Corporate Crime in a Civil Law Culture

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The perceived problems of corporate crime have increasingly come to exercise the minds of lawyers, judges and legal commentators in Australia. Whilst corporate crime is by no means a new phenomenon in this country, the so-called excesses of the 1980s have generated a series of legal cases which have been seen as having the potential to overwhelm the legal system. This is not only because of the size and complexity of legal cases involving corporate wrongdoing, but also because of the extent to which the legal profession has been prepared, throughout the 1980s and beyond, to facilitate the mobilisation of legal mechanisms to structure, safeguard and defend entrepreneurial excesses.

The narrow legalism of Australian lawyers has therefore been exploited by those in the business community seeking to achieve personal advantage.[1] Whilst this is not surprising, it has accentuated the problems facing those involved with complex corporate criminal trials. The experience with the administration of takeover laws during the 1980s has provided an illustration of such legalism upon the part of the Courts, although in practice tempered by a view upon the part of business that breaches of such laws may be readily described as "technical breaches" and therefore ones for which the Commission should be, as it in fact has been, ready to provide exemptions to those who have breached these provisions.[2] Grabosky and Braithwaite have of course referred to what they describe as the "manners gentle" of Australian business regulatory agencies, such as corporate regulatory commissions.[3]

* The research upon which this paper is based was funded by the Criminology Research Council and also supported by staff from the Centre for National Corporate Law Research at the University of Canberra. Some earlier findings from this research have been published in the following articles: Tomasic, R, "Sanctioning Corporate Crime and Misconduct: Beyond Draconian and Decriminalisation Solutions" (1992) 2 *Aust J Corp L* 82–114 and Tomasic, R, "Corporations Law Enforcement Strategies in Australia: The Influence of Professional, Corporate and Bureaucratic Cultures" (1993) 3 *Aust J Corp L* 192–229. Also see Tomasic, R, *Corporate Crime and Corporations Law Enforcement Strategies in Australia, Discussion Paper* 1 (1993).

1 Some of these themes were developed further in Tomasic, R, "Corporate Crime: Making the Law More Credible" (1990) 8 *Company & Securities LJ* 369–382.

2 For a relevant discussion of the attitudes of the courts and practitioners to takeover laws see further: Tomasic, R and Pentony, B, "Fast Tracking Takeover Litigation and Alternatives to the Courts in Company Takeover Disputes" (1989) 17 *Aust Bus LR* 336; Tomasic, R and Pentony, B, "Judicial Technique in Takeover Litigation in Australia" (1989) 12 *UNSW LJ* 240; Tomasic, R and Pentony, B, "Litigation in Takeovers — The Decision Making Process" (1990) 6 *Aust Bar R* 67; Tomasic, R and Pentony, B, "Resisting to the Last Shareholders' Dollar: Takeover Litigation — a Tactical Device" (1991) 1 *Aust J Corp L* 154.

3 Grabosky, P and Braithwaite, J, *Of Manners Gentle. Enforcement Strategies of Australian Business Regulatory Agencies* (1986).

The burden of this paper is not to seek to trivialise the problems of complex criminal trials, for these are real enough, but to argue that it is adopting too narrow a focus upon this "problem" if one fails to place this phenomenon within the wider legal context out of which these cases have arisen.[4] In other words, I wish to suggest that a focus on complex criminal trials for corporate crimes must commence with a broader contextual analysis. A solution to the problem of such complex criminal trials may well be quite different if our basic assumptions regarding corporate crime and the operation of corporate law in Australia are found to be faulty.

Also, whilst I do not wish to argue against the desirability of improved case management and prosecutorial methods, these should not be seen as the threshold question currently facing us. I will argue that we need to reassess our conceptualisation of corporate crime in this country and develop responses to it which are more appropriate to the fundamental nature of this phenomenon. The current debate concerning the simplification of *Australian Corporations Law* is also a product of a fundamental discomfort with the assumptions upon which so much of this body of law now rests and reflects the need to reassess our basic assumptions in this area. This reassessment must also have flow-on effects upon the nature of corporate regulation and law enforcement.[5] Most of my comments in this paper are based upon the criminalisation of offences under the *Corporations Law*. Although similar conclusions may be drawn about other areas of corporate crime, it needs to be recognised that different types of corporate criminality need to be distinguished.[6]

It is not well understood by criminal lawyers that traditional ideas of criminality which have emerged out of notions of individual responsibility and punishment for misconduct often sit awkwardly in the corporate law context.[7] This is especially so when breaches of the law have been committed by or on behalf of the corporation itself, or where the legal fiction of the corporate form has been manipulated to achieve the personal objectives of

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4 For further discussions of the problems of complex corporate trials see: Aronson, M, *Managing Complex Criminal Trials: Reform of the Rules of Evidence and Procedure* (1992); Santow, G F K, "The Trial of Complex Corporate Transgressions — The United Kingdom Experience and the Australian Context" (1993) 67 *Aust LJ* 265; and papers presented to the National Crime Authority, National White Collar Crime Conference, Melbourne, 15–17 June 1992, mimeo.

5 It is interesting to note that such a reassessment has taken place in regard to tax law enforcement in Australia following the bottom of the harbour prosecutions of the 1980s. The emergence of a radically different relationship between the Australian Taxation Office and the professional advisory and business community is a model which those interested in corporate law enforcement ignore at their peril: see further: Tomasic, R and Pentony, B, "Taxation Law Compliance and the Role of Professional Tax Advisers" (1991) 24 *ANZ J Crim* 241–257; Tomasic, R and Pentony, B, "Tax Compliance and the Rule of Law: From Legalism to Administrative Procedure?" (1991) 8 *Aust Tax Forum* 85–116. It is also possible to identify the emergence of a radically different approach to corporate law enforcement within the Trade Practices Commission. The TPC has emphasised settlements, the introduction of compliance programs within firms and the avoidance of criminal prosecutions for breaches of the *Trade Practices Act*: see further, Dee, W, "What are compliance programs and why are they needed?" (1992) 64 (Jan-Feb) *Trade Practices Commission Bull* 58.

6 See further the discussion of the different types of corporate crime in Tomasic, R,."Corporate Crime" (1994) in Chappell, D and Wilson, P (eds), *The Australian Criminal Justice System* at 253–269.

7 This theme has been well developed in the academic literature of the last two decades. Three representative articles worth further examination are: Coffee, J, "Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and Effective Legal Response" (1977) 63 *Virg LR* 1099; Fisse, B, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions" (1983) 56 *Southern Calif LR* 1141; Stone, C D, "The Place of Enterprise Liability in the Control of Corporate Conduct" (1980) 90 *Yale LJ* 1.

corporate controllers. This is not to suggest that the criminal law is not an appropriate mechanism for use against corporations and their controllers, but rather that it has been overemphasised. Whilst this may be seen as a somewhat heretical position to take in the company of criminal lawyers, the very credibility and effectiveness of law relating to corporate wrongdoing necessitates that such an argument be taken seriously. This is because a body of law which is faithful to traditional categories, but which is ineffective when those categories are imposed upon an area of activity is ultimately of little value.

All law operates in a social context; indeed the character of that law is itself moulded by the context in which it exists and out of which it has emerged. This is nowhere more true than in regard to the development of our laws governing merchants and commerce. The emergence of the corporate form as a commonplace legal form of business organisation has also facilitated the creation of different expectations and patterns of legal conduct upon the part of the business community. This picture has been somewhat complicated by the somewhat overenthusiastic application of criminal penalties to corporate law statutes. However, the general irrelevance of these penalties illustrates the basic point which I wish to make here, namely, that corporate law operates in what might be described as a civil law culture. This culture pervades both the business community and its legal advisers. Its message is that the criminalisation of corporate misconduct is generally both inappropriate and irrelevant, except for the most blatant cases.

Now, I would not wish to be understood as saying that the conduct of those who engage in illegal corporate activity should be treated less stringently than that of those who engage in, for example, predatory street crime. Rather, I wish to suggest that the responses to such "corporate crime" need to be devised in such a way as to suit the nature of the offence so as to be seen as being both effective and credible. Merely imposing an approach to crime and misconduct which has been developed in regard to other areas of law and social activity is to fall victim to the instrumentalist fallacy which assumes that the passage of a law will necessarily bring about a change in patterns of social conduct. At best, such actions are merely symbolic in nature. For law to be credible and effective, it needs to take into account the values or mores, social structures, networks and resources (financial, political and educational) of the community subject to legal control. The importance of social networks and underlying values within the business community is well illustrated by the failure of insider trading prosecution in this country over three decades.[8] Moreover, it is important that professional advisers such as auditors, liquidators and lawyers play a much greater role in the private enforcement of the law than they have been prepared to do up until recent times. The failure of auditors is a good illustration of the need to gain the support of professional advisers in dealing with problems of corporate illegality.[9]

However, the mismatch between our approach to corporate law and these social and environmental factors has, I would argue, exaggerated the problem of complex criminal trials in corporate crime matters to such an extent that our judicial process is unable to effectively cope with such matters. This represents a major failure upon the part of our legal system, especially in the light of a number of official enquiries which have looked at the handling of corporate crime by the Australian legal system.[10] I would argue that it is

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8 See further Tomasic, R, *Casino Capitalism? Insider Trading in Australia* (1991).

9 For a discussion of the critical role of auditors in relation to corporate illegality and financial fraud, see for example: Tomasic, R, "Auditors and the Reporting of Illegality and Financial Fraud" (1992) 20 *Aust Bus LR* 198–229.

10 For examples of some of the most notable official failures in this regard, see the work of the Gibbs Committee,

therefore necessary to bring into line, on the one hand, the well developed set of understandings of corporate conduct and misconduct drawn from over two decades of corporate law research and, on the other hand, the responses which the courts, regulatory agencies and the legislature have adopted to corporate misconduct. Fine tuning our judicial processes for the management of complex criminal trials may provide only marginal advances which will only delay the need to come to terms with more fundamental approaches to this area.

This paper will therefore seek to present further evidence to support the argument that corporate law, and therefore corporate law enforcement and compliance strategies, need to be closely related to the structure of the business and professional advisory communities, to patterns of conduct within the commercial community and to attitudes and values of participants in these communities. The paper will enlarge upon some earlier work which was undertaken in collaboration with Stephen Bottomley and which has now been published in the book *Directing the Top 500: Corporate Governance and Accountability in Australian Companies*. One of the principal findings of that study was the marginality of corporate laws to directors of Australia's largest public companies, and that corporate laws will only be understood well and followed where they relate closely to norms which have emerged within, and been accepted by, the business community itself.[11]

What *Directing the Top 500* and more recent work has stressed is the dominance of a civil law culture in which there is little incentive to seek to enforce criminal sanctions within the *Corporations Law* and a strong view upon the part of the business community and professional advisers that it is generally inappropriate to seek to enforce most breaches of this body of law through traditional criminal law mechanisms.[12] As some of you will be aware, early in 1992 I undertook a series of national interviews with key observers of, and participants in, the enforcement of Australian corporation laws. The study focussed especially upon offences under the *Corporations Law*. As Table A illustrates, those interviewed included judges, magistrates, barristers, solicitors in large law firms, regulatory officials and prosecutors.

Table A: Distribution of Interviewees for the Corporate Law Sanctions Project

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

Review of Commonwealth Criminal Law: Interim Report: Principles of Criminal Responsibility and Other Matters (July 1990); Australian Law Reform Commission, "Sentencing", *Report No 44* (1988).

11 See further Tomasic, R and Bottomley, S, *Directing the Top 500: Corporate Governance and Accountability in Australian Companies* (1993).

12 These findings are more fully explored in: Tomasic, R, "Corporations Law Enforcement Strategies in Australia: The Influence of Professional, Corporate and Bureaucratic Cultures" (1993) 3 *Aust J Corp L* 192–229.

* Australian Securities Commission

Trade Practices Commission

† Australian Stock Exchange

The Goals of Corporations Law

These interviews have shown that the Australian *Corporations Law* is widely perceived to be facilitative in character.[13] Corporate law is something to be invoked rather than to be imposed. It sets the broad framework for corporate actions and lays down broad standards of conduct aimed basically at maintaining public confidence in the integrity of corporations and markets. Few perceive the purposes of the *Corporations Law* in terms of traditional criminal law goals, such as retribution, rehabilitation or deterrence. Instead, the *Corporations Law* is seen in very general terms as a mechanism for achieving ethical conduct within the business community. As one Victorian Supreme Court judge explained, "the primary goal is to achieve morality in business with a view to protecting shareholders and the investing public". In similar terms, a Sydney based District Court judge saw the goals of corporate law enforcement as being "to secure legal and moral practices in the corporate life of the nation". Traditionally, however, the courts have taken a noninterventionist approach to the internal affairs of the corporation. This non-interventionist approach goes hand in hand with the widely held view that generally little is to be gained by the imposition of criminal sanctions upon corporations and their officers and that the primary emphasis should be placed upon civil recovery or compensation to those who have been injured by corporate illegality. As a Melbourne silk noted: "... the main purpose [of corporate law enforcement] should be to protect investors and creditors and not to be obsessed with punishing the baddie ...". The maintenance of boundaries and standards was frequently emphasised by other barristers. As a Brisbane silk observed, corporate law enforcement should be seen in facilitative terms of providing "a statutory framework for the economy to function" or as an Adelaide silk added, of creating "... a stable and certain environment in which business can operate effectively".

Such views were echoed even more strongly by partners working in large law firms, arguably the closest to business of any group of lawyers. The goal of achieving market confidence was frequently stressed as the predominant goal of corporate law. There was a widespread view that honest directors were the principal victims of the *Corporations Law*. Summing up the view of many of these practitioners was the belief that the *Corporations Law* should merely set the "outer boundaries or limits of commercial morality" so that within those boundaries "breaches of the law should best be dealt with by the private parties themselves". As I concluded elsewhere:

> Basically, then, the establishment of a framework or a system of boundaries was seen as a fundamental purpose of corporate law enforcement, but the basic purposes of this were explained in facilitative terms, such as the facilitation of the "aggregation of capital" (Melbourne national law firm partner), "improving the manner in which the corporate practice is conducted in, it is not a punishment or morals thing" (Brisbane national firm partner); the maintenance of "minimum standards of commercial practice" (Melbourne law firm partner); "the regulation of corporate activities and not the prosecution of people" (Brisbane national firm partner); "to ensure that business can function effectively by

13 Much of the following discussion is taken from Tomasic, id at 192.

> creating an environment of confidence and trust" (Adelaide law firm partner) and "to effect a structure and a framework within which the orderly business of the community can be undertaken in the hope that investors can expect that the outer parameters can be respected" (Melbourne law firm partner). Fairly typical of this group, a Brisbane law firm partner saw the goals of corporate law enforcement in the following terms:
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> I would see it as being to facilitate business being done well and properly. It is not a retribution system, except in so far as is necessary to instil confidence.
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> Thus, for the corporate law partners of larger law firms, corporate law enforcement is again rarely seen in punitive or criminological terms but rather tends to be seen in facilitative terms, as a means of creating market confidence and ensuring that business operates smoothly. This is clearly consistent with the civil law paradigm which dominates this area of law.[14]

Whilst law firm partners may see a broad range of corporate conduct, liquidators and prosecutors would probably see the worst examples of such conduct. Whilst both groups do speak in terms of achieving deterrence through the use of the *Corporations Law*, however, an overriding consideration for liquidators is whether those who have been harmed by the illegality will be assisted by any enforcement action. Prosecutors were alone of all groups interviewed who saw a close relationship between the enforcement of the *Corporations Law* and the enforcement of other areas of law. Their view was however probably closer to wider community expectations, but not one which was shared by other groups concerned with the operation of the *Corporations Law* provisions.

In contrast, corporate regulators were more influenced by public policy notions such as the achievement of market efficiency and the achievement of wide ethical standards in the marketplace. One Australian Securities Commission lawyer summed up this view as follows: "It is all to do with the credibility, integrity and efficiency of the markets. This is the ultimate goal and all else has to feed from this, including punishment and retribution".

Occasionally, regulators saw this in such terms as the existence of: "... flexibility to allow the black letter of the law to be modified and to allow a commercial result to be achieved, which a strict application of the law would not allow".

An ASC Regional Commissioner added that the goal of corporate law enforcement was to ensure "that capitalism works properly; to ensure that people will have confidence in corporations to create a market for shares". This goal of market facilitation has been carried furthest by another corporate regulator, the Trade Practices Commission, even if this has had the effect of undermining the prosecution goal in criminal cases. As one senior TPC officer explained the purposes of corporate law enforcement, this was perceived as "... the maintenance of a framework for corporations, not as a leash, but as a fence, by drawing outer limits and inside it, encouraging vigorous competition between enterprises".

It is possible to conclude from observations such as those reported above that there is a dominant civil law culture operating in regard to the *Corporations Law* and that this serves to moderate or deflect the impact of criminal law inspired strategies for dealing with criminal breaches of this Law. Even the victims of corporate law breaches, if their representatives are to be believed, would prefer compensation rather than retribution.

There are also good reasons why regulatory agencies will tend to find it difficult to adopt a strong policing role in regard to the *Corporations Law* breaches. Most regulatory

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14 Id at 202.

action tends to be reactive in nature. There is considerable resistance to a more intrusive proactive approach being adopted by the ASC, especially in regard to such things as random audits. However, pro-active policing which is more educational in character is more likely to be accepted. The educative aspects of pro-active corporate regulation were emphasised by a number of officials. One state Australian Stock Exchange official painted a stark picture of the regulatory environment, noting that one aspect of the role of the ASX was to:

> ... help to inform companies, as people are pretty ignorant. There is a reactive ingredient here, but there is a need to educate people rather than play policeman. There is a good percentage that are dishonest. At the bottom are the idiots and in the middle are those who are just ignorant and have no idea of what the ASX is about. Consequently, you need to be more pro-active than reactive.

The case for pro-active corporate law enforcement is clearly a strong one, but only where this can be implemented. One senior TPC official argued that corporate law enforcement:

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

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

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

Another factor limiting the extent of pro-active enforcement activity is the amount of expertise available to the ASC. One prosecutor in Melbourne thought that the ASC was "not up to pro-active methods as competence is lacking". Similarly, a corporate prosecutor in Brisbane supported a more pro-active stance, but added that "for any regulator, pro-active programs are very difficult. In the case of ASC personnel, there could be more training and experience". The cost of pro-active policing was also frequently emphasised as an inhibiting factor. As one prosecutor in Brisbane summarised this problem "the only problem, is that if the cost is a factor, it is difficult to be pro-active if you are snowed under with reactions". Measuring the success of pro-active enforcement is another difficulty. This was referred to by one ASC Regional Commissioner who observed that:

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

All of these factors make proactive corporate law enforcement strategies difficult. These difficulties are accentuated in regard to more intrusive proactive strategies which are criticised by some judges and many private practitioners for civil liberties and other policy reasons. Whilst there is clearly support for a more proactive approach to *Corporations Law* enforcement, given the heavy reliance upon reactive methods in the past, this was often expressed in terms of "nipping illegality in the bud," rather than using such methods as a way of dealing with serious abuses. Moreover, there was some caution about the capacity of the regulatory agencies to effectively and fairly rely upon such methods. In any event, proactive methods need not only be used as a basis for criminal law enforce-

ment and may merely be used as regulatory devices in themselves, such as through the administration of warnings or cautions.

This brings us back to the civil law emphasis which this paper has argued lies at the heart of the *Corporations Law*. This was evident in responses to questions concerning the balance which should be struck between the use of civil remedies and the imposition of criminal penalties. Some of the arguments favouring the civil approach are set out below.

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

Secondly, and related to the first point, there was the widespread view that the criminal justice system was a poor mechanism for dealing with corporate law offences. For example, a leading ASX official took the view that "the criminal [justice] system is close to unworkable". One reason for this was the perceived reluctance of the courts to convict white collar or corporate offenders. As one Sydney government lawyer explained: "... people in suits are usually not seen as candidates for gaol". An Adelaide law firm partner was also critical of the attitudes of the courts in corporate criminal cases, saying that "they are too cautious in sending people to gaol for white collar offences; and then there are the evidentiary problems". The complexity of criminal trials was also a matter of concern to some prosecutors. One experienced Crown prosecutor observed:

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

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

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

Fourthly, civil remedies are widely preferred due to the view that criminal proceedings should only be used in cases of misappropriation, fraud or deceit. One Canberra lawyer noted that if the offence "... happens in the ordinary course of business, it should not be a criminal law matter, meaning that civil penalties should apply". Similarly, a Sydney

Queen's Counsel saw particular merit in civil actions in respect of "innocent but negligent breaches". Another Sydney Queen's Counsel reported that "... there is concern about the inappropriateness of the present penal system for dealing with corporate crime". Again, a Sydney corporate lawyer urged that the criminal law should be "reserved for gross acts of dishonesty". He added that "... people should not be made criminally liable just for bad business decisions".

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

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

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

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

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

On the other hand, many of those who disagreed with the proposition that greater use should be made of civil remedies thought that the use of such remedies should go hand in hand with the use of criminal penalties. As one leading Sydney barrister observed "[m]uch greater use should be made of civil penalties, but it doesn't follow that less use be made of criminal remedies. Civil remedies are essential, but fear of gaol is a powerful sanction". A regulator made a similar point when he observed that " [y]ou must use both [civil and criminal remedies]. When the money is gone there is no point in talking about civil remedies; but the most effect is gained by bringing civil actions in a timely manner".

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

> [t]here should be greater use of criminal penalties as it will wipe it out. Putting three fellows in gaol will get you a generation of peace, as occurred with the Australian Taxation Office. Criminal sanctions only deter the middle and upper classes who have something to lose by gaol.

Another difficulty with resort to civil actions involves finding funds to support such actions. This was a problem which was especially real for liquidators and accountants. One accountant in a large Sydney firm of accountants remarked that he had "... some difficulties with civil actions, as who draws the cheque?" Similarly an Adelaide insolvency partner in a large accounting firm noted that "... the trouble with [civil actions] is that it is the liquidators and creditors who bring these and they don't have the funds, so they run out of puff." The problem of funding civil actions is really a crucial one, especially if information is not readily available to support such actions. Also, a Supreme Court judge added that "the trouble with civil remedies is that those who really milked the company have had advice and shielded their assets." He went on to ask: "Do you really win either way?" This sense of frustration was echoed by a Victorian County Court judge who observed:

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

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

However, although there is a widespread belief that civil remedies are to be preferred in most circumstances where the *Corporations Law* has been breached, there is an equally widespread view that the perils of corporate litigation are such that even civil actions will be avoided in many cases. The destruction of company records, the creation of complex corporate structures and transactions and the limited funds available for protracted civil actions have all meant that such actions will also be rare. Boards are also unlikely to bring legal actions against their fellow directors and a new management will tend to concentrate upon the future of the business rather than spending time seeking to attribute legal responsibility for past events.

As one Sydney law partner put it "... having lost money they are not prepared to spend good money chasing after bad". Another large firm lawyer in Sydney noted that management "won't rake over the coals if it is a new management". An ASC official also noted that "very often corporations do not want to get involved in protracted litigation as it is a distraction and it does not give them a return on their investment. Liquidators lack the resources to bring actions". A South Australian Supreme Court judge also noted that "it is probably part of the attitude of business to write it off to expenses and to get on with business". Furthermore, the publicity associated with litigation is often seen as being bad for business and civil litigation will therefore be avoided.

Conclusions

For many years it has been somewhat casually assumed that corporate crime could be dealt with in much the same way as "normal" crimes. This meant that the distinctive fea-

tures of the context of corporate law were seen as being less important than the similarities between corporate and noncorporate crime. Superficially, such a uniform approach may be defended upon the basis of equality of treatment of those charged, but the outcomes in corporate and noncorporate criminal cases are rarely comparable. As has been argued above, this approach ignores the particular social structures and values of the corporate community and has the effect that the enforcement of corporate crime often became difficult if not impossible.

The task of dealing with corporate crime has been accentuated by careless drafting of companies legislation, such as the lumping together of civil and criminal provisions in the same section, as occurred in the duties of directors provisions and the insolvent trading provisions. This drafting style had the effect of ensuring that courts were often reluctant to find a breach of the civil law provision because of the likelihood that this would be seen as the basis for maintaining a subsequent criminal case.[15] Of course, there were few if any successful criminal actions brought under provisions such as these (ie s232 and the old s592 of the Law). This absurdity has now been addressed by the partial decriminalisation of provisions such as s232 (the duties of officers provisions) of the *Corporations Law*. Criminal sanctions have been only preserved in situations where a "civil penalty provision" has been breached knowingly, intentionally or recklessly and either involves an intention to deceive or defraud, or alternatively, involves a dishonest intent to gain an advantage: s1317FA(1) of the *Corporations Law*. The introduction of a civil penalty order may also alleviate the burden of proof problems which often arise in relation to corporate law breaches, although the Courts have tended to require a higher burden of proof in civil cases where fraud was alleged.[16]

A related problem has been the failure to adequately conceptualise the penalty regime for corporate crime offences under the *Corporations Law*. Although the maximum fines for breaches of the directors' duties provisions and for insider trading have recently been increased tenfold, the allocation of particular penalties in different sections of the legislation has been haphazard. There is the appearance that particular penalties have been provided for in many provisions merely upon the basis of a drafting formula and not with regard to the need to have criminal sanctions at all.[17] One is reminded of comments made by Bob Baxt in evidence to the Cooney Committee dealing with directors' duties where he said that "[i]f I were rewriting the *Companies Act* I would decriminalise a lot of it. I think there are far too many criminal penalties in areas where there should not be".[18] The large number of criminal provisions in the *Corporations Law* has added unnecessary and irrelevant complexity to the Law, especially as most of these provisions have rarely if ever been used. Perhaps the simplification of the *Corporations Law* foreshadowed by Attorney General Michael Lavarch may yet see this issue addressed as well. However, it should not be assumed that civil actions for breaches of *Corporations Law* provisions will become

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15 For example, in *Group Four Industries Pty Ltd v Brosnan and Anor* (1991) 5 ACSR 649, Duggan J (at first instance) had occasion to interpret what is now s592 of the *Corporations Law*. In considering the defence in what was then s556(2)(a) of the Companies Code, he took the view (at 661) that "[t]he existence of a severe penal sanction reinforces my view that a narrower interpretation is called for".

16 *Briginshaw v Briginshaw* (1938) 60 CLR 336.

17 Incidentally, there is also a mismatch between *Corporations Law* criminal penalties and the penalties imposed under various *Crimes Acts* for comparable offences.

18 Evidence of Professor R Baxt before the Senate Standing Committee on Legal and Constitutional Affairs, see *Company Directors' Duties* (10 March 1989) at 356.

more common, especially after significant financial losses have occurred. As I have argued, even where there is a good legal case, there is often little incentive for litigants to throw good money after bad if there is little practical likelihood of recovery, because the funds have been dissipated. Moreover, the informational asymmetries and power imbalances within the corporation mean that shareholders are rarely in a position to have access to the information required to bring civil actions against the corporation or its officers.[19]

The failures of corporate criminal law enforcement in the past cannot be simply attributed to a lack of resources or a lack of determination upon the part of regulatory and prosecutorial authorities. Although the performance of these agencies in regard to corporate crime matters has improved considerably in recent years, there are limits to the extent to which managerial devices (such as more efficient case management and investigation procedures) can be relied upon by these agencies to improve the handling of such matters. The need to build trust and links with the business community means that regulatory agencies such as the ASC need to focus much greater attention upon developing a culture of compliance and facilitating private enforcement of *Corporations Law* provisions. Whilst the complex criminal trial will remain part of the landscape of corporate crime, it is more realistic to focus upon earlier intervention and proactive educational programs in dealing with corporate illegality. Such a focus is more in keeping with what I have called the civil law culture which dominates this area of law enforcement. In the final analysis, it is important to recall the findings of researchers such as Christopher Stone that corporate law is a domain in which the impact of law often ends and that corporate social control will depend upon placing much greater effort upon influencing the values or mores of the business community.[20] Before the problem of complex corporate crime trials is considered, it is therefore vital that these fundamental features of the landscape of corporate Australia be understood. Such an understanding must affect the nature of our response to this problem.

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19 The Rule in *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189 remains a significant barrier here, although the introduction of a statutory derivative action may partially alleviate this problem: see further Lavarch Committee, *Corporate Practices and the Rights of Shareholders*; *Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs* (1991) 192–205.

20 Stone, C D, *Where the Law Ends: The Social Control of Corporate Behaviour* (1975). Similar conclusions have also been reached in Australian research: see further, above n11.