The Enforcement of Corporations Law and Securities Regulation in Australia: A Framework for Analysis and Reform

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The Corporations Law provides an enormous range of possibilities for dealing with the regulation of companies and capital markets. This article presents a scheme for making sense of that range, and suggests how choices of regulatory strategy might be made and how reform might proceed.

INTRODUCTION

Australia emerged from the 1980s perceiving that much needed to be done to address the domestic and international reputation of its business and capital markets. Its innovative system of cooperative federal and state regulation of corporations (corporations law) and capital markets (securities regulation) was seen to be have been inadequate for the changes brought on

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by the boom and the crash of the period.[1] The result was the 'National Scheme' that combines the corporations law and securities regulation centrepiece statute, the Corporations Law, under a single national regulator, the Australian Securities Commission ('ASC' or 'Commission').[2]

The ASC has been assigned a central role under the National Scheme. It has been given a wide range of corporations law and securities regulation functions and authorities that make it both like and unlike its counterparts abroad.[3] It was created as a properly financed national regulator to assist in restoring confidence in Australian business and capital markets.[4] Its enforcement activities are an important part of the role thus laid down for it. Its enforcement activities have in fact created considerable popular and political, as well as professional, interest in Australia.[5]

This article is about how to understand the rich array of enforcement tools provided under the National Scheme. It is also about further law reform — how to improve this array. The particular focus of this paper is on the strategies for civil enforcement and, to a lesser extent, for criminal enforcement, available to the ASC under the National Scheme.

An understanding of the enforcement tools available to the ASC, as a preliminary to consideration of some ideas for their reform, needs to be conducted against the backdrop of the possibilities for enforcement by other entities, most notably private litigants.

An understanding of the tools the ASC has at its disposal requires, in

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1. See Senate Standing Committee on Legal and Constitutional Affairs *The Role of Parliament in Relation to the National Companies Scheme* (Canberra: AGPS, 1987) 23-24.
2. For a useful account of the 'federalisation' of the law here, including interpretation, criminal procedure and administrative and judicial review: see R Tomasic & S Bottomley *Corporations Law in Australia* (Sydney: Federation Press, 1995) chs 3 & 4.
3. The two areas of corporations law and securities regulation are distinguishable, notwithstanding the tendency in this country to conflate them that has followed from the combining of the two schemes of regulation (as well as personal property security law) in one legislative scheme: see RL Simmonds 'Dismembering the Corporations Law and Other Law Reform: Should Something More be Added to The Law Reform Agenda?' (1995) 13 C&SLJ 57. For a comparison in these terms of the position of the ASC and its US counterpart, the Securities and Exchange Commission: see P Redmond *Companies and Securities Law: Commentary and Materials* 2nd edn (Sydney: Law Book Co, 1992) 931-932.
4. There was of course much more to it than that, in terms not least of the politics of intergovernmental relations in our federation: see Redmond supra n 3, 61-80 and references there.
5. Eg Senate Standing Committee on Legal and Constitutional Affairs *The Inquiry into ASC Investigatory Powers* (Canberra: AGPS, 19xx). For the flavour of the debate this marks: see J Longo 'The Mother of all Corporate Investigators: An Assessment of the ASC's Powers of Investigation' ASC and Criminal Law Section of the Law Council of Australia *Corporate Law Enforcement Conference: Whose Right? Who's Wronged?* (Perth, 16 Sept 1994) (hereafter 'Enforcement Conference').

turn, that a number of matters be addressed. First, it is necessary that the types of enforcement activity the ASC can undertake be catalogued, as a set of types of strategy. Not all will be available for all of the Corporations Law norms that the Commission may be concerned with. But all of the types need to be accounted for. Next, it is necessary to describe the considerations that might direct the ASC in its choice of strategy. The first task is one of taxonomy. The second is one of analysis.

As indicated, this article will address civil enforcement primarily. This is because the array of possible enforcement tools (presently) available is in form and practice much richer there than in relation to criminal enforcement. It is less to do with the balance in enforcement activity of the ASC. It is probably true to say that enforcement of corporations and securities law — once both reactive and proactive, formal and informal strategies are taken into account — is greater for civil than for criminal enforcement in this area. However, there is a substantial volume of formal activity of both sorts.[6]

This article also addresses criminal enforcement issues in this field. This is for several reasons. First, there are stronger similarities between criminal and at least some civil enforcement strategies than is sometimes supposed — particularly where a corporate defendant is concerned. Also, consideration of appropriate civil enforcement strategies requires an understanding of the place of criminal enforcement. Finally, civil enforcement, or at least some types of it, will go on against a backdrop of possible criminal enforcement at different levels of penalty.

There is one further reason for this article's blending of the two types of enforcement. It is that a recent challenging proposal for reform of the law of criminal enforcement, in this country and others with similar legal systems, is founded on such a blending. The ASC seems to be attracted to what amounts to a form of such a proposal. Something resembling a version of it has been commended by the Australian Law Reform Commission for reform of the regime for criminal enforcement of the Trade Practices Act 1974 (Cth).[7]

The proposal involves the use of reports on and undertakings as to past wrongdoings, to deal with them so as to prevent their recurrence, obtained as a result of civil proceedings. Such use includes having them serve in sufficiently serious cases as a predicate for subsequent criminal proceedings of escalating severity. This article argues that that proposal, called 'the Accountability Model' by its principal proponents, Professors Brent Fisse

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6. See the Appendix to the most useful paper by F Low 'Civil Enforcement Strategies': Enforcement Conference supra n 5.
7. See ALRC *Compliance with the Trade Practices Act 1974* Rep No 68 (Canberra: AGPS, 1994) ch 10.

and John Braithwaite,[8] has some very considerable attractions in terms of its promise to deal with the major problems of enforcement against corporations without some of its major problems, for defendant and regulator alike. Not the least of its apparent virtues is its promise of maximising the return from the resources available for enforcement of the National Scheme.

TYPES OF ENFORCEMENT STRATEGY

1. Criminal and civil enforcement

In conventional analysis, there are broadly two types of enforcement strategy. One is criminal enforcement. This is distinguished by its process — most notably, court-based — as well as by the range of penalties it can involve. The other type of enforcement is civil — which may, but need not, be court-based, with proof not at the level of traditional criminal proceedings,[9] and with a different range of penalties.

Apart from its authority to take civil enforcement action, the ASC is in fact given the authority under the its legislation, the Australian Securities Commission Act 1989 (Cth), to cause criminal prosecutions to be brought.[10] As a result of differences of opinion between the Commonwealth Director of Public Prosecutions and the ASC on the appropriate balance between civil and criminal enforcement strategies, the two bodies worked out a memorandum of understanding between them which was followed by the issue of a ministerial direction. This direction called for continuing collaboration between the two, including that:

> Except where the exigencies of the particular case prevent prior consultation, the ASC shall, before taking civil enforcement action in any matter in respect of which it considers that serious corporate wrongdoing of a criminal nature may have occurred, consult with the DPP regarding the appropriateness of taking such civil proceedings in the light of the possibility that criminal enforcement action may be available.[11]

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8. Most recently elaborated in the superb book, B Fisse & J Braithwaite *Corporations, Crime and Accountability* (Melbourne: Cambridge UP, 1993), and recently applied to the Corporations Law in C Dellit & B Fisse 'Civil and Criminal Liability Under Australian Securities Regulation: the Possibility of Strategic Enforcement' in G Walker & B Fisse (eds) *Securities Regulation in Australia and New Zealand* (Auckland: Oxford UP, 1994) ch 24. The present paper was prepared between these two publications
9. As a general proposition; where such as fraud is alleged, the standard of proof approaches the criminal one: see *Briginshaw v Briginshaw* (1938) 60 CLR 338.
10. See s 49.
11. See Ministerial Direction 'Serious Corporate Wrongdoing – Direction Relating to Investigation and Enforcement (1992)' [1995] 3 ASC Dig Ministerial Orders 31-35,

Under guidelines worked out from the memorandum of understanding and the direction:

> When the ASC has decided that criminal proceedings should in its opinion be instituted and has gathered substantial evidence to enable it to support that view the ASC is required to request in writing the DPP's view as to whether the matter should be referred to the DPP for the purposes of criminal proceedings.[12]

In effect, the ASC has the role of principal investigator and, in collaboration with the DPP, decides on criminal enforcement action, which the DPP will often take.

The investigatory or other fact-gathering process of the ASC may be formal or informal. Regulators like the ASC[13]have available to them a range of authorities, particularly over securities market intermediaries like licensed dealers, that open up a range of fact-gathering possibilities, from the relatively highly structured ones such as an examination under the Australian Securities Commission Act 1989,[14] to the less structured ones possible under the Corporations Law.[15] The ASC can and does proceed less formally still, through non-compulsory process.

The stage preceding formal enforcement can be readily separated out, but this is misleading in the context of enforcement agencies like the ASC. It is misleading because the fact-gathering phases, whether formal or informal, can themselves be part of a 'pro-active' enforcement strategy designed to encourage a 'culture of compliance'. The main examples here are the ASC's abuse (or misuse) of the corporate form[16] and its securities dealers and investment advisers[17] 'surveillance programs'. It is misleading because the fact-gathering phase — or even its preliminaries, in the ASC's deliberations whether to investigate — may itself attract or be given publicity in ways that seem likely or calculated to secure enhanced compliance or

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Guidelines ¶ 5; and the account of the background to this direction in R Tomasic *Corporate Crime and Corporations Law Enforcement Strategies in Australia* (Canberra: Centre for National Corporate Law Research, 1993) 19-22.

12. M Rozenes 'The Role of the DPP in the Investigation and Prosecution of Complex Fraud': Enforcement Conference supra n 5, 4.
13. Although the ASC's authorities here are considered more extensive than most: see ALRC *TPA Report* supra n 7, ¶ 11.19 (relative to Trade Practices Commission); and see Longo supra n 5.
14. Australian Securities Commission Act Pt 3 Div 2 and related provisions.
15. Eg Corporations Law s 788, discussed in this context in Law Council of Aust, Business Law Section Companies Committee *Submission to Senate Standing Committee on Legal and Constitutional Affairs with Reference to the Investigatory Powers of the ASC* (30 Aug 1993) ¶ 4.1.
16. Most illuminatingly described in 'Abuse of the Corporate Form Surveillance Program' [1994] 2 ASC Dig Info 119-126.
17. ASC 'Securities Dealers and Investment Advisers Surveillance Program' [1993] 2 ASC Dig MR 231-232.

avoid loss.[18] And it is misleading for the well understood reason that the inquiry may terminate in an agreement between the ASC and the target to avoid the cost, delay and risks of enforcement — an agreement that may involve such requirements as compensation to investors for loss and payment to the ASC of the cost of the formal fact-gathering exercise.[19]

The sharp distinction between criminal and civil enforcement may be called into question also, as has been indicated. From the standpoint of the regulator, the main reason for doing so arises out of the preceding discussion of the distinction between the preliminary and the enforcement stages. Both criminal and civil enforcement offer ways of fostering compliance. Furthermore, both will tend to operate, so far at least as corporate defendants are concerned, through the same formal device, the monetary impost, in the form of the fine and the damages order.

Of course, not all of the norms in the law being enforced give rise to both criminal and civil enforcement possibilities in case of their contravention,[20] although a high proportion do.[21] Not all forms of civil enforcement involve damages orders, as will be seen, even in the case of corporations[22] — although not all forms of criminal proceedings for corporations, under general federal criminal law (which is applicable in this respect and others to offences under the National Scheme)[23] need terminate in fines either, with the (largely under-exploited) possibilities opened up by corporate probation orders.[24]

Damages awards are of course based primarily on notions of their operating as a measure of the loss suffered, rather than marking the seriousness of the conduct concerned. However, the recent innovation in the Corporations Law of the 'civil penalty' in certain cases of breach of a

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18. Eg ASC 'Campbell Soup Co Bid for Arnotts Ltd' [1993] 2 ASC Dig MR 66 (ASC considering complaints concerning announcement made by bidder as to date for acceptance offer) and (inquiries) *McCullen & Suarez Inc* [1993] 2 ASC Dig MR 234-235 (report on inquiries into possibility that firm conducting business of dealing in securities in Australia without a licence, carrying on business as a foreign company without registration, and contravening fundraising provisions).
19. Eg ASC 'Little River Goldfields NL' [1992] 3 ASC Dig MR 12. See also ASC 'Advance Investment Advisory Services' [1993] ASC Dig MR5, discussed from this perspective in Dellit & Fisse supra n 8, 598.
20. Eg Corporations Law s 851 (securities advisers not to make recommendations without reasonable basis to person reasonably to be expected to rely on them) which is described as the 'linchpin' of the 'Licence Inspection Program' in B Brown 'The Audit Program in Perspective' [1993] 2 ASC Dig SPCH 5, 18; and the less easily extracted effect on s 232(4), (5) & (6) (duties of 'officer of a corporation') of s 232 (6B) (these are 'civil penalty provisions') and Pt 9.4B. On the civil penalty regime: see n 25 infra.
21. See Corporations Law s 1311 read with sched 3.
22. The major provision here is Corporations Law s 1324, as will be seen below.
23. Eg Corporations Act (WA) s 29(1), read with s 28(2)(e).
24. See Crimes Act 1914 (Cth) s 19B, and Fisse & Braithwaite supra n 8, 42, 124.

'civil penalty provision'[25] somewhat blurs this distinction.

Under the civil penalty regime, courts may make an order for payment to the Commonwealth of an amount by way of 'pecuniary penalty' up to $200 000 in case of contravention of a 'civil penalty provision',[26] but only if such a contravention is 'serious'.[27] An example of a civil penalty provision is the one requiring directors and other 'officers'[28] to exercise due care and diligence.[29] Proof in proceedings here is according to the civil standard (the balance of probabilities).[30]

An order for the payment of a pecuniary penalty is one of two forms of civil penalty order. The other is an order for disqualification from management of a corporation, which may be made by the court for breach of a civil penalty provision, but not if the court is satisfied that, despite the contravention, the person is a 'fit and proper person to manage a corporation'.[31]

The distinction between criminal and civil enforcement is, of course, that criminal process involves notions of stigma or, better, shame or reprobation, and connected opportunities for rehabilitation, that we do not attach to civil judgments.[32] There is, however, much civil liability which may undermine reputations, educate and deter, both generally and specifically.[33] The basic reason for pursuing a criminal enforcement strategy, notwithstanding its heightened risks of failure (the process differences) and graver implications for the accused (the reprobatory effect), ought then to be that there is a case of serious personal blameworthiness involved.[34]

This point emerges most clearly in relation to the troubled area for criminal enforcement represented by the rules on insider trading. The historical pattern, in this country and elsewhere, is of relatively little, or virtually no, successful criminal enforcement[35] — and there is reason to

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25. Introduced by the Corporate Law Reform Act 1992 (Cth) s 17, as recommended by Senate Standing Committee on Legal and Constitutional Affairs *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (Canberra: AGPS, 1989) ('Cooney Report') ¶¶ 13.13-13.15. The Corporations Law regime has been commended as a model for the extension of the civil penalty provisions in the Trade Practices Act 1974 (Cth): see ALRC *TPA Report* supra n 7, ch 9.
26. For a list of some of these: see supra n 20.
27. Corporations Law s 1317EA(3)(b), (5) and s 1317DA ('civil penalty provision'): see also s 1317EA (6) (concerning punitive damages).
28. S 82A ('officer').
29. S 1317DA ('civil penalty provision') read with s 232(4).
30. Ss 1317ED and 1332.
31. S 1317EA (3)(a) read with 1317EA(4) and s 1317DA ('civil penalty provision').
32. See Cooney Report supra n 25, ¶ 1314.
33 See Fisse & Braithwaite supra n 8, 199-201.
34 ALRC *TPA Report* supra n 7, ¶ 9.12.
35. See R Tomasic *Casino Capitalism? Insider Trading in Australia* (Canberra: Aust Institute of Crim, 1991); and R Simmonds 'Insider Trading, Criminal Law and Public Policy: the

believe that modifications of the statutory norms to make them easier to apply (if not less complex to state) will not make much difference.[36] The main difficulties seem to be that the basic concepts in the law, of information likely to have a 'material' effect on price or value that is not 'generally available', will give rise to complex questions in all but the very clearest cases.[37] A more fundamental difficulty may be that the underlying norm is simply not likely to be taken to be as serious a matter, by those affected and by the courts, as more straightforward norms like those against the taking of tangible property or mismanagement.[38]

There is of course a serious problem for criminal enforcement against a corporation, as opposed to an individual, on any such basis of personal blameworthiness. It is that there may seem to be difficulties in discerning how corporations can be 'personally blameworthy' and, even if these can be overcome, explaining how a fine that is not so high as to be capable of 'punishing the innocent' can be viewed as marking such blameworthiness.

Traditionally the common law has got around the personal blameworthiness objection through the anthropomorphic analogy — the idea that one should find the 'head or brain' of the corporation whose fault will be that of the corporation, rather than one for which it is 'merely' vicariously liable.[39] The problems with this response are well known. First, for large corporations operating over a wide geographic area, the response will make it extremely difficult to justify criminal liability despite the fact that corporate procedures and policies, established as a result of policy direction or frameworks from or with the acquiescence of the top, may be the problem.[40] Second, as that problem indicates, the 'head or brain' response is really not much of a response at all — it is simply another form of vicarious liability.[41] Some regulatory statutes have in fact abandoned the response, in favour of attribution to the corporation of the conduct and states of mind of all of its

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Canadian Memotec Prosecutions and their Lessons' in MD Pendleton & R Simmonds (eds) *Occasional Papers of the Law Programme* (Perth: Murdoch UP, 1991) vol 2, 59

36. The Australian rules were modified by the introduction in 1991 of Corporations Law Pt 7.11, Div 2A and s 1313: these provisions take the Australian position rather closer to the breath-taking breadth of the provisions in the Canadian province of Quebec. Yet as broad as the Quebec provisions are, they have proved difficult to enforce through criminal process: see Simmonds supra n 35.
37. See Simmonds supra n 35 (on failed Quebec prosecutions). Cf the rather more sanguine conclusion, at least on the materiality issue, in R Baxt, HAJ Ford & AJ Black *Securities Industry Law* 4th edn (Sydney: Butterworths, 1993) 305-306.
38. See Tomasic supra n 35, ch 3; Simmonds supra n 35, 82-83.
39. See EJ Edwards, RW Harding & IG Campbell *The Criminal Codes: Commentary and Materials* 4th edn (Sydney: Law Book Co, 1992) 305-306, and the locus classicus *Tesco Supermarkets v Nattrass* [1972] AC 153.
40. See Fisse & Braithwaite supra n 8, 8, 47 and references there.
41. Fisse & Braithwaite supra n 8, 47.

agents acting within their authority, actual or apparent.[42]

This alternative approach can be justified to the extent that the blameworthiness of corporations can be sensibly spoken of in terms other than those of individuals working for or in it. This requires that it is possible to talk sensibly of corporations — and other organisations, private and public — in terms of their being more than the sum of their present members, working to achieve their individual utilities through the organisation, which is viewed simply as a tool. There *are* such things as a corporate 'culture' and a corporate 'ethos', and the satisfactions derived from work are *more* than simply individualist instrumental ones. As Professors Fisse and Braithwaite point out, corporate blameworthiness in these terms does make sense.[43]

If so, however, a better approach than either the common law's or the statutory modifications seems possible. One, commended for adoption in Australian criminal law, is that:

> The body corporate expressly, tacitly or impliedly authorised or permitted the commission of the offence. Several means of proving this are provided for, including
> - that the board of directors or a high managerial agent of the body corporate did or authorised the act (but there is a due diligence defence)
> - that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to the contravention
> - that the body corporate failed to create and maintain a corporate culture that required compliance.[44]

This also brings out the difficulties with trying a different tack to corporate criminal liability — targeting individuals. Here the problems are of identifying all those who might be involved and dealing with the problems of attenuated individual responsibility where responsibility is collective, contributed to by many different kinds of fault — which creates the conditions for difficult-to-deal-with scapegoating.[45]

But if the blameworthiness objection can be overcome, that still leaves the problem of how the fine, conceived of as the primary sanction,[46] can be

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42. The best known example is Trade Practices Act 1974 (Cth) s 84(1). It is sometimes forgotten there is a similar provision in the Corporations Law itself, limited to proceedings under ch 7 ('securities'): s 762(3).
43. Fisse & Braithwaite supra n 8, ch 2.
44. ALRC *TPA Report* supra n 7, ¶ 9.32 (footnotes omitted), referring to Criminal Law Officers Committee of the [federal and state] Standing Committee of A-Gs *Model Criminal Code: Chapter 2 –General Principles of Criminal Responsibility* (Canberra AGPS, 1992) 104. The ALRC has commended this basic approach itself, but with some modifications: ALRC *TPA Report* supra n 7 ¶¶ 9 33-9.34.
45. See Fisse & Braithwaite supra n 8, 36-41.
46. This in practice is the case for the corporation, even if it is not a necessary consequence of 'corporateness': see supra n 24.

seen to respond to the problem of blameworthiness. Under the Corporations Law, the fine appears to be the only criminal sanction for corporations.[47] The fine leaves it to the corporation to determine how to deal with the problem, whether by way of changing the costing structure of the practice in question, internal discipline, a compliance strategy or some combination of these.[48] This is sometimes called the 'black box' issue: the corporation is regarded as a black box which the law acts on entirely from the outside, leaving it to the corporation to make whatever internal arrangements it considers — hopefully, as a rational actor — to be justified.[49] It is perhaps more illuminatingly referred to as one of 'non-assurance of internal accountability'.[50] It is best justified on a theory of the second best: we cannot be sure our judgement of what is the best way of dealing with corporate misconduct is correct. Therefore, taking account of all of the risks, we should in many — most? — cases leave it to those with the knowledge (if not necessarily the will) to deal with the matter.[51]

We could always step up the fine to such a level as to be sure to have 'captured the corporation's undivided attention', so that it will share society's aversion to the conduct in question.[52] However, the relevant offence may make such a bludgeoning fine difficult to square with the seriousness of the offence or the likelihood of its repetition; and in any event the measures to cure the problem may lie beyond the resources of the offender.[53] The limiting case of this problem is the 'deterrence trap': the only fine large enough to offset the advantages of the conduct and the discount of the punishment by the difficulties of detection is one which would terminate the corporation's business.[54]

The explanation of fines that do not create these difficulties has to be that there is a purpose to criminal liability other than simply to provide financial disincentives. That is, there is a distinction between criminal liability

47. Corporations Law s 1312. But for the possibility of corporate probation: see supra n 24.
48. Although there is always the possibility of the corporation indicating to the court how it proposes to deal with the problem, as through a compliance strategy, by way of a form of pre-sentencing report.
49 The classic account of this perspective is CD Stone 'The Place of Enterprise Liability in the Control of Corporate Conduct' (1980) 90 Yale L J 1.
50 As do Fisse & Braithwaite supra n 8.
51. Stone supra n 49, 39-40 (on when the state could conclude more interventionist strategies are justified).
52. Thus Corporations Law s 1312 provides that on conviction for an offence of a body corporate, the court may impose a fine no more than 5 times the maximum amount that the court could otherwise impose as a pecuniary penalty.
53. Fisse & Braithwaite supra n 8, 164 - 65; and J Braithwaite in CAJ Coady & CJG Sampford (eds) *Business, Ethics and the Law* (Sydney: Federation Press, 1993) 88.
54. The classic statement of the 'deterrence trap' problem is JC Coffee '"No Soul to Damn, No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79 Mich L Rev, 386-459.

to a fine and, most notably, liability to a civil penalty of an equivalent amount.[55] Corporations can be shamed or reprobated because their decisional calculus is not simply a financial one — and being subjected to the criminal process with its attendant publicity effects *is* an additional sanction.[56] Further, 'criminal law has a legitimate role in denouncing and penalising unacceptable behaviour'.[57] Finally, repeated minor offences may justify more severe action than the 'regulatory' fine.

That having been said, the logic of corporate criminal responsibility described here makes it hard to avoid the conclusion that a wider array of criminal enforcement possibilities than the fines provided for in the Corporations Law needs to be used in practice. This would more closely approximate the position of corporations to that of individuals, for whom there may not only be imprisonment but also under Australian federal criminal law (rather more frequently than for corporations) such orders as community service or probation.[58] This matter is returned to at the end of this paper.

2. Civil enforcement: the rich array of enforcement possibilities

Formal civil enforcement of the Corporations Law can be categorised in a variety of ways. One is by the body initiating the enforcement step (ASC, private entity, or semi-governmental entity like the Australian Stock Exchange ('ASX').)[59] Another is by the nature of the step (proceedings for damages or other relief, action against a licence or other step). Still another is by the purpose which may be most closely associated with the step (compensation, undoing the effects of contravention, preventing future ones, encouraging and promoting community-wide compliance, and deterrence, or at least special deterrence).[60] Finally, there might be categorisation by the body that has jurisdiction to make the final determination (the courts, the ASC, the Companies Auditors and Liquidators Disciplinary Board,[61] the

55. ALRC *TPA Report* supra n 7, ¶ 9.10.
56. Fisse & Braithwaite supra n 8, 33-34, 78-79 (particularly on reputation); and ALRC *TPA Report* supra n 7. For a particularly rich account of this point in the present context, see Dellit & Fisse supra n 8, 575-578.
57. ALRC *TPA Report* supra n 7.
58. ALRC *TPA Report* supra n 7, ch 10. For the same point, extending it to greater use of the alternative sanctions for individuals also, see Dellit & Fisse supra n 8, 589-592.
59. On the ASX as a semi-governmental entity: see D Brewster 'Judicial Enforcement of the Listing Rules of the Australian Stock Exchange' (1991) 9 C&SL J 313 and 'Decisions under the Australian Stock Exchange Listing Rules. Review under the Administrative Decisions (Judicial Review) Act' (1991) 9 C&SL J 377.
60. This is the scheme, for enforcement purposes generally, used in ALRC *TPA Report* supra n 7, ¶ 4.7.
61. On the Board: see HAJ Ford & RP Austin *Principles of Corporations Law* 7th edn (Sydney: Butterworths, 1995) 77

Corporations and Securities Law Panel[62] or the ASX).

The most illuminating typology is considered to be the one that focuses on the nature of the step. This is because it helps to clarify the choices that the main regulator — the ASC — has to make, because it brings into focus the various *informal* types of civil enforcement that are available (where there is no *order* for the enforcement relief, but rather it is by *agreement*), and because it follows the logic of the discussion of criminal enforcement. This typology is also used because it subsumes the matter of the purpose or main logic of the step itself.

The scheme to be followed arrays the forms of civil enforcement in what is increasingly becoming the model for consideration of regulatory strategies. That is in the form of a 'pyramid' of enforcement steps, with the (presumptively) least serious (including the informal ones) at the bottom, tapering to the most serious at the top.[63] In the civil sphere, so far as the Corporations Law is concerned, the pyramid as it descends is as follows:[64]

Ending the Business

Vesting /Divestiture of Property

Preservation of Property

Orders for Compliance

Recovery Actions

Protective Judicial and Administrative Orders

Informal Enforcement Action

It is important to realise that this categorisation cuts across provisions in the National Scheme laws. Thus, a provision like Corporations Law section 260, the statutory oppression remedy, might authorise Ending the Business, an Order for Compliance and a Recovery Action.

It is also important to realise that this categorisation is necessarily a crude rendering. In particular settings, a form of civil enforcement lower down the pyramid will be more serious, in at least its direct effect on the person against whom the step is to be taken, than one higher up the pyramid. This is perhaps most readily seen in relation to informal enforcement action. The target might well agree to certain arrangements that go beyond the level

62 Ford & Austin ibid, 75-76.

63. On the pyramid of enforcement idea: see Fisse & Braithwaite supra n 8, 141-145 and references there.

64. I am indebted to Mr Michael Gething of the ASC (WA Regional Office) for much of this structure — he is not accountable for my modifications or use of it, however. A 6-step pyramid of enforcement that integrates both criminal and civil enforcement is in Dellit & Fisse supra n 8, 584; on their approach see n 136 infra.

of compensation that would be awarded in a formal recovery action.[65] But as a first approximation to guide consideration of the issues of choice of strategy this seems to be a serviceable scheme.

Finally, no attempt has been made to provide an exhaustive listing of all of the relevant provisions of the Corporations Law under each heading. Rather, the aim has been to provide a comprehensive categorisation, and sufficient illustrative detail, to permit unallocated provisions to be categorised.

(i) Ending the business

This covers a range of strategies, from the civil equivalent of 'corporate capital punishment'[66] through the ASC's revocation of an occupational licence or permanent banning of a related activity under the ASC's jurisdiction[67] and the possibility of *permanent* disqualification from the management of a corporation.[68]

(ii) Vesting or divestiture of property

Here the best known application is orders for divestiture of shares in cases of certain contraventions of the regulatory provisions on acquisition of shares, most notably the requirement to proceed under those provisions

65. See the discussion of the administrative settlement with the Trade Practices Commission in the 'Solomons Carpets affair' in Fisse & Braithwaite supra n 8, 230-232

66. Fisse & Braithwaite supra n 8, 201; see eg Corporations Law s 461 (winding up on such as 'just and equitable' and 'selfish director' grounds) read with s 462.

67. Corporations Law s 826 (revocation of dealer's or investment adviser's licence), and s 830 (banning order) read with s 830(1)(a). See the broad grounds that can engage this jurisdiction eg ss 826(1)(c) and 829(d) read with s 9 ('contravention of a securities law') and ss 826(1)(g) and (k) (failure to conduct the relevant activity 'efficiently, honestly and fairly'; on the quoted rubric: see Baxt et al supra n 37, 708) See also s 1292(1)(d) and (2)(d) (cancellation of registration as a registered auditor or liquidator by the Companies Auditors and Liquidators Disciplinary Board on application by the ASC, on such grounds as failure to perform the duties of the position 'adequately and properly') Rather harder to classify in terms of the scheme proposed here is the possibility of the Commission, in certain cases where there is jurisdiction to revoke an occupational licence, *permanently* prohibiting a licensee from carrying on an activity that would fall within the licensing requirement itself: s 827(1)(d). This could be seen as a permanent modification of the sort of business the licensee may carry on, and to that extent could be seen as the ending of a business.

68. S 230 (court may order disqualification at the instance of inter alios the ASC where there have been multiple breaches of the Law with which the person banned was associated as a director, secretary or executive officer); and see eg ASC 'Director Banned for Life' [1992] 3 ASC Dig MR 86-88. See also s 1317EA(3)(a) read with s 1317EA(4) (court may order on the application of the ASC in cases of violations of the civil penalty provisions of the Law disqualification from management of a corporation 'for such period as is specified in the order' — which could presumably extend so as to amount to permanent disqualification).

for acquisitions over the 20 per cent threshold.[69] Variations on this theme exist both in the provisions referred to and elsewhere in the Corporations Law.[70]

(iii) Preservation of property

Here are found a miscellany of enforcement options to preserve or protect the status quo against threatened adverse change. Their effect is to ensure that there will be a fund available for relief later. Like the order to vest or divest property these orders act on the assets of a business or other actor, or on an actor directly, but unlike them do not effect a change of title. Rather, an important attribute of ownership or control is eliminated, at least for the time being. The major example is the ASC's ability to apply to a court for an order (in aid of a formal investigation, a prosecution for contravention of the Corporations Law or a civil proceeding under the Law) freezing payments or transfers, or personal movement out of the country, or appointing a receiver.[71] Injunctions to restrain other dealings with property are available;[72] so too at common law are *Mareva* injunctions.[73]

(iv) Orders securing compliance

Here there are orders made directing conduct so as to ensure compliance with the law. Orders may be final or interim. Their effect is to change the way an actor does business. The main examples are mandatory or prohibitory

69. S 737 (1) read with s 613(1) ('remedial order') (at instance of inter alios the ASC); and see also ss 733 & 734 read with s 732 (divestiture orders at least available on application by the ASC to the Corporations and Securities Panel in aid of the Panel's declaration on such application that 'unacceptable circumstances' exist in relation to an acquisition of shares: on these circumstances see Ford & Austin supra n 61, 918-920).
70. S 737 read with s 613(1)(h) 'remedial order' (order to cancel an agreement in the takeover context); and s 260 (order would also seem to be within the general rubric of 'such order or orders as it thinks fit' open to the court in an oppression proceeding); s 1114(1)(f) (a dealing in securities) See also s 260(2)(f) (power to compel an agreement under the oppression remedy). And see s 1317EA(3)(b) read with s 1317EA(5) (civil penalty order for the payment of up $200 000 to the Commonwealth).
71. S 1323 See also s 737 read with s 613(1)(c) ('remedial order') (where there has been acquisition of shares in contravention of s 615, order for the freezing of dealings in shares)
72. S1324 (on the application inter alios the ASC, in cases of actual or threatened contraventions of the Law)
73. Named after *Mareva Companiera SA v International Bulk Carriers SA* [1975] 2 Lloyd's Rep 509. For an example of this sort of proceeding initiated by the ASC: see *ASC v Corplan* (1994) Fed Court, Qd Dist Reg, 29 Apr 1994; and see ASC 'Family Security Friendly Society' [1991] 1 ASC Dig MR 21-22 (statutory procedures in both ss 1323 & 1324 seem to offer the advantage over the common law institution of a less exacting test of the order being 'desirable' rather than the common law's test of 'high probability of success').

injunctions issued under the Corporations Law.[74] And there may be undertakings related to compliance given to a court to settle proceedings in similar terms, coupled with compensation and cancellation of transactions and costs arrangements.[75]

(v) Recovery actions

Here are the paradigmatic civil enforcement proceedings. The Corporations Law provides for many proceedings for the recovery of loss suffered by private parties, some going back to early English corporate legislation,[76] others more up-to-date, such as the statutory oppression remedy,[77] or others more recent still, like the provisions for civil liability for insider trading.[78] More generally, the ASC has been given standing, following a formal fact-gathering exercise under the Australian Securities Commission Act, in certain circumstances to bring proceedings for the recovery of damages for 'fraud, negligence, breach of duty, or other misconduct' on behalf of a company with or without consent, or on behalf of any other person, with that person's consent.[79]

Here, where the litigant is motivated by the prospect of recovery for loss, is the domain in which a private party may most often be expected to provide a supplement to the resources of the regulator — even if there is no equivalent in this country to the role for the private legal profession in the United States, fostered by substantial contingency fees and liberal shareholder standing rules there, of the 'private attorney general'.[80]

The ASC for its part can play a role here that permits the mounting of what in effect is the Australian equivalent of US style securities class actions.[81]

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74. S 1324; and see s 777(1) (applications by inter alios the ASC for order directing compliance with the business or listing rules of a securities exchange)
75. Analogous to these sorts of civil enforcement proceeding is the possibility, in support of formal (compulsory) fact-gathering proceedings under the ASC Act of the ASC applying to the court for orders for compliance with its requirements or for the ASC itself to make certain orders to freeze dealings of certain sorts: ss 71-75
76. S 996 (liability for misstatements in prospectuses under ss 1005-1012)
77 S 260 (giving standing to inter alios the ASC); and see also the recovery possibilities under ss 1324(10) and 1325
78. S 1005 read with Pt 7.11, Div 2A and ss 1013 and 1015.
79. ASC Act s 50; and to a similar effect Corporations Law s 598 Less obviously the ASC can use the $20 000 security deposit required by the Corporations Law s 786(2)(d) to be lodged by a dealer as a condition of securing a licence to compensate clients or other investors dealing with the dealer: see eg 'World Seekers Pty Ltd — Release of Security Deposit to Claimants' [1994] 1 ASC Dig MR 120.
80. JC Coffee 'Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is not Working' (1983) 42 Md L Rev 215. On the contingency fee in Australia: see Access to Justice Advisory Committee *Access to Justice: An Action Plan* ('Sackville Report') (Canberra, 1994) ch 6.
81. Eg ASC 'Farrow Finance Company Ltd — Damages Sought' [1993] 2 ASC Dig MR

And the ASC can, as has already been seen, procure compensation undertakings as part of a settlement of proceedings brought under other headings in the present categorisation scheme.[82]

(vi) Protective judicial and administrative orders

These are orders to protect against loss, by restricting or curtailing activities. They are thus like orders to preserve property, but unlike them would arguably represent prudent management in any event, at least at the level of the enterprise concerned, and do not represent permanent loss of an occupation, at the level of the individual concerned. Different forms of them can be made both by the courts and by the ASC itself or one or the other, including orders for disqualification for a stipulated period from management[83] or an occupation or related activity under ASC jurisdiction;[84] orders to a similar effect under other provisions;[85]orders for directed special disclosure;[86] and orders restricting the activities of a 'borrowing corporation'[87]

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104 (inviting investors to lend their names to the proceeding for misstatements in a prospectus). See also n 115 infra. For an account and evaluation of ASC and shareholder litigation records: see I Ramsay 'Enforcement of Corporate Rights and Duties by Shareholders and the Australian Securities Commission: Evidence and Analysis' (1995) 23 Aust Bus L Rev 174.

82. Eg ASC 'Fireclub Unit Trust' [1992] 3 ASC Dig MR 61.

83 Corporations Law ss 230 & 1317EA(3)(a) (for their application to found permanent disqualification orders see supra n 68; see also s 229(3) (disqualification for 5 years for conviction of stipulated offences, subject to judicial leave to manage), s 599 (ASC may apply for disqualification order up to 5 years in duration for managers implicated in collapses of two or more 'relevant bodies') and s 600 (ASC itself may make such order in case of liquidator's report of stipulated sorts). For specific judicial and other authority to support a protective characterisation of judicial disqualification orders or judicial refusals of leave to manage despite statutory disqualification: see *Chew v NCSC* (1985) 9 ACLR 527 (WA Sup Ct, Olney J) and *CAC v Bracht* [1989] VR 821 (Ormiston J). For strong support for the efficacy of such orders from this perspective: see ALRC *TPA Report* supra n 7, ¶ 8.14.

84. Corporations Law s 827 (ASC order suspending a securities licence and an ASC banning order for a limited period; in certain cases where it has jurisdiction to revoke a licence the ASC can prohibit for a limited period the doing of acts the licensing requirements would otherwise require a licence for).

85 S 1324 (injunctive orders in relation to contraventions of Law); s 1114 (such orders as court thinks fit in cases in relation to dealings in securities and related activity of contraventions of provisions of Law or of rules of such as securities exchanges); and s 1268 (to similar effect, in relation to futures).

86 S 1004 (cases of breach of the insider trading laws or such as the liability provisions for defective prospectuses; expressed to be '[w]ithout limiting the generality of section 1324')

87 S 1056(2) and (3) read with s 1056(4) and (9) ('borrowing corporation') (where the trustee has applied to the ASC for orders in cases where there is actual or prospective asset insufficiency to discharge the principal debt as and when it comes due) and s 1056(5) and (6) (judicial orders in such cases or for contravention of ASC order).

or the management of unlisted property trusts.[88] Perhaps the most dramatic ASC orders possible under this heading are those interdicting trading in particular securities on the stock market of a securities exchange for a period up to 21 days[89] and interdicting allotment or issue of securities to which a prospectus lodged with it relates.[90]

(vii) Informal enforcement action

Here there is a wide range of enforcement activity possible, all of it characterised by the fact that it does not of itself involve formal sanctions. Undertakings may be given to the ASC following formal or informal fact-gathering, whether or not the effect of the undertaking is to end any possibility of enforcement action or to terminate enforcement action already begun. Such undertakings may include requesting the revocation of a securities licence,[91] compensating investors[92] and taking compliance steps.[93] Surveillance activities, of the sort already referred to,[94] may be engaged in by the ASC, to prevent problems arising by encouraging a 'culture of compliance' and diffusing better practice models.

Perhaps most generally, there is the whole apparatus of ASC public pronouncement about the meaning it gives to the Law, and its recommendations for compliance strategies, through Practice Notes and Policy Statements.[95] Here the activity is characterised by some measure of formality — there is often a process of formal consultation with affected interests and publication in a particular format — which does not, however, involve the imposition of a sanction. Nonetheless, like the surveillance program, these activities have an important role in the compliance effort.

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88. S 1076E and F (ASC may restrict the redemption of units under the trust on application by the trustee where ASC is satisfied that redemptions without such restrictions would imperil the value of the remaining units or interests of the holders of those units).
89. S 775(1) and (2) (where it is of the opinion that such is necessary 'to protect persons buying or selling the securities or the interests of the public', and where after written notice to the securities exchange in question that exchange has not itself prohibited trading); and see in a more limited context s 847 (short-selling).
90. S 1033(2) and (8) (where the prospectus contravenes any of the requirements in Div 2 of Pt 7.12, or represents defective disclosure, the ASC can revoke the order where the problem has been cured).
91. See ASC 'Cumberland Management Limited - Victorian Property Trust and Cumberland Lorne Trust' [1991] 3 ASC Dig MR 162-163.
92. Eg ASC 'Little River Goldfields NL' [1992] 3 ASC Dig MR 12.
93. Eg ASC 'Technical Equities Ltd —Variations of Offer for Amalgamated Equities Ltd' [1992] 3 ASC Dig MR 209-210.
94. See text at supra n 16 and following.
95. These will of course cover other matters as well, such as ASC policy with respect to the granting of exemptions from and modifications to the requirements of the Corporations Law in the areas where it has such power. See for a 'composite' policy statement of this sort ASC Policy Statement No 56 'Prospectuses' [1995] 2 ASC Dig PS 7/433-7/519.

(viii) Ancillary enforcement action

This is action ancillary to action in one of the foregoing categories. Perhaps the major examples are the power of the ASC to act in aid of private litigation, under the Australian Securities Commission Act,[96] by passing on to a person's lawyer a record of an examination under the Act, where the lawyer satisfies the Commission that the person is carrying on or contemplating a proceeding in respect of a matter in the examination.[97] More generally, under the Corporations Law,[98] there is the ASC's power to intervene in any proceeding 'relating to a matter arising under [the Corporations] Law'.

STRATEGIC CONSIDERATIONS: THE CHOICE OF ENFORCEMENT STRATEGY

Here some of the implications of the scheme just laid out will be addressed. What is put forward is a set of ideas for policies that should (and, on the basis of the enforcement record to date, might) be seen to have helped to[99] guide the choice of enforcement strategy by the ASC. The factors which it is suggested are relevant are readily recognisable from some of the literature on regulation by such bodies.[100] The major relevant considerations, it is suggested, are the seriousness of the contravention in issue from a public policy perspective, the protective concern, and the compensatory concern.

1. Seriousness of the contravention from a public policy perspective

This perspective requires a determination not only of the traditional matters of intent, repetition and absence of remorse, but the place of the norm contravened in the regulatory scheme.

All of this implies the possibility of criminal enforcement, where that is available. In any event, it presses towards more formal proceedings, so

96. S 25(1).

97. In practical terms, there is an important qualification on this emerging from the natural justice requirements for the protection of the subject of the examination from *Johns v ASC* (1993) 178 CLR 408. See also ASC Policy Statement No 78 'Confidentiality' [1995] 2 ASC Dig PS 1/89-1/100. Such a power is commended for the Trade Practices Commission in ALRC *TPA Report* supra n 7, ¶ 11.23.

98. S 1330(1).

99. For a useful overview of ASC enforcement activity from a regulator's standpoint see Low supra n 6. Fiona Low was at the time of writing that paper the Regional General Counsel, ASC (WA Regional Office).

100. For what amounts to a very useful up-to-date listing: see Fisse & Braithwaite supra n 8, 239-265 ('bibliography of cited works').

that publicity may be given to the concern in issue. This does not necessarily mean that formal court proceedings are necessary. It does mean that action taken should be publicised, whether it is one of the 'Informal Enforcement Action' type or otherwise. This creates a problem where criminal enforcement is resorted to because of the greater inhibitions on publicity in relation to such proceedings before and during them.[101]

In determining at what level the action should be taken, an important consideration, it is suggested, is the balance between seriousness and the difficulty in imposing a more serious sanction, against the backdrop of the resources available for enforcement. This is an area in which the ASC may be expected to be operating more often higher up the enforcement pyramid than its less well resourced predecessor, the National Companies and Securities Commission acting with the State Corporate Affairs Commissions.[102] This is, of course, the area in which the minister responsible for the administration of the National Scheme recently intervened by way of policy direction.[103]

Other considerations are relevant also, most notably the problems with the criminal sanction itself when applied to the corporation, as discussed above.[104]

2. The protective concern

Here the regulator is concerned to protect the values that underlie the norms in the regulatory scheme, norms whose protection is entrusted to it. So far as the ASC is concerned, these values are conveniently stated for it in the listing of the objects for which the Commission must 'strive' in the performance of its functions.[105]

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101. See P Grabosky & J Braithwaite *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (Melbourne: Oxford UP and Aust Inst Crim, 1986) 14
102. See for this comparison Tomasic supra n 35, 106-108; and on the strategies pursued by that predecessor complex: see Grabosky & Braithwaite supra n 101, ch 2. The point should not be over-emphasised, however. In particular, see the discussion of 'Sanctions and Remedies under Negotiated Settlements' in Dellit & Fisse supra n 8, 596-611.
103. See text at supra n 11 and following.
104. See text at supra n 49 and above.
105. See Australian Securities Commission Act s 1(2):
    (a) to maintain, facilitate and improve, the performance of companies, and of the securities markets and futures markets, in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy; and
    (b) to maintain the confidence of investors in the securities markets and futures markets by ensuring adequate protection for such investors; and
    (c) to achieve uniformity throughout Australia in how the Commission and its delegates perform those functions and exercise those powers; and

This is not simply another way of stating the previous point. This is because the regulator may legitimately consider that, whether or not it chooses to proceed in accordance with the seriousness consideration, it should take whatever other steps are shown to be necessary to protect the present values from further harm. This may incline it towards reliance on sanctions that can operate quickly, and at relatively low cost — especially ones targeted at repetitions of the relevant conduct. Strategies that would be useful here, given the limitations in practice on criminal sanctions, are peculiarly likely to be civil enforcement ones, particularly ones of a proactive nature (like surveillance programs and policy statements under Informal Enforcement Strategies) calling for action directed at preventing a problem arising in the first place, through persuasion, education, advice and responsiveness.[106]

This may direct the regulator away from the courts, particularly in complex areas of law like that of the Corporations Law, where the legislature has created a specialist administrative agency like the ASC and given it broad leeways for application under the statutory provisions.[107] In effect, in much of the law the ASC is better equipped than the courts to develop 'an appropriate common law of the statute',[108] because of the former's greater 'flexibility, expertise, initiative and powers of coordination', as well as its

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(d) to administer national scheme laws effectively but with a minimum of procedural requirements, and

(e) to receive, process, and store, efficiently and quickly, the documents lodged with, and the information given to, the Commission under national scheme laws; and

(f) to ensure that those documents, and that information, are available as soon as possible for access by the public; and

(g) to take whatever action it can take, and is necessary, in order to enforce and give effect to national scheme laws.

For a masterly account of the difficult task of balancing these, in terms of the matrix of roles they give the ASC: see 'Bridging the Regulatory Expectation Gap. Address by Bruce Brown, Director, Legal and Corporate Regulation, [ASC] Regional Office, Tasmania, to Final Year Students at the University of Tasmania, 1993' [1994] 2 ASC Dig SPCH 25-38.

106. This is the familiar case for 'proactive regulation': seeTomasic supra n 11, 33-35, which may call for the regulator to be 'politician' and 'consultant' as well as 'persuader' and 'educator' (HW Adams *Without the Law* (Toronto: Uni of Toronto, 1985) 149).

107. For this analysis of the Corporations Law: see I Ramsay 'Corporate Law in the Age of Statutes' (1992) 14 Syd L Rev 474, 484-493. Consider, apart from his example of company numbers under Corporations Law s 291(3), that of the requirement for a licence as a dealer or investment adviser under s 783 that the applicant have 'educational qualifications and experience' that are 'adequate' for the business to be undertaken, and 'The ASC and the Financial Planning Industry: Address by Alan Cameron, Chairman, ASC, 16 Jun 1994 to the Financial Planning Association of Australia' [1994] 2 ASC Dig SPCH 103, 106 (legislature does not spell matters out, 'but rather relies on the ASC to determine what is appropriate when granting a licence').

108. For an illuminating account of this idea: see RA Macdonald 'On the Administration of Statutes' (1987) 12 Queen's L J 488, 497.

'fact-finding capacity and accountability'.[109]

It is worth noting that, while proactive strategies may be relatively cheap, they will not always be so, as the surveillance program example indicates. Further, this is not to say that the more serious judicially-based civil enforcement strategies and the criminal enforcement ones might not be appropriate from this perspective. It is to say that first, let alone exclusive, reliance on them may not be cost-justified.

3. The compensatory concern

Here the concern is to see that those whom the law is meant to protect, and who suffered the loss meant to be protected against, should have redress.[110] Their efforts may well achieve other enforcement objectives also — including in particular education of both the defendant and other parties. The obvious strategy here is recovery of loss.

At this point it is usual to refer to the difficulties for individual shareholder enforcement of duties owed to the corporation through the common law's *Foss v Harbottle* proceeding, often and misleadingly called a 'derivative' one.[111] There is some reason to think that the practical effect of the formal procedural obstacles has been overstated.[112] The main obstacles are probably the 'collective action' ones — individual shareholders will often not have a sufficient stake in the possibility of such litigation to warrant its investigatory, let alone its operational, costs.[113] This point is not restricted to litigation of the *Foss* type, nor to shareholder actions — creditors raise the same issues.

To the extent that there are obstacles to cost-effective recovery posed by a small loss relative to expensive litigation and the difficulties of privately initiated class action procedure,[114] the regulator may have an important role

109. Ramsay supra n 107, 486.

110. See for a recognition of this point: *AWA v Daniels* (1992) 10 ACLC 1643 (NSW Sup Ct, Comm Div, Rogers CJ) 1658 (on restricted application of s 1318 — permitting court to excuse from liability — in the face of this concern); the point was not commented on in the appeal judgment *Daniels v AWA* NSW CA (15 May 1995).

111. See the stimulating account in S Bottomley 'Shareholder Derivative Action and Public Interest Suits: Two Versions of the Same Story?' (1992) 15 UNSW L J 127; on the usage of 'representative [of the company]' and 'derivative': see B Welling *Corporate Law in Canada: the Governing Principles* 2nd edn (Toronto: Butterworths, 1991) 534-35: its misleadingness notwithstanding, the usage is probably now unavoidable.

112. Redmond supra n 3, 523-24; and R Baxt 'Do We Really Need a Statutory Exception to the Rule in Foss v Harbottle?' (1994) 22 Aust Bus L Rev 298.

113. Redmond supra n 112; and see Ramsay supra n 81.

114. Which are significant, depending on the jurisdiction in which suit is brought: see BC Cairns *Australian Civil Procedure* 3rd edn (Sydney: Law Book Co, 1992) 267-268, 599-601. The most accommodating such rules are those for the federal court, on which see the latter set of pages, and ALRC *TPA Report* supra n 7, ¶ 5.19. There are other problems too: see Ramsay supra n 81, 178-179.

to play to achieve these combined objectives.[115] Of course, the problem from the regulatory standpoint is often that of establishing loss causation — the most notable areas are insider trading, where the trading occurred in an impersonal securities market,[116] and breach of the statutory duty of care and diligence in corporate management, where the problem is to show what the effect on a *collective* decision would have been of the defendant's discharge of his or her duty.[117]

More fundamentally, exclusive reliance on such activity puts the public policy objectives other than compensation — particularly the educational value of a final decision — at risk when settlement comes to be negotiated.[118]

4. Complex calculations

Against even this short list of the major considerations it is clear it will be no easy matter to make the strategic determinations called for — not least because the precise impacts of various sanctions will be extremely difficult if not impossible to determine in advance. This is obvious once it is realised that different enforcement strategies are in practice likely to be pursued concurrently, as well as in sequence: surveillance will throw up cases that may terminate in undertakings whose breach leads to a compliance order whose wilful breach in turn leads to imprisonment for contempt or termination of a licence. In this setting:

> Some redundancy results and a multiplex system of legal control is more costly to run. However, there are major benefits. Redundancy (multiple concurrent avenues of control) has considerable value as a means of helping to ensure that the law keeps its promises. It also provides a useful method for managing uncertainty in many areas of law and government, and may be indispensable in the context of sanctions against corporations where the actual impact of any given deterrent is unknown and unknowable.[119]

In this context the best that may be hoped for is 'rules of action'[120] that the regulator can justify in terms of the sorts of considerations set out here.

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115. Query whether the ASC can take advantage of the relatively liberal class action procedures for the Federal Court, by securing the consent of one individual affected, and then suing on behalf of them all, which would seem to subvert the 'opt in' procedure envisaged in ASC Act s 50, referred to in supra n 79. For the position of the Trade Practices Commission: see ALRC *TPA Report* supra n 7, ¶¶ 5.21, 6.4.
116. See Simmonds supra n 35, 84-85 (problems in establishing privity; problems in extending recovery to all who traded at same time).
117. A familiar one to US lawyers, it has almost made its appearance in the Australian case-law: see *Permanent Building Society v Wheeler* (1994) 10 ACSR 109.
118. ASC policy is that no settlement will be agreed to that may not be made public.
119. From Fisse & Braithwaite supra n 8, 88 (footnotes omitted).
120. On these: see Fisse & Braithwaite supra n 8, 92 (commending 2: recognising certain actions as wrong, such as crimes; and holding responsible all who are wrongdoers).

ENFORCEMENT STRATEGIES AND REFORM

Generally speaking, the enforcement experience under the Corporations Law appears to have gone well.[121] The ASC has a rich array of possibilities at its disposal, and it has utilised most of them. This is not to say that further enrichment would not be appropriate. Just such enrichment is addressed in this concluding section to the paper. The main concern here is for the better blending of civil and criminal enforcement strategies in corporate law and securities regulation in Australia.

1. Civil enforcement reform

This is a period of substantial and ongoing reform of the National Scheme generally.[122] The analysis provided in this article can be used to evaluate briefly a variety of suggestions that have been or can be made for reform in this area. In particular the analysis can be used on reform ideas that have been or could be put forward from a variety of standpoints — comparative, political and regulatory.

Looked at from the standpoint of comparative corporations law and securities regulation, the ASC lacks a number of civil enforcement tools that some of its overseas counterparts possess. Most notable of these deficits perhaps is the lack of a power to order the cessation of trading in securities in *any* securities market (not limited to the stock market of a securities exchange), without time limit and without more detailed specification of grounds than a conclusion by the regulator that it is 'in the public interest' so to act.[123] There is also, relatedly, no power in the Australian scheme, as there is in the major Canadian ones, to *deny* otherwise applicable exemptions from the regulatory schemes 'in the public interest',[124] as opposed to

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121. Judging from the papers presented at, and the audience reaction to, the Enforcement Conference supra n 5, the major area of concern is the scope of the fact-gathering authority of the ASC. Dellit & Fisse supra n 8 believe, however, that the ASC has under-emphasised negotiated settlements and a significant part of their paper is directed to change in this respect.

122. See Simmonds supra n 3 for a review of reform themes.

123. Eg [Ontario] Securities Act RSO 1990 s 127(1)2 ('cease trading power'). The closest Australia comes is in relation to stock markets, for a limited period, in Corporations Law s 775, on which see supra n 84.

124. Eg [Ontario] Securities Act, s 124 (power to deny exemptions). Perhaps the closest Australia comes is in relation to the area of takeover bids, with the provisions for modifications of the scheme of regulation by the ASC under Corporations Law s 730 (on the predecessor of which, from a US standpoint: see JC Coffee 'Partial Justice: Balancing Fairness and Efficiency in the Context of Partial Takeover Offers' (1985) 3 C&SL J 216, 219), and declarations of 'unacceptable circumstances' by the Corporations and Securities Panel under s 733 (on which see Ford & Austin supra n 61, 918 - 19). See also the modification of the recently introduced shorter form prospectus for the 'quoted ED

considerable authority to *grant* exemptions.[125]

Such generalised, 'public interest' based discretionary powers to limit acitivity permit the regulator to act quickly in fields like securities regulation where swift and flexible action is often at a premium and to pursue protective strategies, through such measures as policy statements as well as formal decisions, in areas to which the letter of the statute would not otherwise run.[126] As two Canadian observers have noted:

> The powers [of the Canadian securities regulators] to cease trading a transaction or deny trading exemptions in the 'public interest' are extremely flexible tools that can be used quickly to respond to novel forms of transactions or abuse. Particularly because many complex transactions are difficult to unwind (and interlocutory relief is not always available in the courts), the ability to respond quickly and flexibly may be a key factor in determining the outcome of the case Moreover, the open-ended nature of the regulators' discretionary sanctions allows for substantively different outcomes than those in the courts. The malleability of these tools has, for example, enabled the [Ontario Securities Commission] to recognize the existence of shareholder fiduciary duties when the courts have not yet clearly done so [even functionally, under the oppression remedy]. More generally, the OSC has indicated that it will consider imposing a cease trade or denial of exemptions order even though there is no breach of a legal requirement found in any statute, regulation, or even policy statement.[127]

There seems to be no interest in reform of this sort in Australia however. Furthermore, even if there were such interest, there is a problem for legal transplantation of this Canadian institution. It is that there is no tradition of curial deference to ASC decision-making, like the one clearly articulated in Canada[128] — if anything, there is a counter-tradition in this country, in relation to areas involving legislative interference with commercial transactions and property rights, of protective formalism.[129]

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securities' of a 'disclosing entity' in Corporations Law s 1022AA: the ASC may exclude an entity from this provision for contravention of any of a set of listed provisions in s 1022AA (8). Missing in this last example is the general or open-textured 'public interest' criterion, to be found elsewhere in the Law eg in s 775.

125. On these see Ford & Austin supra n 61, 70 - 71.

126. These powers have been used in this way by the major Canadian provincial securities commissions. On their advantages from an Australian standpoint see Simmonds supra n 3, 62-63.

127. RJ Daniels & JG Macintosh 'Toward a Distinctive Canadian Corporate Law Regime' (1991) 29 Osgoode Hall L J 863, 895 (footnotes omitted). A critical review of the exercise and effects of these authorities by one of these authors is in JG MacIntosh 'Securities Regulation and the Public Interest: of Politics, Procedures and Policy Statements - Part I' (1994) 24 Can Bus L J 77 and Pt II, 287.

128. See most recently *Re Pezim & Superintendent of Brokers* (1994) 114 DLR (4th) 385 On the importance of this issue to administrative authorities like that being commended in the text: see ALRC *TPA Report* supra n 7, ¶¶ 11.14-11.15 (concluding against giving the Trade Practices Commission a cease and desist power of any sort).

129. See R Austin 'Takeovers — the Australian Experience' in J Farrar (ed) *Takeovers: Institutional Investors and the Modernization of Corporate Laws* (Auckland: Oxford

Looking at enforcement reform from a political standpoint, perhaps most notable is the apparently strong political will to give Australia a statutory derivative action, likely to be patterned on Canadian models.[130] On the analysis of the procedural and practical problems in this area previously rehearsed, however, not much if any additional enforcement by private litigants seems likely, at least in the medium term.[131]

Looking at enforcement reform from the administrator's standpoint, most notable is, it seems, the lack of a power, enjoyed by the Trade Practices Commission as a result of a 1992 amendment of the Trade Practices Act 1974, for the ASC to accept binding undertakings. On breach of such undertakings — rather than on the unlawfulness of the underlying conduct — enforcement action may be taken.[132] This approach has much to commend it, as the TPC experience has been ready to suggest.[133] In one instance, the company concerned 'was required to undertake disciplinary action and to report the steps taken. The company was also required to provide compensation which victims would not otherwise have received (without compromising their right to take further private action). Added to these advantages, the [Trade Practices] Commission was able to promote general deterrence by publicising the nature and costs of the settlement'.[134]

2. Criminal enforcement reform and better integration of civil and criminal enforcement strategies

This last institution, of the undertaking, raises the question of taking the next step, of greater use of unconsented to corporate probation.[135] This, as has been noted, seems to be open for offences under the Corporations Law without amendment of the legislation.

UP, 1993) 144, 160 (on control concept in takeover regulation in Corporations Law ch 6).

130. See the initial impetus in Companies and Securities Law Review Committee *Enforcement of the Duties of Directors and Officers of a Company by Means of a Statutory Derivative Action* Rep No 12 (Centura, 1990); and see Baxt supra n 112.

131. For an apparently similar conclusion, but from a different perspective: see Bottomley supra n 111, 147-148 (change will come from rethinking conceptual approach to shareholder litigation in this context — through drawing parallels to judicial review of administrative action — which reform may, but will not necessarily, stimulate).

132. Trade Practices Act 1974 s 87B (Cth), on which see ALRC *TPA Report* supra n 7, ¶¶ 10.8-10.9 & 11.4-11.11. This institution has been commended for emulation in the Corporations Law in the ASC submission to the Inquiry of the Senate Standing Committee on Legal and Constitutional Affairs on the Investigatory Powers of the ASC: 'Opening Statement [by ASC Chairman Alan Cameron] to the Senate Standing Committee Inquiry into ASC Investigatory Powers' supra n 5, 10.

133. Fisse & Braithwaite supra n 8, 230-237. For reform of these provisions: see ALRC *TPA Report* supra n 7, ¶¶ 11.4-11.10.

134. From Fisse & Braithwaite supra n 8, 232.

135. ALRC *TPA Report* supra n 7, ¶ 10.8.

But beyond this, Professors Fisse and Braithwaite have advanced a program for reform that builds on institutions like the undertaking and corporate probation, to widen the array of criminal enforcement strategies in relation to corporate crime generally. In relation to a body of law like the National Scheme of corporate law and securities regulation in Australia, under a regulator like the ASC, the proposal would add to the criminal enforcement options as well as provide a scheme for better integration of criminal and civil enforcement strategies.

Professors Fisse and Braithwaite call their proposal 'the Accountability Model'.[136] This Model would in terms of the discussion in this article provide a six-level pyramid of criminal enforcement strategies.

At the base of this enforcement pyramid would be the informal enforcement strategies, above which would be civil monetary penalties.[137] Then there would be the two levels particular to the Model. Above these there would then be '[c]riminal liability (individual and corporate), with community service, fines and probation authorised for individual offenders, and adverse publicity orders, community service, fines and probation for corporate offenders'.[138] This pyramid would top out with '[e]scalated criminal liability (individual and corporate), with jail authorised for individual offenders, and liquidation (corporate capital punishment), punitive injunctions[139] and adverse publicity orders for corporate offenders'.[140]

The two levels particular to the Accountability Model are:

> LEVEL 3 Disciplinary or remedial investigation undertaken upon agreement with an enforcement agency (accountability agreements) and court-approved assurance of an effective program of disciplinary or remedial action (accountability assurances), coupled with publication of an accountability report.
> LEVEL 4 Court-ordered disciplinary or remedial investigation (accountability orders) or court-approved assurance of an effective program of disciplinary or remedial action (accountability assurances), coupled with publication of an

136. See the exposition in Fisse & Braithwaite supra n 8, chs 5-7. For its elaboration into a 6-step model in the present context, principally as a normative instrument (compare the present paper's larger descriptive purpose), see Dellit & Fisse supra n 8, 584. Their steps in ascending order are: Warnings Censure Advice and Guidance; Negotiation and Settlement (a major focus in their paper: see supra n 121); Civil Remedies and Supervisory Controls; Civil Penalties and Substantial Incapacitation; Criminal Liability; and Total Incapacitation.

137. The size of the ones in the Corporations Law would lead me to put these higher up the pyramid: it would seem that Professors Fisse and Braithwaite have in mind a distinction by size of penalty to be expected, as appears from the text at n 142 infra.

138. Which would not seem to require amendment to the Corporations Law: see text and reference in supra n 23. Cf the conclusion that amendment of the Trade Practice Act 1974 (Cth) is required to provide for at least some of these in ALRC *TPA Report* supra n 7, ch 10 (community service and probation).

139. Essentially a 'distinctive and enhanced form of corporate probation' as it is viewed in ALRC *TPA Report* supra n 7, ¶ 10.22

140 Fisse & Braithwaite supra n 8, 141 (source of quotations).

accountability report.[141]

Level 3 'accountability agreements' would be 'available' for 'all offences, and all civil violations that are subject to a mandatory injunctive remedy or to a significant monetary penalty (say, $10 000 or more)'.[142] Level 4 'accountability orders' would be available 'where it is proved in civil proceedings that [one of the above types of violation] was committed by or on behalf of a corporation'; or 'where it is proved in criminal proceedings that an offence was committed by or on behalf of a corporation'; or 'where it is proved in criminal proceedings that the actus reus of an offence was committed by or on behalf of a corporation'.[143]

It is important to note that the authors of the Model designed it for offences committed by or on behalf of a corporation, leaving to one side the problem of a controller abusing his or her position in a closely held company or using the corporation to work a fraud. There, as they point out, the problem is not crafting a proper response to organisational crime but getting at the responsible individual alone.[144]

The attractions of this Model for a regulator are considerable. It or the ideas underlying it appear to have attracted the Australian Law Reform Commission in a recent report on enforcement of the Trade Practices Act 1974 (Cth).[145] The Model takes the basic idea of the undertaking beyond making it enforceable (as the ASC supports) into a much more elaborate model of escalating enforcement options. It imaginatively blends civil and criminal enforcement experience. It avoids the 'black box' and 'non-assurance of accountability' objections to imposing liability on the corporation. It harnesses the internal disciplinary mechanisms of the corporation, avoiding the imposition of a 'one size fits all' set of standards of compliance procedures, offering the prospect of individually tailored solutions appropriate to the context in question. It builds on present regulatory options, differing from them principally in the better harnessing of formal court process and the articulation of the strategic considerations involved. And it offers the prospect of real cost savings, through the avoidance of much difficult and potentially troubling formal investigatory procedure by the regulator.[146] A strong case can be made for enacting it, or better a version of it that fully blends civil and criminal enforcement strategic options, as a guide to regulator and regulated.[147]

141 Ibid
142. Fisse & Braithwaite supra n 8, 149.
143. Fisse & Braithwaite supra n 8, 149 - 50.
144. Fisse & Braithwaite supra n 8, 2.
145. ALRC *TPA Report* supra n 7, ch 10.
146. See the authors' evaluation of their Model against a wide range of desiderata for enforcement, in Fisse & Braithwaite supra n 8, ch 6.
147. Dellit & Fisse supra n 8, 593-594.

Whether or not this Model commends itself as good public policy, it is a model in another sense. It represents the sort of careful review of enforcement strategy against policy objectives — including cost-containment and safeguarding the interests of those affected — that it is hoped any sensible review of the role of various enforcement strategies in regulation like the National Scheme of corporations law and securities regulation in Australia would emulate.