.

<sup>31</sup> See Gilligan, Bird and Ramsay, 'Civil Penalties and the Enforcement of Directors' Duties', above n 5, 427–8, 431; Gething, above n 5, 378–9.

<sup>32</sup> See Helen Bird, 'The Problematic Nature of Civil Penalties in the Corporations Law' (1996) 14 *Company and Securities Law Journal* 405, 411; Gilligan, Bird and Ramsay, 'Regulating Directors' Duties', above n 30, 16.

<sup>33</sup> The Australian Securities Commission became ASIC on 1 July 1998: *Financial Sector Reform (Amendments and Transitional Provisions) Act 1998* (Cth) s 2(2), sch 1, sch 5 item 7; Commonwealth, *Gazette: Special*, No S 316, 30 June 1998.

<sup>34</sup> See, eg, Bird, above n 32; Gilligan, Bird and Ramsay, 'Regulating Directors' Duties', above n 30.

<sup>35</sup> Bird, above n 32, 413–20; Gilligan, Bird and Ramsay, 'Regulating Directors' Duties', above n 30, 16.

<sup>36</sup> *Corporations Law* s 1317FB, repealed by *Corporate Law Economic Reform Program Act 1999* (Cth) sch 1 item 6.

<sup>37</sup> Bird, above n 32, 414; Gilligan, Bird and Ramsay, 'Civil Penalties and the Enforcement of Directors' Duties', above n 5, 431; Gilligan, Bird and Ramsay, 'Regulating Directors' Duties', above n 30, 16.

<sup>38</sup> Gilligan, Bird and Ramsay, 'Regulating Directors' Duties', above n 30, 16.

<sup>39</sup> Commonwealth, *Gazette: Special*, No S 114, 10 March 2000.

the bar against the issue of criminal proceedings after the institution of civil penalty proceedings.<sup>40</sup>

The removal of the bar against subsequent criminal prosecution means that, in theory, the position of civil penalty provisions on the enforcement pyramid has changed. Since the commencement of the *CLERP Act*, civil penalties and criminal prosecutions are no longer mutually exclusive sanctions. They no longer occupy the same level of the enforcement pyramid. In theory, the position of civil penalties on the enforcement pyramid is clear. In relation to the first category of civil penalty provisions, civil penalties sit at the penultimate level of the enforcement pyramid, with criminal sanctions sitting at the apex. The enforcement pyramid for the second category of civil penalty provisions, such as the duty of care and diligence contained in *Corporations Act* s 180, is different. Civil penalties sit at the apex of the enforcement pyramid for those provisions because criminal penalties are not available.

### B *The Use of the Sanctions*

As stated previously, responsive regulation requires regulators to be armed with a range of sanctions that escalate in severity from persuasion to incapacitation. These escalating penalties must be capable of being displayed on an explicit enforcement pyramid. While it is not required in every case, responsive regulation posits that the most successful regulatory agencies will be able to encourage voluntary compliance with the laws they administer by commencing at the bottom of the pyramid in the majority of cases and escalating up the pyramid in response to continued noncompliance. The use of sanctions in this way is the option preferred by responsive regulation.

One of the reasons for the adoption of this approach is that, because of the cost, it is not possible for any regulatory agency to 'operate consistently near the peak of the enforcement pyramid'.<sup>41</sup> If punishment were to be adopted as the strategy of first choice, this would be unaffordable, unworkable and counterproductive.<sup>42</sup> In the case of the enforcement of the *Corporations Act*, punishment as a strategy of first choice would be unworkable and unaffordable due to the large number of corporations and corporate actors.<sup>43</sup>

If resort to the persuasive measures located at the base of the pyramid does not achieve the desired result, the regulator must be prepared to advance to a higher level in the pyramid. George Gilligan, Helen Bird and Ian Ramsay argue that 'the regulator must accept the reality of non-compliance and be prepared to

<sup>40</sup> *CLERP Act* sch 1 item 6, repealing *Corporations Law* pt 9.4B and inserting (inter alia) *Corporations Law* s 1317P. *Corporations Law* s 1317P became *Corporations Act* s 1317P.

<sup>41</sup> John Braithwaite, 'Responsive Business Regulatory Institutions' in C A J Coady and C J G Sampford (eds), *Business, Ethics and the Law* (1993) 83, 89.

<sup>42</sup> See *ibid* 88–9.

<sup>43</sup> Cf Cynthia Estlund, 'Rebuilding the Law of the Workplace in an Era of Self-Regulation' (2005) 105 *Columbia Law Review* 319, 360. Estlund discusses responsive regulation in the context of occupational health and safety regulation in the US. She argues that regulatory agencies will not be able to comply with responsive regulation unless they are adequately resourced.

move “up” the enforcement pyramid.<sup>44</sup> Ayres and Braithwaite argue that an adequately designed enforcement regime would allow for ‘every escalation of noncompliance by the firm [to] be matched with a corresponding escalation in punitiveness by the state.’<sup>45</sup>

However, Ayres and Braithwaite also state that the most successful regulatory agencies are able to secure regulatory compliance in the majority of cases without having to utilise the most severe sanctions at the apex of the enforcement pyramid.<sup>46</sup> They describe these successful regulatory agencies as ‘benign big guns’.<sup>47</sup> These agencies ‘will be more able to speak softly when they carry big sticks (and crucially, a hierarchy of lesser sanctions). Paradoxically, the bigger and the more various are the sticks, the more regulators will achieve success by speaking softly.’<sup>48</sup>

Responsive regulation has been applied by researchers in relation to a number of regulatory regimes. In 1994, Chris Dellit and Brent Fisse referred to Ayres and Braithwaite’s pyramid of enforcement and noted that the more regulatory agencies can keep their strong sanctions ‘in the background, the more regulation can be transacted through persuasion’ and, therefore, ‘the more effective regulatory intervention is likely to be.’<sup>49</sup> In addition, Dellit and Fisse argue that:

Giving priority to cooperation rather than to punishment or incapacitation as a means of regulation reflects the well-known utilitarian principle that the measures used for social control should be the least drastic necessary to achieve that goal.<sup>50</sup>

In 2005, Neal Shover and Aaron Routhe applied strategic regulatory theory in the context of the enforcement of environmental crimes in the US.<sup>51</sup> They argued that, in responsive regulation:

Emphasis ... is placed on educating firms about rules and assisting them in efforts to comply, and programs that rely principally on threats and the mechanical imposition of penalties are de-emphasized. For firms that fail to comply despite educative and cooperative efforts, officials may escalate their responses and sanctions accordingly. While ordinarily kept in the background, the availability of severe sanctions coupled with officials’ clear willingness to employ them if necessary pushes firms of a more resistant bent toward compliance or to punish those who commit serious or repeated violations. Consequently, pro-

<sup>44</sup> Gilligan, Bird and Ramsay, ‘Civil Penalties and the Enforcement of Directors’ Duties’, above n 5, 426.

<sup>45</sup> Ayres and Braithwaite, above n 6, 37.

<sup>46</sup> Ibid 40–1.

<sup>47</sup> Ibid 40.

<sup>48</sup> John Braithwaite, ‘Convergence in Models of Regulatory Strategy’ (1990) 2 *Current Issues in Criminal Justice* 59, 59.

<sup>49</sup> Chris Dellit and Brent Fisse, ‘Civil and Criminal Liability under Australian Securities Regulation: The Possibility of Strategic Enforcement’ in Gordon Walker and Brent Fisse (eds), *Securities Regulation in Australia and New Zealand* (1994) 570, 572.

<sup>50</sup> Ibid 574.

<sup>51</sup> Neal Shover and Aaron S Routhe, ‘Environmental Crime’ (2005) 32 *Crime and Justice: A Review of Research* 321.

grams of responsive regulation legitimize and make available to officials a range of options, from voluntary assistance programs to sanctions ...<sup>52</sup>

Christine Parker and Vibeke Nielsen applied responsive regulation in the context of the enforcement of the *Trade Practices Act 1974* (Cth).<sup>53</sup> Parker stated that

the [Australian Competition and Consumer Commission's] cartel enforcement experience affirms that enforcement is more successful in promoting compliance at the bottom of the pyramid the greater the range of graduated sanctions available toward the tip of the pyramid. Generally that means that regulators should have a full range of sanctions, including high penalties and criminal sanctions, available to them.<sup>54</sup>

If a regulatory agency were utilising the enforcement mechanisms at its disposal in a manner envisaged by responsive regulation, two consequences would follow. First, in the majority of cases the regulator would commence at the bottom of the pyramid and consider whether the enforcement mechanism available at each level of the pyramid provided an appropriate regulatory response prior to considering the enforcement mechanisms in the higher levels of the pyramid. Secondly, most enforcement activity would take place in the lower levels of the pyramid and the amount of enforcement activity would decrease at each subsequent level.

In theory, it is possible to map the current civil penalty provisions on to the enforcement pyramid in a manner envisaged by responsive regulation. However, the examination of ASIC's use of the civil penalty regime undertaken in the following Parts of this article reveals that this theory is not reflected in reality. If the regime were being used in a manner envisaged by responsive regulation, ASIC would consider the appropriateness of issuing civil penalty applications before it instigates criminal prosecutions in the majority of cases. Criminal prosecutions would be reserved as big guns for the worst possible cases. In addition, there would have been more civil penalty applications issued than criminal prosecutions in cases where both of these enforcement options were available. Neither of these outcomes has occurred.

### III DOES ASIC CONSIDER WHETHER A CIVIL PENALTY IS APPROPRIATE PRIOR TO CONSIDERING A CRIMINAL PROSECUTION?

In order to undertake an examination of ASIC's use of the civil penalty regime, interviews were conducted with a Senior Enforcement Officer from ASIC<sup>55</sup> and

<sup>52</sup> Ibid 355–6 (citations omitted).

<sup>53</sup> Christine Parker, 'The "Compliance" Trap: The Moral Message in Responsive Regulatory Enforcement' (2006) 40 *Law and Society Review* 591; Christine Parker and Vibeke Lehmann Nielsen, 'How Much Does It Hurt? How Australian Businesses Think about the Costs and Gains of Compliance and Noncompliance with the *Trade Practices Act*' (2008) 32 *Melbourne University Law Review* 554; Vibeke Lehmann Nielsen and Christine Parker, 'Testing Responsive Regulation in Regulatory Enforcement' (2009) 3 *Regulation and Governance* 376.

<sup>54</sup> Parker, above n 53, 616–17.

<sup>55</sup> Interview with ASIC Senior Enforcement Officer (Melbourne, 8 December 2006) (on file with author). The Senior Enforcement Officer requested not to be named and not to have any direct quotations attributed to them in this article.

with Mr Shane Kirne, Senior Assistant Director, Commercial Prosecutions Branch, Victorian Office of the Commonwealth Director of Public Prosecutions ('DPP').<sup>56</sup> Mr Kirne is in charge of the Commercial Prosecutions Branch of the Victorian Office of the DPP and receives all of ASIC's referrals for civil penalties directed to that Office.

According to the ASIC Senior Enforcement Officer, when ASIC is alerted to a potential contravention of a provision of the *Corporations Act* that may be subject to both the civil penalty and criminal regimes, it investigates the facts of the case and gathers any available evidence. At the investigative and evidence-gathering stage, ASIC does not have a view as to the type of enforcement action, if any, that might arise as a result of the investigation. Only at the end of the investigative stage does ASIC form a view of the matter on the basis of the evidence available.<sup>57</sup>

ASIC's Senior Enforcement Officer stated that, once the investigative stage is over, ASIC refers the matter to the DPP<sup>58</sup> in accordance with the *Memorandum of Understanding* ('MOU') signed on 1 March 2006 by Mr Jeffrey Lucy, the then Chairman of ASIC, and Mr Damian Bugg, the then Commonwealth DPP.<sup>59</sup> The DPP receives three types of referrals from ASIC. The first type is where ASIC believes there is sufficient evidence to warrant and sustain a criminal prosecution.<sup>60</sup> The second type of matter referred is where ASIC has not formed a view as to whether or not there is sufficient evidence to warrant or sustain a criminal prosecution or whether the matter should be the subject of a civil penalty application.<sup>61</sup> In both of these cases, ASIC sends a full brief to the DPP. The DPP reviews the matter and advises whether or not there is sufficient evidence to support the laying of criminal charges.<sup>62</sup>

The third type of matter referred by ASIC to the DPP is where ASIC believes there is insufficient evidence of criminal conduct and is considering issuing civil penalty proceedings. These matters are covered by para 4 of the *MOU*, which states:

- 4.1 ASIC will consult with the [Commonwealth DPP] before making an application for a civil penalty order.
- 4.2 Where ASIC and the [Commonwealth DPP] agree that it would be appropriate, ASIC will refer the matter to the [Commonwealth DPP] to consider whether, in accordance with the *Prosecution Policy of the Commonwealth*, criminal proceedings should be instituted.

<sup>56</sup> Interview with Shane Kirne, Senior Assistant Director, Commercial Prosecutions Branch, Victorian Office of the Commonwealth DPP (Melbourne, 28 February 2007) (on file with author).

<sup>57</sup> Interview with ASIC Senior Enforcement Officer, above n 55.

<sup>58</sup> *Ibid.*

<sup>59</sup> ASIC and Commonwealth DPP, *MOU* (2006).

<sup>60</sup> Interview with ASIC Senior Enforcement Officer, above n 55. See also Interview with Shane Kirne, above n 56.

<sup>61</sup> Interview with ASIC Senior Enforcement Officer, above n 55. See also Interview with Shane Kirne, above n 56.

<sup>62</sup> Interview with ASIC Senior Enforcement Officer, above n 55. See also Interview with Shane Kirne, above n 56.

- 4.3 The [Commonwealth DPP] will advise ASIC as soon as practicable after it forms the view, having regard to the entirety of the evidence and all relevant information then available, and to the *Prosecution Policy of the Commonwealth*, that criminal proceedings should not be instituted.

The DPP's role is to examine the matters referred to it by ASIC in order to determine whether or not a criminal prosecution should be commenced. This assessment involves a two-step process in line with the *Prosecution Policy of the Commonwealth* ('*Prosecution Policy*').<sup>63</sup> The first stage is a determination of whether or not there is a reasonable prospect of securing a conviction.<sup>64</sup> If the DPP case officer is so satisfied, he or she moves to the second stage in the process. The second stage requires the case officer to assess whether or not the prosecution is in the public interest.<sup>65</sup>

Paragraph 2.10 of the *Prosecution Policy* provides a list of factors that the DPP may take into 'consideration in determining whether the public interest requires a prosecution'.<sup>66</sup> These factors include:

- (j) the availability and efficacy of any alternatives to prosecution;
- (k) the prevalence of the alleged offence and the need for deterrence, both personal and general;
- (l) whether the consequences of any resulting conviction would be unduly harsh and oppressive;
- (m) whether the alleged offence is of considerable public concern; ...
- (s) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court ...

Some of these factors may be relevant to a consideration as to whether or not criminal prosecutions should be reserved for the most serious matters. Considering these factors would be in keeping with responsive regulation and would allow criminal penalties to be reserved for the most serious cases as big guns.

However, it would seem that ASIC and the DPP do not give consideration to the desirability of reserving criminal prosecutions as big guns for the most serious cases. Mr Kirne referred to the need to assess whether or not a prosecution was in the public interest and stated that:

typically the matters referred by ASIC are of such serious nature that it is very rare for us to be satisfied that where there is sufficient evidence, public interest warrants against prosecution. Nearly always if there is sufficient evidence we will prosecute.<sup>67</sup>

Mr Kirne was asked if the DPP would be influenced by the fact that enforcement action could be taken under either the criminal or civil penalty regimes when it

<sup>63</sup> Commonwealth DPP, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (2008).

<sup>64</sup> *Prosecution Policy* para 2.5.

<sup>65</sup> *Prosecution Policy* para 2.8.

<sup>66</sup> *Prosecution Policy* para 2.10.

<sup>67</sup> Interview with Shane Kirne, above n 56.

was considering whether or not criminal charges should be laid. He referred to paras 2.10(j) and (s) of the *Prosecution Policy*<sup>68</sup> as considerations that will be relevant when the DPP is assessing the public interest factor in matters that can, as an alternative to a criminal prosecution, be subject to a civil penalty application.<sup>69</sup>

Consideration of these matters amounts to a consideration of the regulatory impact of the proceedings. Consideration of the regulatory impact will play a lesser role in cases of serious corporate misconduct. Mr Kirne noted that, in cases where the conduct is considered to be less serious, 'the influence of the regulatory impact might take on a greater force than it would if it were a very serious crime. The more serious the conduct is then obviously the far less likely the impact of the regulatory outcome.'<sup>70</sup> Mr Kirne stated that the DPP would not recommend against a criminal prosecution purely because a better regulatory outcome could be obtained under the civil penalty regime. Mr Kirne stated categorically that '[c]ivil proceedings will not be used in substitution of criminal proceedings in matters of serious corporate or financial services crime where the DPP is of the view that there is a reasonable prospect of securing a conviction.'<sup>71</sup>

Both ASIC and the DPP believe that, if there is evidence available which would support a criminal prosecution, then a prosecution should be commenced in preference to other enforcement options. This view was expressed by both the ASIC Senior Enforcement Officer and Mr Kirne.<sup>72</sup> Public statements have been made by officers from ASIC that confirm that this is ASIC's view. For example, on 1 June 2005, Senator Penelope Wong asked Mr Jeffrey Lucy whether ASIC's 'preference would be to take civil proceedings which obviously bear an easier standard of proof rather than criminal proceedings'.<sup>73</sup> Mr Lucy replied:

No. ASIC have not historically demonstrated any convenience in our approach. Our attitude is that if people are capable of being prosecuted criminally, we do so. In particular, in an area such as this where officers and directors have direct responsibilities to the company then invariably they are an area of prosecution which we look to.<sup>74</sup>

A further example occurred on 16 February 2006, when Mr Lucy gave evidence before a Senate Estimates Hearing, stating that

[ASIC's] attitude is that, if a matter can be successfully prosecuted in a criminal court, that is absolutely what we will seek. That decision is taken in consultation with the Commonwealth Director of Public Prosecutions. Therefore, if

<sup>68</sup> *Prosecution Policy* paras 2.10(j), (s). Mr Kirne referred to sub-para '(r)', but evidently meant sub-para (s): see *ibid*.

<sup>69</sup> Interview with Shane Kirne, above n 56.

<sup>70</sup> *Ibid*.

<sup>71</sup> *Ibid*.

<sup>72</sup> Interview with ASIC Senior Enforcement Officer, above n 55; Interview with Shane Kirne, above n 56.

<sup>73</sup> Evidence to Senate Economics Legislation Committee, Parliament of Australia, Canberra, 1 June 2005, 95.

<sup>74</sup> Evidence to Senate Economics Legislation Committee, Parliament of Australia, Canberra, 1 June 2005, 95.

matters can be taken through the criminal court, we will categorically do so. In the event that we are obliged to take civil proceedings, again, we will argue those in the court robustly.<sup>75</sup>

If the available evidence will not support a criminal prosecution, ASIC considers whether further investigation will produce more evidence. If this is not the case, ASIC decides whether or not a civil penalty proceeding or some other enforcement action should be taken.<sup>76</sup>

If ASIC were using the civil penalty regime in a manner envisaged by responsive regulation, then it would enquire whether a civil penalty application provided a suitable regulatory outcome prior to considering a criminal prosecution in the majority of cases. The above evidence demonstrates that this does not occur. In all cases, a criminal prosecution is considered and ruled out before a civil penalty application is considered.<sup>77</sup>

The *MOU* requires ASIC to consult with the DPP before making a civil penalty application,<sup>78</sup> so that (where appropriate) the DPP can rule out the possibility of a criminal prosecution prior to the issuing of a civil penalty application.<sup>79</sup> ASIC and the DPP have a stated policy of commencing criminal prosecutions in preference to civil penalty applications in all cases where there is sufficient evidence to sustain the criminal prosecution. A civil penalty application is considered only after the decision has been made that there is insufficient evidence to sustain a prosecution.

#### IV DOES ASIC ISSUE MORE CIVIL PENALTY APPLICATIONS THAN CRIMINAL PROSECUTIONS?

The second outcome which would be evident if ASIC were utilising the civil penalty regime in a manner envisaged by responsive regulation is that more civil penalty applications than criminal prosecutions would be issued in cases where

<sup>75</sup> Evidence to Senate Economics Legislation Committee, Parliament of Australia, Canberra, 16 February 2006, 48. See also Jeffrey Lucy, 'Directors' Responsibilities: The Reality vs the Myths' (Speech delivered at the Australian Institute of Company Directors, Melbourne, 17 August 2006) 6, where Lucy stated that, '[w]here recklessness or intentional dishonesty is involved and we have enough evidence to mount criminal proceedings, we will refer the matter to the Commonwealth Director of Public Prosecutions for prosecution.'

<sup>76</sup> Interview with ASIC Senior Enforcement Officer, above n 55.

<sup>77</sup> The civil penalty regime allows criminal prosecutions to be commenced after the commencement of a civil penalty application: see above n 40 and accompanying text. Between 1 January 2000 and 31 December 2006, 30 civil penalty applications (including applications not in relation to the directors' duties provisions) have been issued, according to ASIC media releases and the author's examination of civil penalty judgments (for the methodology, see above n 7). Subsequent criminal prosecutions were commenced against some defendants who were the subject of 3 of these 30 civil penalty applications: *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253; *Australian Securities and Investments Commission v Maxwell* (2006) 59 ACSR 373; *Australian Securities and Investments Commission v White* (2006) 58 ACSR 261. The civil penalty applications issued against these defendants alleged contraventions of the directors' duties provisions. The conduct constituting the criminal offence was different from the conduct that was found to have constituted the contravention of the civil penalty provisions. The criminal prosecutions did not allege a contravention of the directors' duties provisions in *Corporations Act* s 184.

<sup>78</sup> *MOU* para 4.1.

<sup>79</sup> See *MOU* paras 4.2–4.3.

both of these enforcement regimes were available. This Part examines whether or not this has occurred.

In order to reveal whether more civil penalty applications than criminal prosecutions are being issued, it is necessary to limit the data to criminal prosecutions and civil penalty applications in relation to alleged contraventions of those provisions of the *Corporations Act* that are subject to both of these enforcement regimes. These are the civil penalty provisions that fall into the first category described above in Part II(A). As stated above, this article examines the criminal and civil penalty applications issued in relation to alleged contraventions of the directors' duties contained in *Corporations Act* ss 181, 182 and 183 because these fall into that first category. Criminal contraventions of these provisions will be prosecuted pursuant to *Corporations Act* s 184.<sup>80</sup> This data is available from the ASIC media releases issued and civil penalty judgments delivered between 1 July 2001 and 30 June 2009 and is displayed in Table 1.

**Table 1: Criminal Prosecutions Commenced Alleging a Contravention of *Corporations Act* s 184 and Civil Penalty Applications Issued Alleging a Contravention of *Corporations Act* ss 181, 182 or 183 from 1 July 2001 to 30 June 2009<sup>81</sup>**

Type(s) of Court-Based Enforcement Actions	Number of Court-Based Enforcement Actions Commenced
Number of criminal prosecutions under <i>Corporations Act</i> s 184 commenced between 1 July 2001 and 30 June 2009	85
Number of civil penalty applications under <i>Corporations Act</i> ss 181, 182 or 183 commenced between 1 July 2001 and 30 June 2009	3
Total number of court-based enforcement actions alleging a contravention of the directors' duties provisions in <i>Corporations Act</i> ss 181, 182, 183 or 184 (first category provisions) commenced between 1 July 2001 and 30 June 2009 <sup>82</sup>	88

<sup>80</sup> *Corporations Act* s 184(1) criminalises reckless or intentionally dishonest breaches of s 181(1), s 184(2) criminalises dishonest and intentional or reckless breaches of s 182(1), and s 184(3) criminalises dishonest and intentional or reckless breaches of s 183(1).

<sup>81</sup> Source: ASIC media releases issued between 1 July 2001 and 30 June 2009 (ASIC, *Media Releases and Advisories* (June 2010) <<http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Media%20and%20information%20releases%20Home%20Page>>) and the author's examination of civil penalty judgments delivered between 1 July 2001 and 30 June 2009 (for the methodology, see above n 7). The relevant civil penalty judgments are those referred to below in nn 83, 86, 90.

<sup>82</sup> This number excludes all civil penalty applications that allege a contravention of *Corporations Act* s 180.

ASIC commenced court-based enforcement actions alleging a contravention of the directors' duties provisions in *Corporations Act* ss 181, 182, 183 or 184 (provisions in the first category described above) on 88 occasions between 1 July 2001 and 30 June 2009. (These actions do not include any civil penalty applications alleging a contravention of *Corporations Act* s 180.) ASIC had the choice of a criminal prosecution or a civil penalty application in all of those cases. There were 85 criminal prosecutions and 3 civil penalty applications commenced.

The first civil penalty application was issued against Mr Stephen Vizard in 2005. ASIC alleged that Mr Vizard had contravened the *Corporations Act* s 183 duty not to improperly use information obtained as a director to gain an advantage.<sup>83</sup> The parties filed an agreed statement of facts with the Federal Court of Australia.<sup>84</sup> ASIC received much criticism for its decision to initiate civil penalty proceedings instead of a criminal prosecution in this case.<sup>85</sup>

The second civil penalty application was issued against Mr Timothy Somerville and eight directors of unrelated companies.<sup>86</sup> ASIC alleged that the directors contravened *Corporations Act* ss 181, 182 and 183 by transferring, for inadequate consideration, assets out of the corporations of which they were directors.<sup>87</sup> All of the corporations were in financial distress at the time the assets were transferred and all were subsequently placed into liquidation.<sup>88</sup>

The third civil penalty application was issued against Dr Martin Soust in January 2009. Soust was alleged to have 'breached his duties as a director,

<sup>83</sup> *Australian Securities and Investments Commission v Vizard* (2005) 145 FCR 57, 59, 62–3 (Finkelstein J) ('*Vizard*'); ASIC, 'ASIC Commences Civil Proceedings against Stephen Vizard' (Media Release No 05-190, 4 July 2005).

<sup>84</sup> *Vizard* (2005) 145 FCR 57, 59 (Finkelstein J). See also ASIC, 'Steve Vizard Banned for 10 Years and Fined \$390 000' (Media Release No 05-215, 28 July 2005).

<sup>85</sup> Examples of the comments in the press include: ABC Television, 'ASIC Criticised over Vizard Case', *Inside Business*, 24 July 2005 <<http://www.abc.net.au/insidebusiness/content/2005/s1421030.htm>>; Jennifer Sexton, 'Vizard Was "Too Well Connected" for Jail', *The Australian* (Sydney), 6 July 2005, 1; Bryan Frith, 'The Unbearable Lightness of Sentencing', *The Australian* (Sydney), 22 July 2005, 22; Terry McCrann, 'Why It's a Mistake to Civilise the Criminal', *The Weekend Australian* (Sydney), 23–24 July 2005, 34; Richard Gluyas, 'Hanging Judge Did Our Crime-Deaf Watchdog's Job', *The Australian* (Sydney), 29 July 2005, 4; James McCullough, 'One Law for Rich, Another for Richer', *The Courier Mail* (Brisbane), 30 July 2005, 27; Richard Gluyas and Blair Speedy, '"ASIC Should Have Tried to Jail Vizard"', *The Weekend Australian* (Sydney), 30–31 July 2005, 8. See also Vicky Comino, 'The Enforcement Record of ASIC since the Introduction of the Civil Penalty Regime' (2007) 20 *Australian Journal of Corporate Law* 183; Vicky Comino, 'Civil or Criminal Penalties for Corporate Misconduct: Which Way Ahead?' (2006) 34 *Australian Business Law Review* 428 (in which the author argues that in order to ensure it is regarded as a credible regulator ASIC should undertake criminal prosecutions in cases of non-inadvertent and non-minor corporate wrongdoing); Juliette Overland, 'Two Steps Forward, One Step Back: Assessing Recent Developments in the Fight against Insider Trading' (2006) 24 *Company and Securities Law Journal* 207.

<sup>86</sup> *Australian Securities and Investments Commission v Somerville* (2009) 259 ALR 574; ASIC, 'ASIC Launches Action against Alleged Phoenix Activity' (Media Release No 08-110, 27 May 2008).

<sup>87</sup> *Australian Securities and Investments Commission v Somerville* (2009) 259 ALR 574, 588–9 (Windeyer AJ).

<sup>88</sup> *Ibid* 578–9.

improperly used his position, and failed to act in good faith',<sup>89</sup> which was held to have occurred in contravention of *Corporations Act* ss 181 and 182.<sup>90</sup> A criminal prosecution could have been commenced in this case.

The data reveals that many more criminal prosecutions than civil penalty proceedings have been issued in cases where ASIC had a choice between both of these enforcement regimes. This is not what would be expected had the civil penalty regime been utilised in a manner envisaged by responsive regulation. This outcome is a result of the policy adopted by ASIC and the DPP to initiate a criminal prosecution in all situations where the evidence would support one.

#### V THE GAP BETWEEN THEORY AND PRACTICE

While it is theoretically possible to map the civil penalty regime on to the enforcement pyramid envisaged by responsive regulation, the above examination of ASIC's use of the regime indicates that, in this case, theory is not matched by reality. The civil penalty regime is not being used in a manner envisaged by responsive regulation: ASIC does not consider whether a civil penalty application would be an appropriate regulatory response prior to considering a criminal prosecution. A civil penalty application is not considered until a criminal prosecution is ruled out. Civil penalty applications do not outnumber criminal prosecutions in relation to the same types of contravention. Criminal prosecutions are not reserved as big guns for the worst cases.

Several commentators have discussed the shortcomings of responsive regulation. Fiona Haines suggests that, while there is considerable merit in the enforcement pyramid because it can bring order to a regulator's internal strategies, responsive regulation theory 'can make the task of regulation appear deceptively simple.'<sup>91</sup> Responsive regulation assumes that the regulated community is made up of rational decision-makers who are in ongoing relationships with the regulator.<sup>92</sup> This is not always the case. Gilligan, Bird and Ramsay note that:

The enforcement pyramid is very much a two dimensional model which assumes smooth, predictable interaction between the regulator and the regulated as depicted by the various tiers of enforcement response. There is a large question mark over whether the reality which is the 'rough and tumble' of commerce and its regulation by the *Corporations Law* delivers such measured

<sup>89</sup> ASIC, 'ASIC Commences Proceedings against Former Melbourne Chief Executive Officer and Managing Director' (Advisory No AD09-03, 13 January 2009).

<sup>90</sup> *Australian Securities and Investments Commission v Soust* (2010) 183 FCR 21, 45 (Goldberg J). Soust also contravened *Corporations Act* ss 1041A(c) and 1041B(1)(b) by undertaking transactions that created an artificial price for trading in shares of Select Vaccines Ltd and that created a false or misleading appearance with respect to the market and price for those shares: *Australian Securities and Investments Commission v Soust* (2010) 183 FCR 21, 44–5. In April 2010, Goldberg J disqualified Soust for 10 years from directing a company and imposed a pecuniary penalty of \$80 000 upon him: *Australian Securities and Investments Commission v Soust* [No 2] (2010) 78 ACSR 1, 18, 23.

<sup>91</sup> Haines, above n 12, 219.

<sup>92</sup> Bird, above n 32, 412–13.

and desirable outcomes. The reality of enforcement in the marketplace suggests a far more complex pyramid than the one depicted [by responsive regulation].<sup>93</sup>

Julia Black argues that, rather than adopting a flexible approach to a regulator's range of enforcement mechanisms, responsive regulation is overcommitted to the process of moving up a hierarchy of sanctions.<sup>94</sup> Robert Baldwin and Julia Black together argue that 'in some circumstances' it 'may not be appropriate' to adopt an approach that requires a 'step by step escalation up the [enforcement] pyramid'.<sup>95</sup> They contend that 'where potentially catastrophic risks are being controlled it may not be feasible to enforce by escalating up the layers of the pyramid and the appropriate reaction may be immediate resort to the higher levels'.<sup>96</sup>

ASIC and the DPP would support these views. They consider a civil penalty application only for serious contraventions. But if the contravention is serious, ASIC and the DPP would argue that it would not be appropriate to adopt a step-by-step approach, moving up a hierarchy of sanctions. Rather, they would argue that immediate resort to criminal sanctions located at the apex of the pyramid is necessary.

John Coffee has examined the behaviour of regulators who have at their disposal overlapping criminal sanctions and civil penalties.<sup>97</sup> While responsive regulation posits that in these situations the most successful regulators will, in the majority of cases, utilise civil penalties, reserving criminal sanctions for the worst cases as big guns, Coffee argues in contrast that regulators are unlikely to prefer civil penalties to criminal sanctions if they have both of these sanctions at their disposal. He argues that bureaucratic incentives mean that regulators will bring criminal prosecutions rather than civil penalty applications.<sup>98</sup> These bureaucratic incentives arise as a result of 'the publicity and public drama' that surround a criminal prosecution.<sup>99</sup> According to Coffee, publicity following a successful criminal prosecution can generate a greater level of deterrence than that following a successful civil penalty application.<sup>100</sup> Moreover, this increased publicity can lead to the regulator gaining an image as a tough enforcer.<sup>101</sup> This perception is desirable because it can lead to the obtaining of a greater level of

<sup>93</sup> Gilligan, Bird and Ramsay, 'Civil Penalties and the Enforcement of Directors' Duties', above n 5, 433.

<sup>94</sup> Julia Black, 'Managing Discretion' (Paper presented at the Australian Law Reform Commission Conference: Penalties — Policy, Principles and Practice in Government Regulation, Sydney, June 2001) 6.

<sup>95</sup> Robert Baldwin and Julia Black, 'Really Responsive Regulation' (2008) 71 *Modern Law Review* 59, 62.

<sup>96</sup> *Ibid* 62–3 (citations omitted).

<sup>97</sup> John C Coffee Jr, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models — And What Can Be Done about It' (1992) 101 *Yale Law Journal* 1875.

<sup>98</sup> *Ibid* 1888–9.

<sup>99</sup> *Ibid* 1888.

<sup>100</sup> See *ibid*.

<sup>101</sup> *Ibid*.

funding, the maintenance of staff morale and can assist in the recruitment of new staff.<sup>102</sup>

In addition, Coffee argues that enforcement officers employed by regulatory agencies are likely to believe that the laws they enforce are vital in order to protect 'public interests'.<sup>103</sup> It is unlikely that these enforcement officers will believe that persons who contravene these laws should not be subjected to criminal prosecutions.<sup>104</sup> According to Coffee, it is for these reasons that regulators are unlikely to choose civil penalties over criminal sanctions when both enforcement options are available.

If Coffee is correct, regulators who have at their disposal overlapping criminal sanctions and civil penalties are unlikely to take a strategic view of regulation. They are unlikely to adopt the step-by-step approach up the enforcement pyramid. They are unlikely to consider whether or not they will achieve a greater level of voluntary compliance by reserving criminal penalties as big guns to be utilised only in the worst possible cases. Instead, regulators are likely to be more concerned with the types of bureaucratic pressures identified by Coffee and issue more criminal prosecutions than civil penalty applications in situations where both of these enforcement options are available.

Coffee's views are supported by the findings of this article. The data in Table 1 shows that ASIC has not reduced its use of criminal sanctions in favour of civil penalty applications. ASIC does face bureaucratic incentives to bring criminal prosecutions in preference to civil penalty applications. These bureaucratic incentives take the form of parliamentary scrutiny and public criticism. ASIC has been scrutinised by various Senate committees about its choice of enforcement regimes. For example, Mr Lucy was questioned by the Senate Economics Legislation Committee in relation to the Vizard matter on 16 February 2006.<sup>105</sup> The following excerpt from the *Official Committee Hansard* of an exchange between Senator Wong and Mr Lucy illustrates the level of scrutiny faced by ASIC in relation to its enforcement decisions:

Wong: I am not trying to redo the Vizard matter; I am interested in learning what changes and alterations to your operations and investigations resulted from that.

Lucy: ASIC has no regrets or qualms about our investigation and subsequent prosecution of the Vizard matter. We remain of the view —

Wong: That is a big statement, Mr Lucy.

Lucy: — that it was robustly investigated and appropriately —

Wong: No regrets or qualms whatsoever?

<sup>102</sup> Ibid 1888–9.

<sup>103</sup> Ibid 1889.

<sup>104</sup> See *ibid* 1888–90.

<sup>105</sup> Evidence to Senate Economics Legislation Committee, Parliament of Australia, Canberra, 16 February 2006, 7–8 (Penelope Wong), 10–11 (Jeffery Lucy and Louise Macaulay, Director of Enforcement Policy, ASIC and Penelope Wong), 18–19 (Jeffery Lucy and Penelope Wong), 48 (Jeffery Lucy and John Watson).

Lucy: Not in relation to the prosecution of Mr Vizard.

Wong: Do you have regrets or qualms in relation to your record on serious white-collar financial crime?

Lucy: No.

Wong: Do you think you have a good record?

Lucy: Yes.

Wong: Do you reject the public concerns which have been raised that ASIC and the DPP are soft on corporate crime?

Lucy: Correct.

Wong: Are you going to alter your prosecution strategy at all? We have discussed previously —

Lucy: No, we are not.<sup>106</sup>

In addition to facing parliamentary scrutiny, ASIC has been criticised in the press for some of its enforcement decisions. An example of this is the criticism that followed the Vizard matter, where many commentators argued that ASIC should have pursued a criminal prosecution rather than civil penalty proceedings. Many claimed that this matter was an example of the law going soft on white-collar offenders.<sup>107</sup> Several academics have criticised a number of ASIC's enforcement decisions, arguing that whenever possible ASIC should pursue criminal prosecutions rather than civil penalty applications.<sup>108</sup>

One of the limitations of responsive regulation is that it does not adequately address the effect the bureaucratic pressures identified by Coffee may have on regulatory decisions. ASIC operates in an environment which requires it to take into consideration vigorous public and political debate about its actions. When choosing between the available enforcement options, ASIC would be aware that it may be required to provide strong justification for any decision not to prosecute criminally. Responsive regulation does not consider in detail how the political and social environment in which ASIC operates influences the regulatory strategy adopted by it.

ASIC would justify its approach by reference to both external pressures to prosecute criminally and deterrence theory. Deterrence theorists assume that regulated persons are self-interested, rational actors who take advantage of opportunities to maximise their desired outcomes. Corporate decision-makers 'weigh the benefits of noncompliance against the probability and costs of

<sup>106</sup> Evidence to Senate Economics Legislation Committee, Parliament of Australia, Canberra, 16 February 2006, 18. See also Evidence to Joint Committee on Corporations and Financial Services, Parliament of Australia, Canberra, 13 September 2005, 1–2 (Jeffrey Lucy).

<sup>107</sup> See above n 85.

<sup>108</sup> See, eg, Comino, 'The Enforcement Record of ASIC', above n 85; Comino, 'Civil or Criminal Penalties', above n 85; Overland, above n 85. See also Geraldine Szott Moohr, 'On the Prospects of Deterring Corporate Crime' (2007) 2 *Journal of Business and Technology Law* 25.

punishment.<sup>109</sup> Deterrence theory assumes that these persons will comply with the law when the cost of noncompliance outweighs the benefits to be gained.<sup>110</sup>

A deterrence strategy requires that offenders be watched closely, all suspicious signs be investigated and the letter of the law be enforced meticulously.<sup>111</sup> It calls for command-and-control regulation, whereby penalties are threatened for noncompliance and violators of the law are punished.<sup>112</sup>

The use of harsh sanctions and strict penalties is often justified by deterrence theory.<sup>113</sup> It is argued that harsher penalties provide the most powerful deterrents.<sup>114</sup> A deterrence approach supports the use of criminal sanctions whenever they are available, because a criminal conviction usually carries harsher penalties than those available through other penalty regimes. In situations where ASIC has the choice of a criminal prosecution or a civil penalty application, a deterrence approach would therefore support the choice of criminal sanctions.

In summary, when ASIC has both criminal sanctions and the civil penalty regime at its disposal, it does not act in a manner envisaged by responsive regulation. One reason for this is the public and political environment in which ASIC operates. Responsive regulation does not adequately address the effect that these external pressures have on the choices that ASIC makes. The regulatory strategy adopted by ASIC instead reflects a deterrence-based approach. However, the discussion in the following Part will reveal that ASIC's enforcement strategy is influenced by responsive regulation when the option of a criminal prosecution is not available.

## VI ASIC'S USE OF THE CIVIL PENALTY REGIME

When a criminal prosecution is not available (that is, for all contraventions that fall into the second category of provisions identified above in Part II(A) and for those contraventions that fall into the first category identified above but where the DPP has determined that there is insufficient evidence to sustain a criminal prosecution),<sup>115</sup> it appears that ASIC is influenced by responsive regulation and

<sup>109</sup> Sally S Simpson, *Corporate Crime, Law, and Social Control* (2002) 94.

<sup>110</sup> John T Scholz, 'Cooperation, Deterrence, and the Ecology of Regulatory Enforcement' (1984) 18 *Law and Society Review* 179–81.

<sup>111</sup> *Ibid* 182.

<sup>112</sup> Jenny Job, Andrew Stout and Rachael Smith, 'Culture Change in Three Taxation Administrations: From Command-and-Control to Responsive Regulation' (2007) 29 *Law and Policy* 84, 87, citing Eugene Bardach and Robert A Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (1982); Nigel Dodd and Bridget Hutter, 'Geopolitics and the Regulation of Economic Life' (2000) 22 *Law and Policy* 1; P N Grabosky, 'Regulation by Reward: On the Use of Incentives as Regulatory Instruments' (1995) 17 *Law and Policy* 257; Jenny Job and David Honaker, 'Short-Term Experience with Responsive Regulation in the Australian Taxation Office' in Valerie Braithwaite (ed), *Taxing Democracy: Understanding Tax Avoidance and Evasion* (2003) 111, 113; Albert J Reiss Jr, 'Selecting Strategies of Social Control over Organizational Life' in Keith Hawkins and John M Thomas (eds), *Enforcing Regulation* (1984) 23.

<sup>113</sup> See, eg, Simpson, above n 109, 17.

<sup>114</sup> See, eg, *ibid* 20; Moohr, above n 108, 35.

<sup>115</sup> A criminal prosecution will not be available where the DPP has advised ASIC that there is insufficient evidence to sustain a criminal prosecution or where ASIC is alleging that the duty of

is thus more likely to take a strategic view in relation to its enforcement options. The ASIC Senior Enforcement Officer was asked what factors influence ASIC's choice of the civil penalty regime once a criminal prosecution has been ruled out or where it is not available. The response was that, in these situations, the factors ASIC considers are: whether or not the matter involves a serious breach; what the regulatory outcome may be; what resources will be required to pursue a civil penalty application; and whether or not any other remedies are available.<sup>116</sup>

Civil penalty applications will only be commenced where there has been a serious breach of the *Corporations Act*. On 1 June 2005, Mr Jeffrey Lucy gave evidence to the Senate Economics Legislation Committee regarding ASIC's use of the civil penalty regime in the context of James Hardie.<sup>117</sup> He explained that civil penalty proceedings will only be instituted by ASIC in situations where a 'serious' breach of the *Corporations Act* has been committed.<sup>118</sup>

The resources required to run a civil penalty application will be a factor considered by ASIC in any decision as to whether or not to issue proceedings, as its Senior Enforcement Officer stated. In evidence to the Senate Economics Legislation Committee, Mr Lucy further showed that this is the case, stating that he

do[es] not think that the regulator [ASIC] should be undertaking any investigative activity, or in particular enforcement activity, unless [it was] satisfied as to the grounds of success. We are using taxpayers' money to bring prosecution[s] and to bring charges. The consequences of our actions are significant ...<sup>119</sup>

As ASIC's Senior Enforcement Officer stated, prior to issuing a civil penalty application, ASIC will consider other available remedies to determine if such remedies may themselves provide an appropriate regulatory response. This approach is in keeping with responsive regulation. For example, if the person in question has been a director of two or more failed companies that have returned less than 50 cents in the dollar to creditors,<sup>120</sup> ASIC considers an administrative ban pursuant to *Corporations Act* s 206F.<sup>121</sup> In some cases, a better regulatory outcome will be achieved from an administrative ban than from a civil penalty application. The administrative ban (under s 206F) is quicker and cheaper than

care in *Corporations Act* s 180 has been breached. There is no criminal liability for contravention of s 180: see s 184 and the heading of s 180 ('Care and diligence — civil obligation only').

<sup>116</sup> Interview with ASIC Senior Enforcement Officer, above n 55.

<sup>117</sup> Evidence to Senate Economics Legislation Committee, Parliament of Australia, Canberra, 1 June 2005, 71, 84–98. On 15 February 2007, ASIC announced that it had commenced civil penalty proceedings against a number of former and current directors and former executives of the James Hardie group: see ASIC, 'ASIC Commences Proceedings Relating to James Hardie' (Media Release No 07-35, 15 February 2007). The proceedings related to disclosures made by James Hardie Industries Ltd with respect to the adequacy of the funding of the Medical Research and Compensation Foundation. The Foundation was set up for the purpose of funding the James Hardie group's asbestos liabilities.

<sup>118</sup> Evidence to Senate Economics Legislation Committee, Parliament of Australia, Canberra, 1 June 2005, 85.

<sup>119</sup> Evidence to Senate Economics Legislation Committee, Parliament of Australia, Canberra, 1 June 2005, 109.

<sup>120</sup> *Corporations Act* ss 206F(1)(a)(ii), 533(1)(c).

<sup>121</sup> Interview with ASIC Senior Enforcement Officer, above n 55.

an application for a disqualification order under the civil penalty regime (that is, under s 206C).<sup>122</sup> An administrative ban is positioned below civil penalty proceedings on the enforcement pyramid.<sup>123</sup>

Another alternative to the civil penalty regime is the institution of proceedings seeking a disqualification order pursuant to *Corporations Act* s 206E(1). This section allows ASIC to apply to the court for an order disqualifying a person from managing a corporation where:

- (a) the person:
  - (i) has at least twice been an officer of a body corporate that has contravened this Act ... while they were an officer of the body corporate and each time the person has failed to take reasonable steps to prevent the contravention; or
  - (ii) has at least twice contravened this Act ... while they were an officer of a body corporate; ... and
- (b) the Court is satisfied that the disqualification is justified.

As a further alternative to civil penalty provisions, ASIC is able to accept court-enforceable undertakings from persons who contravene the *Corporations Act*.<sup>124</sup> An enforceable undertaking is positioned below a civil penalty application on the enforcement pyramid.<sup>125</sup> It can therefore be seen that, in cases where a criminal prosecution is not available, ASIC takes a strategic view and considers whether these alternative remedies provide an adequate regulatory response prior to issuing a civil penalty application.

Table 2 examines the types of enforcement actions instigated by ASIC against directors. It does not include any criminal prosecutions. The data examined is limited to enforcement activity commenced between 1 July 2001 and 30 June 2009. Much of the available data relating to ASIC's enforcement activities is presented in financial years.<sup>126</sup>

The civil penalty proceedings listed in Table 2 are those applications that allege that a contravention of at least one of the directors' duties contained in *Corporations Act* ss 180, 181, 182 or 183 has occurred. The banning orders listed in Table 2 are orders that ban a person from acting as a director or an officer. These banning orders were obtained pursuant to provisions other than the civil penalty regime. The enforceable undertakings listed in Table 2 are those entered into by directors or officers in situations where their alleged contraventions related to their role as a director or an officer.

In relation to contraventions of the directors' duties provisions where a criminal prosecution is not available, civil penalty applications sit at the apex of the enforcement pyramid. Administrative banning orders and enforceable undertakings occupy lower levels of the pyramid. If ASIC were utilising civil

<sup>122</sup> Ibid.

<sup>123</sup> See above nn 16–20 and accompanying text.

<sup>124</sup> *Australian Securities and Investments Commission Act 2001* (Cth) s 93AA.

<sup>125</sup> See above nn 16–20 and accompanying text.

<sup>126</sup> The current civil penalty regime was introduced by *CLERP Act* sch 1 item 6. It came into operation on 13 March 2000: see above n 39 and accompanying text.

penalties in a manner envisaged by responsive regulation, ASIC would make greater use of the banning orders and enforceable undertakings than the civil penalty provisions.

**Table 2: Civil Enforcement Activities for (Alleged) Contraventions of the Corporations Act Commenced by ASIC from 1 July 2001 to 30 June 2009<sup>127</sup>**

Year	Number of Civil Penalty Applications Issued Alleging Contravention of <i>Corporations Act</i> ss 180, 181, 182 and/or 183	Total Number of Company Directors and Officers Banned Pursuant to Provisions Other than the Civil Penalty Regime <sup>128</sup>	Number of Cases in Which Enforceable Undertakings Were Provided by Company Directors and Officers and Accepted by ASIC
2001–2002	3 cases (10 directors and officers in total)	15 directors and officers	4 cases (5 directors and officers in total)
2002–2003	2 cases (4 directors and officers in total)	4 directors and officers	2 cases (2 directors and officers in total)
2003–2004	3 cases (16 directors and officers in total)	20 directors and officers	Nil

<sup>127</sup> Source: The data relating to civil penalty applications is drawn from ASIC media releases and the author's examination of civil penalty judgments (for the methodology, see above n 7). The source of the data relating to the number of directors banned is the ASIC annual reports from 2000–01 to 2008–09 (ASIC, *Annual Report 2001–02: Tackling Ethics and Governance* (2002) 29–30; ASIC, *Annual Report 2002–03: Fighting Fraud and Misconduct* (2003) 28; ASIC, *ASIC Annual Report 2003–04: Building Confidence in Financial Markets* (2004) 18; ASIC, *ASIC Annual Report 2004–05: Patrolling a Broad Territory* (2005) 20; ASIC, *ASIC Annual Report 2005–06: Working for Australia — Consumers, Investors, Business and Markets* (2006) 21; ASIC, *ASIC Annual Report 06–07: Regulating in a Time of Growth — Markets, Business, Investors and Consumers* (2007) 16; ASIC, *ASIC Annual Report 07–08: A Year of Change* (2008) 60–1; ASIC, *ASIC Annual Report 08–09: A Year of Consolidation* (2009) 19), ASIC media releases and the author's examination of corresponding judgments (bannings under the civil penalty regime revealed in relevant judgments were subtracted from the total number of bannings stated in the annual reports). The source of the data relating to the number of enforceable undertakings obtained is the ASIC website: ASIC, *Enforceable Undertakings Register* (December 2009) <<http://www.asic.gov.au/asic/asic.nsf/byheadline/Enforceable+undertaking+register%3A+list?openDocument>>.

<sup>128</sup> For the purposes of this Table, the 'civil penalty regime' refers to s 206C and pt 9.4B of the *Corporations Act*.

<b>Year</b>	<b>Number of Civil Penalty Applications Issued Alleging Contravention of <i>Corporations Act</i> ss 180, 181, 182 and/or 183</b>	<b>Total Number of Company Directors and Officers Banned Pursuant to Provisions Other than the Civil Penalty Regime</b>	<b>Number of Cases in Which Enforceable Undertakings Were Provided by Company Directors and Officers and Accepted by ASIC</b>
<b>2004–2005</b>	1 case (5 directors and officers in total)	26 directors and officers	1 case (1 director in total)
<b>2005–2006</b>	4 cases (6 directors and officers in total)	32 directors and officers	1 case (1 director in total)
<b>2006–2007</b>	4 cases (14 directors and officers in total)	95 directors and officers	Nil
<b>2007–2008</b>	2 cases (14 directors and officers in total)	62 directors and officers	Nil
<b>2008–2009</b>	1 case (1 director in total)	49 directors and officers	1 case (number of directors and officers unknown)

The data in Table 2 reveals that the total number of directors banned pursuant to provisions other than the civil penalty provisions exceeded the total number of directors who were subjected to civil penalty applications arising out of contraventions of the directors' duties provisions. The data indicates that ASIC has a preference for banning orders obtained pursuant to provisions other than the civil penalty regime rather than civil penalty applications. This is to be expected if ASIC is adopting an approach supported by responsive regulation.

It can therefore be seen that, when a criminal prosecution is not available, ASIC is more inclined to utilise the civil penalty regime in a manner envisaged by responsive regulation. Prior to issuing a civil penalty application, ASIC considers whether or not the other remedies available would provide an adequate regulatory response. In addition, the spread of enforcement activity across the pyramid exhibited in Table 2 is more consistent with the adoption of a strategic response than is the spread exhibited in Table 1.

Despite the fact that the civil penalty regime is not utilised in a manner envisaged by responsive regulation in situations where ASIC has the choice of a criminal prosecution or a civil penalty application, civil penalty applications are important regulatory mechanisms. Civil penalties allow ASIC to take enforcement action in situations where it would otherwise be unable to act. For example, between 1 July 2001 and 30 June 2009, ASIC issued 17 civil penalty applications alleging a contravention of the duty of care and diligence in *Corporations Act* s 180.<sup>129</sup> A criminal prosecution is not available for a contravention of this section.<sup>130</sup> Without the civil penalty regime, ASIC would not have been able to take court-based enforcement action in these 17 cases.<sup>131</sup>

During this same period and as previously mentioned, ASIC issued a civil penalty application against Mr Stephen Vizard alleging a contravention of the *Corporations Act*.<sup>132</sup> On 14 September 2005, Mr Jeffrey Lucy appeared before the Joint Committee on Corporations and Financial Services and stated that:

In this case, criminal charges were not pursued against Mr Vizard because the DPP was not satisfied that there was admissible, substantial and reliable evidence of the offence and therefore there were not reasonable prospects of securing a conviction.<sup>133</sup>

If the DPP's advice was correct, ASIC would not have been able to take court-based enforcement action against Mr Vizard at all had the civil penalty regime not been available.

ASIC has achieved a high degree of success with the civil penalty applications it has issued. At 30 June 2009, 38 of the civil penalty applications issued by ASIC since 1993 had been finalised. ASIC was successful in all but 3 of the 38 finalised cases<sup>134</sup> (success being defined as the issuing of a declaration of contravention against at least one of the defendants in the proceeding and the obtaining of civil penalty orders).

According to ASIC, civil penalty applications feature strongly in what it regards as the key results it achieves each year. An examination of the ASIC annual reports from 2001–02 to 2008–09 reveals that civil penalty proceedings

<sup>129</sup> According to ASIC media releases and the author's examination of civil penalty judgments (for the methodology, see above n 7).

<sup>130</sup> See above n 115.

<sup>131</sup> A further civil penalty application alleging a contravention of the directors' duties provisions was issued during this period against Ronald Moore, director of Monitored Investment Services (Qld), and Allarna Moore, a former trustee of the Moore Unit Trust: see ASIC, 'ASIC Obtains Undertakings against Monitored Investment Services' (Media Release No 03-337, 23 October 2003). There is insufficient information available about this matter to determine which of the directors' duties provisions have allegedly been contravened. It is not possible to determine whether or not ASIC would have been in a position to institute a criminal prosecution had the civil penalty regime not been available.

<sup>132</sup> See above n 83 and accompanying text.

<sup>133</sup> Evidence to Joint Committee on Corporations and Financial Services, Parliament of Australia, Canberra, 13 September 2005, 2.

<sup>134</sup> According to ASIC media releases and the author's examination of civil penalty judgments (for the methodology, see above n 7).

are prominent in the matters identified as ‘key’ or ‘significant’ for each year.<sup>135</sup> For example, in the 2001–02 year, five matters were identified as being ‘key’.<sup>136</sup> One of those was the civil penalty proceedings issued against the directors of the HIH group of companies.<sup>137</sup> In the 2008–09 year, three civil penalty applications were identified as being among the major enforcement actions that had been undertaken.<sup>138</sup> These were the civil penalty applications issued in relation to James Hardie, Fortescue Metals Group and AWB.<sup>139</sup>

## VII CONCLUSION

In the case of ASIC, the theory of responsive regulation (which holds that it is possible to map the civil penalty provisions on to the enforcement pyramid and that these provisions will be used by the regulator in accordance with that pyramid) does not match reality. When ASIC has the choice between criminal sanctions and civil penalty applications, it does not utilise the civil penalty regime in a manner envisaged by this theory. The data and the other evidence examined in this article reveal that ASIC does not consider whether or not a civil penalty application would be an adequate regulatory response prior to considering a criminal prosecution and that ASIC does not initiate more civil penalty proceedings than criminal prosecutions in relation to the same types of contraventions. In every case that could be the subject of both a criminal prosecution and a civil penalty application, ASIC will not issue civil penalty proceedings until the possibility of obtaining a criminal conviction is ruled out. The stated policy of both ASIC and the DPP is that a criminal prosecution will be launched in preference to a civil penalty application in every case where the evidence supports it. Many more criminal prosecutions than civil penalty applications have therefore been issued in relation to the same type of conduct.

The examination of ASIC’s use of the civil penalty regime undertaken in this article reveals that ASIC’s decision-making process is different from the process suggested by responsive regulation. ASIC acts in a public and political environment in which it may be required to justify any decision not to prosecute criminally. Responsive regulation theory does not adequately address the influence that such external pressures have on the strategies adopted by a regulator. It is only after a criminal prosecution has been ruled out that ASIC’s decision-making process begins to resemble one that is envisaged by responsive regulation.

<sup>135</sup> ASIC, *Annual Report 2002–03*, above n 127, 23, 27; ASIC, *ASIC Annual Report 2003–04*, above n 127, 14–15; ASIC, *ASIC Annual Report 2004–05*, above n 127, 16; ASIC, *ASIC Annual Report 2005–06*, above n 127, 18; ASIC, *ASIC Annual Report 06–07*, above n 127, 16; ASIC, *ASIC Annual Report 07–08*, above n 127, 14–15.

<sup>136</sup> ASIC, *Annual Report 2001–02*, above n 127, 25.

<sup>137</sup> *Ibid.*

<sup>138</sup> ASIC, *ASIC Annual Report 08–09*, above n 127, 16–17.

<sup>139</sup> *Ibid.*