

RESEARCH REPORT

# ASIC ENFORCEMENT PATTERNS

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ASIC Enforcement Patterns

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# CENTRE FOR CORPORATE LAW & SECURITIES REGULATION

## ASIC ENFORCEMENT PATTERNS

RESEARCH REPORT

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IAN RAMSAY

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## **EXECUTIVE SUMMARY**

### **I. OVERVIEW OF RESEARCH REPORT**

- This research report reports the findings of an empirical study of court-based enforcement activities undertaken by the Australian Securities and Investments Commission ("ASIC") during the years 1997 to 1999.
- ASIC has responsibility for enforcing company and financial services laws in Australia. By enforcement we mean, that is, all the activities by which ASIC investigates possible breaches of the relevant laws, takes action to remedy the breaches and/or to punish wrongdoing and secure compliance.
- This research builds on a 1999 empirical study by members of the Centre for Corporate Law and Securities of how ASIC used civil penalties as enforcement tools against company directors.
- The current research project has two aims:
  - To produce a detailed study of ASIC's enforcement activities and to identify patterns in those activities;
  - To determine whether ASIC enforcement activities are consistent with the findings of past sociological studies of legal regulation and enforcement. Sociological theories contend that the effectiveness of laws as forms of regulation depends on the process by which those laws are received, interpreted and responded to by the participants in the regulatory process. Those participants include ASIC, the Commonwealth Director of Public Prosecutions, and the pool of persons and companies influenced and controlled by company and financial services laws.

### **II. RESEARCH METHODOLOGY**

- The project involves an empirical study of AISC court-based enforcement activities over the period January 1997 to December 1999.
- The dataset was generated in collaboration with ASIC, comprising information regarding all ASIC court-based enforcement activities during the sample period. Information was also obtained from the Commonwealth Director of Public Prosecutions ("DPP") detailing enforcement activities referred to the DPP by ASIC

during the sample period. The amalgamation of data from various sources has enabled the creation of a unique dataset with a high degree of detail.

- The findings of the empirical study are the subject of this research report. The report has seven principal sections. Part I is the introduction. Part II is a literature review of the sociological theories of regulation underpinning the project. Part IV describes the practices and issues affecting ASIC enforcement activities. Part V describes the dataset and project methodology in greater detail. Part IV reports the empirical findings of the project and analyses them by reference to sociological theories of regulation.

### **III. KEY FINDINGS OF THE STUDY**

- The empirical study analyses three aspects of ASIC court-based enforcement activities during the sample period:
  - The characteristics of the participants in the regulatory process, apart from ASIC and the DPP (Part VI.C);
  - The types of enforcement activity undertaken by ASIC and the legislation applied in those activities (Part VI.D);
  - The outcomes of ASIC enforcement activities (Part VI.E).

#### ***Characteristics of regulatees***

The study found that ASIC was more likely to pursue court-based enforcement:

- against individuals (rather than companies);
- against men (rather than women) aged between 41-50 years in their capacity as directors of companies working in the finance and insurance industry; and
- in relation to private companies rather than public companies and, in particular, private companies that were no longer a going concern.

#### ***Types of enforcement activity***

The study found that ASIC was more likely to pursue penal enforcement in relation to:

- laws that were mandatory (rather than enabling) in nature;

- laws that were oriented towards social, rather than economic, regulation. In particular, the external administration and misconduct provisions of the *Corporations Law*, rather than the disclosure provisions; and
- laws with an ethical foundation that address conduct that is widely condemned because it exploits and defrauds shareholders and creditors.

### ***Enforcement outcomes***

The study found evidence of:

- the predominant use of penal enforcement activities by ASIC over civil enforcement activities;
- targeted enforcement by ASIC specifically in relation to external administrator assistance actions;
- the predominant use of a limited, severe set of penal sanctions (specifically fines and custodial sentences) despite the availability of a much wider range of sanctions;
- the predominant use of settlements by ASIC as outcomes for civil enforcement activities; and
- ASIC court-based enforcement activity being predominantly in the middle to higher bands of the pyramid of enforcement proposed by John Braithwaite and Ian Ayres.

### ***General conclusions***

- The study highlights the predominant use of penal enforcement activities and sanctions within the dataset of ASIC court-based enforcement work.
- This finding reflects the traditional conception of the role of court enforcement in legal regulation as a "last resort" strategy.
- The study also highlights the reality that the majority of enforcement activities in the dataset concern breaches of mandatory, socially oriented or ethically-based laws by regulatees in circumstances where their behaviour is widely regarded as undesirable.
- What the study cannot do is comment on whether any of these trends are predominant in all ASIC enforcement work, or merely court-based enforcement work, the subject of this study. A study of non-court based enforcement activities undertaken by ASIC is required before this would be possible.

## I. INTRODUCTION<sup>1</sup>

This research reports the findings of an empirical study of the court-based enforcement activities of the Australian Securities and Investments Commission ("ASIC") during the years 1997 to 1999. ASIC has responsibility for enforcing company and financial services laws in Australia. In performing this function, ASIC undertakes enforcement activities to investigate possible breaches of the relevant laws and to take action to punish wrongdoing or to secure compliance. The majority of enforcement activities undertaken by ASIC involve contraventions of the *Corporations Act 2001* (Cth) (previously the *Corporations Law*).<sup>2</sup> ASIC also has responsibility for the *Australian Securities and Investments Commission Act 2001* (Cth) (the *ASIC Act*), various acts regulating insurance, superannuation and State law relating to the affairs of a body corporate or managed investment. The contraventions investigated by ASIC range from minor breaches to serious wrongdoing, and include both civil and criminal matters.

In 1999, the Centre for Corporate Law and Securities Regulation conducted research into the conduct of ASIC in its use of civil penalties as an enforcement tool against company directors.<sup>3</sup> The prior research involved the use of empirical data regarding ASIC's enforcement activities collected through a series of semi-structured interviews with senior ASIC enforcement personnel from regional offices around Australia. The current study is a further development of that prior research. In collaboration with ASIC, a unique dataset has been generated, comprising of information regarding all of ASIC's enforcement activities over a period from 1997 to 1999. In addition to information supplied by ASIC, data was obtained from the Commonwealth Director of Public Prosecutions ("DPP") detailing enforcement activities referred to the DPP from ASIC

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<sup>1</sup> The research for this study was funded by a Strategic Partnerships with Industry - Research and Training grant from the Australian Research Council ("the ARC") and conducted in association with the Australian Securities and Investments Commission ("the ASIC"). The views expressed are not necessarily those of either the ARC or ASIC. The report is an independent analysis by the research team of the issues discussed. Although the study was undertaken with the co-operation of ASIC, the conclusions drawn from the data provided by ASIC represent the views and findings of the research team and should not be seen as the views or policies of ASIC. The research team thanks Arie Frieberg, George Gilligan, Anne-Marie Neagle and Bethany Sharman for their support and research assistance. Please address any correspondence to Helen Bird (h.bird@unimelb.edu.au).

<sup>2</sup> As the sample period for this report covers the period from 1997 to 1999, further references will be to the *Corporations Law* as it was the applicable law at the time.

<sup>3</sup> George Gilligan, Helen Bird and Ian Ramsay, *Regulating Directors' Duties - How effective are the Civil Penalty Sanctions in the Corporations Law?* (Research Report, Centre for Corporate Law and Securities Regulation, The University of Melbourne, 1999); 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.

over the same period. The amalgamation of data from various sources has enabled the creation of a dataset with a high degree of detail.

The current project has two aims. First, to produce a detailed survey of ASIC's enforcement activities and to identify patterns in those activities. The survey will be conducted within the framework of sociological theories of regulation. The second aim is to determine whether the empirical results on ASIC enforcement practices are consistent with the findings of past sociological studies.

The research report consists of seven principal sections, of which the introduction and conclusion respectively form sections I and VII. Part II, the literature review, examines the sociological theories of regulation underpinning this project. Part III sets out the research questions investigated in the empirical study. Part IV provides an overview of the practices and issues affecting enforcement activity undertaken by ASIC. Part V describes the data set examined in the project and the methodology used to undertake the empirical study. Part VI reports the empirical findings of the project and analyses those findings by reference to sociological theories of regulation.

## II. LITERATURE REVIEW

### A. Research context

The subject matter of this research project is the regulation of corporations and corporate activity in Australia. The term "regulation" is problematic to define.<sup>4</sup> For present purposes it will be explicitly confined to *deliberate state actions* that use legal instruments to constrain, organise and influence social and industrial behaviour.<sup>5</sup> Regulation encompasses the making of laws, the interpretation of laws to determine what is required to comply with them and, in turn, the actions taken to enforce those laws in cases of non-compliance. The regulation being examined in this project encompasses one aspect of the regulatory process, namely the enforcement of the *Corporations Law*, the principal statute regulating corporations in Australia during the sample period for this study. As at 30 June 2002, there were 1,251,237 corporations registered in Australia.<sup>6</sup> The *Corporations Law* contains laws with respect to the registration of companies,

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<sup>4</sup> There are a variety of definitions used in regulation literature; for a discussion of this 'definitional free-for-all' and the value of a clear definition in providing a purchase for critical thought, see Black, 'Decentring Regulation: understanding the role of regulation and self regulation in a "post regulatory world"' (2001) *Current Legal Problems* 103, 129 and 140-141.

<sup>5</sup> Robert Baldwin and Martin Cave, *Understanding Regulation* (1999), 1-2.

<sup>6</sup> ASIC, *Annual Report* (2001-2002), 80.

governance of corporations, corporate finance, transactions affecting control of corporations, corporate liability and external administration of corporations in Australia.

Central to this research project is an empirical study of court-based enforcement actions undertaken by ASIC as the regulator of the *Corporations Law*.<sup>7</sup> The results of this empirical study will be analysed with reference to sociological theories of regulation. As a broad generalisation, such theories examine regulation as an ongoing social process with a variety of participants.<sup>8</sup> The effectiveness of regulation as a mechanism for controlling behaviour depends on how it is received, transmitted and refracted by the participants in the regulatory process.<sup>9</sup> Governments are only one such participant, and their regulatory activities are (re)constructed through a complex of public and private networks and by both formal and informal means.<sup>10</sup> Other participants include the regulator, here ASIC, other governmental bodies that have a role in the regulatory field, such as the DPP, and the diverse pool of persons and institutions to be influenced or controlled through regulation (“**the regulatees**”). In the context of the *Corporations Law*, the regulated included companies, directors, officers, shareholders, auditors, financial advisors and liquidators.<sup>11</sup> The object of this analysis is to broaden contemporary debate about the role and effectiveness of the enforcement regime in the *Corporations Law*.

The starting point for the research project is a review of the academic literature on regulation. The review will:

- (a) provide an explanation of what is regulation;
- (b) provide a summary of the competing theories of regulation, with a specific focus on sociological theories of regulation;
- (c) consider the role of enforcement within regulation and describe the different styles or models of enforcement available to regulators;
- (d) describe and explain other variables that affect enforcement activities by regulators;

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<sup>7</sup> *Corporations Act* 1989 (Cth) s 5B; *ASIC Act* 1989 (Cth) s 11(1).

<sup>8</sup> Keith Hawkins, *Environment and Enforcement* (1984), 15-16; Brigit Hutter, *Compliance, Regulation and Enforcement* (1997), 4-6.

<sup>9</sup> Neil Gunningham, "Private Ordering, Self-Regulation and Futures Markets: A Comparative Study of Informal Social Control" (1991) 4 *Law & Policy* 297, 300.

<sup>10</sup> *Ibid.*

<sup>11</sup> See Australian Securities and Investment Commission, *A User's Guide to ASIC, Your Corporate and Financial Services Watchdog* (1999), 6-7.

- (e) explain how Ayres' and Braithwaite's model of regulation<sup>12</sup> forms part of sociological theories of regulation and provides a framework for examining regulatory practice; and
- (f) highlight issues and factors that may inform this project's empirical study of ASIC enforcement practices.

## **B. Theories of regulation**

### **1. Overview of discussion**

The following discussion provides an outline of the sociological theories of regulation on which the research project draws. The object of the discussion is to define the theoretical and definitional framework on which the research project depends. Sociological approaches to regulation offer one of many alternative explanations of regulation. Before focussing exclusively on them, it is useful to gain an appreciation of the range of approaches to regulation found in the academic literature. These definitions illustrate that regulation is a multi-faceted notion, capable of analysis from a variety of perspectives. An appreciation of the wider context of regulation assists understanding of any one specific theory, such as the sociological approach relied on here.

### **2. Perspectives on regulation**

Three broad 'textbook' definitions or approaches to regulation are commonly identified, ranging from the narrowest to widest senses of the term.<sup>13</sup> First, regulation as (government-determined) legal rules backed by mechanisms for monitoring and enforcement. Secondly, in a more encompassing variation of the first, regulation includes any form of deliberate state intervention in the economy or other fields of social activity. Thirdly, regulation, in its widest reading, includes all mechanisms of social control or influence, from whatever source and whether intentional or not. These variations of meaning can clearly be witnessed in the obvious contrasts between a narrowly focused approach such as that adopted by some (principally of USA origin) 1980s regulation literature (which has subsequently been criticised for leading to a narrow 'de/re'-regulation debate),<sup>14</sup> the disciplined examination of regulation as a 'politico-economic' concept in law and economics approaches,<sup>15</sup> and the intricate and expansive analyses of

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<sup>12</sup> Ayres and Braithwaite, *Responsive Regulation* (1992).

<sup>13</sup> Black, 'Decentring Regulation', above n 4, 129, in light of Robert Baldwin, Colin Scott and Christopher Hood, *A Reader on Regulation* (1998) and Baldwin and Cave, above n 5.

<sup>14</sup> Ibid, 140. These debates are closely linked to the American focus on the 'capture' theory: see Hutter, *Compliance*, above n 8, 6.

<sup>15</sup> For example, Anthony Ogus, *Regulation: Economic Theory and Legal Form* (1994), 1.

anthropological and cultural studies or systems theory.<sup>16</sup> Recent trends in regulatory policies and academic literature, particularly debate surrounding “co”, “quasi” and self-regulation,<sup>17</sup> “networks” and ideas of decentred, post-regulatory governance, illustrate the breadth of contemporary interest in regulation theory.<sup>18</sup>

### 3. Regulation as deliberate state intervention

As noted above, this research project defines regulation in terms of deliberate state actions that seek to influence social and industrial behaviour. This approach is clearly adapted from the second definition above. It includes a specific set of actions grouped together as a field-specific *regime*, such as corporate law, without pre-empting the mode of influence chosen. Academic interest in this field falls into two interrelated categories. One cluster of work explores the development, reform and death of specific projects,<sup>19</sup> perceived trends in regime formations<sup>20</sup> and their assessment in terms of techniques, design and effectiveness.<sup>21</sup> Work in this area includes discussion of consensual versus conflict theories, directed towards questions of in whose interest governments intervene (does regulation serve a normative or technical 'public good', or are regulatory processes 'captured' by private interests?),<sup>22</sup> or more interactive analyses such as Leigh Hancher and Michael Moran's conception of 'regulatory space'.<sup>23</sup> The second cluster of research has focused on particular areas of regulation or aspects of the regulation function,<sup>24</sup> such as the impact of individualised decision-making (and the problem of 'discretion'),<sup>25</sup> rule-making,<sup>26</sup> or empirical work on day-to-day compliance and enforcement practices. This

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<sup>16</sup> Black, 'Decentring Regulation', above n 4, 107.

<sup>17</sup> Ibid, 117, discussing the taxonomy employed in Productivity Commission, *Guide to Regulation* (2<sup>nd</sup> ed, 1999).

<sup>18</sup> Ibid, 103.

<sup>19</sup> See Baldwin and Cave, above n 5, Chapter 2.

<sup>20</sup> Julia Black, 'An Economic Analysis of Regulation: One View of the Cathedral' 16(4) (1996) *Oxford Journal of Legal Studies* 699, 699.

<sup>21</sup> Julia Black, 'New Institutionalism and Naturalism in Socio-Legal Analysis: Institutional Approaches to Regulatory Decision Making' (1997) 19(1) *Law & Policy* 51, 53.

<sup>22</sup> Hutter, *Compliance*, above n 8, 4-5.

<sup>23</sup> Leigh Hancher and Michael Moran, 'Organising Regulatory Space' in Leigh Hancher and Michael Moran (eds) *Capitalism, Culture and Regulation* (1989), discussed in Robert Baldwin and Martin Cave, above n 5, 30.

<sup>24</sup> Black, 'An Economic Analysis of Regulation', above n 20, 699.

<sup>25</sup> Ibid.

<sup>26</sup> See, for example, Robert Baldwin, 'Why Rules Don't Work' (1990) 53 *Modern Law Review* 321 and Robert Baldwin, *Rules and Government* (1995); Julia Black, *Rules and Regulators* (1997).

research falls into this second cluster, given its empirical focus on ASIC enforcement practices.

#### 4. Sociological theories of regulation

Distinctly sociological theories of regulation have primarily entered this field with an explicit focus on the enforcement of regulation and the social influences upon the law ‘in action’.<sup>27</sup> They seek to identify and explain the patterns of social interaction that are negotiated and enacted by the actors in a regulatory arena.<sup>28</sup> Keith Hawkins' study of water pollution control agencies is seminal in this area.<sup>29</sup> Prior to this, the enforcement behaviour of regulatory agencies had most frequently been explained in terms of their “capture” by external influences.<sup>30</sup> Sociological approaches, however, have emphasised the diverse interactions of people (individually and socially), perceptions (of themselves, their tasks and others) and processes (legal, interpretive and informal).<sup>31</sup> A sociological approach to regulation presents it as an ever-evolving product of such interactions within the regulatory project.<sup>32</sup> Emphasising this ‘social paradigm’ in understanding the law and legal processes<sup>33</sup> does not take away from the formal content of the regime under analysis. By recognising that regulatory compliance is as much a negotiated social process as an event,<sup>34</sup> the driving question for sociologists is the place of the formal legal process in regulatory enforcement.<sup>35</sup> The infrequency and selectivity of the legal processes used by regulators is thus a particular matter of concern.<sup>36</sup> Indeed, it is by approaching regulation sociologically that the individual components of the regulatory process – enforcement and compliance – come into sharper focus and thus prompt separate analysis.

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<sup>27</sup> Hutter, *Compliance*, above n 8, 12.

<sup>28</sup> Ibid, 18-19.

<sup>29</sup> Hawkins described this work as explicitly interpretative, interactionist and dramaturgical, often drawing on ethnographic studies (social research that attempts to scientifically describe cultural practices, often using participant-observation techniques): Hawkins, above n 8, 15-17.

<sup>30</sup> Ibid, 3.

<sup>31</sup> Ibid, 15.

<sup>32</sup> Julia Black, ‘Managing Discretion’, Conference Paper to ALRC Conference *Penalties: Policy, Principles and Practice in Government Regulation* (June 2001), 2.

<sup>33</sup> Black, ‘New Institutionalism and Naturalism in Socio-Legal Analysis’, above n 21, 53.

<sup>34</sup> Hutter, *Compliance*, above n 8, 13.

<sup>35</sup> Hawkins, above n 8, 15.

<sup>36</sup> Ibid, 178.

## C. The role of enforcement in regulation

The purpose of the following discussion is to examine what amounts to enforcement and the part it plays in the regulatory process. The discussion is in two parts. The first part identifies the key concepts involved in enforcement and explores the ways in which they interact. Armed with an understanding of enforcement terminology, the second part reviews academic literature on enforcement styles and the variables that impact on the form and effectiveness of enforcement activities.

### 1. Key concepts in enforcement literature

Defining what is enforcement in simple terms is problematic. The term traditionally evokes images of the strict application of laws, such as a formal prosecution and threats of criminal sanctions. Sociological approaches to regulation contend that a wider conception of enforcement is required, because enforcement is pursued both through an array of less invasive legal instruments and other informal means.<sup>37</sup> Enforcement is sometimes defined as gaining compliance with the letter of the law. This assumes that compliance is a one-dimensional concept. Sociological approaches contend that it is in fact an ongoing, negotiated and interpretive process.<sup>38</sup> One author has gone so far as to define enforcement as involving all forms of compliance-seeking.<sup>39</sup> The process of enforcement necessarily involves a determination of what counts as compliance. An understanding of the role of enforcement is not possible without an understanding of what is compliance. It is useful to briefly explore each term separately and to consider the ways in which they interact, before reviewing the academic literature on enforcement.

#### (1) *The concept of enforcement*

One of the difficulties in defining what is enforcement is the variety of contexts in which the term is used in the academic literature. It may be used to refer solely to court-based enforcement actions or criminal prosecutions.<sup>40</sup> Alternatively, it can describe less invasive regulatory instruments, such as the issuing of a contravention notice, which may or may not be part of a formal prosecution process.<sup>41</sup> An example of this in the corporate

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<sup>37</sup> Jeremy Rowan-Robinson, Paul Watchman and Christine Barker, *Crime and Regulation: a Study of the Enforcement of Regulatory Codes* (1990), 186.

<sup>38</sup> Hutter, *Compliance*, above n 8, 12-15; Julia Black, 'Managing Discretion' above n 32, 3.

<sup>39</sup> Baldwin, 'Why Rules Don't Work', above n 26, 324.

<sup>40</sup> Rowan-Robinson, Watchman and Barker, above n 37, 186.

<sup>41</sup> *Ibid*, 199.

law context is a penalty notice under s 1313 of the *Corporations Law*. In other literature, enforcement is used even more inclusively, to refer to the regulator's tactics and practices rather than specific legal instruments. Tactics have been described as the techniques and devices used by regulators "on the ground" to secure compliance.<sup>42</sup> Practices refer to the regulator's established routines. They may be formal or informal. Examples of formal practices are the Policy Statements and Practice Notes published by ASIC, which outline the regulator's strategies and approaches to regulation of specific issues.<sup>43</sup> Informal practices are the sum of the regulator's day-to-day activities.<sup>44</sup> While these contextual definitions potentially overlap, they serve as a reminder of the multidimensional and complex nature of enforcement activities.

In an attempt to clarify enforcement terminology, Brigit Hutter, an academic in sociological theories of regulation, defined regulatory enforcement as involving two dimensions: enforcement strategy and enforcement styles.<sup>45</sup> Enforcement strategy refers to the way in which the parameters for enforcement actions and daily practices are deliberately determined in accordance with the explicit goals of the particular regulatory project under analysis.<sup>46</sup> Enforcement style, in contrast, refers to the choice between a broad, flexible and accommodative approach and a legalistic, sanctioning approach to enforcement.<sup>47</sup> At different times the same regulator may adopt either approach, depending on a number of factors that will be detailed below. One task of this report is to explore when and how ASIC employs court-based enforcement practices in the context of the issues discussed here.

## (2) *The concept of compliance*

Conceptual confusion about the meaning of 'compliance' is less acute. It is often clear from the context whether compliance is used simply to mean conforming with the law, or as an enforcement style in its own right. More generally, this term is prefaced as voluntary or instinctive compliance or sanctioned non-compliance and used to characterize part of a broader picture of the regulatory environment.<sup>48</sup> These varied uses

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<sup>42</sup> Brigit Hutter, *The Reasonable Arm of the Law* (1988), 131.

<sup>43</sup> The ASIC website ([www.asic.gov.au](http://www.asic.gov.au) under "Publications") explains the role of policy statements and practice notes in the following terms: "Policy statements (PS) are issued as formal declarations of our policies. They indicate how we will administer the Corporations Act 2001 and other legislation for which we are responsible. Practice notes (PN) are issued for the guidance of practitioners on reporting and compliance matters."

<sup>44</sup> Rowan-Robinson, Watchman and Barker, above n 37, 213-215.

<sup>45</sup> Hutter, *The Reasonable Arm*, above n 42, 131-132.

<sup>46</sup> *Ibid.*

<sup>47</sup> This dichotomy is discussed in further detail below.

<sup>48</sup> See IID2(1) below.

focus attention on the underlying negotiations and interpretations involved in compliance at both the standard setting and the enforcement stages of the regulatory process.<sup>49</sup> They also highlight the important relationship between the goals and context of regulation (influencing regulatees' behaviour) and the perceived tasks and styles of enforcement of the regulator.

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<sup>49</sup> Hutter, *Compliance*, above n 8, 13.

## 2. Goals and styles of enforcement

An organising concept in the enforcement literature is a binary model of enforcement styles employing a distinction between an accommodative (goal-orientated and co-operative) and a sanctioning (legalistic and penal) approach to compliance.<sup>50</sup> Somewhat confusingly, this dichotomy has been alternatively described as negotiated-compliance / enforced-compliance,<sup>51</sup> compliance / sanctioning<sup>52</sup> or compliance / deterrence.<sup>53</sup> An accommodative style, which studies have associated with regulatory enforcement,<sup>54</sup> is generally orientated towards *preventing* the occurrence of violations and securing long-term co-operative compliance by persuasion, negotiation, bargaining and education.<sup>55</sup> Brigit Hutter has further sub-divided this style into two strategies, persuasive and insistent, primarily distinguished by the latter's more defined limits of tolerance and reduced flexibility.<sup>56</sup> The sanctioning style is a more legalistic, inflexible approach again, orientated towards *punishing* violations for breaches of legal rules,<sup>57</sup> and is associated with reacting to harm-causing conduct and actions.<sup>58</sup> Systemic compliance is not the main issue for this style,<sup>59</sup> although deterrence and the threat of punishment is intended (as a secondary goal) to influence regulatee behaviour.<sup>60</sup>

Though based on empirical research and participant-observation work, this binary distinction is an “ideal-type” device. Its primary value lies in organising thinking in this area. This traditional distinction is often critiqued for its obvious simplicity. Such a dichotomy is, however, only ever a starting point. The model is useful to the current research project because it helps to characterise the empirical study undertaken here, while also illustrating the limitations of that study. This research explores ASIC court-based enforcement activity during the years 1997 to 1999 (**‘the dataset’**). That activity typifies a ‘sanctioning’ style of enforcement. However the dataset on which this research

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<sup>50</sup> Ibid, 14; Hawkins, above n 8, 3.

<sup>51</sup> This terminology of Shover, Clelland and Lynzwiler is discussed in Hutter, *The Reasonable Arm*, above n 42, 155.

<sup>52</sup> Hawkins, above n 8, 3.

<sup>53</sup> Albert J Reiss, 'Selecting Strategies of Social Control over Organisational Life' in Keith Hawkins and J M Thoms (eds), *Enforcing Regulation* (1984), 23.

<sup>54</sup> Hutter, *Compliance*, above n 8, 15.

<sup>55</sup> Reiss, 'Selecting Strategies of Social Control' above n 53, 23-26; Hawkins, above n 8, 3-4; Hutter, *Compliance*, above n 8, 14-15; Julia Black, 'Managing Discretion' (2001), above n 32, 4-5.

<sup>56</sup> Hutter, *The Reasonable Arm*, above n 42, 157.

<sup>57</sup> Above n 55.

<sup>58</sup> Ibid.

<sup>59</sup> Hawkins, above n 8, 4.

<sup>60</sup> Reiss, 'Selecting Strategies of Social Control' above n 53, 24.

draws constitutes only a subset of those activities undertaken by ASIC that could be classified as enforcement. Clearly, it is thus not possible to define all ASIC enforcement activity as belonging to one or other of these ideal types.

#### **D. Key enforcement variables**

For a more thorough account of the place of enforcement in regulation theory and practice, it is appropriate to turn to the particular insights and findings of specific sociological studies in this area. An examination of these studies serves to highlight the range of factors that influence a regulator's decisions as to:

- whether enforcement action is required; and
- if so, what action to take.

Theoretical and empirical research on regulatory practice has revealed a complex array of variables affecting the choice and effectiveness of enforcement activities undertaken by regulatory agencies. They include the following factors:<sup>61</sup>

- the activity or behaviour being regulated and objectives of the regulation;
- the legal framework;
- the nature of interactions between the regulator and the regulatee;
- organisational / institutional factors affecting the regulator;
- personal backgrounds and experiences of the enforcement officers; and
- the economic, political, social and moral context of the regulation.

These factors will be separately considered in turn. The discussion will take the form of an overview of their general insights on enforcement, followed by a consideration of their application to the corporate law context and this research project.

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<sup>61</sup> Adapted from Julia Black, 'Managing Discretion', (June 2001), above n 32, 6. Black's clustering, which does not include the first category, was incorporated into Australian Law Reform Commission, *Securing Compliance*, Discussion Paper No 65 (April 2002) 116-123. These categories are further distilled in Australian Law Reform Commission, *Principled Regulation – Federal Civil and Administrative Penalties in Australia*, Report No 95 (March 2003), 362-369.

## 1. Activity or behaviour being regulated and objectives of regulation

### (1) Overview of research literature

A broad finding of sociological studies of regulation and enforcement is that the underlying nature of the activity being regulated, and the objectives of such regulation, continues to shape the styles, strategies and actions adopted in that process. The contextual specificity of an activity or set of concerns would normally be taken into account in the law-making stage and in the formalization of policy goals into rules. Sociological studies of regulation argue that enforcement officials still remain highly sensitive to the tensions, if not outright ambivalence, between different policy goals when approaching the day-to-day task of enforcing a regulatory regime.<sup>62</sup>

The term 'regulation' implies tolerance of the primary activity.<sup>63</sup> In the context of corporate law, for example, the law facilitates the organization of business activity through the corporate form. It then establishes, through directors' duties, accountability mechanisms for those people charged with the management and oversight of that business. How regulatory officials subsequently gauge compliance with the law, and take actions to enforce it, will clearly be influenced as a practical matter by the nature and characteristics of the underlying primary business activity. As a further example, consider circumstances in which the regulatory field involves a relatively stable, predictable and ongoing set of concerns, as is often the case in industries where there is a licensing requirement. In this case, a preventative and co-operative compliance-focused enforcement style will often seem appropriate to the regulator.<sup>64</sup> The interface between the legal requirements or prohibitions and the behaviour being examined is also tested whenever an enforcement official is required to make a judgement regarding the extent or nature of the contravention. In this situation, enforcement may depend upon the regulator's determination whether a substantive wrong has been committed.<sup>65</sup>

How a regulatory official engages with the problem of whether or not compliance with the regulatory regime has been achieved, or if formal enforcement processes are necessary, will depend on issues surrounding this underlying context. The strict enforcement of the law may not be seen as central to the regulator's function. Instead, the focus may be 'full compliance' (something beyond the letter of the law)<sup>66</sup> or the 'deeper purpose' of the regime.<sup>67</sup> Alternatively, the formal enforcement of regulation

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<sup>62</sup> Hawkins, above n 8, 195.

<sup>63</sup> Ibid, 10.

<sup>64</sup> Reiss, 'Selecting Strategies of Social Control over Organisational Life', above n 55, 27.

<sup>65</sup> Black, *Rules and Regulators*, above n 13, 222; Black, 'Managing Discretion' above n 32, 31.

<sup>66</sup> Black, 'Managing Discretion', above n 32, 3.

<sup>67</sup> Rowan-Robinson, Watchman and Barker, above n 37, 209.

might be pursued where the underlying activity, act or state of affairs calls for a ‘ceremonial statement of what is desirable in the public interest’.<sup>68</sup>

The influence of the activity or behaviour being regulated, and the objectives of any such regime, is also an important caveat on the use of past sociological studies. Though regulation and enforcement issues have been studied on a range of levels and in diverse areas, some of the most cited and influential research on regulation and enforcement (particularly in the United Kingdom literature) comes from industry or issue-specific studies, such as pollution control<sup>69</sup> and environmental health.<sup>70</sup> An important question in exploring the current research in light of past studies is the possible contrasts between the particular regulatory demands of corporate law and these other fields where ‘law is familiar only as the backdrop’<sup>71</sup> to the specific substantive goals being pursued.<sup>72</sup>

## (2) *Application to corporate law context*

The sociological studies discussed to this point draw attention to the relationship between the regulatory and enforcement objectives of corporate law and the underlying activities regulated by that law. Corporate law encompasses both case law and statute, but the discussion here is confined to statute-based regulation only. In particular, the *Corporations Law* and the *ASIC Act*. The *Corporations Law* is a complex set of laws with respect to the incorporation of companies, their governance, corporate finance, transactions affecting control of corporations, corporate and corporate officers' liability, external administration of companies and the liability of auditors, liquidators and financial advisers. The *ASIC Act* provides for the appointment of ASIC as administrator of the *Corporations Law*, in addition to a range of other regulatory regimes.<sup>73</sup> The *Corporations Law* as a whole does not specify what are its formal regulatory objectives.<sup>74</sup> The *ASIC Act* includes a statement of objectives intended to guide ASIC in its role as administrator of the *Corporations Law*.<sup>75</sup> Between those general goals and past public

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<sup>68</sup> Hawkins, above n 8, 194.

<sup>69</sup> Ibid.

<sup>70</sup> Hutter, *The Reasonable Arm*, above n 42.

<sup>71</sup> Hawkins, above n 8, 178.

<sup>72</sup> Black, ‘Managing Discretion’, above n 32, 6.

<sup>73</sup> *ASIC Act 2001* (Cth) s 11. The other statutes include: *Insurance Contracts Act 1984* (Cth); *Superannuation (Resolution of Complaints) Act 1993* (Cth); *Life Insurance Act 1984* (Cth); *Retirement Savings Accounts Act 1997* (Cth); and *Superannuation Industry (Supervision) Act 1993* (Cth).

<sup>74</sup> A trend towards the specification of outcomes is evident in more recent reforms to the *Corporations Act*. Two examples where objectives are specified are: *Corporations Act* s 602; and s 760A. However, these reforms were made subsequent to the period of this research.

<sup>75</sup> *ASIC Act 2001* (Cth) s 1(2).

statements from ASIC<sup>76</sup>, it is clear that ASIC's main enforcement priorities focus on protecting the integrity of the market and deterring potential wrongdoers.

In the absence of an express statement of the goals of the *Corporations Law*, it is necessary to turn to the academic literature on the issue. Sociological studies distinguish between two types of regulation: economic and social regulation.<sup>77</sup> Economic regulation is regulation that seeks to stabilise market relations. Social regulation is regulation that addresses the negative effects of production processes that may cause harm to workforces, the public or the environment. Clearly, this division into economic and social regulation is an imperfect one as one set of laws can simultaneously contain elements of both.<sup>78</sup> The *Corporations Law* is one such example. The distinction between social and economic regulation would seem to hinge on the directness of the harm suffered in the production processes targeted by social regulation, in contrast to the broader market facilitation goals of economic regulation. Such a distinction fails to recognize the proximity between those harms that can arise where market relations lack integrity or stability and thus have negative consequences for ordinary consumers, investors and workers. In this context, the consumer protection role of ASIC can be reconciled with the primary goals of the *ASIC Act*, which can be seen as focussing primarily on economic regulation.

A parallel description of the *Corporations Law* is that of a hybrid system of mandatory and enabling rules.<sup>79</sup> The mandatory or enabling nature of rules is determined by whether the rules facilitate or restrict the ability of private individuals to arrange their business.<sup>80</sup> Enabling rules are facilitative rules in the sense that they give the regulatee scope to choose whether the rules will apply to them. They may be permissive (apply only when the regulatee chooses to take advantage of them, such as limited liability incorporation) or presumptive (apply as default rules unless the regulatee expressly adapts or displaces them, such as the 'replaceable rules' in the *Corporations Law*).<sup>81</sup> Mandatory rules are

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<sup>76</sup> See for e.g. Australian Securities Commission, *Annual Report 1996-1997*, 17.

<sup>77</sup> Hutter, *Compliance*, above n 8, 7 and P Yaeger, *The Limits of Law: the Public Regulation of Private Pollution* (1991), 24.

<sup>78</sup> Consider also that the qualitative distinction between social and economic regulation would seem to hinge on the directness of the harm suffered in the production processes targeted by social regulation, in contrast to the broader market facilitation goals of economic regulation. Such a distinction fails to recognize the proximity between those harms that can arise where market relations lack integrity or stability and ordinary consumers, investors and workers.

<sup>79</sup> Stephen Bottomley, 'The Birds, the Beasts, and the Bat: Developing a Constitutionalist Theory of Corporate Regulation' (1999) 27(2) *Federal Law Review* 243, 253; consider also Ian Ramsay, 'Models of Corporate Regulation: the Mandatory / Enabling Debate' in Charles Rickett and Ross Grantham (eds), *Corporate Personality in the 20<sup>th</sup> Century* (1998).

<sup>80</sup> Brian Cheffins, *Company Law: Theory Structure and Operation* (1993), 217-263.

<sup>81</sup> *Ibid*, 217-218.

rules that apply automatically to conduct and cannot be modified or displaced by the regulatee. They tend to be more coercive in nature than enabling rules.<sup>82</sup> The *Corporations Law* includes mandatory rules that address a broad range of matters, including disclosure requirements, meetings, registers, directors' and officers' duties, takeovers and related party financial benefits.<sup>83</sup>

The complexity of Australian corporate law gives rise to other debates regarding how the legal interpretation of this regulatory scheme is to be guided. It is not the intention of this research project to participate in these debates, other than to acknowledge their existence alongside the mandatory/enabling debate outlined above. Stephen Bottomley has proposed an approach to corporate regulation and the justifiable objectives of corporate law by re-assessing standard accounts of the corporate form.<sup>84</sup> Dimity Kingsford Smith has emphasised the legislative character of the contemporary corporate law context. As a consequence, she argues that there is a tension between the mixed objectives underlying the private law baselines and public interest goals of this regulatory scheme. This tension should be managed through a purposive reasoning approach that defers to the public interest goals and collective authority of public legislation.<sup>85</sup> Michael Whincop, by contrast, has questioned this qualitative split between public-regarding regulation and private law baselines,<sup>86</sup> and identified in the evolution of Anglo-Australian corporate law 'four classic values – contractibility, adjudicatory passivity, doctrinal pragmatism, and prudentialism.'<sup>87</sup>

### (3) *Issues relevant to empirical study*

A central aspect of the empirical study will be to analyse the dataset by reference to the activity and behaviour regulated by and the objectives of the *Corporations Law*. The object of the analysis is to determine whether in those cases in which ASIC takes court-based enforcement action, there is a preference for targeting behaviour or activities of regulatees that are widely regarded as undesirable.<sup>88</sup> If this is the case, ASIC's enforcement approach is consistent with the trends identified by sociological studies.<sup>89</sup>

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<sup>82</sup> Ibid, 218.

<sup>83</sup> Ian Ramsay, 'Models of Corporate Regulation', above n 79, 222.

<sup>84</sup> Stephen Bottomley, above n 79, 243.

<sup>85</sup> Dimity Kingsford Smith, 'Interpreting the Corporations Law – Purpose, Practical Reasoning and the Public Interest' (1999) 21 *Sydney Law Review* 161.

<sup>86</sup> Michael Whincop, 'The Immanent Conservatism of Corporate Adjudication: Thoughts on Kingsford Smith's "Interpreting the Corporations Law"' (2000) 22 *Sydney Law Review* 273.

<sup>87</sup> Michael Whincop, 'Liberalism, Conservatism, and Economic Efficiency: Tradition and Change in the Values of Corporate Law' (2000) 23(2) *University of New South Wales Law Journal* 111.

<sup>88</sup> Rowan-Robinson, Watchman and Barker, above n 37, 205-206.

<sup>89</sup> Hawkins, above n 8, 205; Black, 'Managing Discretion' above n 32, 4.

The analysis will involve an examination of the dataset according to the types of enforcement action brought by ASIC, the contraventions giving rise to the enforcement actions taken and the primary activity or public policy goal underlying the contravened laws.<sup>90</sup> An assessment of the harm prevented or regulatory good achieved by ASIC's enforcement actions provides evidence of the "blameworthy" character of the activities underlying the contravened laws. An assessment of the contravened laws, as to whether they are mandatory or enabling in character, provides evidence of the moral clarity of those laws. The nature of the misconduct committed and the moral character of the laws contravened are factors affecting the regulator's willingness to pursue court-based enforcement.<sup>91</sup>

## 2. Legal framework

### (1) Overview of research literature

The enforcement of laws is determined in part by the legal framework that establishes, governs and forms the content of those laws. Sociological theories of regulation have focused on two clusters of related variables that influence enforcement. The first grouping includes the substance and form of the rules or laws themselves. Are they specific / vague, act-prohibitive or standard-based, accessible, reasonable, under/over-inclusive?<sup>92</sup> The second cluster examines the range, strength and facility of the formal tools and other organisational resources available to the regulator. The second dimension is immediately relevant to this research. This range is often referred to in the literature as the regulator's enforcement toolkit.<sup>93</sup> Specific instruments within the enforcement toolkit are described as sanctions.

Focusing solely on sanctions draws attention to the overlapping relationship between regulatory substance and enforcement approach. Many studies argue that the nature of sanctions available impacts on enforcement practice.<sup>94</sup> However, there are a number of issues involved. The enforcement style of the regulator is clearly a relevant factor. To an accommodative compliance mindset, it is often the case that 'to actually carry out a

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<sup>90</sup> Consider that rules can be described as the "skin" of a living policy: C S Diver, 'Regulatory Precision' in Keith Hawkins and J Thomas, *Making Regulatory Policy* (1989), 199, quoted in Julia Black, *Rules and Regulators* (1997), 214.

<sup>91</sup> Hawkins, above n 8, 202.

<sup>92</sup> Baldwin, 'Why Rules Don't Work', above n 26 and *Rules and Government*, above n 26; Black, *Rules and Regulators*, above n 26; Eugene Bardach and Robert A Kagan, *Going by the Book: the Problem of Regulatory Unreasonableness* (1982).

<sup>93</sup> Black, 'Managing Discretion', above n 32, adopted in Australian Law Reform Commission, *Securing Compliance*, Discussion Paper No 65 (2002), [4.11].

<sup>94</sup> *Ibid*, 17 and 25.

punishment is a signal of ... failure to prevent non-compliance.<sup>95</sup> Issues also arise with the strength of sanctions. If they are too strong or weak the regulator may lack credibility.<sup>96</sup> Regulators are said to gain merely from carrying a 'big stick'. They may not need to use their considerable power because the 'shadow' of law increases the influence of other compliance-aiding pressures (such as internal pro-regulation attitudes, media attention or public concern).<sup>97</sup> However, it has been noted that such tools ought to be used often enough to reassure regulatees and the wider public that non-compliers are being adequately punished.<sup>98</sup> This prevents any suggestion that the regulator has been 'captured'<sup>99</sup> or lacks the will to use its weapons.<sup>100</sup>

The *character* of the sanction is also a key issue. If a criminal sanction is one among other options, regulators may presume that the lawmaker intended for it to have a lower profile.<sup>101</sup> As a matter of practice, studies have highlighted that regulators prefer to adopt administrative tools, as demonstrated by the growth in administrative orders and notices.<sup>102</sup> Such an approach may allow the regulator to retain interpretive control of what amounts to compliance within their regulatory field.<sup>103</sup> In a previous study of ASIC civil penalty practices ASIC officers have expressed such interpretive concerns with court-based enforcement.<sup>104</sup>

Two particular issues often arise in the literature relating to the question of the necessity and appropriateness of sanctions. It has been suggested that 'the power of law as a means of social control lies in its capacity to secure compliance by agreement'.<sup>105</sup> This suggestion highlights why formal prosecution may be seen as a failure and points to the recent interest in regulatory regimes that work with the regulatee(s), perhaps in a self,

<sup>95</sup> Reiss, 'Selecting Strategies of Social Control' above n 53, 24.

<sup>96</sup> Julia Black, 'Managing Discretion', above n 32, 7.

<sup>97</sup> Peter Grabosky and John Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (1986), 336; Bardach and Kagan, *Going by the Book*, above n 92, 62.

<sup>98</sup> John T Scholz, 'Enforcement Policy and Corporation Misconduct: the Changing Perspective of Deterrence Theory' (1997) 60(3) *Law and Contemporary Problems* 253, 262; also Hawkins, above n 8, 200.

<sup>99</sup> Robert A Kagan and John T Scholz, 'The "Criminology of the Corporation" and Regulatory Enforcement Strategies' in Keith Hawkins and J M Thomas (eds), *Enforcing Regulation* (1984), 80.

<sup>100</sup> Hawkins, above n 8, 201.

<sup>101</sup> Rowan-Robinson, Watchman and Barker, above n 37, 199.

<sup>102</sup> Ibid, 198. For a commentary on non-criminal responses to regulatory breaches, see Richard Fox, 'New Crimes or New Responses?: Future Directions in Australian Criminal Law' (2002) 28(1) *Monash University Law Review* 103, 115-118.

<sup>103</sup> Hawkins, above n 8, 200.

<sup>104</sup> Gilligan, Bird and Ramsay, *Regulating Directors' Duties*, above n 3, 26 and 42-45.

<sup>105</sup> Reiss, 'Selecting Strategies of Social Control' above n 53, 33.

quasi or co-regulatory system,<sup>106</sup> to promote the internalisation of the law and ‘instinctive compliance’.<sup>107</sup> Seminal studies such as Hawkins, however, highlight that enforcement by punitive sanctions is not just a strategic tool of last resort where other regulatory techniques have failed to produce voluntary compliance. Rather, formal sanctions are often sought where the regulator perceives moral blameworthiness in the actions of the regulatee, the breach is not routine but has serious, publicity-generating consequences, is exceptional or otherwise amounts to a ‘symbolic assault’ on the legitimacy of the regulator or the public goals of the regime.<sup>108</sup>

## (2) *Application to corporate law context*

The legal framework discussion above has highlighted two important variables requiring consideration in the corporate law enforcement context. First, the relationship between the form and substance of Australian corporate laws and the enforcement of those laws has been noted. There is a growing body of academic literature on the form and substance of Australian corporate laws.<sup>109</sup> They offer anecdotal evidence of the impact different forms of laws have on compliance. However, there are no published empirical studies on this issue undertaken in the Australian context. The issue is outside the scope of the current research project due to the constraints of the dataset used in the empirical study.

The second variable noted was the nature of the sanctions available to a regulator and their impact on regulatees’ behaviour and the regulator’s enforcement practices. This has also been an area of interest in the Australian academic literature, particularly with regard to their formal status (criminal, civil or administrative)<sup>110</sup> and the adequacy of the

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<sup>106</sup> Black, ‘Decentring Regulation’, above n 4, 117.

<sup>107</sup> Black, ‘New Institutionalism and Naturalism in Socio-Legal Analysis’, above n 21, 76.

<sup>108</sup> Hawkins, above n 8, 205.

<sup>109</sup> John Farrar, *Corporate Governance in Australia and New Zealand* (2001), 6; John Green, “‘Fuzzy Law’: a Better Way to Stop “Snouts in the Trough”?” (1991) 9(3) *Company and Securities Law Journal* 144; Ian Ramsay, ‘Models of Corporate Regulation’, above n 79; Ian Ramsay, ‘Corporate Law in the Age of Statutes’ (1992) 14(4) *Sydney Law Review* 474; Dimity Kingsford Smith, ‘Decentred Regulation in Online Investment’ (2001) 19(8) *Company and Securities Law Journal* 532; Dimity Kingsford Smith, ‘Interpreting the Corporations Law, above n 85, 161; Michael J Whincop, *An Economic and Jurisprudential Genealogy of Corporate Law* (2001); Michael Whincop, ‘Form, Function and Fiction: A Taxonomy of Corporate Law and the Evolution of Efficient Rules’ (2001) 24 *University of New South Wales Law Journal* 85; Michael Whincop, ‘Rules, Standards and Intransitive Statutes: What the Economic Reform of Corporate Law Might Have Looked Like’ (1999) 17(1) *Company and Securities Law Journal* 11.

<sup>110</sup> Jonathan Dobinson, ‘Penalties: Policy Principles and Practice in Government Regulation’ (2001) 79 *Reform* 44.

sanctions available under the *Corporations Law*.<sup>111</sup> The focus here has been on the strength and character of the sanctions imposed by the *Corporations Law* and the circumstances under which they are used. The issue has also been considered by the Australian Law Reform Commission.<sup>112</sup>

(3) *Issues relevant to empirical study*

The dataset available to this research is limited to the court-based actions taken by ASIC during the sample period. This clearly prevents any assessment being made of the relative role this form of enforcement activity has in ASIC's overall approach to enforcement, including its processes of choosing among available legal tools (for example, administrative actions). However, observations about the choice and effectiveness of court-based sanctions are possible.

One aspect of the empirical study will be to analyse the dataset in light of the enforcement actions and sanctions provided by the *Corporations Law*. The object is to assess the strength and facility of the tools actually used by ASIC, and to determine whether it appears that certain offences have been targeted<sup>113</sup> or a particular regulatory purpose or effect has been sought.<sup>114</sup> The factors to consider include the extent to which particular actions and sanctions are used, the range of regulatees targeted and the possibility of a relationship between the compliance goal and ASIC's enforcement choice. The literature indicates a diverse range of potential purposes and effects of regulation, including signalling to regulatees, assuring the general public, defending organisational legitimacy or seeking to reaffirm regime commitment to specific policy goals.

### 3. Nature of interactions between the regulator and the regulatee

(1) *Overview of research literature*

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<sup>111</sup> Academic research includes Helen Bird, 'The Problematic Nature of Civil Penalties in the Corporations Law' (1996) 14(7) *Companies and Securities Law Journal* 405; 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; and Roman Tomasic and Stephen Bottomley, 'Corporate Governance and the Impact of Legal Obligations on Decision Making in Corporate Australia' (1992) 1(1) *Australian Journal of Corporate Law* 55.

<sup>112</sup> Australian Law Reform Commission, *Principled Regulation*, above n 61, 169-171[5.21-5.26].

<sup>113</sup> Note ASIC's National Compliance Unit's 'regulatory campaigns' role: ASIC, *User's Guide*, above n 11, 23 and Gilligan, Bird and Ramsay, *Regulating Directors' Duties*, above n 3, 30.

<sup>114</sup> Gilligan, Bird and Ramsay, *Regulating Directors' Duties*, above n 3, 20. See IID3 below.

Sociological studies have repeatedly highlighted the perceived and actual characteristics of, and relationships between, regulators and regulatees as crucial factors in shaping regulatory enforcement practices. These issues have a prominent role in regulation debates generally, both because the issue of regulatory capture has had a prominent role in the literature,<sup>115</sup> and also as a legacy of viewing general regulatory strategies as a ‘punish / persuade problem’.<sup>116</sup>

Academic studies focus on two variables: characterisations of regulatees and regulators,<sup>117</sup> and the “relational distance” between regulatees and regulators. In relation to the first variable, Robert A Kagan and John T Scholz examined three popularly held ‘images’ of the business corporation as a target of regulation: moral calculators; political citizens; and the organisationally incompetent. They identified the strengths and limits of a regulator’s matching enforcement strategy/role: as police officer; politician; and consultant.<sup>118</sup> It has been argued that such a taxonomy ought to include ‘irrational non-compliers’, as a fourth group of regulatees for whom non-compliance is a not simply a matter of strict cost / benefit analysis (amoral calculators), contingent on the reasonableness of the policy goals and mechanisms (political citizens) or a question of capacity (organizationally incompetent) but is a deliberate, symbolic rejection of the agency’s authority.<sup>119</sup>

John Braithwaite, John Walker and Peter Grabosky’s comprehensive study of Australian regulatory agencies is particularly notable in this context.<sup>120</sup> On the basis of data collected from 96 agencies using 127 different variables,<sup>121</sup> they identified seven types of agencies: Conciliators, Benign Big Guns, Diagnostic Enforcers, Detached Token Enforcers, Detached Modest Enforcers, Token Enforcers and Modest Enforcers. They found that most Australian regulatory enforcement was of the Token variety. They fall ‘between the devil of deterrence regulation and the deep blue sea of diagnostic or compliance

<sup>115</sup> In particular, the ‘life-cycle theory’ of Marver H Bernstein, *Regulating Business by Independent Commission* (1955): see discussion in Baldwin and Cave, *Understanding Regulation*, above n 5, 21 and Hawkins, above n 8, 3. Note also more recent private interest / public choice economic theories: Baldwin and Cave, *Understanding Regulation*, above n 5, 21-25.

<sup>116</sup> Black, ‘Managing Discretion’, above n 32, 22.

<sup>117</sup> Consider Robert Baldwin’s four broad categories employed by health and safety inspectors to characterise employers (Baldwin, ‘Why Rules Don’t Work’, above n 26,324), and Jeremy Rowan-Robinson, Paul Watchman and Christine Barker’s meta-research that found that studies of regulatory agencies reveal three broad categories of self-perception and function adopted by enforcement officers: educator / advisor; welfare officer; or revenue collector. See Rowan-Robinson, Watchman and Barker, above n 37, 207.

<sup>118</sup> Kagan and Scholz, ‘The “Criminology of the Corporation”’, above n 99, 67-95.

<sup>119</sup> Black, ‘Managing Discretion’, above n 32, 9.

<sup>120</sup> Grabosky and Braithwaite, *Of Manners Gentle*, above n 97. The material on the characterization of regulatory agencies is discussed in John Braithwaite, John Walker and Peter Grabosky, ‘An Enforcement Taxonomy of Regulatory Agencies’ (1987) 9 *Law and Policy* 323.

<sup>121</sup> John Braithwaite, John Walker and Peter Grabosky, ‘An Enforcement Taxonomy’, above n 120, 326.

regulation [instead] wallow[ing] in the shoals of perfunctory rulebook ... regulation by going through the motions.<sup>122</sup> Importantly, in their research (undertaken under the previous co-operative schemes of corporate law)<sup>123</sup> the bulk of the relevant state Corporate Affairs agencies were by contrast Modest Enforcers, the grouping that best fits the deterrence, sanctioning style of enforcement.<sup>124</sup>

There are limits to the less empirical versions of these characterisations. In many cases, either one or both of the regulatory agency or regulatee consist of multiple individuals with different attitudes and levels of responsibility. These characterisations are still relevant, however, as a reminder that regulatees do vary in their motivation and capacity to comply with regulatory requirements and forestall social harms, especially where compliance involves more than a one-off expenditure.<sup>125</sup> These frames further demonstrate the manner in which the core regulatory problem, how to influence others,<sup>126</sup> has been presented and addressed in the literature. Kagan and Scholz note, when exploring the influence of capture theories on the rise of legalistic enforcement in the 1970s USA, that theories of non-compliance can have real effects on enforcement practices.<sup>127</sup> A crucial factor is the regulator's willingness to perceive the regulatee as a 'good apple'<sup>128</sup> and their shared regulatory relationship as involving a long-term 'game' of negotiating compliance.<sup>129</sup>

The second variable that studies suggest influence the choice and effectiveness of enforcement activities is the 'relational distance' between the regulator and regulatee. This variable is often influenced by the objective characteristics of the regulatee (such as their industry<sup>130</sup> or size). The notion of the relational distance refers to both the regulatory agency / regulatee entity level and an interpersonal, individual social interactions and local community level. Braithwaite and Grabosky, adopting relational distance from Donald Black,<sup>131</sup> considered issues such as the number of companies in an

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<sup>122</sup> Ibid, 339-340.

<sup>123</sup> Prior to the contemporary federal co-operative scheme, a national agency shared broad regulatory responsibilities with separate state 'Corporate Affairs' bodies, which individually regulated the 'mirror' corporate codes; for an outline of the evolution of Australian company law, see Harold Ford, Robert Austin and Ian Ramsay, *Ford's Principles of Corporations Law* (10<sup>th</sup> ed, 2003), [2.170].

<sup>124</sup> Ibid, 331 and 340.

<sup>125</sup> Bardach and Kagan, *Going by the Book*, above n 92, 62-63; Black, 'Managing Discretion', above n 32, 10.

<sup>126</sup> Black, 'Decentring Regulation', above n 4, 123.

<sup>127</sup> Kagan and Scholz, 'The "Criminology of the Corporation"', above n 99, 69-70.

<sup>128</sup> Bardach and Kagan, *Going by the Book*, above n 92, 64.

<sup>129</sup> Hutter, *The Reasonable Arm*, above n 42, 134.

<sup>130</sup> Black, 'Managing Discretion', above n 32, 10.

<sup>131</sup> Donald Black, *The Behaviour of Law* (1976).

agency's regulatory purview, their diversity of pursuits, frequency of regulatory contact and staff crossover, and controlled for, among other things, the size of regulated companies.<sup>132</sup> While staff recruitment issues (and corollary 'capture' questions) were eliminated by their statistical controls,<sup>133</sup> the results for the other issues are noteworthy: the larger the numbers of companies in the regulatory regime, the higher the resort to criminal sanctions; prosecution was used one fifth as often by single industry regulators; and agencies whose officers are in more frequent with the regulatee contact tend to be less formal in their enforcement response.<sup>134</sup> Their study also found a variable level of prosecution that correlated with the size of the regulatee. 'Some of the most prosecutorial agencies have a tendency to net the minnows to the neglect of the sharks', including the state Corporate Affairs Commissions of the time.<sup>135</sup> Reflecting on the previous discussion of perceived characteristics, it is noteworthy that this study found that most Australian regulatory officials genuinely believe large firms were more law-abiding than small business, due to their presumed greater sensitivity to publicity and resources to employ compliance staff.<sup>136</sup> Such findings have international counterparts.<sup>137</sup>

(2) *Application to corporate law context*

The preceding discussion highlighted two variables likely to affect the enforcement of corporate law by ASIC. First, the characterisations of ASIC by regulatees and the regulatees by ASIC. Secondly, the relational distance between ASIC and its regulatees. In relation to the first variable, the characterisation of corporate regulatory agencies as "Modest Enforcers" was noted earlier. There are no more recent studies confirming whether this characterisation is still accurate. During the sample period ASIC's public representations as to its enforcement strategy stressed its adoption of a campaign-based approach to enforcement under which a particular area of regulatory concern is identified and a range of enforcement tools are applied by ASIC in respond to that concern.<sup>138</sup> ASIC advocates increasing use of its administrative remedies and educational and consumer alerts to achieve faster outcomes than are possible using court based enforcement. Court based enforcement remains available where "strong and decisive action" is

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<sup>132</sup> For a full description, see Grabosky and Braithwaite, *Of Manners Gentle*, above n 97, 201-217.

<sup>133</sup> Ibid, 214.

<sup>134</sup> Ibid, 207 and 214.

<sup>135</sup> Ibid, 216.

<sup>136</sup> Ibid, 216-217.

<sup>137</sup> Consider Susan Shapiro, *Wayward Capitalists* (1984), 39, whose study of the USA Securities and Exchange Commission's ('SEC's') enforcement noted that the organizations subject to investigation where invariably young and small (41); note also Black, 'Managing Discretion', above n 32, 12.

<sup>138</sup> George Gilligan, Helen Bird and Ian Ramsay, 'The Efficacy of Civil Penalty Sanctions Under the Australian Corporations Law' (1999) 136 *Australian Institute of Criminology – Trends and Issues* 1, 4.

necessary.<sup>139</sup> The issue of the relational distance between the corporate regulator and its regulatees was also the subject of Walker, Braithwaite and Grabosky's study. An unstated assumption of that study is that the regulatees were going concerns. The issue of relational distance may not be as relevant where the company is either under external administration or bankrupt.<sup>140</sup> Such circumstances remove the regulator's sensitivity to accusations of interference or reticence against imposing penalties.

(3) *Issues relevant to empirical study*

The dataset in the empirical study does not lend itself to an informed assessment of the characterisations of ASIC and its regulatees or to the relational distance between them. However, it is possible to make observations about the objective characteristics of the regulatees in the dataset and to look for trends consistent with the findings of Walker Braithwaite and Grabosky's study. The empirical study will analyse the corporate entity status<sup>141</sup> and industry background of the regulatees who are the subject of the court based enforcement actions included in the dataset. It will also be alert for patterns of enforcement that are consistent with structural biases identified in earlier studies with respect to the size, scale and status of regulatees and the industries within which they work. For example, whether ASIC brings more actions against smaller corporations than larger corporations.<sup>142</sup> Secondly, whether the regulatees work in manufacturing, building or farming industries or are in professional fields.<sup>143</sup> Finally, it is useful to consider whether the data includes court actions that have come at the end of the regulatory relationship, where the regulatee has ceased to function as a going concern.

#### 4. Organisational / institutional factors

(1) *Overview of research literature*

As a regulator's legal mandate must be carried out in the context of that regulator's own unique organisational environment, it is not surprising that perceptions of what this

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<sup>139</sup> Jillian Segal, 'ASIC Issues: An Update on the Last 12 Months' (Conference paper presented to Insurance Council of Australia, 10 August 2000), 6.

<sup>140</sup> Note that in Shapiro's study of USA SEC investigations, bankrupt organizations comprise 35 percent of investigations in her sample: Susan Shapiro, *Wayward Capitalists* (1984), 40-41.

<sup>141</sup> Whether the regulatee is a public or private company.

<sup>142</sup> Grabosky and Braithwaite, *Of Manners Gentle*, above n 97, 216-217.

<sup>143</sup> Studies of enforcement officer's perceptions of businesses operating in manufacturing, construction and primary production characterise regulatees in these industries as malicious and uncooperative: list studies. In contrast, regulatees in professional industries have been characterised as likely to comply with regulation: Hutter, *Compliance*, above n 8, 180.

mandate involves are shaped by the institutional pressures and demands the regulator faces.<sup>144</sup> Different approaches have attempted to examine these factors by focusing primarily on the conceptual lenses used in the decision-making of individual enforcement officials, or alternatively emphasising the role of repeated interactions between individuals and organisations in establishing institutional frameworks.<sup>145</sup> For current purposes, this clustering of factors highlights both the practical and symbolic organizational influences on enforcement activities.

Practical influences include the allocation of limited resources and how an enforcement issue is handled within the regulator's internal organizational structure.<sup>146</sup> The 'practical' quickly blurs into the symbolic and cultural in this context, however, as decisions on the level of certainty required before formal prosecution will be pursued<sup>147</sup> can be affected by both an individual's and the agency's attitude or sensitivity to the publicity attached to prosecution. Failure may damage the regulator's 'posture of invincibility',<sup>148</sup> yet a high profile, formal approach might be unavoidable where a previously lax record of enforcement has become an issue of public concern.<sup>149</sup> A fear of being seen as 'captured',<sup>150</sup> by not resorting to formal sanctions may be counterbalanced by a desire not to appear needlessly harsh, punitive and vindictive.<sup>151</sup> Importantly, pursuing a formal sanction could serve a purely organizational purpose, both in reinforcing the regulator's preferred (accommodative) approach to the compliance lesson<sup>152</sup> or being drawn on to establish their own (legal and moral) authority, especially where the regulatees 'wrongs' amount to a 'symbolic assault' on the regulator's legitimacy.<sup>153</sup>

## (2) *Application to corporate law context*

These issues fall outside the scope of the enforcement data analysis undertaken in this project. They have been explored in semi-structured interviews conducted with ASIC officials as part of an empirical study done by George Gilligan, Helen Bird and Ian

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<sup>144</sup> Hawkins, above n 8, 16.

<sup>145</sup> See Julia Black, 'New Institutionalism and Naturalism in Socio-Legal Analysis' (1997), 52-54.

<sup>146</sup> Black, 'Managing Discretion', above n 32, 13; Hawkins, above n 8, 182.

<sup>147</sup> Hutter, *The Reasonable Arm*, above n 42, 148.

<sup>148</sup> Hawkins, above n 8, 190.

<sup>149</sup> Hutter, *The Reasonable Arm*, above n 42, 173.

<sup>150</sup> Rowan-Robinson, Watchman and Barker, above n 37, 186; Kagan and Scholz, 'The "Criminology of the Corporation"', above n 99, 80.

<sup>151</sup> Hawkins, above n 8, 195; 'the big risk on publicity is that they will be castigated in the press as the big heartless bureaucracy victimizing the private citizen': *ibid*, 206.

<sup>152</sup> Rowan-Robinson, Watchman and Barker, above n 37, 208.

<sup>153</sup> Hawkins, above n 8, 205.

Ramsay.<sup>154</sup> In identifying and evaluating the factors that impact upon ASIC enforcement decisions regarding civil penalties, they noted that the enforcement culture within ASIC was characterised by a desire to ‘get the right outcome’ within its broader regulatory environment. This was thought to be symptomatic of an organisation careful about its enforcement choices but seriously committed to its compliance goals.<sup>155</sup> It also perhaps suggests a high level of self-consciousness of the need to deliver regulatory outcomes with credibility,<sup>156</sup> particularly given the interviewees’ awareness of other environmental, organisational factors such as ASIC’s relationship with the Director of Public Prosecutions<sup>157</sup> and possible comparisons with the Australian Competition and Consumer Commission.<sup>158</sup> This research also found that though ASIC’s limited resource environment contributed to the over-riding rubric of pragmatism under which ASIC engages in enforcement activity, it did not appear to directly impede any day-to-day decision-making with regard to pursuing civil penalties.<sup>159</sup> Such a finding is consistent with Julia Black’s analysis that resource constraints should be treated as an organisational policy problem, rather than an over-encompassing explanation for particular enforcement patterns.<sup>160</sup>

## 5. Personal backgrounds and experiences of the enforcement officers

### (1) Overview of research literature

A number of studies of regulatory practice have noted the impact of the regulator’s personnel on enforcement activity, in mediating formal policy or organizational culture on a day-to-day and case-by-base basis.<sup>161</sup> An officer’s own concept of “substantive reasonableness” or, as found in W G Carson’s 1970 study of factory inspectorates each inspector’s own interpretation of their role,<sup>162</sup> has the potential to influence their enforcement behaviour.<sup>163</sup> There can also be conflicting understandings between officers as to what their task involves, with their rates of prosecution being treated either

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<sup>154</sup> Gilligan, Bird and Ramsay, *Regulating Directors’ Duties*, above n 3.

<sup>155</sup> Ibid, 36.

<sup>156</sup> Ibid.

<sup>157</sup> Ibid, 37.

<sup>158</sup> Ibid, 36.

<sup>159</sup> Ibid, 32.

<sup>160</sup> Black, ‘Managing Discretion’, above n 32, 13.

<sup>161</sup> Ibid, 217.

<sup>162</sup> Rowan-Robinson, Watchman and Barker, above n 37, 207.

<sup>163</sup> G M Richardson, A Ogus and P Burrows, *Policing Pollution: a Study of Regulation and Enforcement* (1982), 161.

positively or negatively (as an indicator of whether the person in question is ‘doing their job’ by preventing breaches or alternatively is not looking hard enough for them).<sup>164</sup> These differences have an intra-organisational dimension, as pressure for compliance can be applied by a regulatee’s own professionals as a consequence of them having ‘some loyalty to the standards of their profession’.<sup>165</sup> The regulator may also pursue enforcement activities with one eye on the attitudes of the wider regulatory community, as an officer may be concerned about their reputation as a ‘softie’ or ‘little Hitler’.<sup>166</sup>

(2) *Application to corporate law context*

Gilligan, Bird and Ramsay’s study also explored the issue of ASIC enforcement officers’ backgrounds and experience. The study noted that ASIC began with substantial numbers of investigators whose backgrounds were in the criminal law. The range of skills and experience base was shifting, with an increasing proportion of staff having civil rather than criminal law backgrounds.<sup>167</sup> More broadly, these questions of the personal background and subsequent attitudes and approaches of enforcement officers overlap with earlier discussion regarding their role in mediating the objectives, underlying activities and legitimacy of corporate regulation.

## 6. Economic, political, social and moral context of the regulation

(1) *Overview of research literature*

This final cluster of variables serves as something as a catch-all category. Studies have noted that the extent of political and media interest can remove from a regulator the luxury of a flexible enforcement approach.<sup>168</sup> Moral ambivalence about regulatory goals and pressure from diverse constituencies,<sup>169</sup> and regulator funding and broader economic conditions,<sup>170</sup> are examples of other wider, contextual influences on enforcement activity. One 1984 study of USA Occupational Health and Safety Administration cited the *national* context of enforcement, the perceived rights-focus of the USA legal culture and policy-makers’ pessimism regarding regulatee’s willingness to voluntarily comply with regulation, as partly explaining regulatory predisposition against reward-based

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<sup>164</sup> Hutter, *The Reasonable Arm*, above n 42, 161-162.

<sup>165</sup> Bardach and Kagan, *Going by the Book*, above n 92, 62.

<sup>166</sup> Hutter, *The Reasonable Arm*, above n 42, 161.

<sup>167</sup> Gilligan, Bird and Ramsay, *Regulating Directors’ Duties*, above n 3, 35.

<sup>168</sup> Hutter, *The Reasonable Arm*, above n 42, 150-151.

<sup>169</sup> Hawkins, above n 8, 9-12 and 195.

<sup>170</sup> Black, ‘Managing Discretion’, above n 32, 15.

regimes.<sup>171</sup> While comparisons of seminal USA, UK and Australian studies have often suggested that USA regulators are more punitive and legalistic than UK or Australia, recognition of agency, industry and other circumstantial variation would suggest that such representations are both generally suspect and not particularly insightful with regard to the enforcement patterns of any particular regulator.<sup>172</sup>

(2) *Application to corporate law context*

While corporate law is clearly not as sensitive to electoral timetables as local government level regulation can be,<sup>173</sup> it is perhaps worth noting that the timeframe of the research data does coincide with the first term of a Coalition government and a period of heightened fiscal restraint.<sup>174</sup> Recent high-profile corporate collapses, such as HIH and One.Tel, have drawn attention to ASIC's enforcement activities.<sup>175</sup> These events serve as a general reminder of the temporal dilemma of regulatory enforcement. Depending on other variables such as the nature of the harm, in situations where the regulator acts in response to breaches (rather than being proactive in monitoring compliance) they may be more likely to 'go by the book' and pursue a formal enforcement action.<sup>176</sup>

Regulators seek to influence the broader context of regulation not only with actual prosecutions but also through public threats; 'barking' rather than 'biting' in Ian Ayres' and John Braithwaite's strategic sheepdog metaphor.<sup>177</sup> In this context, it is noteworthy that, subsequent to the sample period of this research, the current Chair of ASIC, David Knott flagged that ASIC would be more visible in enforcing the *Corporations Law* and meeting 'the public expectation that we should be a vigilant and effective corporate watchdog'.<sup>178</sup> The threat of strict enforcement can, however, mitigate against using formal tools. A too precipitous shift to an adversarial stance might reveal prosecution as

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<sup>171</sup> Hutter, *The Reasonable Arm*, above n 42, 175.

<sup>172</sup> Black, 'Managing Discretion', above n 32, 5-6.

<sup>173</sup> Hutter, *The Reasonable Arm*, above n 42, 145.

<sup>174</sup> Consider Australian Securities Commission, *Annual Report 1996-1997*, above n 76, 14: 'base funding ... significantly lower than previous years ... must expect to live within this lower base going forward'. Note this funding situation has shifted somewhat, with ASIC funding being increased by \$90.8 million over four years in 2001-2002 to pay for financial services reform and enforcement: ASIC, *Annual Report 2001-2002*, above n 6, 1. ASIC received additional funding again in the May 2003 budget: Bill Pheasant, 'ASIC sharpens its claws' *Australian Financial Review* 19 May 2003, 61.

<sup>175</sup> Farid Assaf, 'What Will Trigger ASIC's Strategies?' 40(4) (2002) *Law Society Journal* 60.

<sup>176</sup> Black, 'Managing Discretion', above n 32, 13.

<sup>177</sup> Ayres and Braithwaite, *Responsive Regulation*, above n 12, 44.

<sup>178</sup> David Knott, 'Address to the Australian Institute of Company Directors' (Address to the Australian Institute of Company Directors - South Australian and Northern Territory Division, Adelaide, 23 May 2001).

a bluff, just as the latent uncertainty of success in court can undermine the regulator's willingness to lose control of the regulatory engagement. As a consequence, for day-to-day regulatory practice formal enforcement is often kept on the horizon, as a stage both inevitable yet constantly deferred.<sup>179</sup>

## 7. Summary - key variables for enforcement style and effectiveness

In outlining these key variables certain central themes reappear. Studies of regulatory practice note that in the context of close relational bonds, regulatees' co-operative or self-interested commitment to compliance goals, and a public sensitivity to stigmatising or interfering with economically productive regulatees, regulators may have an unwillingness to prosecute 'for not having applied for the right piece of paper'.<sup>180</sup> Without needing to adopt a cynical view of ASIC having a self-justificatory motive in pursuing (and reporting) formal enforcement outcomes,<sup>181</sup> there are very real political, organisational and symbolic pressures on regulators to be legalistic.<sup>182</sup> Broadly speaking, the relationship between the perceived objectives of the regime and the contextual appropriateness of the styles, strategies and tools available would certainly seem to be of central concern.

## E. Strategic regulation theory

### 1. Overview of discussion

As noted above, this research project envisages regulation as an ongoing social process, and enforcement practice as shaped by multiple variables and contextual pressures. Ian Ayres' and John Braithwaite's model of regulatory compliance and enforcement<sup>183</sup> provides a useful framework for examining ASIC enforcement actions in this context. They position their 'responsive' or 'strategic' regulation, and its 'tit-for-tat' enforcement strategy, at the point of convergence between rational choice, game theory approaches and sociological analyses.<sup>184</sup> Importantly, Ayres and Braithwaite also position themselves

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<sup>179</sup> Hawkins, above n 8, 199.

<sup>180</sup> Ibid, 204.

<sup>181</sup> Assaf, above n 175, 62. ASIC Chairman David Knott has explicitly rejected a 'cynical use of the media' in enforcing the *Corporations Law*: see Knott, above n 178.

<sup>182</sup> Kagan and Scholz, 'The "Criminology of the Corporation"', above n 99, 87.

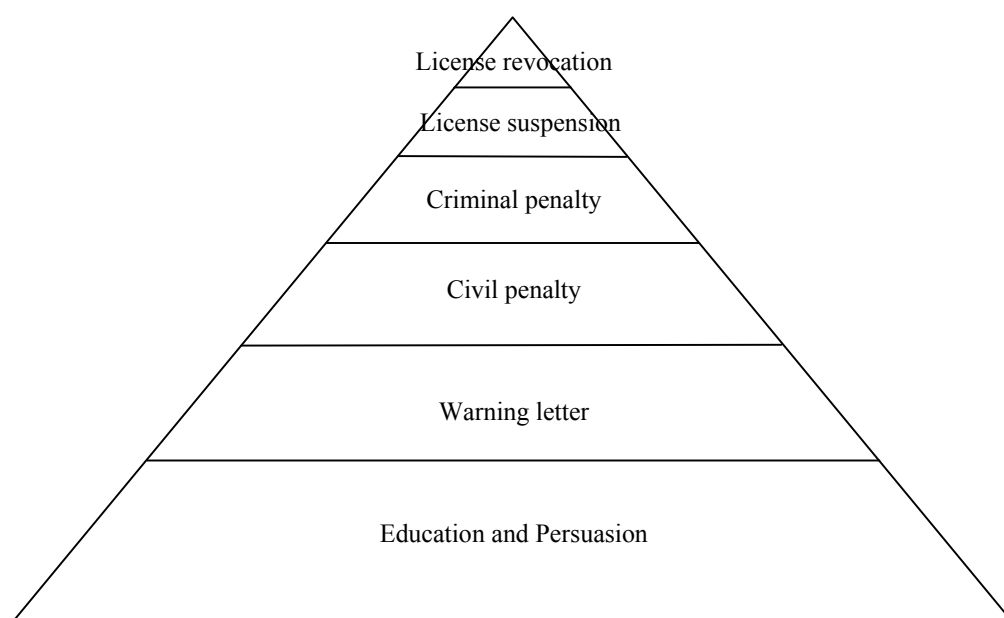
<sup>183</sup> Ayres and Braithwaite, *Responsive Regulation*, above n 12, 35.

<sup>184</sup> Ibid, 19.

after the binary ‘debates’ between market regulation and deregulation<sup>185</sup> and the ‘punish or persuade’, deterrence / compliance models of regulation.<sup>186</sup>

## 2. Responsive Regulation and Enforcement Pyramids

The key elements of Ayres and Braithwaite’s model of regulation for this research into ASIC enforcement patterns relates to their prescriptions for twin pyramids of enforcement strategies and sanctions. In these hierarchies, the least intrusive interventions (such as promoting voluntary compliance through education and persuasion) constitute the base level approach, but the regulator’s actions will respond ‘up’ the relevant pyramid to more intrusive and punitive approaches (such as strict, punitive enforcement of regulatory commands through court prosecution or license revocation) depending on the regulatee’s behaviour.



*Figure 1 – Example of Strategic Regulation Enforcement Pyramid<sup>187</sup>*

Importantly, Ayres and Braithwaite emphasise that the effectiveness of this ‘tit-for-tat’ strategy and hierarchical range of sanctions and styles is enhanced by a delicate combination of the relative ‘height’ of the sanctions (the punitiveness of the most severe

<sup>185</sup> Ibid, 3.

<sup>186</sup> Ibid, 20.

<sup>187</sup> Ayres and Braithwaite, *Responsive Regulation*, above n 12, 35.

sanction)<sup>188</sup> and the regulator's success in balancing their credibility as a 'benign big gun' (capable of firing if necessary) while building voluntary compliance by keeping punishment in the background.<sup>189</sup>

(1) *Criticisms of strategic enforcement theory*

Without engaging fully in an assessment of strategic regulation theory, it ought to be noted that this approach has been critiqued on the basis that by focusing primarily on the use of punishment in enforcement it remains trapped in the compliance / deterrence dialectic.<sup>190</sup> The continued use of regulatee-action / regulator-response notions is undoubtedly a function of this model's rational action and game theory roots.<sup>191</sup> Even though this theory emphasizes the contingent *when* rather than a collective *or* in considering punish / persuade options, it is not a great advance on the (already well recognized) basic typology of government regulatory instruments (the carrot, stick or sermon)<sup>192</sup> and is perhaps over-committed to the process of moving up a hierarchy of sanctions (rather than a more flexible approach to the regulator's range of tools).<sup>193</sup> Indeed, it has been argued that the continued examination of general regulatory strategies with punish / persuade as the basic elements of analysis has distracted academics' and policy-makers' attention from the development of particular, post-regulatory strategies for enforcement (such as education, consultation, capacity-building and meta-evaluation).<sup>194</sup>

### 3. Application to corporate law context

Previous studies have already examined parts of the corporate law enforcement context in light of Ayres and Braithwaite's model of regulation.<sup>195</sup> Importantly, however, this research is in the unique position of being able to thoroughly examine when and how the regulator in this field, ASIC, has resorted to what are normally regarded as the more

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<sup>188</sup> Ibid, 40.

<sup>189</sup> Ibid, 47-50.

<sup>190</sup> Black, 'Managing Discretion', above n 32, 21.

<sup>191</sup> Bird, above n 111, 410.

<sup>192</sup> Black, 'Decentring Regulation', above n 4, 126, quoting Bruijn and Heuvelhof.

<sup>193</sup> Black, 'Managing Discretion', above n 32, 20. Note, however, that Ayres and Braithwaite emphasise the hierarchical pyramid for the particular purpose of reminding potentially recalcitrant regulatees of the risks involved in sustained non-compliance: see Ayres and Braithwaite, *Responsive Regulation*, above n 12, 36.

<sup>194</sup> Black, 'Managing Discretion', above n 32, 22.

<sup>195</sup> Bird, above n 111.

serious regulatory responses. For the current research on prosecution data, the emphasis in Ayres and Braithwaite's model on the hierarchical ordering of sanctions provides a useful framework for sifting through the actions ASIC has taken, both in terms of cataloguing the formal actions in this study and problematising those mechanisms (from administrative actions and other regulatory powers to informal persuasion) that fall beyond the data.

## **F. Limits on the use of the cited literature**

While studies of regulatory enforcement practices provide this research project with a number of valuable staging posts, significant limitations exist that prevent the direct application of this literature to the current project. There is a danger of extrapolating from empirical research findings based on individual studies of other regulatory agencies, operating in different fields and pursuing issue-specific goals, to the broader mandate and regulatory context of ASIC. Another primary issue is the formal nature of the dataset in this research. The extent of enforcement activity, when this is defined broadly, cannot be known from prosecution data alone.<sup>196</sup> Beyond the limits of the research methodology and results (discussed below), the dataset is clearly not a suitable basis for anything other than general reflections on the possible social processes behind these matters.

## **G. Summary**

Having surveyed the academic literature on regulation and identified the continuing relevance of enforcement issues in regulation debates, this literature review has highlighted and examined the key factors in shaping enforcement practices as revealed by sociological, empirical and ethnographic studies, before outlining the enforcement framework recommended by Ayres' and Braithwaite's strategic regulation theory.

Despite academic and policy interest in self-regulation,<sup>197</sup> voluntary compliance as a statistical reality, and predictions that compliance strategies will dominate regulatory practice,<sup>198</sup> it has been repeatedly noted in the literature that formal enforcement processes remain important in the pursuit of securing regulatory compliance. While current theoretical debates on how to regulate self-regulating actors explore a proposed shift from prescriptive 'regulatory law' to reflexive 'procedural' or post-regulatory law,<sup>199</sup> these trends do not detract from that prevailing issue for government regulation of the

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<sup>196</sup> Rowan-Robinson, Watchman and Barker, above n 37, 186.

<sup>197</sup> And other 'decentred', "post-regulatory" alternatives to the traditional 'command and control' model of government regulation.

<sup>198</sup> Reiss, 'Selecting Strategies of Social Control' above n 53, 34.

<sup>199</sup> Black, 'Decentring Regulation', above n 4, 126.

state monopoly on the use of coercion in binding and sanctioning others.<sup>200</sup> Not only does this shadow of the law increase the influence of other, compliance-promoting, pressures,<sup>201</sup> but the more compliance is understood to occur generally voluntarily (seeing regulatees as political citizens) or through accommodative compliance strategies (that facilitate self-interested error-correction),<sup>202</sup> the more unique is the resort to court-based enforcement. Indeed, the fundamental driver for enforcement pattern analysis has always been a concern with the infrequency and selectivity in formal law application,<sup>203</sup> and in this respect alone little has changed in the study of regulatory practice.

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<sup>200</sup> Ibid, 145. Indeed, despite apparent 'newness' of self-regulation discourse (as diagnosed by Julia Black, *ibid*, 114), the self-regulatory potential (or autonomy) of a regulatee has always been the precise basis for regulation by state (125).

<sup>201</sup> Bardach and Kagan, *Going by the Book*, above n 92, 62.

<sup>202</sup> John T Scholz, 'Enforcement Policy', above n 98, 256.

<sup>203</sup> Hawkins, above n 8, 178.

### III. RESEARCH QUESTIONS

The objects of the empirical study are to:

- provide a detailed survey of ASIC's court-based enforcement activities; and
- determine whether any patterns detected in the survey are consistent with the sociological studies highlighted in Part II.

The following broad categories and specific questions have been drafted to provide a broad basis for the data analysis and reflection undertaken in Part VI.

#### *Regulatory interactions*

- *What are the notable objective characteristics of the regulatees in the data set?*
- *Which of these characteristics is consistent with the possible existence of structural biases in the dataset with respect to the size and status of regulatees?*

#### *Relationship between enforcement activity and regulatory objectives*

- *What are the laws mostly commonly enforced in the dataset?*
- *What are the primary activities underlying those laws?*
- *What policy goals are served by those laws?*
- *Are the laws being enforced of a permissive/enabling, presumptive/default or mandatory nature?*
- *Is breach of the laws being enforced widely regarded as morally blameworthy?*
- *What is the relationship between ASIC enforcement activities in the data set and its regulatory objectives?*

#### *Legal framework supporting ASIC enforcement activity*

- *What are the laws mostly commonly enforced in the dataset?*
- *What is the character (civil or penal) of the laws enforced?*
- *Have particular laws been targeted by ASIC?*
- *Has a specific regulatory purpose or effect been sought by ASIC in enforcing particular laws?*
- *What sanctions are available for non-compliance with these laws?*
- *What sanctions were mostly commonly imposed?*

- ***What is the character (civil or penal) of the sanctions imposed?***

*Ayres' and Braithwaite's pyramid of enforcement*

- ***How does the dataset map onto Ayres' and Braithwaite's sanctions pyramid?***

## IV. ASIC AND THE ENFORCEMENT FRAMEWORK

### A. Overview

#### 1. Purpose

Part IV provides a background briefing on the enforcement activity undertaken by ASIC during the sample period of this study. Its purpose is to draw attention to the organisational constraints and issues affecting ASIC enforcement activities during the sample period. The briefing will focus particularly on ASIC enforcement objectives, the allocation of ASIC resources and ASIC enforcement procedures.

#### 2. Snapshot of ASIC, the organisation

ASIC is a Commonwealth statutory corporation established by s 7 of the *Australian Securities and Investments Commission Act 1989* (Cth), and continues in existence under the present *ASIC Act*<sup>204</sup> by virtue of s 261.<sup>205</sup> ASIC states that its role is “[to] regulate and inform the public about Australian companies, financial markets, financial services organisations and professionals who deal and advise in investments, superannuation, insurance and deposit taking.”<sup>206</sup>

During the sample period of this research report, ASIC was organised on a hybrid model of national and regional (state) structures. Three National Directors and eight Regional Commissioners reported to the three full time Commissioners (appointed by the Governor-General on the nomination of the Minister). Under this structure, the National Directors provided coordination and leadership in their assigned areas of national significance (Regulation and Enforcement, with the third serving as an Executive General Manager), while the Regional Commissioners managed ASIC regulatory programs and enforcement activity in each state and territory.<sup>207</sup> A more detailed discussion of the enforcement procedures during the sample period is presented below, in Part IV.D.

More recently, ASIC has been restructured around seven national directorates (enforcement, financial services and regulation, market regulation and policy, consumer

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<sup>204</sup> *ASIC Act 2001* (Cth).

<sup>205</sup> *ASIC Act 2001* (Cth) s 261 provides that: “A body that was established under the old *ASIC Act* continues in existence as if it had been established under this Act.”

<sup>206</sup> ASIC, *Annual Report 2000-2001*, i.

<sup>207</sup> ASIC, *User's Guide*, above n 11, 8-9

protection, international and regional coordination, public and commercial services, and infrastructure and strategic planning). Of these directorates, the first three are involved in the enforcement and regulation of corporate laws. The Consumer Protection directorate is considerably smaller than other directorates, and advises the enforcement and regulation directorates rather than carrying out enforcement activities directly itself.<sup>208</sup>

As at 30 June 1999, ASIC employed 1225 full-time equivalent staff,<sup>209</sup> of whom approximately 716 were employed in regulatory and enforcement operations.<sup>210</sup> Out of a total operating cost of \$146 million,<sup>211</sup> approximately 65% (\$95 million) was spent on enforcement.<sup>212</sup>

## B. Enforcement objectives

ASIC does not publish a formal statement of its enforcement objectives or policies. Statements of that kind are uncommon amongst most regulators.<sup>213</sup> An appreciation of ASIC's enforcement priorities and strategies during the sample period can be gleaned from ASIC's annual reports and the ASIC publication, *A User's Guide to ASIC, Your Corporate and Financial Services Watchdog* ("the ASIC User's Guide").<sup>214</sup> Another indirect source of enforcement policy is the decisions on the budgetary allocation of resources for enforcement activities within ASIC.<sup>215</sup> A summary of ASIC's budgetary position during the sample period is given in paragraph C below. As the sample period covers the years 1997 to 1999, ASIC's regulatory and enforcement activities during that period are covered by its annual reports for the years 1996-1997, 1997-1998, 1998-1999 and 1999-2000, and by the ASIC User's Guide that was published in September 1999. Comparison between annual reports and the User's Guide reveal important variations in enforcement objectives and approach during the years covered by the sample period.

### 1. 1996-1997 Annual Report

The 1996-1997 Annual Report states that ASIC's core enforcement aim is to protect the market from people who harm companies and investors and to deter other potential

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<sup>208</sup> ASIC, *AR 2000-2001*, above n 206, i.

<sup>209</sup> ASIC, *Annual Report 1998-1999*, 6.

<sup>210</sup> *Ibid*, 23 and 27.

<sup>211</sup> *Ibid*, 22.

<sup>212</sup> *Ibid*, 23.

<sup>213</sup> Rowan-Robinson, Watchman and Barker, above n 37, 211-213.

<sup>214</sup> ASIC, *User's Guide*, above n 11, 3.

<sup>215</sup> Hutter, *Compliance*, above n 8,

wrongdoers.<sup>216</sup> This objective reflects the traditional corporate law responsibilities of ASIC, which were subsequently expanded in 1998. The objective was supported by the specific enforcement aims (and results), summarised below in Table 1 - **Enforcement objectives and performance results in 1996-1997 ASIC Annual Report**.<sup>217</sup> The language of these enforcement aims has overtones of a sanctioning model of enforcement.<sup>218</sup>

Aims for 1996-1997	Results
To succeed in 70% of criminal and major civil cases.	84% of major cases concluded successfully.
To complete 85% of major corporate investigations within 12 months.	67% of major corporate investigations completed within 12 months.
To complete 75% of market investigations within 9 months.	48% of market investigations completed within 9 months.

*Table 1 - Enforcement objectives and performance results in 1996-1997 ASIC Annual Report*

From the complaints received during the year, ASIC aimed to investigate those matters likely to have a regulatory impact on the marketplace.<sup>219</sup> ASIC has specific criteria by which the assessment of regulatory impact was made but declined to reveal them in the Annual Report.<sup>220</sup> In an earlier ASIC publication, *Policy Statement 52 Enforcement action submissions*, ASIC stated that it accords priority to investigating matters according to the seriousness of the conduct identified.<sup>221</sup> Presumably, regulatory impact is a function of how broadly the seriousness conduct affects the market, companies and investors.

## 2. 1997-1998 Annual Report

The enforcement objectives in the 1997-1998 Annual Report and 1998-1999 Annual Report reflect the extension of ASIC's regulatory responsibilities during 1998 to include superannuation, investments, insurance and deposit taking.<sup>222</sup> The 1997-1998 Annual

<sup>216</sup> ASIC, *Annual Report 1996-1997*, above n 76, 17.

<sup>217</sup> Ibid 4-5.

<sup>218</sup> See above Part II.C.2.

<sup>219</sup> ASIC, *Annual Report 1996-1997*, above n 76, 22.

<sup>220</sup> Ibid.

<sup>221</sup> ASIC, *Policy Statement 52, Enforcement action submissions* (10 May 1993) para 52.7.

<sup>222</sup> ASIC, *Annual Report 1997-1998*, 23 and ASIC, *Annual Report 1998-1999*, above n 209, 1-3.

Report stated that the enforcement objectives for ASIC had expanded to encompass the following objectives:

- to reduce fraud and unfair practices in financial markets and financial products;
- to maintain, facilitate and improve the performance of the financial system and the entities within it; and
- to promote the confident and informed participation of investors and consumers in the financial system.<sup>223</sup>

In consequence of its expanded responsibilities, ASIC announced that it would concentrate on activities that made the most difference to the market.<sup>224</sup> It sought to integrate enforcement into other regulatory programs, rather than treating it as a separate activity. Enforcement, along with other regulatory activities, was to be organised and undertaken under five programs: investments; markets; major corporates; small business and complaints management.<sup>225</sup> Investments dealt with fundraising, disclosure and licencing issues. Markets concerned the operation of the securities and futures markets and the behaviour of companies within those markets. Major corporates dealt with corporate governance, directors' duties, insolvent trading and related party transactions. Small business concerned insolvent trading, record keeping, voluntary administration and poor corporate governance procedures. Complaints management concerned the handling of reported possible breaches of the law.

### 3. 1998-1999 Annual Report

The 1998-1999 Annual Report reported the introduction of four new enforcement strategies by ASIC:

- to target inspections and take action that will increase the quality of service and advice for consumers and get rid of incompetent or dishonest people;
- to guide and consult with industry so consumers can user new products and services without loss of protection;
- to strengthen relationships with financial institutions and industry associations to raise standards of disclosure and advice that investors and consumers receive; and

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<sup>223</sup> ASIC, *Annual Report 1997-1998*, above n 222, 23. Consider these enforcement objectives in relation to the broader, *ASIC Act 2001* (Cth) s 1(2), regulatory objectives of ASIC, discussed above Part II.D.1.(2).

<sup>224</sup> *Ibid*, 24.

<sup>225</sup> *Ibid*, 25.

- to communicate so that business comply with the law and consumers use their rights to avoid fraud.<sup>226</sup>

This statement has three notable features. First, unlike the broad statements in previous Annual Reports, the enforcement strategies directly addressed enforcement issues. Their focus was on ASIC's newer responsibilities in superannuation, insurance and deposit taking. Secondly, the strategy of targeted inspections marked a formal shift by ASIC away from random surveillance, based on complaints of misconduct received by ASIC, towards targeted campaigns, such as insolvent trading and bankrupts managing companies.<sup>227</sup> Targeted campaigns are often used by regulators to identify or nominate specific areas or targets for regulatory attention.<sup>228</sup> Thirdly, the use of consultation, disclosure and education as enforcement strategies reflected the more holistic approach to enforcement being adopted by ASIC.<sup>229</sup> Enforcement activities during 1998-1999 were segmented into four core groups: investments; markets; major corporates; and small business.

#### 4. 1999-2000 Annual Report

The 1999-2000 Annual Report saw the reinstatement of the broadly cast enforcement objective favoured in the 1996-1997 and 1997-1998 Annual Reports. The purpose of enforcement was said to be to protect investors, consumers and the overall integrity of Australia's financial markets.<sup>230</sup> To achieve this aim, two enforcement strategies are highlighted. First, the need to sharpen the focus and impact of regulation to uncover and resolve problems earlier. Secondly, the delivery of faster and higher quality briefs for administrative, civil and criminal action against misconduct.<sup>231</sup>

A more detailed explanation of ASIC's enforcement objectives during this regulatory year is provided by the ASIC User's Guide.<sup>232</sup> This is a booklet designed to keep regulatees up

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<sup>226</sup> ASIC, above *Annual Report 1998-1999*, 27-28.

<sup>227</sup> Ibid, 5.

<sup>228</sup> Gilligan, Bird and Ramsay, *Regulating Directors' Duties*, above n 3, 29.

<sup>229</sup> Jillian Segal, "The Future of Corporate Regulation in Australia", Address to the 18<sup>th</sup> Annual Company Secretaries' Conference, Surfers Paradise, 19 November 2001. ASIC's holistic approach reflects the influence of Malcolm Sparrow, *Imposing Duties: Government's Changing Approach to Compliance* (1994). The author contends that once a particular problem is identified, a whole of range of strategies and enforcement tools should be brought to bear to solve the underlying problem including education, new policy statements, amnesties, surveillance and enforcement action.

<sup>230</sup> ASIC, *Annual Report 1999-2000*, 24.

<sup>231</sup> Ibid, 24.

<sup>232</sup> ASIC, *User's Guide*, above n 11.

to date with ASIC's plans, organisation and policies for 1999-2000.<sup>233</sup> On the subject of ASIC's enforcement activities, the User's Guide notes:

“Expect us to complement the current range of enforcement and regulatory activities that we take in response to specific matters that come to our attention, with regulatory and enforcement activities which address emerging trends we have detected. Typically, we will identify and analyse the regulatory problem, alert you to it, conduct targeted inspections, make public statements to guide people on what to do and take enforcement actions to reduce the impact of the problem. Complaints about misconduct will be analysed more for evidence of systemic problem.

You can also expect us to go before the courts, conduct hearings or settle matters more promptly across the full range of our responsibilities.”<sup>234</sup>

This statement provides a description of the campaign and holistic enforcement strategies advocated by ASIC during the regulatory year 1998-1999, discussed previously.<sup>235</sup> The User's Guide also provides information about the aims and activities involved in ASIC programs. The programs for 1999-2000 were: investments; markets; major corporates; small business; and public information. Except for the public information program, these are the same programs as operated during the 1997-1998 and 1998-1999 regulatory years.<sup>236</sup> Table 2 - **Summary of ASIC's regulatory aims and activities for 1999-2000** below provides a summary of the regulatory aims and activities involved in each program.<sup>237</sup>

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<sup>233</sup> Ibid, 3.

<sup>234</sup> Ibid, 10.

<sup>235</sup> See IV.B.3. above

<sup>236</sup> See IV.B.2 - 3 above.

<sup>237</sup> ASIC, *User's Guide*, above n 11, 11-12.

<b>Name of program</b>	<b>Regulatory Aims</b>	<b>Regulatory and enforcement activities</b>
Investments	<ul style="list-style-type: none"> <li>▪ Ensuring investors have access to high quality information and advice to assist their investment choices.</li> <li>▪ Ensuring investors have access to redress through ASIC approved high quality dispute resolution schemes.</li> <li>▪ Ensuring investor funds are professionally managed and protected against loss from fraud, reckless or negligent mismanagement and other abuses.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Undertaking a full range of compliance and inspection activities of intermediaries.</li> <li>▪ Reviewing disclosure documents.</li> <li>▪ Granting and revoking licences and registrations to market intermediaries.</li> <li>▪ Granting exemptions and modifications of the law.</li> <li>▪ Undertaking a full range of administrative, civil and criminal enforcement actions.</li> </ul>
Markets	<ul style="list-style-type: none"> <li>▪ Promoting a high degree of confidence in the integrity of the securities and derivatives markets through continuous disclosure by listed entities to the market; intermediaries undertaking fair and honest market transactions; takeovers occurring in a fair manner to shareholders; and the proper supervision of regulated markets by the exchanges and other market operators.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Regulating takeover activity documents.</li> <li>▪ Working with exchanges in supervising markets.</li> <li>▪ Granting exemptions and modifications to the law.</li> <li>▪ Undertaking a full range of administrative, civil and criminal enforcement actions in response to market referrals and other information about possible contraventions of the law.</li> </ul>
Major Corporates	<ul style="list-style-type: none"> <li>▪ Promoting maintenance of high standards of corporate governance.</li> <li>▪ Ensuring directors fulfil their duties.</li> <li>▪ Ensuring shareholders are adequately informed.</li> <li>▪ Conducting all ASIC major investigations and the most significant enforcement activity as efficiently as possible.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Conducting investigations of serious contraventions.</li> <li>▪ Providing education and guidance to directors and others on how to meet the requirements of the law.</li> <li>▪ Taking swift remedial and enforcement action where there has been a serious breach of the law.</li> <li>▪ Taking action to preserve assets at risk from illegal activity.</li> </ul>

		<ul style="list-style-type: none"> <li>▪ Removing unfit persons from managing corporations.</li> </ul>
Small business	<ul style="list-style-type: none"> <li>▪ Enabling consumers and other businesses to be confident in their dealings with small business.</li> <li>▪ Promoting good corporate practices and understanding of director's duties.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Providing information to small business to assist understanding of directors, company officers and professional advisers of their duties and obligations under the law.</li> <li>▪ Ensuring that companies do not trade when insolvent.</li> <li>▪ Working with insolvency practitioners to ensure high standards in their activities.</li> <li>▪ Understanding a full range of administrative, civil and criminal enforcement actions.</li> </ul>
Public information	<ul style="list-style-type: none"> <li>▪ Collating lodged information efficiently.</li> <li>▪ Providing ready public access to information.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Providing Business Centre services.</li> <li>▪ Making information available electronically.</li> </ul>

**Table 2 - Summary of ASIC's regulatory aims and activities for 1999-2000**

### C. Sample period allocation of resources for enforcement activities

ASIC publishes its staff numbers and financial performance every year in an annual report. A difficulty arises in using information sourced from these annual reports in that they cover 12 month financial year periods (from July to June). Therefore, the 1996-1997 Annual Report and the 1999-2000 Annual Report cover periods that overlap the beginning and end of the project sample period respectively. Notwithstanding this, the number of ASIC staff involved in enforcement and regulation functions, and the budget of these operations is presented below in Table 3 - ASIC's enforcement resources, by financial year.

	FY 1996- 1997 <sup>238</sup>	FY 1997- 1998 <sup>239</sup>	FY 1998- 1999 <sup>240</sup>	FY 1999- 2000 <sup>241</sup>
Budget allocated to enforcement and regulation (\$ million)	62	70	95	73
% of total ASIC costs	49%	55%	65%	53%
Staff employed in enforcement and regulation	630	658	716	662
% of total ASIC staff	47%	57%	58%	54%

*Table 3 - ASIC's enforcement resources, by financial year*

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<sup>238</sup> Australian Securities Commission, *Annual Report 1996-1997*, above n 76, 17, 27. Note that unlike following years, the Annual Report for 1996-1997 separately reported statistics for resources in Investigations and Enforcement, and Compliance and Regulatory. The figures reported are the combination of the two divisions to ensure consistency with future years.

<sup>239</sup> ASIC, *Annual Report 1997-1998*, above n 222, 20.

<sup>240</sup> ASIC, *Annual Report 1998-1999*, above n 209, 6, 23.

<sup>241</sup> ASIC, *Annual Report 1999-2000*, above n 230, 6, 21.

## D. Overview of enforcement procedures

The management of regulatory investigation and enforcement of corporate wrongdoing in Australia is the subject of an inter-organisational arrangement between ASIC and the Commonwealth Director of Public Prosecutions ('DPP'). That arrangement is guided by a 1992 direction issued by the then Attorney-General.<sup>242</sup> This direction provides guidelines for ASIC and DPP collaboration and co-operation and focuses particularly on encouraging timely consultation between ASIC and the DPP.

ASIC's internal enforcement processes during the sample period originate from the directions on enforcement contained in Policy Statement 52, mentioned previously.<sup>243</sup> Policy statements are publications by which ASIC explains the circumstances under which it will exercise its statutory powers. They do not have any legal force. Policy Statement 52 concerns the circumstances under which ASIC will consider submissions from regulatees on what enforcement action it should take in response to findings made in an investigation.<sup>244</sup> As part of that policy, ASIC provides an explanation of its approach to enforcement. Caution must be exercised in relying too heavily on the policy statement owing to the fact that it was published in 10 May 1993, four years prior to the sample period of this study. Sociological studies indicate that written policies of this nature become increasingly unreliable over time because they are subject to constant revisions and variations in response to changes in legislation, internal and external pressures.<sup>245</sup> Policy Statement 52 does however provide a useful starting point for a description of ASIC's enforcement procedures.

Policy Statement 52 indicates that ASIC adopts a two-pronged approach to enforcement:

- a complaints management strategy for responding to complaints relating to corporate law matters; and
- enforcement campaigns and surveillance programs for addressing particular types of misconduct.<sup>246</sup>

The complaints management strategy is used to select the matters to which ASIC will allocate its resources. ASIC allocates resources according to the seriousness of the conduct identified.<sup>247</sup> It aims to conduct and complete investigations of matters within

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<sup>242</sup> ASC, Memo 19/92, *Serious corporate wrongdoing: direction relating to investigation and enforcement* (30 September 1992).

<sup>243</sup> See Part IVB(2) above. ASIC, *Policy Statement 52*, above n 221.

<sup>244</sup> *Ibid*, para 52.1.

<sup>245</sup> Rowan-Robinson, Watchman and Barker, above n 37, 211-213.

<sup>246</sup> ASIC, *Policy Statement 52*, above n 221, para 52.7.

<sup>247</sup> *Ibid*, para 52.8(a).

12 months of the investigation being resourced.<sup>248</sup> The broad aims of an investigation are to maximise the remedies that may be realised and to identify breaches of the *Corporations Law* and criminal laws.<sup>249</sup> ASIC gives consideration to a range of enforcement options including civil enforcement, criminal prosecutions and administrative action.<sup>250</sup>

For the purpose of this research report, an overview of the complaints management program in use at the time can be drawn from George Gilligan, Helen Bird and Ian Ramsay's previous study of ASIC enforcement.<sup>251</sup> On the basis of semi-structured interviews with senior ASIC enforcement personnel, that study outlined the decision-making processes of ASIC enforcement sections and officials. Using the receipt of a liquidator's report as representative of the investigation processes, the progress of such reports were traced through ASIC's standardised assessment and evaluation channels. Reports that allege offences are evaluated by the regional Complaints Management Program ("CMP"), which writes off a significant percentage of complaints, on the grounds that they are outside the legal framework or are minor offences. A CMP report is then reviewed by a more senior Technical Review and Assessment Committee ("TRAC"). The TRAC considers the global enforcement picture and uses similar criteria and data to the CMP, including questions such as: whether the complaint gives rise to a cause of action within ASIC jurisdiction with an appropriate remedy; whether the action would have any regulatory effect (due to the complaint's special significance or as part of a wider trend of non-compliance and any campaign-based enforcement considerations); and whether there are any other general considerations (such as the availability of evidence or the complainant being equally placed to pursue an action). If the TRAC decides to resource a matter, a case officer will be assigned and given broad directions as to an investigative strategy. Their subsequent reports to the TRAC will shape, in light of national project methodology guidelines, the further management of a matter. In situations where the matter is taken to court, the legal processes are handled by the region's senior legal officer, generally having the title of Counsel, who will also have been involved as a member of the TRAC.

More recently, ASIC staff have confirmed that the fundamental processes described in the study by Gilligan, Bird and Ramsay have not changed since the period under review.<sup>252</sup> There have, however, been changes in who makes the resourcing decisions. Complaints continue to receive an initial assessment by a specialist complaints management program. The outcomes of this process are that the complaint may be:

- referred to the Enforcement Directorate for investigation;
- referred to one of the other operational directorates for surveillance;

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<sup>248</sup> Ibid, para 52.8(b).

<sup>249</sup> Ibid, para 52.8(d).

<sup>250</sup> Ibid, para 52.8(d).

<sup>251</sup> Gilligan, Bird and Ramsay, *Regulating Directors' Duties*, above n 3, 19-22.

<sup>252</sup> Information obtained from discussions with Michael Gething, WA Regional Commissioner for ASIC, who assisted the research team in the preparation of this report.

- resolved by the provision of information or negotiation; or
- analysed, assessed and recorded.

A complaint referred for investigation is subject to a further review by a committee of senior enforcement staff to determine whether it should be resourced for investigation. In contrast with the arrangements during the period of this research project, the committee now comprises senior staff from the Enforcement Directorate from a number of regions (as opposed to staff from one State during the period of the research project). In this way, a "whole of ASIC" approach is taken to resourcing investigations, with a view to optimising outcomes from available resources.

Policy Statement 52 provides that the enforcement actions resulting from an investigation may include:

- if criminal prosecutions are warranted, referral of the matter to the DPP;
- the commencement of, or intervention in civil proceedings;
- the release of information under ss 18 or 25 of the *ASIC Act*;
- administrative proceedings;
- referral of the matter to a different regulatory agency; or
- a decision that enforcement action is inappropriate.

This list reveals the sanctioning style of enforcement that dominated the ASIC enforcement mindset, at least at the time that Policy statement 52 was published. The shift away from that mindset towards a more holistic approach to enforcement was noted in Part IV.B.3. above.

## **E. Scope of court based enforcement actions**

The data supplied contains information on activities where ASIC has commenced a formal investigation. The *ASIC Act* in force during the relevant period for the project<sup>253</sup> provides for a number of grounds upon which ASIC may commence a formal investigation:

- a contravention of the *Corporations Law* (s 13(1)(a) of the *ASIC Act*);
- a contravention of a law of the Commonwealth or of a State or Territory, being a contravention that:
  - (i) concerns the management or affairs of a corporation or a managed investment scheme; or

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<sup>253</sup>

*ASIC Act 1989* (Cth).

- (ii) involves fraud or dishonesty and relates to a corporation or managed investment scheme, securities or futures contract (s 13(1)(b) of the *ASIC Act*);
- (iii) the Minister directs ASIC to investigate a matter because, in the Minister's opinion, it is in the public interest for that matter to be investigated (s 14 of the *ASIC Act*);
- (iv) ASIC receives a report of a receiver or liquidator lodged under ss 422 or 533 of the *Corporations Law* (s 15 of the *ASIC Act*).

ASIC is granted wide powers of investigation by the *ASIC Act*. Section 13 of the *ASIC Act* grants ASIC the power to “make such investigation as it thinks expedient for the due administration of the corporations legislation ... where it has reason to suspect that [a contravention] may have been committed.”<sup>254</sup> ASIC also has a general power to “do whatever is necessary for or in connection with, or reasonably incidental to, the performance of its functions,” granted by s 14(4) of the same Act. Separately, provisions in the *Corporations Law* confer various investigative powers on ASIC.

At the conclusion of an investigation, if ASIC believes that an offence may have been committed and a person ought to be prosecuted for this, ASIC can commence prosecution itself, or refer the matter to the Commonwealth DPP.<sup>255</sup> In practice, the DPP handles the prosecution of all indictable criminal matters, whilst ASIC prosecutes the bulk of minor summary matters itself.

## **F. Involvement of other regulatory agencies**

A representation of the enforcement roles of ASIC and other organisations is shown in Figure 2. Activities not involving court-based enforcement, and therefore outside of the scope of this project, are shaded out.

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<sup>254</sup> “Corporations legislation” is defined in the *ASIC Act* as meaning the *Corporations Act* and the *ASIC Act*.

<sup>255</sup> *ASIC Act* s 49.

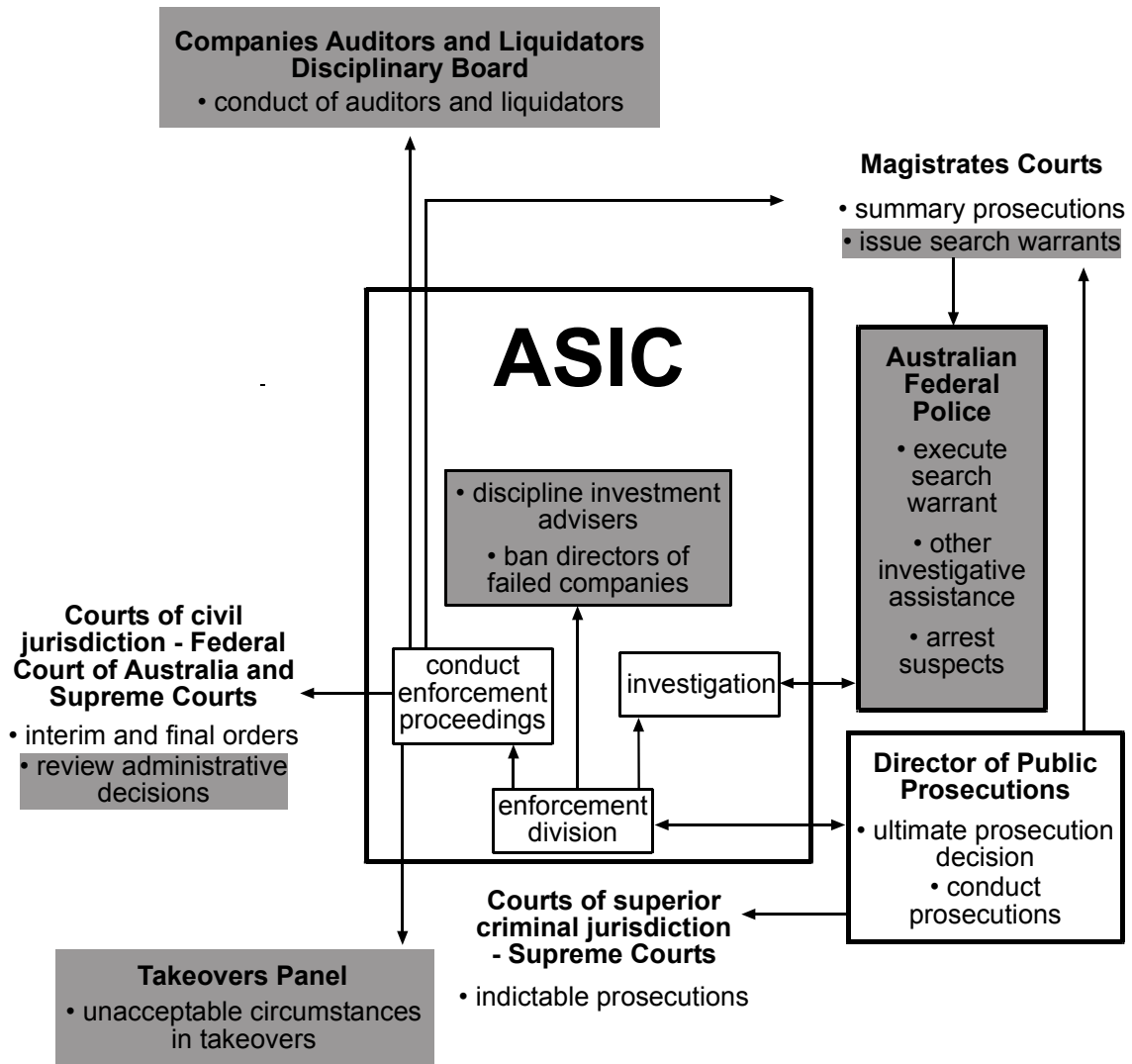


Figure 2 - Enforcement roles of various organisations<sup>256</sup>

<sup>256</sup>

Adapted from ASIC, *Annual Report 1995-1996*, 22.

## G. Regime of proceedings and sanctions

The sample period for this report covers the years 1997 to 1999. The following discussion of ASIC enforcement proceedings cites the provisions of the *Corporations Law* that were applicable during this sample period.

### 1. Classifications of enforcement activities used in ASIC data

ASIC supplied records were categorised into two categories, civil and criminal matters. This division reflects the classic doctrinal distinction between private, remedial legal processes and public, penally focussed enforcement activities. The division plays a practical role in the court procedures and protections that apply to enforcement actions brought by ASIC. One example is the standard of evidence required. Civil actions must be proved on the balance of probabilities. Criminal actions must be proved beyond reasonable doubt. A second example is the availability of the privilege against self-incrimination. This privilege limits the evidence that ASIC may rely on in criminal proceedings or proceedings to impose a penalty. Specifically, evidence recorded in transcripts of administrative hearings conducted by ASIC<sup>257</sup> is not admissible in those proceedings.

### 2. Issues with traditional classifications

There are, however, conceptual difficulties with the division of enforcement activities into civil and criminal matters. Such a division relies on a single, binary distinction to separate activities, yet the enforcement activities being classified can have multiple, overlapping effects. Concerns with the integrity and blurring of these categories are matters of considerable debate. Sociological studies have particularly noted the ‘pervasive influence’ of distinguishing between regulatory offences and traditional crime, as a pre-emptive bar on using ‘criminal’ enforcement tools when regulating conduct that is not considered ‘inherently immoral’.<sup>258</sup> In Australian policy discourse, conference debates<sup>259</sup> and the Australian Law Reform Commission (‘ALRC’)<sup>260</sup> have also considered the veracity of the simple criminal / civil distinction. Precisely because of the potential for confusion and overlap the ALRC discussion paper dedicated two chapters to problems of terminology and taxonomy<sup>261</sup> and restated its position on much of these issues in its final report. The ALRC argues that the term ‘civil offence’ is a misnomer, as ‘civil’ refers to the court processes used (those normally employed in

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<sup>257</sup> See *ASIC Act*, s 19.

<sup>258</sup> Rowan-Robinson, Watchman and Barker, above n 37, 205-206.

<sup>259</sup> Jonathan Dobinson, ‘Penalties: Policy, Principles and Practice in Government Regulation’ (2001) 79 *Reform* 44, 45.

<sup>260</sup> Australian Law Reform Commission, *Securing Compliance*, above n 61, 64-66 [2.90-2.96]; Australian Law Reform Commission, *Principled Regulation*, 64-74 [2.1-2.52] and 112-120 [3.6-3.68].

<sup>261</sup> Australian Law Reform Commission, *Securing Compliance*, above n 61, Part A.2 and A.3.

private law matters) rather than the offence itself.<sup>262</sup> The term ‘non-criminal regulatory offence’ is preferred by the ALRC, so as to avoid over-burdening the word ‘civil’.<sup>263</sup>

For current purposes, it is important to recognise that some activities that involve civil actions are closer in function to criminal actions in that they seek to punish wrongdoing, rather than achieve restitutionary relief. Two examples of this are the civil penalty regime in Part 9.4B and management banning orders.

Under the civil penalty regime in Part 9.4B of the *Corporations Law*, when a breach of a civil penalty provision is proved the court can order significant sanctions be imposed. The severity of these potential sanctions indicates the punitive nature of enforcement activities against these breaches. In light of this discussion, some commentators have suggested that their ‘quasi-criminal’ status may have the perverse effect of reducing the probability of criminal conviction and thus undermining the general deterrent value of criminal sanctions.<sup>264</sup>

Case law on management banning orders has held that the purpose of a proceeding that may result in a banning order is not to impose a penalty but instead to protect the public.<sup>265</sup> Such orders are said to be protective against present and future use of the corporate structure and, though having a motive of personal deterrence, are not punitive.<sup>266</sup> Nonetheless, previous studies of corporate law regulation have highlighted the quasi-incapacitation effect of such orders.<sup>267</sup> Thus, while not being strictly ‘punitive’, these sanctions appear at the apex of the *Corporations Law* enforcement pyramid and do involve at least a secondary sense of ‘punishment’.<sup>268</sup>

### 3. Classifications used in this research

In partial recognition of these terminological difficulties, and noting related discussion on the precise legal meanings and organisational and procedural consequences of ‘penalty’ and ‘sanction’,<sup>269</sup> the ASIC distinction of civil and criminal was supplanted in the dataset with a distinction between civil and penal activities. This alternative distinction is based on whether the enforcement activities use particular court actions

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<sup>262</sup> Ibid 53 [2.45], and Australian Law Reform Commission, *Principled Regulation*, above n 61, 73 [2.46].

<sup>263</sup> Australian Law Reform Commission, *Securing Compliance*, above n 61, 48 [2.22], and *Principled Regulation*, above n 61, 68 [2.21].

<sup>264</sup> Bird, above n 111, 411-2 and 415.

<sup>265</sup> *Australian Securities Commission v Kippe* 137 ALR 423.

<sup>266</sup> *Re HIH Insurance Ltd and HIH Casualty and General Insurance Ltd; Australian Securities and Investments Commission v Adler* (2002) 42 ASCR 80, 97 per Santow J.

<sup>267</sup> Gilligan, Bird and Ramsay, *Regulating Directors’ Duties*, above n 3, 15; Bird, above n 111, 419.

<sup>268</sup> *Maxwell Alfred Kippe v Australian Securities Commission* No. Q95/497 AAT No. 10587 (9 November 1995), [65].

<sup>269</sup> Australian Law Reform Commission, *Principled Regulation*, above n 61, 69-71 [2.25-2.38] and see discussion in *Maxwell Alfred Kippe v Australian Securities Commission* No. Q95/497 AAT No. 10587 (9 November 1995).

with a restitutionary or punitive aim. Such assessments were made with reference to the supplied progress and summary reports. A further description of the categorisation is detailed below.

The authors recognise that this alternative categorisation continues to employ a single binary distinction in separating activities. Consequently, it does not avoid all the problems of characterising with regard to single dimension enforcement activities that were both undertaken under a broad rubric of securing regulatory compliance and have multiple legal and practical effects. Importantly, however, a civil / penal characterisation has the advantage of focussing analysis on the (mixed) purposes of this regulatory regime, while remaining sensitive to the context specific issues of each enforcement activity in question.

#### 4. Civil enforcement actions

Activities categorised as civil actions in the dataset are court-based actions undertaken by ASIC primarily with a restitutionary aim. The most frequently occurring actions of this type are:

- applications to the court to restrain the payment or transfer of money or property where there has been a breach of the law under s 1323 of the *Corporations Law*;
- applications to the court for injunctions under s 1324 of the *Corporations Law* to restrain breaches of the law; and
- applications to the court to wind-up companies under s 461 of the *Corporations Law*.

#### 5. Penal enforcement actions

In contrast to civil enforcement actions, activities categorised as penal enforcement actions are primarily punitive in nature. In these actions ASIC is seeking a sanction against the wrongdoer as punishment for wrongdoing. Within the *Corporations Law*, wrongdoing can be categorised into two separate streams:

- wrongdoing for which the penalty is specifically specified in a particular section, or in s 1311;
- wrongdoing under a civil penalty provision.<sup>270</sup>

Section 1311 is a general penalty provision that provides that where a provision of the Law specifies a penalty to apply in the case of breach, then that penalty will apply. Failing that, s 1311 specifies the penalty to apply to a breach as that specified in Schedule 3, and further if no penalty is specified in Schedule 3, a default penalty of five penalty units.

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<sup>270</sup>

*Corporations Law*, Part 9.4B.

Where there is wrongdoing under a civil penalty provision,<sup>271</sup> two different regimes of penalty can apply, civil and criminal. Two kinds of civil penalties are prescribed: orders prohibiting a person from managing a corporation for an unspecified period, and/or a pecuniary penalty of up to \$200,000.<sup>272</sup> Where a person contravenes a civil penalty provision knowingly, intentionally or recklessly and either:

- was dishonest and intended to gain an advantage for themselves or another person; or
- intended to deceive or defraud someone;

criminal penalties can apply.<sup>273</sup> Criminal penalties which can be imposed are a fine of up to \$200,000 or five years imprisonment or both.<sup>274</sup>

Apart from breaches of the *Corporations Law*, the penal enforcement actions within the project involve breaches of the *ASIC Act* and other Commonwealth and state legislation. Ordinarily, the breaches of the Commonwealth and state legislation are incidental to a breach of the corporations legislation.

## H. Treatment of references to the Companies Code

Over the sample period, a significant number of enforcement activities specified Companies Code sections as relevant. To ensure these instances are counted accurately, references to Companies Code sections were aggregated and counted under the corresponding *Corporations Law* and *ASIC Act* sections. Details of this aggregation are in Appendix A.

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<sup>271</sup> Until 30 June 1998, the designated civil penalty provisions under s 1317DA were ss 232(2), (4), (5) and (6), 243ZE(2) and (3), 318(1) and 588G. The *Company Law Review Act 1998* (Cth) added to this ss 254L, 256D, 259F, 260D, 601FC, 601FD, 601FE and 601JD.

<sup>272</sup> *Corporations Law* s 1317EA(3).

<sup>273</sup> *Corporations Law* s 1317FA.

<sup>274</sup> *Corporations Law* s 1311(2) and (3) and Schedule 3.

## V. PROJECT METHODOLOGY AND DATA DESCRIPTION

### A. Overview

Part V describes the dataset examined in the project and the methodology used to undertake the empirical study. The project involved an empirical investigation of ASIC's enforcement activities over the period from January 1997 to December 1999. The investigation was performed by way of a statistical analysis of information supplied by ASIC and the Commonwealth Department of Public Prosecutions. The use of these data sources has the obvious advantage of providing information not available publicly elsewhere. This allows for a much more detailed view of ASIC's enforcement activities, and their results. A description of the source information supplied by each respectively follows.

### B. Information supplied by ASIC

A database containing summary information on all ASIC enforcement activities was obtained from ASIC. The database was constructed from ASIC's own Activity Management System, ASCTEC and, apart from the exceptions below, included all activities which were completed from the beginning of 1997 to the end of 1999. The criteria for an entry appearing in the database supplied by ASIC is where the Technical Review and Assessment Committee in a regional office decides to resource a matter for enforcement.<sup>275</sup>

It should be noted that the ASIC supplied data only recorded ASIC's actions in criminal and civil enforcement matters. It did not record instances of ASIC's administrative enforcement actions. ASIC's administrative enforcement actions include actions to ban or deregister investment advisers and insurance brokers. The ASIC supplied database did contain five activities relating to action taken to discipline auditors and liquidators before the Companies Auditors and Liquidators Disciplinary Board. These five activities were excluded from the dataset as no data from other administrative enforcement actions was available. Therefore, the dataset was limited to ASIC's court-based enforcement activities.

In addition to the database, ASIC also provided the written progress and summary reports for each of these activities. These reports were written by the ASIC case officers in charge of each activity and include detailed information about the progress and outcome of the activities.

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<sup>275</sup>

For further information on ASIC's internal enforcement processes, see Gilligan, Bird and Ramsay, above n 3, 20.

In total, information on 1585 activities was supplied by ASIC. However, it was found that 131 of these were either not enforcement actions or were duplicate actions.<sup>276</sup> A further 11 activities were removed from the dataset as they involved activities where persons who were prohibited from managing corporations<sup>277</sup> were applying for leave of the court to manage a corporation. It was determined that ASIC's involvement in these actions did not constitute an enforcement action, regardless of whether the Commission opposed the application or not. After removing these 147 activities, the dataset contained 1438 activities.

### C. Information supplied by the DPP

A database of activities was supplied by the DPP. The database contained information on activities referred to the DPP from ASIC. For each of the DPP matters in the supplied database, the matching ASIC Activity was identified and the information from each source was linked in the project dataset.<sup>278</sup> There was a difference in the way activities were recorded in the DPP and ASIC information. The ASIC information recorded a single activity for an investigation, even where the investigation involved more than one subject person or company. In contrast, the DPP information recorded a separate activity for each subject person or company. This inconsistency was overcome by linking more than one DPP activity to a single ASIC Activity where appropriate.

The DPP supplied records on 434 activities covering the same date range as the ASIC Activities (January 1997 to December 1999). A discrepancy arose as to a number of DPP records in relation to their related ASIC records, which is discussed below. This discrepancy led to a limited number of DPP records being linked to corresponding ASIC records. 264 records from the supplied DPP database were matched with 247 ASIC Activity records.

### D. Limitations in source data

A number of limitations in the source data affected the construction of the dataset. They included:

- (a) the problem of missing data;
- (b) the limited sample period for the study; and

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<sup>276</sup> Predominantly, these actions found to not be enforcement activities related to activities of ASIC in responding to demands for third-party discovery in litigation and other procedural matters.

<sup>277</sup> Of these 11 activities, 7 were applications by persons prohibited from managing a corporation by *Corporations Law* s 229, 2 by persons banned by ASIC under *Corporations Law* s 600 and 2 for which the circumstances of the subjects' prohibitions are unknown.

<sup>278</sup> Whilst each ASIC Activity record concerns the entire activity and all of the subjects (organisations or persons) investigated, the DPP records each concern a single subject only. As a result, a number of ASIC records were linked to multiple DPP records.

(c) ASIC procedures for recording data.

The limitations are discussed separately.

### 1. Missing data

The primary limitation identified was that the ASIC supplied database did not represent a definitive record of all activities undertaken by ASIC. This resulted in it being impossible to determine the total number of activities in any category of data, or indeed overall. Furthermore, for those records that were contained in the ASIC supplied database, it was stated that the information may be incomplete and that missing information should be obtained from the supplied progress and summary reports. However, it was found that the progress and summary reports were likewise incomplete. This made it impossible in many cases to obtain a complete set of information about a particular enforcement activity for the dataset. This limitation constrains the project to an investigation of those activities for which sufficient data was obtained from the ASIC source files.

A further problem was that a number of activities have been excluded from the ASIC supplied information for which we have been unable to determine the justification. As mentioned above, the ASIC supplied data does not contain information on administrative enforcement actions, which was removed by ASIC from the ASCTEC source. However, there are other activities that have been excluded, such as a number of actions that result in an enforceable undertaking. Examining the ASIC Enforceable Undertaking Register, it was determined that there were 15 enforceable undertakings obtained by ASIC in 1998, and 38 in 1999. However, in the dataset, only 9 activities have an enforceable undertaking recorded as the outcome.

Within the dataset significant deficiencies in the recording of legislation section information exist. The project dataset is reliant on ASIC's recording of which legislation sections were investigated for contravention in each activity. However, the recording of exact subsection numbers was found to be lacking. As a result, it has not been possible to extract information on legislation applied to the detail of subsection level. The strategy for dealing with this has been to aggregate instances where the subsection has been recorded by section number only.<sup>279</sup>

A more specific problem arose with respect to activities involving a breach of the *ASIC Act*. The ASIC supplied data aggregated all breaches of the Act to be recorded under s 63, which is a provision specifying wrongdoing under a number of other provisions. Each of the four subsections of s 63 specifies the wrongdoing and the penalty for

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An example of this is the recording of the various breaches of *Corporations Law* s 232, which sets out the duties and liabilities of an officer of a corporation. They include: the duty to act honestly (s 232(2)), the duty to exercise due care and diligence (s 232(4)), the duty not to make improper use of information (s 232(5)) and the duty not to make improper use of position (s 232(6)). However, the recording of the specific subsection of s 232 involved in a particular activity is inconsistent, with numerous activities simply recording that s 232 was applicable. This lack of consistent recording of subsection information requires the aggregation of all s 232 activities into one category.

different sections of the Act. The aggregation of the activities under s 63, and the failure to record the specific subsection of s 63 applied meant that different offences under the *ASIC Act* could not be distinguished.

A significant number of DPP records within the DPP supplied database could not be matched with ASIC records. This was despite the fact that all of the records in the DPP database were purported to be of activities referred to the DPP by ASIC, and therefore should necessarily be associated with an ASIC investigation and associated record. As detailed above, only 264 DPP records could be matched to corresponding ASIC records. For this reason, the DPP information was utilised only to confirm the accuracy of ASIC supplied information.

## 2. Limited sample period

As stated, the ASIC supplied information only included activities completed over the three-year period from 1997 to 1999. This limited sample restricts the inferences that can be drawn from the results.

Furthermore, since the end of the sample period, there have been several changes within ASIC itself. Firstly, there has been a change in focus of ASIC's enforcement activities away from pursuing simple summary matters to greater resourcing of complex major matters. This is discussed in Part V.E below. Secondly, the passage of time has undoubtedly resulted in staff changes within ASIC. Most importantly, both the national Chairman and National Director Enforcement have changed.<sup>280</sup> Thirdly, the structure of ASIC has changed. In the 1996/1997 the enforcement functions of ASIC appeared to be divided between the Investigations and Enforcement and Compliance and Regulatory divisions.<sup>281</sup> In the 1997/1998 Annual Report, there appears to be only one relevant division, Enforcement and Regulation, with two National Directors: National Director Enforcement and National Director Regulation. This structure continued until 1999/2000. In the 2000/2001 Annual Report, ASIC appears to be divided into directorates as set out in Part IV.A above.

## 3. ASIC recording of legislation sections

The ASIC supplied data contains information on the legislation section relevant to the particular enforcement activity. The main limitation in this information is that ASIC has recorded all legislation that was considered in the investigation, not just the legislation and sections under which offences were alleged in proceedings. No differentiation is made in the ASIC supplied data between legislation sections that were eventually alleged to have been breached, and legislation sections which were at any

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<sup>280</sup> Alan Cameron completed his term as ASIC Chairman on 31 December 2000, and was succeeded by David Knott, the present Chairman.

Joe Longo was the National Director Enforcement until March 2000. He was succeeded by Peter Wood in April 2001. The position is now known as Executive Director Enforcement.

<sup>281</sup> Australian Securities Commission, above n 238.

stage suspected by ASIC to have been breached. This has limited the project to considering which legislation sections were recorded by ASIC in its data.

A further limitation imposed by ASIC's recording of legislation sections is that where a penalty has been imposed by a court against an enforcement activity subject, it has not been possible to allocate the penalty information to a specific offence if an enforcement activity has recorded more than one legislation section as relevant to the offences committed. Thus in the dataset, a fine imposed in relation to an activity which records more than one legislation section as having been breached will disclose the same fine over each of the legislation sections, regardless of whether in the actual case there was a distinction between culpability in relation to the alleged offences, and indeed regardless of whether the offence was eventually alleged in proceedings.

#### 4. Changes to ASIC data record system

Since the period of this research project, ASIC has made significant changes to its data recording systems. In November 2001, ASIC installed a new system to record investigation and enforcement data, which is capable of producing more refined data than was provided for this research project.

#### E. Bias of ASIC investigations over sample period

It was found that over the sample period, there was a preponderance of activities undertaken by ASIC against company officers to assist external administrators of companies. It would appear that the focus on these actions began in the 1998/1999 financial year, as disclosed in the ASIC Annual Report for that year. The Annual Report states:

We prosecuted summarily 354 directors or company officers who had failed to give external administrators statements about the company's affairs or books and records. Streamlining this process caused a marked jump from the 90 prosecutions last year.<sup>282</sup>

This concentration on summary prosecution was ended during the 2000-2001 financial year due to a diversion of enforcement resources from minor matters to more complex major matters.<sup>283</sup>

Primarily, these actions involved summary prosecutions for breaches of requirements for officers to produce a report as to affairs to external administrators, as required under s 475 of the *Corporations Law*.<sup>284</sup> However, it was found that these liquidator assistance

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<sup>282</sup> ASIC, above n 240, 35.

<sup>283</sup> ASIC, *Annual Report 2000-2001*, above n 206, 20.

<sup>284</sup> *Corporations Law* s 475 requires that persons who were directors or secretaries of a company at the date of a winding up order must submit a statement in the prescribed form as to the affairs of the corporation at the date concerned to the liquidator or provisional liquidator.

actions also involved ss 429, 530A, 530B, and 530C of the *Corporations Law*.<sup>285</sup> Offences under all of these sections are summary offences.<sup>286</sup>

Of the 1438 ASIC Activities in the dataset, 867 activities involve one or more of the sections identified above, representing over half of the data sample. To present this large number of activities of a particular type from overwhelming other information in the dataset, the results in Part VI are presented both as a full set, and for a subset of the data excluding these 867 external administrator assistance activities.

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<sup>285</sup> Section 429 is analogous to s 475, but creates an obligation to make out a report as to affairs and submit it to the external controller of a company.

Section 530A requires company officers to help an appointed liquidator or provisional liquidator in various ways, including delivering up the books of the company (s 530A(1)(a)), informing of where the books are located (s 530A(1)(b)), attending on the liquidator (s 530A(2)(a)), giving the liquidator information about the corporation (s 530A(2)(b)), informing the liquidator of any change of address of the officer (s 530(A)(5)) and in other ways as reasonably required by the liquidator (s 530A(4)).

Section 530B(3) makes it an offence to hinder or obstruct a liquidator in obtaining possession of books of the company unless the person is entitled to retain possession of the books.

Section 530C permits a court to issue a warrant for the search, seizure and delivery of books of a company upon application by a liquidator, a provisional liquidator or ASIC.

<sup>286</sup> Section 4H of the *Crimes Act 1914 (Cth)* provides that offences against a law of the Commonwealth which are punishable by imprisonment for a period not exceeding 12 months or are not punishable by imprisonment are summary offences.

Offences under s 475 of the *Corporations Law* carry a maximum penalty of 25 penalty units or imprisonment for six months, or both (Schedule 3 of the *Corporations Law*) and are therefore summary offences.

Offences under ss 420, 530A, 530B and 530C do have a penalty stated in the specific sections themselves, nor in Schedule 3. Therefore, they carry a maximum penalty of five penalty units as specified in s 1311 and are also therefore summary offences.

## VI. EMPIRICAL STUDY AND ANALYSIS OF DATA

### A. Overview of discussion

After a general description of the dataset, the following presentation of the empirical research aggregates the data into four categories (characteristics of the regulatees, enforcement activities, enforcement outcomes and legal framework). Each of these divisions includes an analysis of the relevant data, followed by a separate section reflecting on the trends and implications arising from the preceding analysis. The empirical study and its findings are then considered by reference to Ayres' and Braithwaite's pyramid of enforcement. A final, concluding analysis follows.

### B. General description of the dataset

#### 1. General statistics

Data was collected for 1438 ASIC enforcement activities that were completed in the period from January 1997 to December 1999. The enforcement activities examined typically commence with an ASIC investigation of misconduct and conclude with the outcomes of court proceedings and prosecutions initiated by ASIC. The dataset does not include any data on administrative activities or educational programs undertaken by ASIC during the sample period. The enforcement activities in this study were distributed across the sample period as shown in Table 4 - Enforcement activities by year.

Year	Number of enforcement activities
1997	286
1998	467
1999	685

*Table 4 - Enforcement activities by year*

Although not directly comparable, the number of enforcement activities as reported in the ASIC Annual Reports is presented in Table 5 - Enforcement activities by financial year, as reported by ASIC.

Financial Year	Number of enforcement activities
1996/1997	178
1997/1998	199
1998/1999	564
1999/2000	461

*Table 5 - Enforcement activities by financial year, as reported by ASIC<sup>287</sup>*

The apparent discrepancy here, between 1438 activities in 3 calendar years and 1402 activities in 4 overlapping financial years, is consistent with subsequent comments by ASIC which acknowledge that in the past, reporting of (particularly criminal) enforcement activities has understated the real situation.<sup>288</sup>

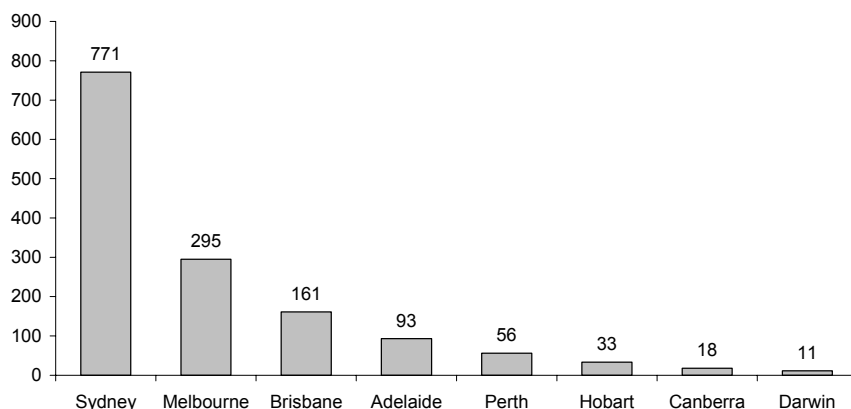
The number of activities originated by each regional office is shown in Table 6 and Figure 3. The Sydney office dominates the study. It is notable that the national enforcement co-ordination unit for ASIC was located in Sydney during this period.

Regional office	Number of enforcement activities
Sydney Regional Office	771
Melbourne Regional Office	295
Brisbane Regional Office	161
Adelaide Regional Office	93
Perth Regional Office	56
Hobart Regional Office	33
Canberra Regional Office	18
Darwin Regional Office	11

*Table 6 - Number of enforcement activities in each regional office*

<sup>288</sup>

ASIC, above n 5, 25.



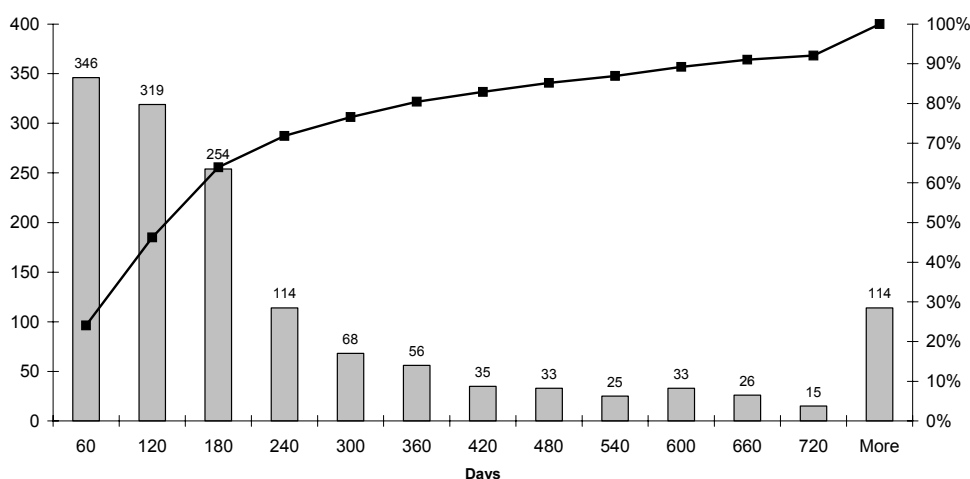
*Figure 3 – Number of enforcement activities in each regional office*

## 2. Activity duration

The majority of enforcement activities are completed within six months of commencement. However, a significant proportion (7.9%) took longer than two years to complete.

<b>Days</b>	<b>Count</b>	<b>Cumulative proportion</b>
<b>Up to 60</b>	346	24.04%
<b>61 to 120</b>	318	46.14%
<b>121 to 180</b>	253	63.72%
<b>181 to 240</b>	114	71.65%
<b>241 to 300</b>	70	76.51%
<b>301 to 360</b>	56	80.40%
<b>361 to 420</b>	36	82.90%
<b>421 to 480</b>	33	85.20%
<b>481 to 540</b>	25	86.94%
<b>541 to 600</b>	33	89.23%
<b>601 to 660</b>	26	91.04%
<b>661 to 720</b>	15	92.08%
<b>More than 720</b>	113	100.00%

*Table 7 - Duration of enforcement activities*



*Figure 4 - Duration of enforcement activities*

It should be noted that ASIC aims to complete 85% of its major corporate investigations within 12 months.<sup>289</sup> Investigations are the typical starting point of ASIC enforcement proceedings. Over the two financial years within the project sample period, ASIC reported that it completed 85% (1997/1998 financial year)<sup>290</sup> and 90% (1998/1999 financial year)<sup>291</sup> of its investigations within 12 months. The proportion of enforcement activities completed, including investigations, in under 12 months for each year in the sample period is shown in Table 8.

<b>Year</b>	<b>% activities completed within 12 months</b>
1997	72.0
1998	75.8
1999	87.7

*Table 8 - Proportion of activities completed within 12 months by year*

The ASIC annual report data and the results from the dataset both show a trend towards an increasing number of enforcement activities completed within 12 months.

<sup>289</sup> ASIC, above n 239, 23 and Senate Legal and Constitutional References Committee, Parliament of Australia, *Investigatory Powers of the Australian Securities Commission* (1995) Recommendation 3.

<sup>290</sup> Ibid.

<sup>291</sup> ASIC, above n 240, 5.

## C. Characteristics of the regulatees in the dataset

The regulatees in the dataset were individuals. No companies were named as parties in the enforcement actions included in the dataset. The dataset included information on the age, gender, company position and industry characteristics of the regulatees. Where relevant, the data is decomposed into civil and penal matters, as discussed in Part IV.G.

### 1. Age of regulatees

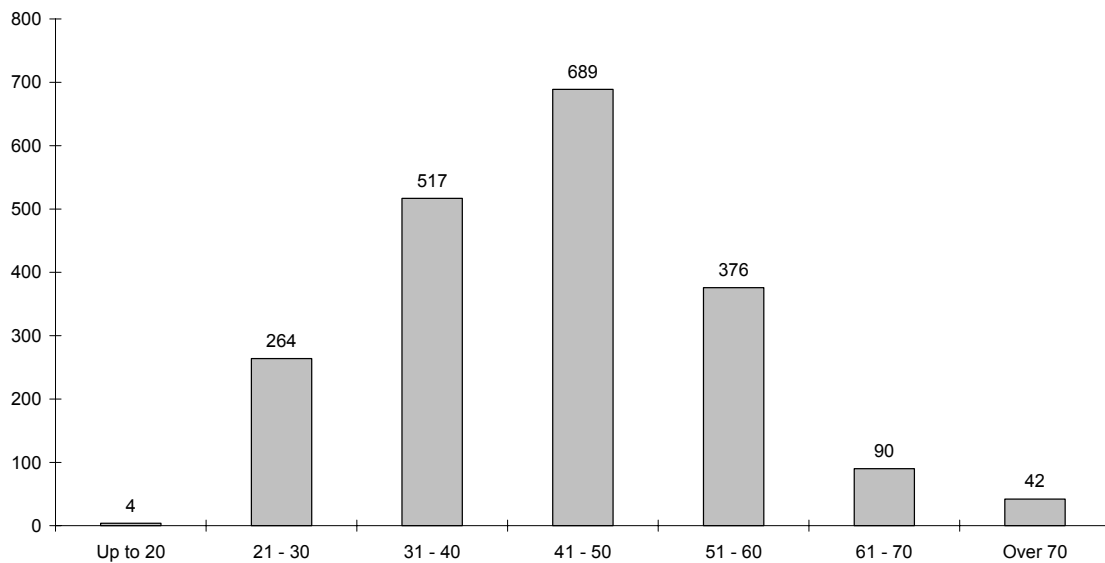
The age of a subject person of an enforcement activity was measured as the difference in years between when an activity commenced and their date of birth. Many activities involved more than one subject person. Furthermore, a single subject person may be involved in more than one activity in the dataset. The distribution of subject person ages is shown in Table 9 and Figure 5. Where the date of birth of a subject person was missing, the ASCOT extract for the company in which the subject person was involved was obtained, and where possible, the date of birth was determined from the information in the extract.<sup>292</sup> After collecting the additional data from the ASCOT extracts, there were 54 instances in which the date of birth of the subject person was not available.

<b>Age Range</b>	<b>Count</b>
Up to 20	4
21 – 30	264
31 – 40	517
41 – 50	689
51 – 60	376
61 – 70	90
Over 70	42
Unknown	54

*Table 9 - Subject person ages*

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<sup>292</sup> ASCOT is ASIC's national corporate database and contains information on companies and other corporate bodies registered under the *Corporations Law*.



*Figure 5 - Distribution of subject person ages*

Table 9 and Figure 5 show that the average age of a regulatee in the dataset is between 41-50 years (689 counts). The next most common cohort is regulatees aged 31-40 (517).

## 2. Gender of regulatees

The ASIC supplied database did not record any information about subject person gender. In the absence of any other source for determining gender, gender was inferred from the subject's given name. In a number of instances, the gender of a subject person was unclear from given name alone. Note that as was the case above, a single activity may have more than one subject person, and a single subject person may be involved in more than one enforcement activity in the dataset. The results for subject gender for civil and penal activities are shown in Table 10 and Figure 6, and Table 11 and Figure 7, respectively.

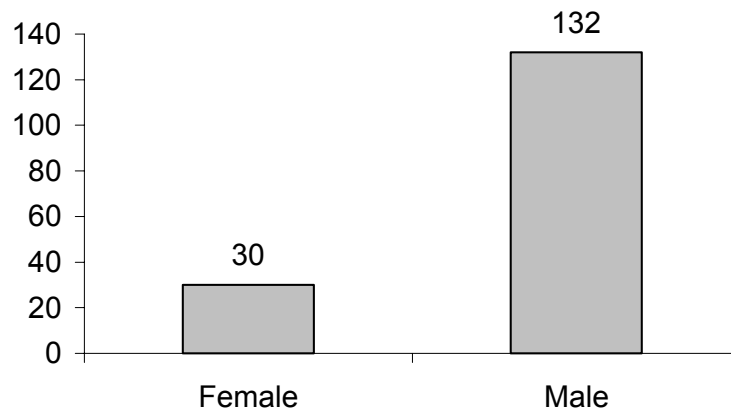
The data clearly shows that male regulatees dominate the dataset, for both civil and penal activities. The ratio of male to female regulatees for civil matters is 4.4:1, and for penal matters is 2.9:1.

Gender	Count
Female	30
Male	132

*Table 10 - Gender statistics, civil matters<sup>293</sup>*

<sup>293</sup>

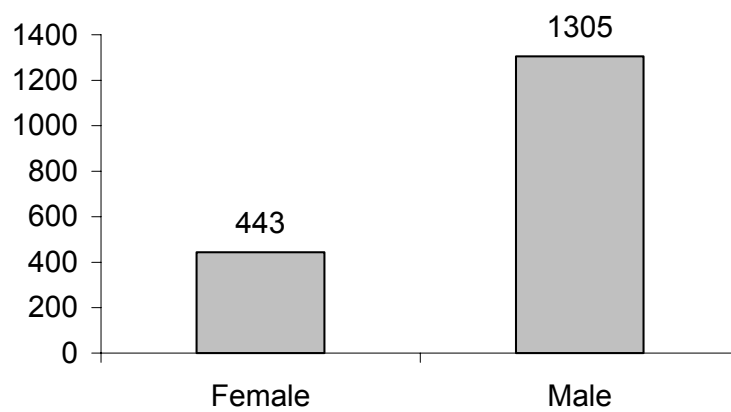
In five instances, the gender could not be determined.



*Figure 6 - Gender statistics, civil matters*

<b>Gender</b>	<b>Count</b>
Female	443
Male	1305

*Table 11 - Gender statistics, penal matters<sup>294</sup>*



*Figure 7 - Gender statistics, penal matters*

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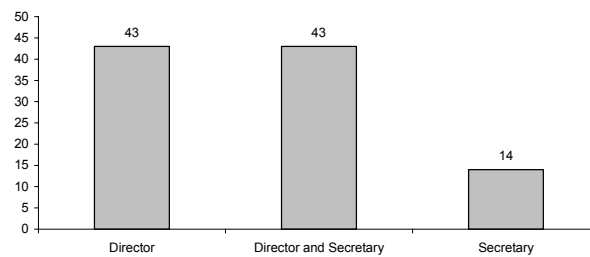
<sup>294</sup> In 117 instances, the gender could not be determined.

### 3. Position of regulatees within company

The corporate position of the individual subject to ASIC enforcement activity in civil and penal matters is shown in Table 12 and Figure 8, and Table 13 and Figure 9, respectively.

<b>Position</b>	<b>Count</b>
Director	43
Director and Secretary	43
Secretary	14

*Table 12 - Subject position statistics, civil matters<sup>295</sup>*



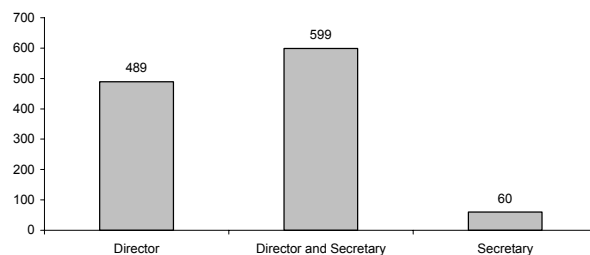
*Figure 8 - Subject position statistics, civil matters*

<b>Position</b>	<b>Count</b>
Director	489
Director and Secretary	599
Secretary	60

*Table 13 - Subject position statistics, penal matters*

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<sup>295</sup> In 67 instances, the subject's position was unknown.



*Figure 9 - Subject position statistics, penal matters*

This data shows that most penal enforcement activities targeted individuals who were both directors and secretaries of companies. The dataset did not name the corporate entity for which these officers work.

#### 4. Types of companies with which regulatees affiliated

The type of companies the subject of civil and penal enforcement activities is shown in Table 14 and Table 15. Note that companies in the dataset are not necessarily parties in an enforcement action, but are named in the ASIC investigation activity.

Type	Count
Australian proprietary company	97
Australian public company	37
Other	11

*Table 14 - Type of subject company, civil matters*

Type	Count
Australian proprietary company	1243
Australian public company	79
Other	6

*Table 15 - Type of subject company, penal matters*

Proprietary companies dominate the dataset, particularly in relation to penal matters. The ratio of proprietary to public companies in civil matters is 2.6:1, and is 15.7:1.

The status of subject companies in civil and penal matters is shown in Table 16 and Table 17.

<b>Type</b>	<b>Status</b>	<b>Count</b>
Australian proprietary company	Deregistered	13
Australian proprietary company	Externally administered	41
Australian proprietary company	Registered	38
Australian proprietary company	Strike-off action in progress	4
Australian public company	Deregistered	1
Australian public company	Externally administered	7
Australian public company	Registered	28
Foreign company (overseas)	Externally administered	1
Non-registered entity	Not registered	10

*Table 16 - Type and status of subject companies, civil matters*

<b>Type</b>	<b>Status</b>	<b>Count</b>
Australian proprietary company	Deregistered	411
Australian proprietary company	Externally administered	617
Australian proprietary company	Registered	125
Australian proprietary company	Strike-off action in progress	94
Australian public company	Deregistered	12
Australian public company	Externally administered	26
Australian public company	Registered	42
Non-registered entity	Not registered	6

*Table 17 - Type and status of subject companies, penal matters*

The Tables above classify company status into four groups: deregistered; externally administered; strike off action in progress; and registered. A deregistered company is a company that has ceased to exist.<sup>296</sup> An externally administered company is a company that is either being wound up, has a receiver and / or manager appointed, is under administration, or under a deed of company arrangement.<sup>297</sup> A company classified as having a strike-off action in progress is one that is in the process of being deregistered. A registered company is a company operating as a going concern and registered under the *Corporations Law*. Comparing these tables, the most common status of an Australian public company in either civil or penal activities was registered

<sup>296</sup> *Corporations Law*, s 9.

<sup>297</sup> *Corporations Law*, s 9.

(28 of 36, or 78% for civil activities, 42 of 80, or 53% for penal). For proprietary companies, companies in the categories of deregistered, externally administered or being struck-off were more common than their registered counterparts. Grouping together these three non-registered categories, the ratio of registered to non-registered companies was 1:1 for civil activities and 1:7 for penal activities.

## 5. Commercial activities of regulatees

The ASIC supplied information recorded the primary activity of subject companies, but did not do so in a systematic manner. The subject companies were reclassified using the Australian and New Zealand Standard Industrial Classification (ANZSIC). The ANZSIC is produced by the Australian Bureau of Statistics,<sup>298</sup> and specifies categories at four levels of increasing specificity: Divisions, Subdivisions, Groups and Classes. Although each company in the dataset was classified by class, the results are presented aggregating the companies to the subdivision level for clarity.

A limitation in the ASIC supplied data was that where a subject company was a trustee company, no further distinction was made as to the function of the underlying business of the trust. If a business was conducted through a trust with a trustee company, the underlying activity of the company was subsequently not captured in the ASIC data. These trustee companies were categorised under subdivision 075 – *Services to Finance and Insurance*. The activities of subject companies for civil activities are shown in Table 18 and Figure 10.

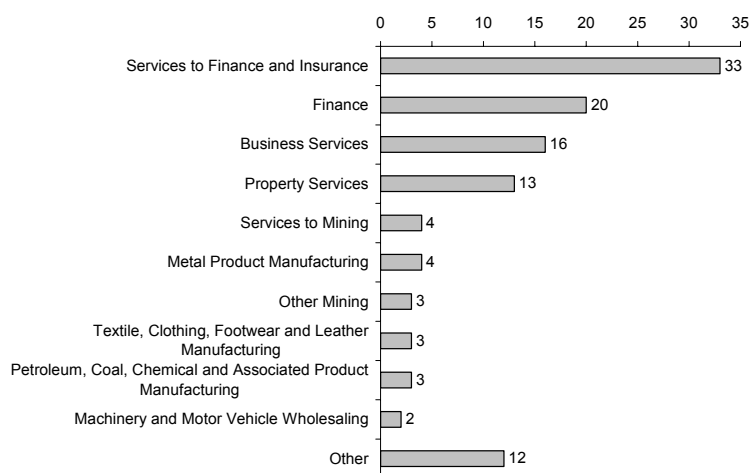
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<sup>298</sup>

Australian Bureau of Statistics, *1292.0 Australian and New Zealand Standard Industrial Classification (ANZSIC)* (1<sup>st</sup> ed, 1993).

Subdivision	Subdivision description	Count
075	Services to Finance and Insurance	33
073	Finance	20
078	Business Services	16
077	Property Services	13
015	Services to Mining	4
027	Metal Product Manufacturing	4
014	Other Mining	3
022	Textile, Clothing, Footwear and Leather Manufacturing	3
025	Petroleum, Coal, Chemical and Associated Product Manufacturing	3
046	Machinery and Motor Vehicle Wholesaling	2
	Other	12
	Not Applicable / Unknown	31

*Table 18 - Activities of subject companies, civil matters*



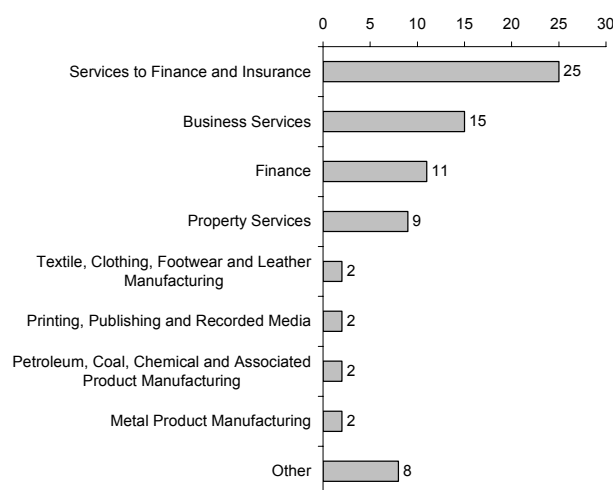
*Figure 10 - Activities of subject companies, civil matters*

The dominant activity of companies involved in civil enforcement activities was *075 - Services to Finance and Insurance*. Note there are 31 companies for whom no activity information was provided.

The activities of proprietary and public companies in civil matters are shown in Table 19 and Figure 11, and Table 20 and Figure 12, respectively. The data shows that for both proprietary and public companies *Services to Finance and Insurance*, and like subdivisions, is prominent in the dataset.

<b>Subdivision</b>	<b>Subdivision description</b>	<b>Count</b>
075	Services to Finance and Insurance	25
078	Business Services	15
073	Finance	11
077	Property Services	9
022	Textile, Clothing, Footwear and Leather Manufacturing	2
024	Printing, Publishing and Recorded Media	2
025	Petroleum, Coal, Chemical and Associated Product Manufacturing	2
027	Metal Product Manufacturing	2
	Other	8
	Not Applicable / Unknown	20

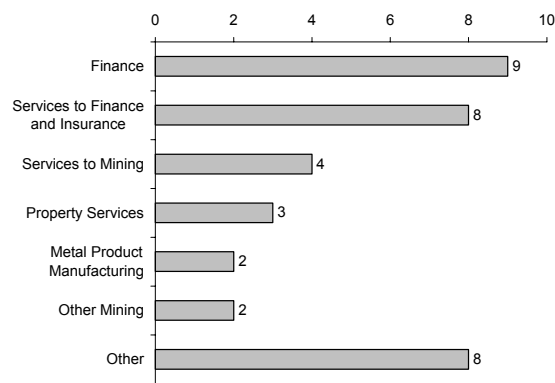
*Table 19 - Activities of proprietary subject companies, civil matters*



*Figure 11 - Activities of proprietary subject companies, civil matters*

<b>Subdivision</b>	<b>Subdivision description</b>	<b>Count</b>
73	Finance	9
75	Services to Finance and Insurance	8
15	Services to Mining	4
77	Property Services	3
27	Metal Product Manufacturing	2
14	Other Mining	2
	Other	8
	Not Applicable / Unknown	1

*Table 20 - Activities of public subject companies, civil matters*

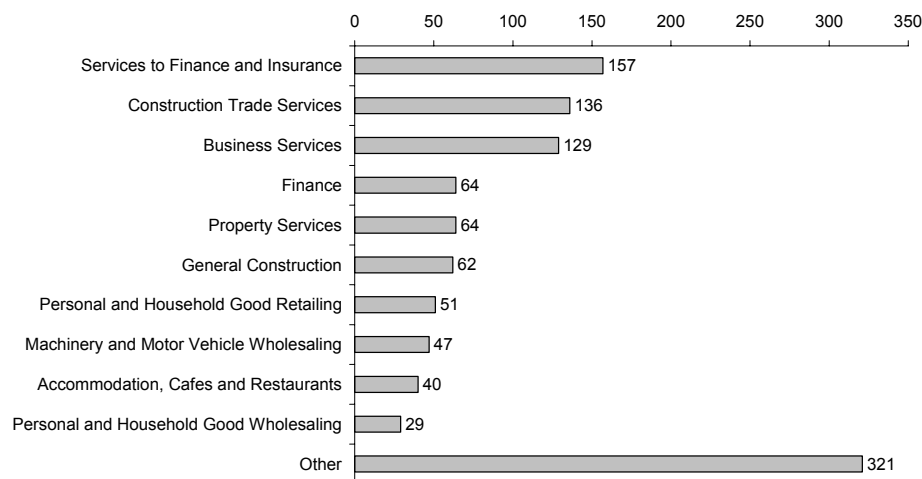


*Figure 12 - Activities of public subject companies, civil matters*

The activities of subject companies in penal matters is shown in Table 21 and Figure 13. Note again the predominance of *Services to Finance and Insurance*.

<b>Subdivision</b>	<b>Subdivision description</b>	<b>Count</b>
075	Services to Finance and Insurance	157
042	Construction Trade Services	136
078	Business Services	129
077	Property Services	64
073	Finance	64
041	General Construction	62
052	Personal and Household Good Retailing	51
046	Machinery and Motor Vehicle Wholesaling	47
057	Accommodation, Cafes and Restaurants	40
047	Personal and Household Good Wholesaling	29
	Other	321
	Not Applicable / Unknown	224

**Table 21 - Activities of subject companies, penal matters**

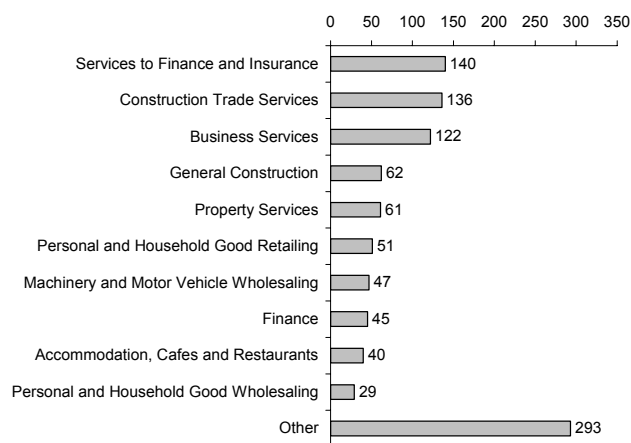


**Figure 13 - Activities of subject companies, penal matters**

The activities of proprietary and public companies in penal matters are shown in Table 22 and Figure 14, and Table 23 and Figure 15, respectively.

<b>Subdivision</b>	<b>Subdivision description</b>	<b>Count</b>
075	Services to Finance and Insurance	140
042	Construction Trade Services	136
078	Business Services	122
041	General Construction	62
077	Property Services	61
052	Personal and Household Good Retailing	51
046	Machinery and Motor Vehicle Wholesaling	47
073	Finance	45
057	Accommodation, Cafes and Restaurants	40
047	Personal and Household Good Wholesaling	29
	Other	293
	Not Applicable / Unknown	213

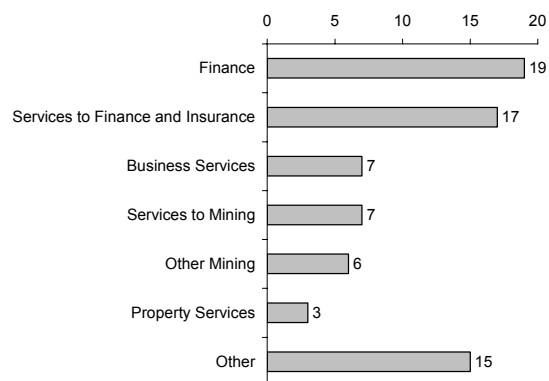
*Table 22 - Activities of proprietary subject companies, penal matters*



*Figure 14 - Activities of proprietary subject companies, penal matters*

<b>Subdivision</b>	<b>Subdivision description</b>	<b>Count</b>
073	Finance	19
075	Services to Finance and Insurance	17
078	Business Services	7
015	Services to Mining	7
014	Other Mining	6
077	Property Services	3
	Other	15
	Not Applicable / Unknown	5

*Table 23 - Activities of public subject companies, penal matters*



*Figure 15 - Activities of public subject companies, penal matters*

The data reveals no significant differences in the dominant activities of public and proprietary companies involved in penal enforcement matters.

## 6. Reflections on the nature of the regulatory interactions between regulatees and ASIC

- *What are the notable objective characteristics of the regulatees in the data set?*
- *Which of these characteristics is consistent with the possible existence of structural biases in the dataset with respect to the size and status of regulatees?*

As discussed in Part II, sociological studies have repeatedly highlighted the perceived and actual characteristics of, and relationships between, regulators and regulatees as crucial factors in shaping regulatory enforcement practices. Aside from perception-based issues, questions of relational distance and regulatee size, regulatee industry and current status are recognised in the research literature as noteworthy factors. The dataset provides information on the following characteristics: subject person age, gender and company position; and company type, status and commercial activity.

Data on the distribution of age, gender and subject position in the dataset is unsurprising. The predominance of middle-aged men in senior corporate roles is a well-acknowledged statistical reality.<sup>299</sup> It is noteworthy that the ASIC data cites individuals, rather than companies, as the subjects of enforcement activities. For current purposes, however, attention is focused on the objective characteristics of the regulated companies for which these subject persons' work. Three characteristics of these companies warrant analysis. First, the overwhelming number of proprietary companies in the dataset in comparison to public companies. Secondly, the relative proportions of subject company status (de/registered, externally administered, not registered or in the process of being struck off) by type (public or proprietary). Thirdly, the high incidence of financial services as the principal activity of the companies in the dataset.

The data on company type lends itself to observations about regulatee size. The data shows that ASIC took more actions in relation to proprietary than public companies (Table 14 and Table 15). As public companies are generally larger enterprises than proprietary ones, this may suggest a possible structural bias against proprietary companies. However, these aggregate figures need to take into account the relative pool

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<sup>299</sup>

Consider Korn/Ferry International and Egan Associates' study of Australian and New Zealand listed companies and governmental organizations, *Boards of Directors Study in Australia and New Zealand 2002*, 9. Available [[http://www.kornferry.com/Sources/PDF/PUB\\_030.pdf](http://www.kornferry.com/Sources/PDF/PUB_030.pdf)] Accessed 12 February 2003 (Copy on file with author). Note that the median age for that total study (58 years) was higher than here (see Table 9 and Figure 5), though female board participation on their data was lower (9%) than the subject person gender data in this research (16% civil subjects were female, and 25% female subjects for penal activities). This discrepancy is most likely explicable in terms of higher female participation rates in proprietary companies.

of companies from which they arise. Consider, as an incomplete but demonstrative example, that at 30 June 1999 ASIC oversaw a total of 1,149,297 companies registered in Australia,<sup>300</sup> while the Australian Stock Exchange (“ASX”) recorded a mere 1,217 domestic public companies with quoted equities as at 31 December 1999.<sup>301</sup> Proprietary companies make up a significant bulk of the companies under ASIC’s purview. To develop further any analysis of structural bias with regard to size, a statistical tool for comparing company size with the extent of a company’s corporate law activities (and thus their potential exposure to breaching that law) would be required. Such cross-referencing is further problematised by the fact that these total numbers can be expected to have fluctuated over the temporal period of this study.

The public / proprietary company type comparison is illuminating in terms of the company status data. Comparing Table 16 and Table 17, the most common status of an Australian public company named in the civil or penal activities was “registered” (28 of 36, or 78%, for civil activities, 42 of 80, or 53%, for penal). The “registered” status indicates that those companies remained a ‘going concern’ (in contrast to their deregistered or externally administered counterparts). In contrast, for proprietary companies in civil and particularly for penal activity data, deregistered, externally administered and companies being struck off were more often the subject of ASIC enforcement activity than registered companies. For proprietary companies the subject of enforcement activity, this registered / other status ratio was 1:1 for civil activities, and a staggering 1:7 for penal activities. The overwhelming bulk of penal activities against proprietary companies (and enforcement activities in total) were brought against the already gone (deregistered, 411 of 1247, 33%, and externally administered, 617 of 1247, 49%) or the going (strike-off action in progress, 94 of 1247, 8%).

In testing the subject company commercial activities data for possible signs of structural bias, analysis is complicated by the limitation noted above regarding trustee companies, and their inclusion in the *075 - Services to Finance and Insurance* subdivision. This subdivision (with 33 counts), along with *073 - Finance* (20) and *078 - Business Services* (16), leads the combined company type data for civil activities. For penal activities data subdivided by company type, *042 - Construction Trade Services* (136) closely follows the *075 - Services to Finance and Insurance* (140) subdivision amongst proprietary companies. By contrast, for public companies *073 - Finance* (19) then *075 - Services to Finance and Insurance* (17) predominate. As corporate law issues are directly related to the underlying, day-to-day business activities of finance and related services companies, their greater exposure to compliance investigation is perhaps unsurprising. Without additional data on the underlying business activities of these regulatees, it is however inappropriate to speculate further.

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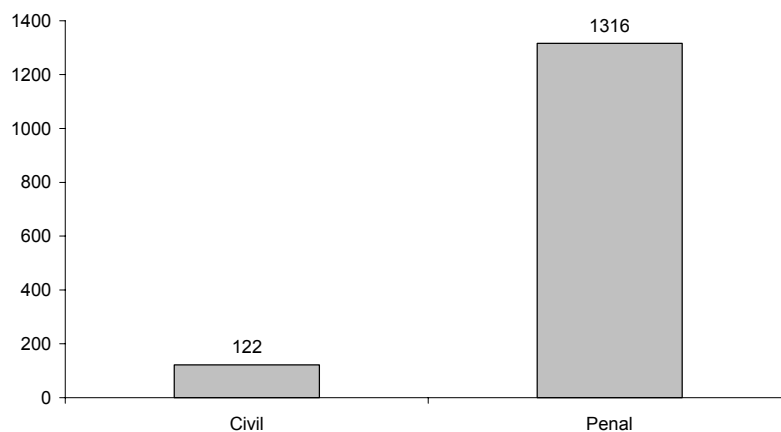
<sup>300</sup> ASIC, *Annual Report 1998-1999*, above n 209, 43.

<sup>301</sup> Australian Stock Exchange, *10/11 Calendar Year Fact Sheet 1992-2002*. Copy on file with author.

## D. The enforcement activities in the dataset

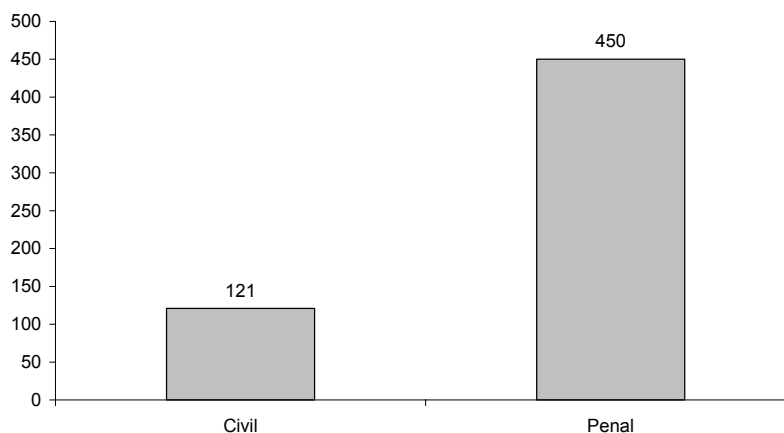
### 1. Types of enforcement activity undertaken

Using the recategorisation detailed above in Part IV.G., the dataset can be decomposed into 122 civil and 1316 penal activities (Figure 16).



*Figure 16 - Number of civil and penal enforcement matters*

The number of penal enforcement activities far outweighs the number of civil enforcement activities undertaken by ASIC. However, a large number of the penal enforcement activities are external administrator assistance actions as mentioned above in V.E. Excluding these from the sample results in 121 civil activities and 450 penal activities (Figure 17).



*Figure 17 - Number of civil and penal enforcement matters, external administrator assistance actions removed*

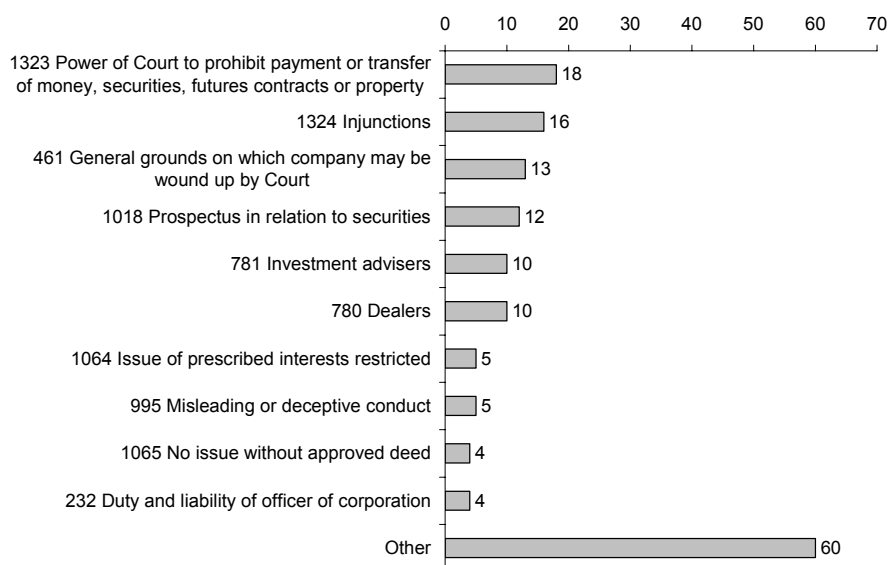
## 2. Legislation applied in dataset

As detailed in Part V.A. and Part V.D.3. above, the project is limited to using the legislation sections recorded by ASIC as relevant to each enforcement activity. Using the data supplied, the most commonly specified legislation and section was determined. Note that a single activity can have more than one relevant legislation section recorded. If an activity has more than one section recorded, each section is counted individually as one instance. Also, legislation subsections are aggregated and counted under the parent section, for reasons specified in Part V.D.1.

The most commonly specified sections in civil and penal enforcement activities are all from the *Corporations Law*, and are shown in Table 24 and Figure 18, and Table 25 and Figure 19, respectively.

Section	Title	Count
1323	Power of Court to prohibit payment or transfer of money, securities, futures contracts or property	18
461	General grounds on which company may be wound up by Court	13
1324	Injunctions	12
1018	Prospectus in relation to securities	12
781	Investment advisers	10
780	Dealers	10
1064	Issue of prescribed interests restricted	5
995	Misleading or deceptive conduct	5
1065	No issue without approved deed	4
232	Duty and liability of officer of corporation	4
Other		60

*Table 24 - Most commonly specified legislation sections, civil matters*



**Figure 18 - Most commonly specified legislation sections, civil matters**

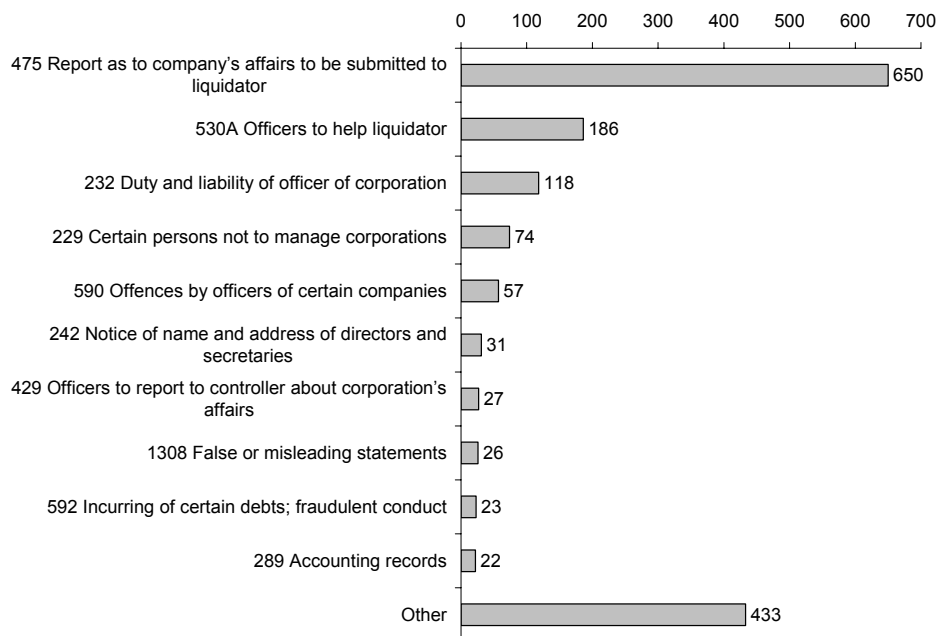
The data shows that the most commonly specified legislation sections for civil enforcement activities are the "real-time" remedies under the *Corporations Law*.<sup>302</sup> ASIC makes use of these remedies in a pre-emptive fashion, seeking to prevent or reduce damage to investors and consumers.<sup>303</sup>

<sup>302</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), 585.

<sup>303</sup> ASIC, above n 5, 25. Gilligan, Bird and Ramsay, *Regulating Directors' Duties*, above n 3, 26.

Section	Title	Count
475	Report as to company's affairs to be submitted to liquidator	650
530A	Officers to help liquidator	186
232	Duty and liability of officer of corporation	118
229	Certain persons not to manage corporations	74
590	Offences by officers of certain companies	57
242	Notice of name and address of directors and secretaries	31
429	Officers to report to controller about corporation's affairs	27
1308	False or misleading statements	27
592	Incurring of certain debts; fraudulent conduct	23
289	Accounting records	22
Other		437

*Table 25 - Most commonly specified legislation sections, penal matters*

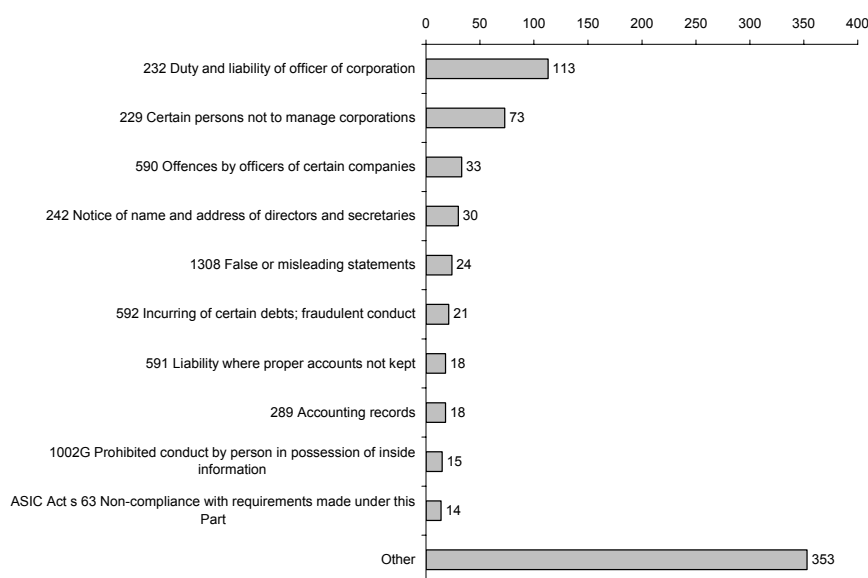


*Figure 19 - Most commonly specified legislation sections, penal matters*

It can be seen that activities to assist external administrators (involving ss 475, 530A and 429) dominate the most commonly specified legislation sections in penal matters. Excluding activities to assist external administrators yields the results in Table 26 and Figure 20. In this data, directors' duties, fraudulent conduct and management disqualification offences dominate.

Section	Title	Count
232	Duty and liability of officer of corporation	113
229	Certain persons not to manage corporations	73
590	Offences by officers of certain companies	33
242	Notice of name and address of directors and secretaries	30
1308	False or misleading statements	25
592	Incurring of certain debts; fraudulent conduct	21
289	Accounting records	18
591	Liability where proper accounts not kept	18
1002G	Prohibited conduct by person in possession of inside information	15
(ASIC Act) 63	Non-compliance with requirements made under this Part	14

**Table 26 - Most commonly specified legislation sections, penal matters, external administrator assistance actions removed**



**Figure 20 - Most commonly specified legislation sections, penal matters, external administrator assistance actions removed**

The most commonly applied sections in civil activities for proprietary and public companies is shown in Table 27 and Table 28.

<b>Proprietary companies</b>		
<b>Section</b>	<b>Title</b>	<b>Count</b>
1323	Power of Court to prohibit payment or transfer of money, securities, futures contracts or property	16
461	General grounds on which company may be wound up by Court	15
1324	Injunctions	13
1018	Prospectus in relation to securities	12
781	Investment advisers	9
995	Misleading or deceptive conduct	7
780	Dealers	7
1064	Issue of prescribed interests restricted	6
1065	No issue without approved deed	6
232	Duty and liability of officer of corporation	4

*Table 27 - Most commonly specified legislation sections, civil matters, proprietary companies*

<b>Public companies</b>		
<b>Section</b>	<b>Title</b>	<b>Count</b>
1323	Power of Court to prohibit payment or transfer of money, securities, futures contracts or property	5
1324	Injunctions	4
722	Compliance with notices	3
<i>ASIC Act s 50</i>	ASIC may cause civil proceeding to be begun	3
289	Accounting records	3
258	Minutes of proceedings	2
217	Registered office of company	2
222	Restrictions on appointment or advertisement of director	2
232	Duty and liability of officer of corporation	2
236	General duty to make disclosure	2

***Table 28 - Most commonly specified legislation sections, civil matters, public companies***

A comparison of these tables reveals close similarities in the main remedies sought against proprietary and public companies in civil enforcement activities. One notable difference in relation to proprietary companies is the use of winding-up orders under s 461. Table 28 reveals that ASIC made use of s 50 of the *ASIC Act* three times in relation to public companies.

The most commonly applied sections in penal activities for proprietary and public companies is shown in Table 29 and Table 30.

<b>Proprietary companies</b>		
<b>Section</b>	<b>Title</b>	<b>Count</b>
639	Report as to company's affairs to be submitted to liquidator	639
186	Officers to help liquidator	186
103	Duty and liability of officer of corporation	103
78	Certain persons not to manage corporations	78
58	Offences by officers of certain companies	58
29	Notice of name and address of directors and secretaries	29
27	Officers to report to controller about corporation's affairs	27
23	False or misleading statements	23
22	Incurring of certain debts; fraudulent conduct	22
21	Accounting records	21

*Table 29 - Most commonly specified legislation sections, penal matters, proprietary companies*

<b>Public companies</b>		
<b>Section</b>	<b>Title</b>	<b>Count</b>
232	Duty and liability of officer of corporation	46
998	False trading and market rigging transactions	15
1002G	Prohibited conduct by person in possession of inside information	12
1309	False information etc.	9
1308	False or misleading statements	8
596	Frauds by officers	4
Crimes Act 1900 (NSW) s 178BA	Obtaining money etc by deception	4
Crimes Act 1900 (NSW) s 176	Director or officer publishing fraudulent statements	4
590	Offences by officers of certain companies	4
205	Company financing dealings in its shares etc.	3

*Table 30 - Most commonly specified legislation sections, penal matters, public companies*

A comparison of these tables reveals that external administrator assistance activities are predominantly brought against proprietary companies. Penal enforcement activities involving proprietary companies, external administrator actions excluded, show a focus by ASIC on directors' duties, fraudulent and misleading conduct, and some minor disclosure offences. For public companies, ASIC's focus appears to have been on directors' duties, market offences (including insider trading), and fraudulent and misleading conduct. It is notable for public companies that some offences are brought under state criminal legislation.

### 3. Reflections on the relationship between enforcement activity and ASIC regulatory objectives

- *What are the laws mostly commonly enforced in the dataset?*
- *What are the primary activities underlying those laws?*
- *What policy goals are served by those laws?*
- *Are the laws being enforced of a permissive/enabling, presumptive/default or mandatory nature?*
- *Is breach of the laws being enforced widely regarded as morally blameworthy?*
- *What is the relationship between ASIC enforcement activities in the data set and its regulatory objectives?*

One goal of the empirical study is to assess whether, in those cases in which ASIC takes court-based enforcement action, there is a preference for targeting regulatee behaviour or activity that is widely regarded as undesirable. A finding of this nature would be consistent with trends identified in sociological studies. Undertaking an assessment of this kind is made difficult in relation to civil enforcement activities because the legislation specified for those activities is remedially focused. It is not always clear from the available data what was the underlying law contravened that gave rise to the remedial action taken. For this reason, the assessment is only undertaken by way of a case study of the most common penal activities in the dataset.

The analysis draws on Table 25 (Figure 19) and Table 26 (Figure 20) discussed previously. The combined effect of the two tables is to provide a breakdown of the 13 most commonly investigated penal provisions of the *Corporations Law* and *ASIC Act* in the dataset. For current discussion purposes, they are classified into three groups: provisions concerning external administration,<sup>304</sup> disclosure provisions<sup>305</sup> and misconduct provisions.<sup>306</sup>

The external administration provisions dominate the case study. External administration refers to the administration of companies by a person or persons appointed to take over control from the directors.<sup>307</sup> The broad function of external administration in insolvency situations is to regulate the rights of creditors in any

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<sup>304</sup> *Corporations Law* ss 429; 475; and 530A.

<sup>305</sup> *Corporations Law* ss 242; 289; 590; 591; and 1381.

<sup>306</sup> *Corporations Law* ss 229; 232; 592 and 1002G; and *ASIC Act* 1989 (Cth) s 63.

<sup>307</sup> Ford, Austin and Ramsay, above n 123, 1192.

possible rehabilitation of the company or failing rehabilitation, the distribution of company property.<sup>308</sup> The external administration provisions in the dataset relate to the duty of officers of insolvent companies to provide a report as to affairs and to assist the liquidator or other comptroller of the company who takes over from the directors.<sup>309</sup> The requirements of information and assistance ensure that urgently needed information is provided to the external administrator so as to avoid drawn out external administrations.<sup>310</sup> Efficient external administrations protect the interests of creditors and may act to stem the follow of losses resulting from insolvency.

The common feature of the disclosure provisions is the requirement that information be disclosed to ASIC or the public. Section 242 requires details of directors' and secretaries' names and addresses to be lodged with ASIC.<sup>311</sup> Section 289 requires a company to give ASIC notice when its financial records are kept outside Australia. Section 591 requires directors to take reasonable steps to ensure a company complied with s 289.<sup>312</sup> Section 590 makes it an offence for an officer of a company to fail to make disclosure to the company of all transactions affecting company property or to make fraudulent statements relating to the affairs of the company. Section 1308 prohibits a company making false or misleading statements about its financial capital. Disclosure is increasingly acknowledged as a key regulation priority of ASIC.<sup>313</sup> It is one of the mechanisms by which ASIC achieves its aims of improving the performance of the financial system and promoting confident participation in that system by investors and consumers.<sup>314</sup>

The third group of provisions, the misconduct provisions, prohibit specific types of misconduct. The group comprises directors' duties,<sup>315</sup> insolvent trading,<sup>316</sup> conduct with intent to defraud creditors<sup>317</sup>, insider trading,<sup>318</sup> managing a corporation despite being disqualified from that role,<sup>319</sup> and misconduct in connection with an ASIC investigation of alleged misconduct.<sup>320</sup> The broad function of directors' duties is to avoid shirking of

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<sup>308</sup> Ibid 1193.

<sup>309</sup> *Corporations Law* ss 429, 475 and 530A.

<sup>310</sup> Ford, Austin and Ramsay, above n 123, 1204.

<sup>311</sup> Section 242 is now s 205B in the *Corporations Act*.

<sup>312</sup> Section 591 has been repealed and replaced by s 344 of the *Corporations Act*.

<sup>313</sup> Jillian Segal, "The Future of Corporate Regulation in Australia" Address to the 18th Annual Company Secretaries' Conference, Surfers Paradise, 19 November 2001.

<sup>314</sup> *ASIC Act 2001* (Cth) s 1(2)(a) and (b).

<sup>315</sup> *Corporations Law* s 232.

<sup>316</sup> *Corporations Law* s 592(1).

<sup>317</sup> *Corporations Law* s 592(3).

<sup>318</sup> *Corporations Law* s1002G, now s 1043A of the *Corporations Act*.

<sup>319</sup> *Corporations Law* s 229, now s 206A(1) of the *Corporations Act*.

<sup>320</sup> *ASIC Act 2001* (Cth) s 63.

responsibility and to ensure loyalty by directors to the company and its shareholders.<sup>321</sup> Laws regarding insolvent trading and conduct with intent to defraud creditors protect creditors against excessive risk-taking by corporations and their shareholders.<sup>322</sup> Insider trading laws prohibit anyone from trading who is in possession of inside information and knows its significance. The rationales for this law include the protection of shareholders and the securities markets.<sup>323</sup> Prohibitions against managing a corporation despite being disqualified from that role appear to protect the interests of shareholders and creditors. Misconduct in connection with an ASIC investigation assists ASIC to more efficiently enforce and give effect to the *Corporations Law*.<sup>324</sup>

It is possible to further refine the classification of the laws in the dataset into economic and social regulation. The dichotomy, discussed earlier in this paper, is between laws that seeks to stabilise and promote confidence in market relations, and regulation that addresses activities causing harm to the public or the environment.<sup>325</sup> With the exception of insider trading, the external administration and misconduct provisions included in the dataset are examples of social regulation. The sections of the public being protected from harm are the shareholders and creditors. The disclosure provisions are examples of economic regulation. Insider trading appears to contain elements of both forms of regulation.<sup>326</sup> Analysed in this paradigm, ASIC's penal enforcement activities in the dataset focus more on social than economic regulation.

An alternative explanation is that ASIC's penal enforcement focus is predominantly on laws with an obvious ethical foundation, that address underlying conduct that is widely condemned because it exploits and defrauds shareholders and creditors. Directors' duties, insolvent trading, management disqualification and the external administration laws in the dataset are obvious examples of this phenomenon. Public attention has focused on these laws in reaction to the abuses of power by corporate executives in the 1980s,<sup>327</sup> heightened by more recent investigations of corporate collapses and turbulence in the management of major companies such as Coles Myer Ltd.<sup>328</sup> Sociological studies suggest that ASIC is not alone in its approach to enforcement of these laws. Keith Hawkins contends that where the breach of laws is regarded by the community as morally blameworthy, a regulator is generally more willing to adopt a formal, court-based enforcement strategy than to pursue a co-operative, negotiated compliance approach.<sup>329</sup>

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<sup>321</sup> Ford, Austin and Ramsay, above n 123, 308, Ian Ramsay, *Corporate Governance and the Duties of Company Directors* (1997) 10.

<sup>322</sup> Ford, Austin and Ramsay, above n 123, 860-861.

<sup>323</sup> *Ibid*, para 9.620.

<sup>324</sup> *ASIC Act* 2001 (Cth) s 63 and s 1(2)(g).

<sup>325</sup> See above Part II.D.1(2).

<sup>326</sup> Ford, Austin and Ramsay, above n 123, para 9.620.

<sup>327</sup> Frederick Hilmer, *Strictly Boardroom* (1993), Henry Bosch, *Corporate Practices and Conduct* (1995).

<sup>328</sup> Ford, Austin and Ramsay, above n 123, 296.

<sup>329</sup> Hawkins, above n 8, 205.

An interesting feature of all of the laws in the data set of penal enforcement activities is that they are mandatory in nature.<sup>330</sup> The laws can be divided into groups of mandatory laws. The first group is the laws requiring the corporation or its officers to carry out specific activities.<sup>331</sup> Failure to comply constitutes a contravention of the provision. The second group prohibits specific conduct and provides that it is an offence to commit that conduct.<sup>332</sup> There is a spread of both forms of mandatory laws in the external administration, disclosure and misconduct laws included in this case study. Sociological studies suggest that ASIC's preference for court-based enforcement of mandatory laws can be viewed as part of wider trend in regulation practices.<sup>333</sup> The coercive nature of mandatory laws is a factor that encourages regulators to pursue formal enforcement where they are breached. Many of the provisions in the current study were amended in 2001 to make them strict liability provisions.<sup>334</sup> The introduction of strict liability may have been intended to facilitate enforcement actions. However sociological studies suggest that such a move may have the opposite effect. Strict liability laws, which seek to remove issues of moral blameworthiness, may ironically lead to regulators being less willing to enforce them.<sup>335</sup>

The final observation in this part concerns the relationship between the enforcement activities in the dataset and ASIC's regulatory objectives. ASIC's enforcement objectives were discussed earlier.<sup>336</sup> In brief, ASIC favours a "campaign or targeted enforcement" approach coupled with the systematic use of a range of enforcement activities.<sup>337</sup> The "campaign" style aspects of its enforcement strategy are evident in the predominance of actions based on external administration and insolvency laws in the dataset.<sup>338</sup> The *ASIC 1998/99 Annual Report* records ASIC's enforcement campaign in relation to, inter alia, external administration.<sup>339</sup> The significant effect of the campaign strategy/streamlining of processes regarding external administration on the dataset is a timely reminder of the impact of the regulator's organisational structure on enforcement outcomes.<sup>340</sup>

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<sup>330</sup> See Part II. D.1

<sup>331</sup> *Corporations Law* ss 232, 242, 289, 429, 475, 530A, 590 and 591.

<sup>332</sup> *Corporations Law* ss 229, 592, 1002G, and 1308.

<sup>333</sup> Hawkins, above n 8, 205.

<sup>334</sup> For example, *Corporations Act* s 205B(7) (formerly s 242 of the *Corporations Law*); s 206A(1A) (formerly s 229 of the *Corporations Law*); s 289(2A); s 475(10); s 530(6A); s 590(2); s 592(1A); and s 1308(1A).

<sup>335</sup> Hawkins, above n 8, 202-203.

<sup>336</sup> See Part IV.B.

<sup>337</sup> Jillian Segal, "ASIC Issues: An Update on the last 12 Months", (Conference paper to the Insurance Council of Australia, 10 August 2000), 6.

<sup>338</sup> See Part VI.D.2.

<sup>339</sup> ASIC, *ASIC 1998/99 Annual Report* (1999), 35.

<sup>340</sup> See Part II.D.4.

## E. The enforcement outcomes in the dataset

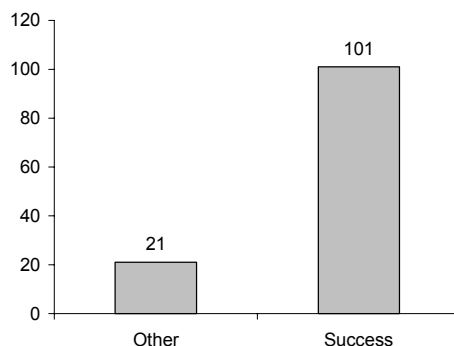
Statistics on the outcomes of the court-based enforcement activities in the dataset are presented below. Note that at a broad level, activities are categorised as either successful, or “other”. The “other” category of outcomes include situations where ASIC failed in its enforcement activity, and also situations where the enforcement activity was aborted during its conduct.<sup>341</sup>

### 1. Outcomes of civil enforcement actions

A high proportion (82.8%) of ASIC’s civil activities result in a successful outcome.

Outcome	Count
Success	101
Other	21

*Table 31 - Outcomes of civil matters*



*Figure 21 - Outcomes of civil matters*

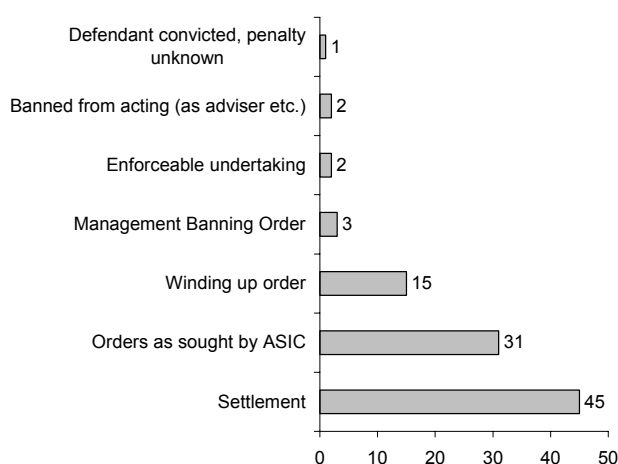
<sup>341</sup>

Unfortunately, the data supplied by ASIC did not contain information on reason behind why an activity was aborted. Activities were merely marked as “NFA”, standing for No Further Action taken.

The success and “other” outcomes can be decomposed into more specific outcomes in each case.

<b>Outcome</b>	<b>Count</b>
Settlement	45
Orders as sought by ASIC	31
Winding up order	15
Management banning order	3
Enforceable undertaking	2
Banned from acting (as adviser etc.)	2
Defendant convicted, penalty unknown	1

*Table 32 - Decomposition of successful civil activities<sup>342</sup>*



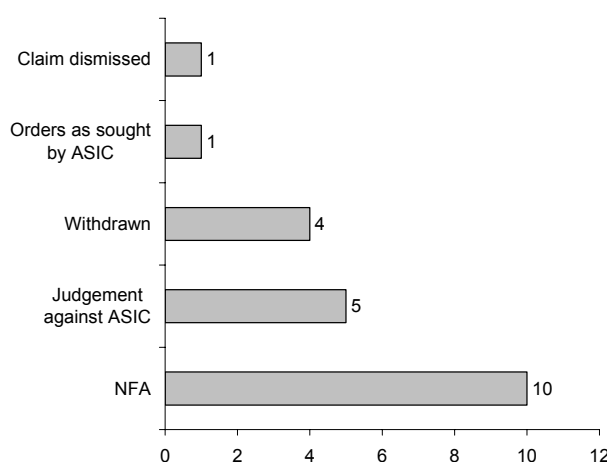
*Figure 22 - Decomposition of successful civil matters*

<sup>342</sup>

For two successful civil activities, the outcome could not be determined. The activities are recorded as successful by ASIC.

<b>Outcome</b>	<b>Count</b>
No further action taken (NFA)	10
Judgment against ASIC	5
Withdrawn	4
Orders as sought by ASIC	1
Claim dismissed	1

*Table 33 - Decomposition of "other" civil matters*



*Figure 23 – Decomposition of “other” civil matters*

The data shows that the dominant outcome for successful civil activities was settlement. It is interesting to compare the number of settlements (45) with the small number of enforceable undertakings (2). An enforceable undertaking is an agreement between a regulatee and ASIC which may involve a settlement of an enforcement activity.<sup>343</sup> The advantage of an enforceable undertaking over a settlement is that, as its name suggests, the undertaking can be enforced in court if breached. The low incidence of enforceable undertakings in the dataset reflects the introduction of enforceable undertakings during the sample period (on 1 July 1998). It can be speculated that this relative proportion may change in the future.

The dominant outcome in the "other outcomes" data category for civil enforcement activities was "no further action taken".

<sup>343</sup>

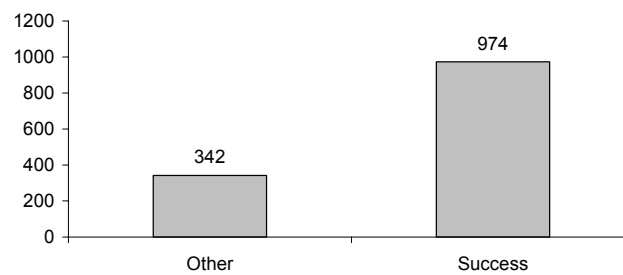
*ASIC Act 2001 (Cth), s 93AA.*

## 2. Outcomes of penal enforcement actions

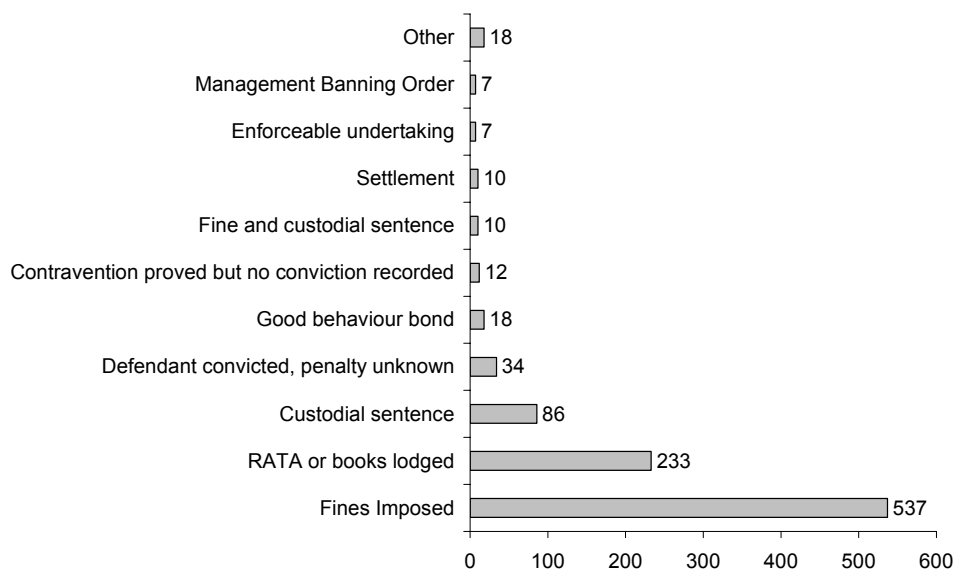
Overall, 74.0% of the penal activities in the dataset resulted in a successful outcome.

<b>Outcome</b>	<b>Count</b>
Success	974
Other	342

*Table 34 - Outcomes of penal matters*



*Figure 24 - Outcomes of penal matters*



*Figure 25 - Decomposition of successful penal activities*

<b>Outcome</b>	<b>Count</b>
Fines Imposed	537
RATA or books lodged	233
Custodial sentence	86
Defendant convicted, penalty unknown	34
Good behaviour bond	18
Contravention proved but no conviction recorded	12
Fine and custodial sentence	10
Settlement	10
Enforceable undertaking	7
Management banning order	7
Other	18

*Table 35 - Decomposition of successful penal activities<sup>344</sup>*

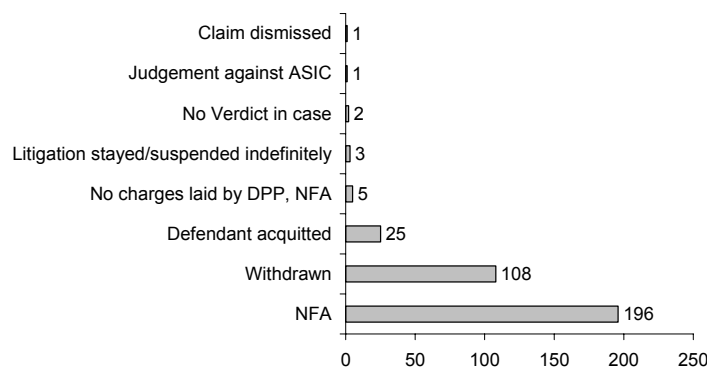
It is noteworthy that the most frequent penal activity outcome in this dataset was a fine (537). This correlates with the large number external administrator assistance actions in the dataset.

<sup>344</sup>

For two successful penal activities, the outcome could not be determined. The activities are recorded as successful by ASIC.

<b>Outcome</b>	<b>Count</b>
NFA	196
Withdrawn	108
Defendant acquitted	25
No charges laid by DPP, NFA	5
Litigation stayed/suspended indefinitely	3
No verdict in case	2
Judgment against ASIC	1
Claim dismissed	1

*Table 36 - Decomposition of "other" penal matters<sup>345</sup>*



*Figure 26 - Decomposition of "other" penal matters*

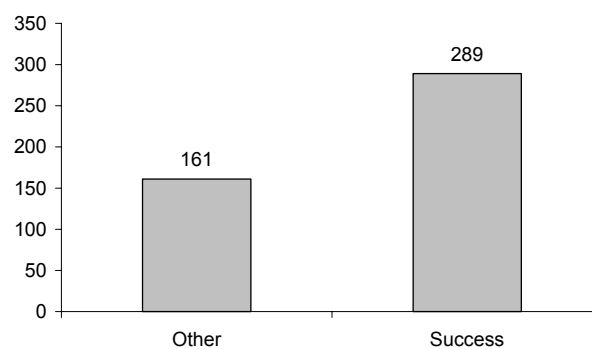
<sup>345</sup>

For one “other” penal activities, the outcome could not be determined. The activities are recorded as “other” by ASIC.

As detailed in Part V.E, the predominance of activities to assist external administrators has the potential to overshadow other results in the dataset. In Table 37 and Figure 27 the results for penal activities are represented excluding these activities.

<b>Outcome</b>	<b>Count</b>
Success	289
Other	161

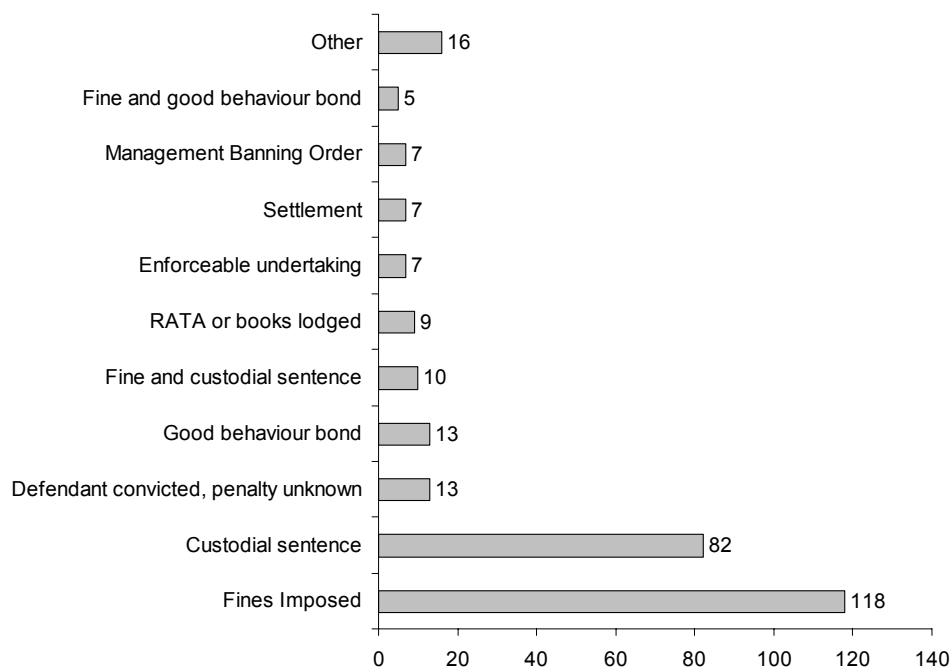
*Table 37 - Outcomes of penal matters excluding external administrator assistance actions*



*Figure 27 - Outcomes of penal matters excluding external administrator assistance actions*

<b>Outcome</b>	<b>Count</b>
Fines Imposed	118
Custodial sentence	82
Defendant convicted, penalty unknown	13
Fine and custodial sentence	13
Fine and good behaviour bond	10
RATA or books lodged	9
Contravention proved but no conviction recorded	7
Enforceable undertaking	7
Management banning order	7
Settlement	5
Other	16

*Table 38 - Decomposition of successful penal matters, excluding external administrator assistance actions<sup>346</sup>*



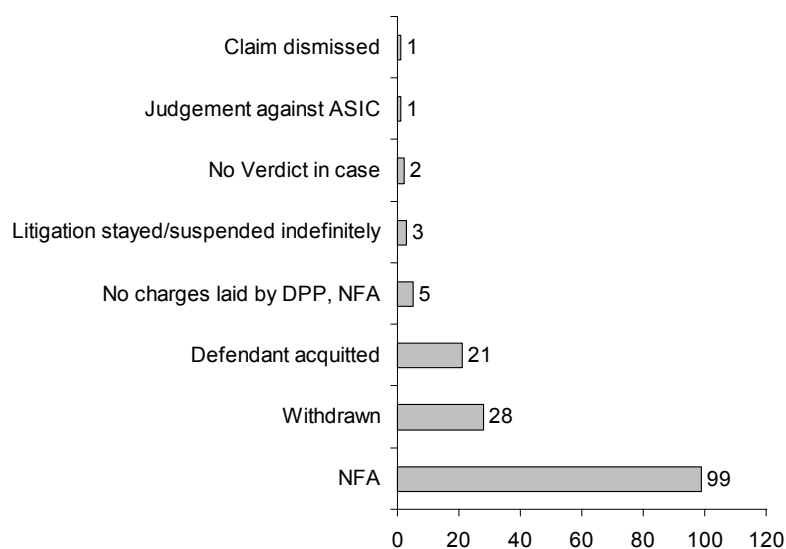
*Figure 28 - Decomposition of successful penal matters, excluding external administrator assistance actions*

<sup>346</sup>

For two successful penal activities, the outcome could not be determined. The activities are recorded as successful by ASIC.

<b>Outcome</b>	<b>Count</b>
NFA	99
Withdrawn	28
Defendant acquitted	21
No charges laid by DPP, NFA	5
Litigation stayed/suspended indefinitely	3
No verdict in case	2
Judgment against ASIC	1
Claim dismissed	1

*Table 39 - Decomposition of "other" penal matters, excluding external administrator assistance actions<sup>347</sup>*



*Figure 29 - Decomposition of "other" penal matters, excluding external administrator assistance actions*

It is noteworthy that even after removing external administrator assistance actions, fines still dominant the outcomes data.

<sup>347</sup>

For one "other" penal activities, the outcome could not be determined. The activities are recorded as "other" by ASIC.

### 3. Fines imposed

The sections under which fines were imposed most frequently and the average fines are presented in Table 40. Note that a limitation of the source data was that many activities in the database had more than one section number recorded against them. It has not been possible to allocate the amount of the fine awarded in a particular action to the sections involved in that activity. As a result, the average fines reported below reflect average fines awarded across entire activities, not just for the offence under that section alone.

Section	Title	Number of fines	Average fine amount
475	Report as to company's affairs to be submitted to liquidator	326	\$1,030
530A	Officers to help liquidator	82	\$891
229	Certain persons not to manage corporations	33	\$1,673
242	Notice of name and address of directors and secretaries	20	\$492
232	Duty and liability of officer of corporation	15	\$27,077
592	Incurring of certain debts; fraudulent conduct	11	\$31,159
590	Offences by officers of certain companies	9	\$856
429	Officers to report to controller about corporation's affairs	7	\$679
530B	Liquidator's rights to company's books	7	\$979
63	Non-compliance with requirements made under this Part	7	\$3,321

*Table 40 - Sections most frequently resulting in fines, and average fine amount<sup>348</sup>*

The highest average fine was under s 592 (fraudulent conduct), followed by s 232 (directors' duties). Despite their predominance, the external administrator actions (ss 475, 530A and 429) only attracted fines of less than \$1,030.

<sup>348</sup>

All section numbers from the *Corporations Law*.

#### 4. Custodial sentences imposed

The sections under which custodial sentences were imposed most frequently and the average lengths of sentences are presented in Table 41. The same limitation regarding the recording of more than one section number under each activity, as detailed above in Part V.D.3, applies.

Section	Title	Number of custodial sentences	Average custodial sentence length (months)
232	Duty and liability of officer of corporation	46	23.96
229	Certain persons not to manage corporations	23	7.52
592	Incurring of certain debts; fraudulent conduct	9	19.11
Criminal Code of Queensland s 408C	Fraud	9	37.33
590	Offences by officers of certain companies	8	11.75
Crimes Act 1958 (Vic) s 74	Theft	7	35.14
1064	Issue of prescribed interests restricted	7	31.57
1317FA	When contravention of civil penalty provision is an offence	6	38.50
Crimes Act 1958 (Vic) s 83	False accounting	6	38.00
1308	False or misleading statements	6	21.83

*Table 41 - Sections most frequently resulting in custodial sentences, and average sentence length<sup>349</sup>*

The overwhelmingly most common offence attracting a custodial sentence was s 232 (directors' duties). The average custodial sentence for that offence was approximately 2 years.

<sup>349</sup>

All section numbers from the *Corporations Law* unless otherwise stated.

## 5. Reflections on the legal framework supporting ASIC enforcement activity

- *What are the laws mostly commonly enforced in the dataset?*
- *What is the character (civil or penal) of the laws enforced?*
- *Have particular laws been targeted by ASIC?*
- *Has a specific regulatory purpose or effect been sought by ASIC in enforcing particular laws?*
- *What sanctions are available for non-compliance with these laws?*
- *What sanctions were mostly commonly imposed?*
- *What is the character (civil or penal) of the sanctions imposed?*

The earlier discussion of the impact of the legal framework on regulatory enforcement noted two clusters of related variables: the form and substance of the regulatory regime and the range, strength and facility of the formal tools available to the regulator of that regime. From the dataset available here, a number of observations can be made, with regard to which tools have actually been used by ASIC, and what offences or compliance goals have been targeted.

An important rider on this analysis is the general observation that the full scope, or the degree of success, of ASIC enforcement activity cannot be known from this court-based dataset. Not all of the 17.2% of civil and 26% of penal activities that were categorised as 'other' than 'successful' (see Part VI.D.1 and VI.D.2) involved judgment against ASIC. It can be presumed that in many of the "no further action" situations, out-of-court negotiations resulted in some substantive compliance goal being achieved. Equally, consider the predominance of "settlement" as the successful outcome in civil activities. It is hard to assess the substance regulatory effect of such settlements, in terms of achieving compliance with the underlying legislation. For these reasons, the following analysis focuses on penal outcomes.

Some general trends in the dataset have already been noted in Part VI.D.3. The high numbers of external administrator assistance actions is indicative of a particular targeting of activity in this field. Numerically, penal activities far outweigh civil activities (1316 to 122), even when external administration assistance actions are removed from the sample (450 to 122). For more specific analysis of the most commonly enforced laws, see above Part VI.D.3.

From the immediately preceding data, the decomposition of successful penal activities revealed that most of the available sanctions were not commonly deployed. Management banning orders, enforceable undertakings, settlements and good behaviour bonds were all used on between 5 and 18 occasions. In contrast, fines (537 counts in the dataset including external administrator assistance actions, 118 without) and custodial sentences (86 and 82) were common. Civil activities were similarly dominated by two outcomes, settlement (45) and orders as sought by ASIC (31).

The heavy use of fines as a penal sanction is highly suggestive of those enforcement activities having a ‘sanctioning’ style and objective. While noting the statistical limitations of the data in Table 40, this style is further indicated by the higher average fine amount for breaches of s 232 (duty and liability of officer of corporation) and s 592 (incurring of certain debts; fraudulent conduct). These breaches involve, as indicated in the literature review above, undesirable conduct. The relatively much lower average fine amounts for the other breaches suggests that fines in these activities were used more routinely (as a “slap on the wrist”). The use of heavy fines in punishing undesirable conduct is consistent with earlier discussion, in Part II, of the relationship between enforcement outcomes and the mandatory, social character of the laws being enforced.<sup>350</sup>

Custodial sentence data in Table 41 is also demonstrative of this ‘big stick’ being kept for breaches that involve the ‘moral turpitude’<sup>351</sup> of fraud, theft, false or misleading conduct or breaches of duty. Whether these average sentence lengths (between 7.52 and 38.5 months) are of sufficient duration to act as a deterrent, or the stain of a custodial sentence alone is sufficient, is beyond the scope of this research.

## **F. Analysis of the data by reference to Ayres’ and Braithwaite’s pyramid of enforcement**

- *How does the dataset map onto Ayres’ and Braithwaite’s sanctions pyramid?*

As outlined above, Ayres’ and Braithwaite’s model of regulation proposes that a regulator ought to encourage voluntary compliance from the regulatee through education, persuasion and keeping punishment in the background, while retaining the regulator’s credibility as a ‘Benign Big Gun’ by responding ‘tit-for-tat’ to non-compliance and having a range of sanctions of increasing potency on which to draw.

This model provides a useful frame for sifting through the enforcement activities of ASIC outlined above. According to this enforcement pyramid, the ‘top’ of the enforcement pyramid consists of the ‘big sticks’, those capable of incapacitation (such as by custodial sentence or management banning order). The expectation is that the deterrent value of these tools would lead to them being used comparatively less than the lower level enforcement activities. Importantly, the dataset provides information predominately on the middle to higher reaches of such a pyramid. It does not provide any information on most of the lower reaches, involving administrative actions, education campaigns and other non-court-based enforcement actions.

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<sup>350</sup> See discussion in Part II.D.1 and Part VI.D.3.

<sup>351</sup> This apt turn of phrase is taken from Rowan-Robinson, Watchman and Barker, above n 37, 206.

An initial analysis of the dataset suggests that ASIC enforcement activity is predominantly within the middle bands of its latent enforcement pyramid. However, it is not possible to confirm this observation without information on its activities in the lower reaches. Excluding external administrator assistance actions, management banning orders were granted in 2% of activities, and a custodial sentence was the outcome in 28% of the successful penal activities. Fines were imposed in 41%, and both a custodial sentence and a fine were ordered in a further 3%. As discussed above in Part VI.E.5, there would seem to be some correlation in Table 40 and Table 41 between the use of ‘big sticks’ (heavier fines and custodial sentences) for non-compliant regulatee behaviour that is more clearly stained by moral turpitude. For example, custodial sentences were the outcome in 46 of the 118 (39%) activities in which ASIC specified s 232 (duty and liability of officer of corporation) as the legislation section relevant to the enforcement activity. Fines were ordered in 15 of the 118 s 232 activities (13%), at an average fine amount of \$27,077. Section 232 was the highest specified law after external administrator activities were removed from the dataset (see Table 26).

The remaining 26% of outcomes for successful penal activities excluding external administrator assistance actions were spread amongst enforceable undertakings and settlements (2% each), good behaviour bonds with or without fines attached (2% and 4%), books to be lodged orders (3%), other (6%) and unknown (4%). Depending on the extent of unmeasured enforcement activity and the substantive basis for court-based actions, the low ratio of these lesser sanctions can either be explained as a consequence of them being only a part of the compliance-seeking picture, or a factor of their relative inappropriateness once a compliance issue has reached the court-enforcement stage.

The uncertainty with regard to the mapping of the enforcement outcomes data onto Ayres’ and Braithwaite’s enforcement pyramid is partially a result of the separation in this discussion of penal and civil activities. The most commonly specified legislation sections in the civil activities data (Table 24)<sup>352</sup> highlights those situation where ASIC addresses the more immediate, contextualised and targeted enforcement responses typical of the middle to lower sections of an enforcement pyramid. This is consistent with recent ASIC statements regarding their use of pre-emptive civil action to prevent or reduce damage to investors and consumers.<sup>353</sup> The lower sections of the enforcement pyramid would also include the 45 settlement and 31 orders as sought by ASIC civil outcomes (of a total 101 ‘successful’ outcomes).<sup>354</sup> Importantly, however, the comparative weight of numbers between civil and penal actions (even after administrator assistance actions are removed) tends to suggest that, consistent with sociological studies of regulatory enforcement, ASIC predominantly resorts to court-based enforcement activity where there is a penal / punitive dimension involved or as part of a deliberate organisational campaign. The dataset reveals that ASIC undertakes

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<sup>352</sup> Sections 1323 (prohibit property transfer), 461 (general grounds for company winding up) and 1324 (injunctions).

<sup>353</sup> ASIC, above n 5, 25.

<sup>354</sup> See Table 32 - Decomposition of successful civil activities.

more penal than civil enforcement activities as a ratio of 1316:122 (450:121 when external administrator activities are discounted).<sup>355</sup>

The external administrator assistance actions are also noteworthy in this context, as the data in Table 25 and Table 40 would seem to indicate that the sections enforced here (s 475, s 530A and s 530B) were punished with routine fines. The context of these high-turnover, low punishment actions (external administration) clearly mitigates against the otherwise non-strategic ‘flea-biting’ effect of getting the regulatee offside and encouraging future non-compliance.<sup>356</sup> The broader regulatory purpose of these actions is to signal ASIC’s commitment to timely management of such proceedings.<sup>357</sup> With regard to regulatory purpose and effect, note that there is a high number of NFA and withdrawn outcomes in the penal data. These results account for 196 and 108 of the 342 unsuccessful penal matters including administration assistance actions (see Table 34 and Table 36) and 99 and 28 of the 161 penal matters when those actions were excluded (Table 37 and Table 39). It should be noted that these ‘unsuccessful’ outcomes might obscure substantive regulatory success, where the mere instigation of such activities might have had the desired effect on compliance. However, this cannot be verified in the current study.

## G. Concluding analysis

It is appropriate to revisit the key findings of this study and to comment on the extent to which those findings are consistent with the sociological studies highlighted in Part II. The empirical study analysed three aspects of ASIC court-based enforcement during the 1997-1999 sample period. They are:

- the characteristics of the regulatees (Part VI.C);
- the types of enforcement activities undertaken by ASIC and the legislation applied in those activities (Part VI.D); and
- the outcomes of ASIC enforcement activities (Part VI.E).

### 1. Characteristics of regulatees

The study found that ASIC was more likely to pursue court-based enforcement:

- against individuals (rather than companies);
- against men (rather than women) aged between 41-50 years in their capacity as directors of companies working in the finance and insurance industry; and

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<sup>355</sup> See Figure 16 and Figure 17, above VI.D.1.

<sup>356</sup> Ayres and Braithwaite, *Responsive Regulation*, above n 12, 49.

<sup>357</sup> See above, Part VI.D.3.

- in relation to private companies rather than public companies and, in particular, private companies that were no longer a going concern.

These characteristics informed the analysis of the relationship between ASIC and its regulatees in the dataset as well as helping to explain the relational distance between them. One of the distinctive features of the study is the absence of *any* ongoing relationship between ASIC and the majority of regulatees in the dataset. This is due to the dominance of external administration enforcement activities in the dataset involving companies that have, or are about to cease to be, going concerns.<sup>358</sup> The significance of a finding of no ongoing relationship between these regulatees and ASIC is that there is no danger of ASIC harming future interactions with those regulatees. Sociological studies suggest that the ASIC is freed from a key pressure on regulators that works against formal enforcement.<sup>359</sup>

The finding that ASIC was more likely to pursue private companies, rather than public ones, appears initially to be consistent with the study of regulatee size by Braithwaite and Grabosky discussed earlier.<sup>360</sup> That study found that regulators were more likely to pursue small companies than larger ones. The assumption made here is that private companies are by their very nature smaller than their public equivalents. However, as discussed earlier, the ratio of public to private companies in Australia is so disproportionate, that a finding of this nature is hardly surprising.<sup>361</sup>

What is surprising is that the principal business activity of the majority of companies involved in the dataset was in the finance and insurance industry. This finding challenges earlier sociological studies that characterise regulatees in professional industries, such as finance and insurance, as likely to comply with regulation.<sup>362</sup> On the other hand, as noted earlier, this may be explained by the fact that regulatees in finance and insurance have greater exposure to compliance issues under the *Corporations Law* than regulatees in other fields.<sup>363</sup>

## VII. ENFORCEMENT ACTIVITIES AND LAW APPLIED

The analysis found that ASIC was more likely to pursue penal enforcement in relation to:

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<sup>358</sup> See Part VI.C.6 and Part II.D.3. for a discussion of the relevance of being a going concern to the issue of relational distance.

<sup>359</sup> See Part II.D.3.

<sup>360</sup> See Part II.D.3.

<sup>361</sup> See Part VI.C.6.

<sup>362</sup> See Part II.D.3.

<sup>363</sup> See Part VI.C.6.

- laws that were mandatory (rather than enabling) in nature;
- laws that were oriented towards social, rather than economic, regulation. In particular, the external administration and misconduct provisions of the *Corporations Law*, rather than the disclosure provisions; and
- laws with an ethical foundation that address conduct that is widely condemned because it exploits and defrauds shareholders and creditors.

These findings are broadly consistent with the trends identified in a seminal empirical study of enforcement by Keith Hawkins discussed earlier.<sup>364</sup> Hawkins found that water pollution regulators were more likely to pursue formal enforcement activities in cases involving flagrant breach of laws addressing widely condemned behaviour. Caution should be observed in the application of these findings in subsequent studies. First, they are based on a case study of the 13 most commonly enforced laws in the penal activities section of the dataset. They are not based on a study of all penal activities in the dataset. Secondly, the findings do not apply to the civil enforcement activities in the dataset. No study of those activities was undertaken for the reasons discussed earlier.<sup>365</sup>

## VIII. ENFORCEMENT OUTCOMES

The study found evidence of:

- the predominant use of penal enforcement activities by ASIC over civil enforcement activities (1316:122, 450:121 when external administrator actions are removed);
- targeted enforcement by ASIC (specifically in relation to external administrator assistance actions);
- the predominant use of a limited, severe set of penal sanctions (specifically fines and custodial sentences) despite the availability of a much wider range of sanctions; and
- the predominant use of settlements by ASIC as outcomes for civil enforcement activities.

The heavy use of penal enforcement activities and severe sanctions (fines and custodial sentences) is highly suggestive of those activities having a sanctioning style and objective.<sup>366</sup> It is to be contrasted against the softer approach taken in relation to civil enforcement activities. It is not possible to comment on whether this enforcement style is predominant in ASIC enforcement activities generally as the data set does not contain information about non court-based enforcement activities. These findings suggest that

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<sup>364</sup> See Part II.D.1.

<sup>365</sup> See Part VI.D.3.

<sup>366</sup> See Part VI.E. 5.

ASIC enforcement activity in the dataset is predominantly in the middle to higher bands of the pyramid of enforcement measures proposed by Braithwaite and Ayres.<sup>367</sup> The comparative weight of numbers between civil and penal actions is consistent with sociological studies that suggest regulators resort to court based enforcement when there is a penal/punitive dimension or as part of a deliberative campaign.<sup>368</sup> The reluctance to use court based enforcement stems from a belief that the regulator loses interpretative control of what amounts to compliance in court actions.<sup>369</sup> This concern was acknowledged by ASIC to be a factor affecting enforcement decisions in the study by Gilligan, Bird and Ramsay discussed earlier.<sup>370</sup>

## IX. GENERAL OBSERVATIONS

It is interesting to observe the correlation in the dataset between company status, law contravened and sanction imposed. In relation to proprietary companies, the majority of penal activities related to contravention of external administration assistance laws, attracting a fine of up to \$1,030.00. In contrast, the majority of penal activities involving public companies related to breach of directors' duties, market rigging and insider trading laws.<sup>371</sup> These were offences for which custodial sentences, rather than fines, were the most commonly imposed sanction.<sup>372</sup> The data is reflective of an enforcement pattern whereby ASIC is more likely to pursue enforcement activities against smaller (proprietary) companies in relation to routine offences that are seemingly overlooked in relation to the larger (public) companies. As a consequence, sanctions in relation to proprietary companies typically consist of a modest fine. Public companies are typically pursued in relation to more serious offences, such as breach of directors' duties. Sanctions in relation to them are usually more severe, either in the size of fine or because a custodial sentence is imposed.

The discrepancy between public and proprietary companies may be explicable in terms of relational distance. ASIC may have adopted a strategy of long-term co-operation with public companies to ensure their general compliance with the *Corporations Law* at the expense of routine infringements of that law. However, the imposition of severe sanctions in relation to more serious misconduct matters also suggests that ASIC will not tolerate exceptional non-compliance by public companies. These findings are broadly consistent with findings by Braithwaite and Graboksy that regulators genuinely believe large firms are more law-abiding than small ones.<sup>373</sup> In relation to proprietary companies, the stricter enforcement of routine laws can perhaps be understood because

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<sup>367</sup> See Part VI.F.

<sup>368</sup> See Part VI.F.

<sup>369</sup> See Part II.D.2.

<sup>370</sup> Gilligan, Bird and Ramsay, *Regulating Directors' Duties*, above n 3, 26, 42-45.

<sup>371</sup> See Part VI.D.2.

<sup>372</sup> See Part VI.E.3.

<sup>373</sup> See Part II.D.3.

regulators typically do not conceive of their interactions with a large cohort of smaller regulatees in relational terms.<sup>374</sup>

## X. CONCLUSION

The purpose of this report has been to detail and analyse the findings of an empirical study of the court-based enforcement activities of ASIC during the years 1997 to 1999. Part VI contains the principal findings of the study. The project methodology used, including a description of the limitations of the data set used in the study, are detailed in Part V. The enforcement framework within which ASIC undertook the enforcement activities included in the study, is examined in Part IV. The research questions used in the study are summarised in Part III. The study was conducted within the framework of sociological theories of regulation as defined in Part II.

The study highlights the predominant use of penal enforcement activities and sanctions within the dataset of ASIC court-based enforcement work. What has been seen in this study is that enforcement undertaken through the court remains a 'last resort' strategy, rather than being part of a wider, enforceable compliance, approach. This wider approach is advocated by ASIC in its own *Annual Reports* and *User's Guide*.<sup>375</sup> Despite the rhetoric, the reality of the dataset suggests a traditional conception of the role of enforcement in legal regulation. The majority of the enforcement activities in the dataset concern breaches of mandatory, socially oriented or ethically-based laws by regulatees in circumstances where their behaviour is widely regarded as undesirable. What the study cannot do is comment on whether these trends are predominant in all ASIC enforcement work. A study of non-court based enforcement, perhaps of ASIC's administrative activities and other compliance-seeking programs such as formal education campaigns and individual regulatee interactions, is needed before this would be possible.

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<sup>374</sup> See Part II.D.3.

<sup>375</sup> See Part IV.B.

## XI. APPENDICES

### A. Appendix A

#### Details of aggregation of Companies Code section references

<b>Act</b>	<b>Section</b>	<b>aggregated under</b>	<b>Act</b>	<b>Section</b>
Companies Code	108		Corporations Law	996
Companies Code	12		ASIC Law	34
Companies Code	129		Corporations Law	205
Companies Code	169		Corporations Law	1064
Companies Code	227		Corporations Law	229
Companies Code	229		Corporations Law	232
Companies Code	231		Corporations Law	231
Companies Code	236		Corporations Law	240
Companies Code	240		Corporations Law	245
Companies Code	267		Corporations Law	289
Companies Code	269		Corporations Law	292
Companies Code	270		Corporations Law	307
Companies Code	276		Corporations Law	318
Companies Code	555		Corporations Law	591
Companies Code	556		Corporations Law	592
Companies Code	560		Corporations Law	1118
Companies Code	561		Corporations Law	596
Companies Code	563		Corporations Law	1308
Companies Code	564		Corporations Law	1309
Companies Code	564		Corporations Law	1309
Companies Code	565		Corporations Law	201

## XII. BIBLIOGRAPHY

### A. Books and Chapters in Books

Ayres, I. and Braithwaite, J., *Responsive Regulation* (1992).

Baldwin, R. and Cave, M., *Understanding Regulation* (1999).

Baldwin, R., Scott, C., and Hood, C., *A Reader on Regulation* (1998).

Baldwin, R., *Rules and Government* (1995).

Bardach, E. and Kagan, R. A., *Going by the Book: the Problem of Regulatory Unreasonableness* (1982).

Bernstein, M. H., *Regulating Business by Independent Commission* (1955).

Black, D., *The Behaviour of Law* (1976).

Black, J., *Rules and Regulators* (1997).

Bosch, H., *Corporate Practices and Conduct* (1995).

Cheffins, B., *Company Law: Theory Structure and Operation* (1993).

Dellit, C. and Fisse, B., 'Civil and Criminal Liability under Australian Securities Regulation: The Possibility of Strategic Enforcement' in Walker, G. (ed) *Securities Regulation in Australia and New Zealand* (1994).

Farrar, J., *Corporate Governance in Australia and New Zealand* (2001).

Ford, H., Austin, R. and Ramsay, I., *Ford's Principles of Corporations Law* (10th ed, 2003).

Grabosky, P. and Braithwaite, J., *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (1986)

Hancher, L. and Moran, M., 'Organising Regulatory Space' in Hancher, L. and Moran, M. (eds) *Capitalism, Culture and Regulation* (1989).

Hawkins, K., *Environment and Enforcement* (1984).

Hilmer, F., *Strictly Boardroom* (1993).

Hutter, B., *Compliance, Regulation and Enforcement* (1997).

Hutter, B., *The Reasonable Arm of the Law* (1988).

Kagan, R. A. and Scholz, J. T., 'The "Criminology of the Corporation" and Regulatory Enforcement Strategies' in Hawkins, K. and Thomas, J. M. (eds), *Enforcing Regulation* (1984).

Ogus, A., *Regulation: Economic Theory and Legal Form* (1994).

Ramsay, I., 'Models of Corporate Regulation: the Mandatory / Enabling Debate' in Rickett, C. and Grantham, R. (eds), *Corporate Personality in the 20<sup>th</sup> Century* (1998).

Ramsay, I., 'Models of Corporate Regulation: the Mandatory / Enabling Debate' in Charles Rickett and Ross Grantham (eds), *Corporate Personality in the 20<sup>th</sup> Century* (1998).

Reiss, A. J., 'Selecting Strategies of Social Control over Organisational Life' in Hawkins, K. and Thoms, J. M. (eds), *Enforcing Regulation* (1984).

Richardson, G. M., Ogus, A. and Burrows, P., *Policing Pollution: a Study of Regulation and Enforcement* (1982).

Rowan-Robinson, J., Watchman, P. and Barker, C., *Crime and Regulation: a Study of the Enforcement of Regulatory Codes* (1990).

Shapiro, S., *Wayward Capitalists* (1984).

Sparrow, M., *Imposing Duties: Government's Changing Approach to Compliance* (1994).

Whincop, M., *An Economic and Jurisprudential Genealogy of Corporate Law* (2001).

Yaeger, P., *The Limits of Law: the Public Regulation of Private Pollution* (1991).

## **B. Journal Articles**

Assaf, F., 'What Will Trigger ASIC's Strategies?' 40(4) (2002) *Law Society Journal* 60.

Baldwin, R., 'Why Rules Don't Work' (1990) 53 *Modern Law Review* 321.

Bird, H., 'The Problematic Nature of Civil Penalties in the Corporations Law' (1996) 14(7) *Companies and Securities Law Journal* 405.

Black, J., 'Decentring regulation: understanding the role of regulation and self-regulation in a "post-regulatory" world' (2001) *Current Legal Problems* 103.

Black, J., 'New Institutionalism and Naturalism in Socio-Legal Analysis: Institutional Approaches to Regulatory Decision Making' (1997) 19(1) *Law & Policy* 51.

Black, J., 'An Economic Analysis of Regulation: One View of the Cathedral' 16(4) (1996) *Oxford Journal of Legal Studies* 699.

Braithwaite, J., Walker, J. and Grabosky, P., 'An Enforcement Taxonomy of Regulatory Agencies' (1987) 9 *Law and Policy* 323.

Bottomley, S., 'The Birds, the Beasts, and the Bat: Developing a Constitutionalist Theory of Corporate Regulation' (1999) 27(2) *Federal Law Review* 243.

Dobinson, J., 'Penalties: Policy Principles and Practice in Government Regulation' (2001) 79 *Reform* 44.

Fox, R., 'New Crimes or New Responses?: Future Directions in Australian Criminal Law' (2002) 28(1) *Monash University Law Review* 103.

Gilligan, G., Bird, H. and Ramsay, I., 'Civil Penalties and the Enforcement of Directors' Duties' (1999) 22 *University of New South Wales Law Journal* 417.

Gilligan, G., Bird, H. and Ramsay, I., 'The Efficacy of Civil Penalty Sanctions Under the Australian Corporations Law' (1999) 136 *Australian Institute of Criminology – Trends and Issues* 1.

Green, J., "“Fuzzy Law” : a Better Way to Stop “Snouts in the Trough”?" (1991) 9(3) *Company and Securities Law Journal* 144.

Gunningham, N., "Private Ordering, Self-Regulation and Futures Markets: A Comparative Study of Informal Social Control" (1991) 4 *Law & Policy* 297.

Kingsford Smith, Dimity, 'Decentred Regulation in Online Investment' (2001) 19(8) *Company and Securities Law Journal* 532.

Kingsford Smith, Dimity, 'Interpreting the Corporations Law – Purpose, Practical Reasoning and the Public Interest' (1999) 21 *Sydney Law Review* 161.

Ramsay, I., 'Corporate Law in the Age of Statutes' (1992) 14(4) *Sydney Law Review* 474.

Scholz, J. T., 'Enforcement Policy and Corporation Misconduct: the Changing Perspective of Deterrence Theory' (1997) 60(3) *Law and Contemporary Problems* 253.

Tomasic, R. and Bottomley, S., 'Corporate Governance and the Impact of Legal Obligations on Decision Making in Corporate Australia' (1992) 1(1) *Australian Journal of Corporate Law* 55.

Whincop, M., 'Form, Function and Fiction: A Taxonomy of Corporate Law and the Evolution of Efficient Rules' (2001) 24 *University of New South Wales Law Journal* 85.

Whincop, M., 'The Immanent Conservatism of Corporate Adjudication: Thoughts on Kingsford Smith's "Interpreting the Corporations Law"' (2000) 22 *Sydney Law Review* 273.

Whincop, M., 'Liberalism, Conservatism, and Economic Efficiency: Tradition and Change in the Values of Corporate Law' (2000) 23(2) *University of New South Wales Law Journal* 111.

Whincop, M., 'Rules, Standards and Intransitive Statutes : What the Economic Reform of Corporate Law Might Have Looked Like' (1999) 17(1) *Company and Securities Law Journal* 11.

### C. Reports

Australian Law Reform Commission, *Securing Compliance*, Discussion Paper No 65 (2002).

Australian Law Reform Commission, *Principled Regulation – Federal, Civil and Administrative Penalties in Australia*, Report No 95 (2003).

Australian Securities Commission, *Annual Report* (1996-1997).

Australian Securities and Investment Commission, *Annual Report* (1998-1999).

Australian Securities and Investment Commission, *Annual Report* (2001-2002).

Australian Securities and Investment Commission, *A User's Guide to ASIC, Your Corporate and Financial Services Watchdog* (1999).

Gilligan, G., Bird, H. and Ramsay, I., *Regulating Directors' Duties – How Effective are the Civil Penalty Sanctions in Australian Corporations Law?*, Research Report, Centre for Corporate Law and Securities Regulation (1999)

Korn/Ferry International and Egan Associates, *Boards of Directors Study in Australia and New Zealand* (2002).

Productivity Commission, *Guide to Regulation* (2<sup>nd</sup> ed, 1999).

Senate Legal and Constitutional References Committee, Parliament of Australia, *Investigatory Powers of the Australian Securities Commission* (1995).

## D. Legislation

*ASIC Act 1989 (Cth)*

*Company Law Review Act 1998 (Cth)*

*Corporations Act 2001 (Cth)*

*Corporations Act 1989 (Cth) ("**Corporations Law**")*

*Crimes Act 1914 (Cth)*

*Insurance Contracts Act 1984 (Cth)*

*Life Insurance Act 1984 (Cth)*

*Retirement Savings Accounts Act 1997 (Cth)*

*Superannuation Industry (Supervision) Act 1993 (Cth).*

*Superannuation (Resolution of Complaints) Act 1993 (Cth)*

## E. Other

Australian Bureau of Statistics, *1292.0 Australian and New Zealand Standard Industrial Classification (ANZSIC)* (1993).

Australian Securities and Investment Commission, *Policy Statement 52, Enforcement Action Submissions* (1993).

Australian Securities Commission, *Memo 19/92 Serious corporate wrongdoing: direction relating to investigation and enforcement* (1992).

Black, J., 'Managing Discretion', Conference Paper to ALRC Conference *Penalties: Policy, Principles and Practice in Government Regulation* (June 2001).

Knott, D., 'Address to the Australian Institute of Company Directors' (Address to the Australian Institute of Company Directors - South Australian and Northern Territory Division, Adelaide, 23 May 2001).

Pheasant, B., 'ASIC sharpens its claws' (Article in the *Australian Financial Review*, 19 May 2003, 61).

Segal, J., 'The Future of Corporate Regulation' (Address to the 18<sup>th</sup> Annual Company Secretaries' Conference, Surfers Paradise, 19 November 2001).

Segal, J., 'ASIC Issues: An Update on the Last 12 Months' (Conference Paper presented to Insurance Council of Australia, 10 August 2000).