AN EMPIRICAL ANALYSIS OF PUBLIC ENFORCEMENT OF DIRECTORS' DUTIES IN AUSTRALIA: PRELIMINARY FINDINGS

WORKING PAPER

CENTRE FOR INTERNATIONAL FINANCE AND REGULATION AND MELBOURNE LAW SCHOOL

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EXECUTIVE SUMMARY

This working paper presents the preliminary findings of a detailed empirical study of court proceedings brought by the Australian Securities and Investments Commission (ASIC) and the Commonwealth Director of Public Prosecutions (CDPP) for breach of directors' duties provisions of the *Corporations Act 2001* (Cth) in the ten year period from 2005 to 2014.

This study is the most in-depth empirical analysis of public enforcement of directors' duties to date, examining the type, frequency and magnitude of sanctions imposed in civil and criminal proceedings, as well as the success rates, duration and reporting of such proceedings. Its findings provide the foundation for evidence-based legal analysis and policy development in relation to this fundamental area of corporate regulation.

Effective enforcement of directors' duties is central to the wellbeing of Australia's society, economy and environment. Given the rapidly growing number of companies in Australia, with 2,292,624 companies registered as at November 2015, it is critical to ensure that companies are managed lawfully and responsibly. As Justice Middleton commented in *ASIC v Healey* (2011) 196 FCR 291, "The role of a director is significant as their actions may have a profound effect on the community, and not just shareholders, employees and creditors."

Court action by ASIC and the CDPP plays a significant role in the enforcement of directors' duties, being responsible for approximately half of all public and private proceedings involving breach of directors' duties. Australia's public enforcement regime has attracted attention from overseas jurisdictions in relation to establishing, expanding or refining public regimes of their own. Yet the effectiveness of penalties for corporate wrongdoing has also been called into question in recent times, with the Financial System Inquiry concluding that the "maximum civil and criminal penalties for contravening ASIC legislation should be substantially increased to act as a credible deterrent for large firms." The Senate Standing Committee on Economics is currently conducting an inquiry into the "inconsistencies and inadequacies of current criminal, civil and administrative penalties for corporate and financial misconduct or white-collar crime."

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This working paper contributes towards an empirically informed discourse on the adequacy of penalties for corporate wrongdoing. The following are some of the key trends identified in the paper.

- Most previous commentary on enforcement of directors' duties has focussed on the civil penalty regime, yet this paper shows that criminal enforcement of directors' duties by the CDPP was significantly more prevalent than civil enforcement by ASIC. Comparing directors' duties that attract both civil and criminal liability, criminal enforcement by the CDPP was responsible for about 81% of all matters in which liability was established and about 61% of all defendants found liable.

- Much of the debate surrounding penalties for corporate wrongdoing has centred on the maximum pecuniary penalty of $200,000 in the *Corporations Act 2001* (Cth). However, this paper reveals that incapacitative sanctions, such as custodial sentences and civil management disqualification orders, were much more frequently imposed than pecuniary penalties. Prison sentences and disqualification orders each accounted for about 33.50% of the total number of sanctions imposed (67% collectively), while about 18% of the sanctions were civil pecuniary penalties and only about 2% were criminal fines.

- While the statutory maximum civil pecuniary penalty is $200,000, this paper reveals that the penalties imposed by courts are typically much lower than the maximum. The median civil pecuniary penalty imposed on defendants who had engaged in a single contravention of a directors' duties provision was $25,000, which is only 12.50% of the statutory maximum. The median penalty imposed on all defendants, including defendants who had engaged in multiple contraventions, was $50,000.

- The average civil management disqualification order was about 5.2 years. The average maximum prison sentence was about 2.25 years, while the average minimum (i.e. minimum amount of time that must be served) was about 1.4 years. However, a significant proportion of prison sentences, about 46%, involved immediate release subject to a good behaviour bond.

- Both ASIC and the CDPP enjoyed high litigation success rates. Despite the higher standard of proof applicable to criminal proceedings for breach of directors' duties, the CDPP's success rates were not significantly lower than ASIC's. The CDPP and ASIC established liability in about 88% and 89% of matters respectively. In terms of individual defendants, the CDPP and ASIC established liability in relation to about 84% and 92% of defendants respectively.

- Contrary to a commonly held view that civil enforcement is more efficient than criminal enforcement, the duration of both the civil and criminal enforcement processes was lengthy. From the first detected contravention to the final judgment, the average duration of civil matters was about 6.9 years, while the average duration of criminal matters was about 7.9 years.

AN ANALYSIS OF PENALTIES UNDER ASIC ADMINISTERED LEGISLATION: OTHER PUBLICATIONS

- George Gilligan, Paul Ali, Andrew Godwin, Jasper Hedges and Ian Ramsay, 'An Analysis of Penalties under ASIC Administered Legislation: Scoping the Issues' (Working Paper No. 1, Centre for International Finance and Regulation and Melbourne Law School, 31 May 2015)

- Helen Bird and George Gilligan, 'Financial Services Misconduct and the Corporations Act 2001' (Working Paper No. 2, Centre for International Finance and Regulation and Melbourne Law School, 31 July 2015)

- George Gilligan, Jasper Hedges, Paul Ali, Helen Bird, Andrew Godwin and Ian Ramsay, 'Regulating by Numbers: the Trend Towards Increasing Empiricism in Enforcement Reporting by Financial Regulators' (2015) 9 *Law and Financial Markets Review* 260-282

- Helen Bird, George Gilligan, Andrew Godwin, Jasper Hedges and Ian Ramsay, 'An Empirical Analysis of the use of Enforceable Undertakings by the Australian Securities and Investments Commission between 1 July 1998 and 31 December 2015' (Working Paper No. 4, Centre for International Finance and Regulation and Melbourne Law School, 4 March 2016)

I INTRODUCTION

This working paper advances the understanding of how directors' duties are enforced in practice by way of a detailed empirical study of civil and criminal proceedings brought by the Australian Securities and Investments Commission (ASIC) and the Commonwealth Director of Public Prosecutions (CDPP). It analyses the sanctions imposed in such proceedings by reference to a number of criteria, including: jurisdiction (civil or criminal); quantity (number of matters and defendants); type (specific kind of sanction); and magnitude (amount or duration of sanction). In addition, this paper addresses broader issues relating to the enforcement process, including the liability rates (i.e. win/loss rates), duration of the enforcement process and ASIC media release coverage of civil and criminal enforcement of directors' duties.

This paper breaks new ground by analysing public enforcement of directors' duties (i.e. enforcement by statutory agencies rather than private parties[2]) in greater detail than previous empirical studies. It also presents previously unpublished data on criminal directors' duties matters obtained from the CDPP via an application under the *Freedom of Information Act 1982* (Cth). Previous empirical studies on public enforcement of directors' duties have not tended to cover the full range of enforcement methods or analyse in detail the sanctions imposed. Most empirical studies have focussed on civil enforcement by ASIC.[3] Studies that have investigated criminal enforcement outcomes have done so mainly by reference to the jurisdiction and number of matters.[4] This paper adds significant depth to previous studies by examining additional criteria such as the number of defendants and the specific type and magnitude of sanctions. These additional criteria contribute to a more complex understanding of how directors' duties are enforced by ASIC and the CDPP.

The analysis in this working paper is based on an empirical database of sanctions imposed in civil and criminal proceedings brought by ASIC and the CDPP for contraventions of directors'

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2 See page 6 of this working paper for further discussion regarding the distinction between public and private enforcement of directors' duties.

3 See eg J. Varzaly, 'The Enforcement of Directors' Duties in Australia: An Empirical Analysis (2015) 16 *European Business Organization Law Review* 281, 307; A. Keay and M. Welsh, 'Enforcing Breaches of Directors' Duties by a Public Body and Antipodean Experiences (2015) 15 *Journal of Corporate Law Studies* 255; M. Welsh, 'Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia (2014) 42 *Federal Law* Review 217; V. Comino, 'James Hardie and the Problems of the Australian Civil Penalties Regime' (2014) 37 *UNSW Law Journal* 196; R. Jones and M. Welsh, 'Toward a Public Enforcement Model for Directors' Duty of Oversight' (2012) 45 *Vanderbilt Journal of Transnational Law* 343; J. Varzaly, 'Protecting the Authority of Directors: An Empirical Analysis of the Statutory Business Judgment Rule' (2012) 12 *Journal of Corporate Law Studies* 429; V. Comino, 'The Enforcement Record of ASIC since the Introduction of the Civil Penalty Regime' (2007) 20 *Australian Journal of Corporate Law* 183; M. Welsh, 'Eleven Years On – An Examination of ASIC's Use of an Expanding Civil Penalty Regime' (2004) 17 *Australian Journal of Corporate Law* 175.

4 See eg M. Welsh, 'Civil Penalties and Responsive Regulation: The Gap Between Theory and Practice' (2009) 33 *Melbourne University Law Review* 908; M. Welsh, 'The Regulatory Dilemma: The Choice Between Overlapping Criminal Sanctions and Civil Penalties for Contraventions of the Directors' Duty Provisions' (2009) 27 *Company & Securities Law Journal* 370; V. Comino, 'The Challenge of Corporate Law Enforcement in Australia' (2009) 23 *Australian Journal of Corporate Law* 233.

duties provisions of the *Corporations Act 2001* (Cth) and its predecessor, the *Corporations Act 1989* (Cth), from 1 January 2005 to 31 December 2014. The database contains final court judgments during the ten year study period in which a determination was made as to whether or not there was a contravention of the following provisions: ss 180, 181, 182, 183, 184, 191, 195, 208 and 588G of the *Corporations Act 2001* (Cth) and their predecessors, ss 232(4), 232(2), 232(6), 232(5), 231, 232A, 243H and 588G of the *Corporations Act 1989* (Cth). The study sample covers the full range of provisions that are considered to constitute 'directors' duties'. The content of these duties is set out in Table 1 in Part III of this paper.

This working paper focusses on civil and criminal enforcement and presents the preliminary findings of a broader research project on public enforcement of directors' duties. This paper will be followed by a final paper on public enforcement of directors' duties which will be published in 2016. The final paper will present some additional data on administrative and negotiated enforcement of directors' duties and consider the extent to which the original aspirations of the civil penalty regime, as discussed in extrinsic material surrounding the introduction of the regime, have been put into practice. Among other issues, the paper will address to what extent the system of responsive regulation and 'pyramid of enforcement'[5] envisaged by those who advocated for the civil penalty regime have been implemented. This detailed analysis of the civil penalty regime as it applies to directors' duties will be of interest not only to those who work in corporate regulation but also to the broader regulatory community, as civil penalties are an increasingly common feature of Australian legislation in corporations law and many other areas of law.[6]

The structure of this working paper is as follows: Part II discusses the importance of empirical research on public enforcement of directors' duties; Part III outlines the content of directors' duties and describes the civil and criminal sanctions applying to contraventions of the duties; Part IV explains the coverage of the empirical database and the methods used to identify and collect data on enforcement of directors' duties; Part V presents a series of tables containing the data and discusses the preliminary findings of the research; and Part VI summarises the key findings of this paper and outlines in more detail the forthcoming final paper on public enforcement of directors' duties.

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[5] See I. Ayres and J. Braithwaite, *Responsive Regulation, Transcending the Deregulation Debate* (Oxford University Press, 1992); G. Gilligan, H. Bird and I. Ramsay, 'Civil Penalties and the Enforcement of Directors' Duties' (1999) 22 *UNSW Law Journal* 417; Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (1989).

[6] See R. P. Austin and I. M. Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (Online edition, LexisNexis Butterworths, 2015), [3.400]; R. Head, 'Company Secretary: The Rise and Rise of Civil Penalties in Australia' (2008) 60 *Keeping Good Companies* 518; A. Rees, 'Civil Penalties: Emphasising the Adjective or the Noun' (2006) 34 *Australian Business Law Review* 139, p. 140 n. 4; Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia (ALRC Report 95)*, March 2003, http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC95.pdf.

II IMPORTANCE OF EMPIRICAL RESEARCH ON PUBLIC ENFORCEMENT OF DIRECTORS' DUTIES

The empirical research presented in this working paper and the forthcoming final paper on public enforcement of directors' duties is important for a number of reasons.

First, directors' duties regulate the conduct of individuals who have the most significant influence on the actions of corporations, which are numerous and, in some cases, command substantial social and economic power. As at November 2015, there were 2,292,624 companies registered in Australia.[7] According to a March 2012 report by Deloitte Access Economics commissioned by the Australian Institute of Company Directors, the private sector's share of Australia's gross value added was estimated at 85%.[8] The significant contribution that companies make to the Australian economy demonstrates the critical importance of ensuring that they are managed responsibly.

An influential report in shaping some aspects of the modern directors' duties regime was the Senate Standing Committee on Legal and Constitutional Affairs' report *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (Cooney Report).[9] Upon tabling of the report in Parliament, Senator Cooney emphasised the important role that directors' duties play in Australian society:

> The modern corporate sector has a profound effect on our life. It is crucial to the creation of the nation's wealth. Society looks to it to produce that wealth ethically and in accordance with community values. Directors are the mind and soul of the corporate sector. They are crucial to how its great power is exercised. They can weaken and even suppress markets. They can disturb and destroy an environment. Their actions can have a profound effect on the lives of the shareholders, employees, creditors and the public generally. A legal framework has developed regulating companies' incorporation and providing a mechanism for their winding-up, laying down standards of conduct for their officers, protecting shareholders and regulating how they may merge and be taken over.[10]

The important role of directors has also been recognised by the judiciary. For example, Justice Middleton commented in *ASIC v Healey* (2011) 196 FCR 291:

> A director is an essential component of corporate governance. Each director is placed at the apex of the structure of direction and management of a company. The higher the office that is held by a person, the greater the responsibility that falls upon him or her.

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7 Australian Securities and Investments Commission, *2015 Company Registration Statistics*, November 2015, http://asic.gov.au/regulatory-resources/find-a-document/statistics/company-registration-statistics/2015-company-registration-statistics/

8 Deloitte Access Economics, *The Economic Contribution of the Private Sector*, 16 March 2012, pp. 3-4, http://www.companydirectors.com.au/~/media/resources/director-resource-centre/research/dae-aicd-report_16032012_final.ashx?la=en

9 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (1989).

10 Commonwealth, *Parliamentary Debates*, Senate, 22 November 1989, 3070 (Bernard Cooney).

> The role of a director is significant as their actions may have a profound effect on the community, and not just shareholders, employees and creditors.[11]

Second, enforcement of directors' duties constitutes a significant component of the overall enforcement activity of ASIC and the CDPP is also actively engaged in the enforcement of directors' duties. According to ASIC's enforcement reports from 1 July 2011 to 30 June 2015, 'actions against directors' constituted over half of ASIC's 'enforcement outcomes' within the regulatory area of corporate governance.[12] The CDPP does not publish enforcement reports; however, proceedings brought by the CDPP account for 72.73% of matters and 52.20% of defendants in the study sample, indicating that enforcement of directors' duties is an important area of the CDPP's operational practices.

Of course, directors' duties can also be enforced via private civil proceedings. An empirical study published by Varzaly in 2015 found that there were 112 private directors' duties matters during the period from 2001 to 16 April 2013.[13] Combined with the finding presented in this paper that there were 99 matters involving public enforcement of directors' duties during the ten year period from 1 January 2005 to 31 December 2014, the data suggests that public enforcement accounts for approximately half of all directors' duties matters. Enforcement of directors' duties by ASIC and the CDPP therefore plays a key role in the broader regulatory framework of corporate governance.

Third, a number of commentators have suggested that other jurisdictions, including the United States,[14] the United Kingdom,[15] Hong Kong,[16] Singapore[17] and New Zealand,[18] can gain insight from Australia's public enforcement of directors' duties in relation to establishing, expanding or refining public enforcement regimes in those jurisdictions. Australia has pioneered some key developments with respect to directors' duties. For example, it was the first English-speaking jurisdiction to introduce statutory directors' duties in 1896[19] and the first such jurisdiction to introduce criminal sanctions to enforce statutory

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11 *ASIC v Healey* (2011) 196 FCR 291, 297 [14].

12 See Australian Securities and Investments Commission, *ASIC Enforcement Outcomes*, July 2011 to June 2015, http://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-enforcement-outcomes/

13 J. Varzaly, 'The Enforcement of Directors' Duties in Australia: An Empirical Analysis (2015) 16 *European Business Organization Law Review* 281, 307.

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

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

16 See J. Cassidy, 'Directors' Duty of Care in Australia – A Reform Model?' (2008) 16 *Asia Pacific Law Review* 19, 32-39.

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

18 See S. Watson and R. Hirsch, 'Empty Heads, Pure Hearts: The Unintended Consequences of the Criminalisation of Directors' Duties' (2011) 17 *New Zealand Business Law Quarterly* 302, 321-327.

19 See R. T. Langford, I. Ramsay and M. Welsh, 'The Origins of Company Directors' Statutory Duty of Care' (2015) 37 *Sydney Law Review* 489.

directors' duties in 1958.[20] This research will therefore be of interest to other jurisdictions that may look to Australia's public enforcement of directors' duties in relation to reforming their own penalties regimes for contraventions of directors' duties and corporate wrongdoing more broadly.

Fourth, penalties regimes for corporate wrongdoing have been the subject of recent debate not just overseas but also within Australia. The Financial System Inquiry conducted in 2013 to 2014 considered the issue of the adequacy of the penalties available to ASIC. Recommendation 29 of the Final Report stated that 'The maximum civil and criminal penalties for contravening ASIC legislation should be substantially increased to act as a credible deterrent for large firms. ASIC should also be able to seek disgorgement of profits earned as a result of contravening conduct.'[21] The report also emphasised the need for ASIC to be adequately resourced, the stated objective of Recommendation 29 being to '[e]nsure ASIC has adequate funding and regulatory tools to deliver effectively on its mandate.'[22] On 24 July 2015 the Commonwealth Government announced a capability review of ASIC, which forms part of its response to the Financial System Inquiry, '…to ensure that ASIC has the appropriate governance, capabilities and systems to meet [its] objectives and future regulatory challenges.'[23] Most recently, the Senate Standing Committee on Economics announced an inquiry into penalties for white-collar crime on 25 November 2015, which will report by 27 July 2016 and seeks to address the 'inconsistencies and inadequacies of current criminal, civil and administrative penalties for corporate and financial misconduct or white-collar crime.'[24] This study on public enforcement of directors' duties relates directly to a number of the Terms of Reference of the inquiry, including: 'the use and duration of custodial sentences'; 'the use and duration of banning orders'; and 'the value of fine and other monetary penalties…'[25] Such research is therefore highly relevant to current debates in relation to the adequacy of sanctions for corporate wrongdoing.

Fifth, following on from the point above, this research provides an important supplement to ASIC's analysis of penalties in *Report 387: penalties for corporate wrongdoing*[26] (Report 387)

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[20] A. Keay and M. Welsh, 'Enforcing Breaches of Directors' Duties by a Public Body and Antipodean Experiences (2015) 15 *Journal of Corporate Law Studies* 255, 257.

[21] Financial System Inquiry, *Final Report*, November 2014, p.250, http://fsi.gov.au/publications/final-report/

[22] Ibid.

[23] The Hon Josh Frydenberg MP, Assistant Treasurer of the Commonwealth of Australia, *Capability Review of the Australian Securities and Investments Commission*, 24 July 2015, http://jaf.ministers.treasury.gov.au/media-release/036-2015/

[24] Senate Standing Committee on Economics, Parliament of Australia, *Penalties for White Collar Crime* (2016), http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/White_collar_crime

[25] Senate Standing Committee on Economics, Parliament of Australia, *Penalties for White Collar Crime* (2016), http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/White_collar_crime/Terms_of_Reference

[26] Australian Securities and Investments Commission, *Report 387: Penalties for Corporate Wrongdoing*, 20 March 2014, http://download.asic.gov.au/media/1344548/rep387-published-20-March-2014.pdf

and its submission to the Financial System Inquiry (ASIC FSI Submission) in 2014.[27] ASIC's Report 387 and the ASIC FSI Submission analyse the types and maximum sanctions for selected types of wrongdoing within the market integrity and financial services regulatory areas across seven jurisdictions: Australia, the United States, the United Kingdom, Hong Kong, Canada, Singapore and New Zealand. However, sanctions for wrongdoing within the regulatory area of corporate governance were excluded from Report 387 and the ASIC FSI Submission because it is not possible to meaningfully compare Australia's public enforcement of statutory directors' duties with other jurisdictions, which for the most part rely on private enforcement of directors' duties.[28] This study therefore supplements ASIC's analysis by providing a domestic examination of sanctions imposed for contraventions of directors' duties, which is ASIC's largest area of enforcement activity within corporate governance.[29]

Finally, civil penalty provisions are an increasingly common feature of Australian legislation in corporations law and many other areas of law.[30] In corporations law, civil penalties were initially limited to directors' duties, including ss 180-184, 209 and 588G and their predecessors in the *Corporations Act 1989* (Cth), but there are now 44 other civil penalty provisions in the *Corporations Act 2001* (Cth).[31] Rees notes that there were 72 statutes containing civil or administrative penalty provisions examined by the Australian Law Reform Commission in the course of its inquiry culminating in Report 95, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, published in 2002.[32] Given the increasing prevalence of civil penalty regimes, research on civil enforcement of directors' duties relative to other enforcement methods is important not only to the development of corporate law enforcement but also regulatory enforcement more broadly.

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27 Australian Securities and Investments Commission, *Financial System Inquiry Interim Report: Submission by the Australian Securities and Investments Commission*, August 2014, http://fsi.gov.au/files/2014/08/ASIC.pdf

28 See Australian Securities and Investments Commission, *Report 387: Penalties for Corporate Wrongdoing*, 20 March 2014, pp 4-5, http://download.asic.gov.au/media/1344548/rep387-published-20-March-2014.pdf

29 See Australian Securities and Investments Commission, *ASIC Enforcement Outcomes*, July 2011 to June 2015, http://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-enforcement-outcomes/

30 See R. P. Austin and I. M. Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (Online edition, LexisNexis Butterworths, 2015), [3.400]; R. Head, 'Company Secretary: The Rise and Rise of Civil Penalties in Australia' (2008) 60 *Keeping Good Companies* 518; A. Rees, 'Civil Penalties: Emphasising the Adjective or the Noun' (2006) 34 *Australian Business Law Review* 139, p. 140 n. 4; Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia (ALRC Report 95)*, March 2003, http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC95.pdf.

31 See R. P. Austin and I. M. Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (Online edition, LexisNexis Butterworths, 2015), [3.400].

32 A. Rees, 'Civil Penalties: Emphasising the Adjective or the Noun' (2006) 34 *Australian Business Law Review* 139, p. 140 n. 4; Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia (ALRC Report 95)*, March 2003, http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC95.pdf

III DIRECTORS' DUTIES AND SANCTIONS FOR CONTRAVENTION

The directors' duties provisions that are the subject of this empirical study are: ss 180, 181, 182, 183, 184, 191, 195, 208 and 588G of the *Corporations Act 2001* (Cth) and their predecessors, ss 232(4), 232(2), 232(6), 232(5), 231, 232A, 243H and 588G of the *Corporations Act 1989* (Cth). For ease of expression, this paper refers to these duties by their current section numbers in the *Corporations Act 2001* (Cth), rather than citing both the current sections and their predecessor sections in the *Corporations Act 1989* (Cth).

Table 1 outlines the substantive directors' duties and corresponding civil and criminal sections of the *Corporations Act 2001* (Cth). The duties fall into three categories depending on the sanctions applying to a contravention of the duty. One duty, s 180 (the duty to exercise reasonable care and diligence) has only civil penalty sanctions where it is contravened. Two duties, ss 191 and 195 (which deal with conflicts of interest), have only criminal sanctions where they are contravened. The remaining duties attract both civil penalty sanctions and criminal sanctions. Criminal sanctions can be applied where the defendant's conduct satisfies additional requirements.

Table 1: Directors' duties provisions in the *Corporations Act 2001* (Cth)

Duty	Civil section	Civil application	Criminal section	Additional requirements	Criminal application
Duty of care and diligence					
Must exercise powers and discharge duties with the degree of care and diligence that a reasonable person would exercise if they: (a) were a director or officer of a corporation in the corporation's circumstances; and (b) occupied an office held by, and had the same responsibilities within the corporation as, the director or officer	180(1)	Directors and other officers	N/A	N/A	N/A
Duty to act in good faith in the best interests of the corporation and duty to act for proper purposes					
Must exercise powers and discharge duties: (a) in good faith in the best interests of the corporation; and (b) for a proper purpose	181(1)	Directors and other officers	184(1)	Recklessness or intentional dishonesty	Directors and other officers
Duty not to improperly use position					
Must not improperly use their position to: (a) gain an advantage for themselves or someone else; or (b) cause detriment to the corporation	182(1)	Directors, other officers and employees	184(2)	Dishonesty plus intention or recklessness	Directors, other officers and employees
Duty not to improperly use information					
Must not improperly use information that has been obtained because the person is or has been a director, officer or employee of a corporation to: (a) gain an advantage for themselves or someone else; or (b) cause detriment to the corporation	183(1)	Directors, other officers and employees	184(3)	Dishonesty plus intention or recklessness	Directors, other officers and employees
Duty to disclose material personal interests					

Must give other directors of the company notice in accordance with s 191(3) of any material personal interest the director has in a matter that relates to the affairs of the company unless an exception pursuant to s 191(2) applies	N/A	Director	191(1)	Strict liability	Director
Duty not to be present at meetings and vote on matters in which director has material personal interest – directors of public companies only					
Must not, in relation to any material personal interest the director has in a matter that is being considered at a directors' meeting: (a) be present while the matter is being considered at the meeting; or (b) vote on the matter (unless an exception pursuant to s 195(1A) applies)	N/A	Director	195(1)	Strict liability	Director
Duty not to give a financial benefit to a related party of a public company without member approval					
A public company, or an entity that the public company controls, must not give a financial benefit to a related party of the public company without obtaining member approval pursuant to s 208(1)(a) unless an exception pursuant to s 208(1)(b) applies	208 & 209(2)	Person involved in a contravention of s 208 (209(2))	208 & 209(3)	Dishonesty	Person involved in a contravention of s 208 (209(3))
Duty to prevent insolvent trading by company					
Must prevent the company from incurring a debt if the company is insolvent or becomes insolvent by incurring that debt, or debts including that debt, and there are reasonable grounds for suspecting that the company is insolvent or would so become insolvent and the director is aware that there are such grounds or a reasonable person in a like position in a company in the company's circumstances would be so aware	588G(2)	Director	588G(3)	Combination of absolute liability, strict liability and dishonesty	Director

A *Civil Sanctions for Contraventions of Directors' Duties*

All of the duties outlined in Table 1 are subject to civil sanctions except ss 191 and 195. Where a duty is subject to civil penalty sanctions and the court is satisfied that a defendant has contravened the duty, the court is required to make a declaration of contravention: s 1317E(1). ASIC can then seek a pecuniary penalty order, a disqualification order or a compensation order. The court proceedings are civil proceedings in terms of the application of rules of evidence and procedure: s 1317L. This means that there must be proof on the balance of probabilities that there has been a contravention rather than proof beyond reasonable doubt, which is the higher standard of proof that applies to criminal proceedings.[33]

[33] The common law *Briginshaw* principle has often been applied to the civil standard of proof in proceedings for contraventions of directors' duties, which has effectively meant that in many civil matters the standard of proof has been higher than the balance of probabilities: see T. Middleton, *ASIC Corporate Investigations and Hearings* (Thomson Reuters, 2012) 8.1520; R. P. Austin and I. M. Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (Online edition, LexisNexis Butterworths, 2015) [3.410.6]; V. Comino, 'James Hardie and the Problems of the Australian Civil Penalties Regime' (2014) 37 *UNSW Law Journal* 196, 225; A.

Pecuniary penalty order: Where a court has declared that a defendant has contravened a director's duty that is subject to civil penalty sanctions, the court may order that person to pay a pecuniary penalty to the Commonwealth government of up to $200,000 if the contravention:

- materially prejudices the interests of the company or its creditors;
- materially prejudices the company's ability to pay its creditors; or
- is serious: s 1317G.

Disqualification order: Where a court has declared that a defendant has contravened a director's duty that is subject to civil penalty sanctions, the court may disqualify that person from managing companies for a period the court considers appropriate if the court is satisfied that the disqualification is justified. In determining whether the disqualification is justified, the court may have regard to:

- the person's conduct in relation to the management, business or property of any company; and
- any other matters that the court considers appropriate: s 206C.

Compensation order: Where a court has declared that a defendant has contravened a director's duty that is subject to civil penalty sanctions and damage has resulted from the contravention, then the court may order the person to compensate the company for damage suffered by it. The damage suffered by the company for the purposes of making a compensation order includes any profits made by the person resulting from the contravention: s 1317H.

B *Criminal Sanctions for Contraventions of Directors' Duties*

All of the duties outlined in Table 1 are subject to criminal sanctions except s 180. The duties not to make improper use of position, not to make improper use of information, not to give a financial benefit to a related party of a public company, to act in good faith in the best interests of the company, to act for a proper purpose, and to prevent the company from trading while it is insolvent, are subject to the same criminal penalties. A defendant who commits an offence by breaching any of these statutory duties in the way specified may be fined up to 2,000 penalty units ($360,000), or imprisoned for up to five years, or both: Schedule 3 of the *Corporations Act 2001* (Cth).

The duties pursuant to ss 191 and 195 attract their own criminal penalties. A contravention of s 191 is a criminal offence on the part of the director who does not disclose his or her interest in accordance with the requirements of the section. The maximum penalty

Keay and M. Welsh, 'Enforcing Breaches of Directors' Duties by a Public Body and Antipodean Experiences (2015) 15 *Journal of Corporate Law Studies* 255, 268.

imposed pursuant to Schedule 3 of the *Corporations Act 2001* (Cth) is a fine of 10 penalty units ($1800) or imprisonment for three months, or both.

Contravention of s 195 is a criminal offence on the part of the director who votes or is present for the discussion of a matter on which he or she has a material personal interest, if no valid permission is obtained. Under s 1311 and Schedule 3 of the *Corporations Act 2001* (Cth), the maximum penalty is a fine of five penalty units ($900).

Convictions for breaches of all of the directors' duties provisions outlined in Table 1, except ss 191 and 195, result in an automatic five year period of disqualification from managing corporations commencing either on the day on which the person was convicted, if the person does not serve a term of imprisonment, or the day on which they are released from prison, if the person does serve a term of imprisonment: s 206B.

IV RESEARCH METHOD

Our research located 27 civil and 72 criminal court matters from 1 January 2005 to 31 December 2014 involving final proceedings brought by ASIC and the CDPP in which a determination was made as to whether or not there was a contravention of the following provisions: ss 180, 181, 182, 183, 184, 191, 195, 208 and 588G of the *Corporations Act 2001* (Cth) and their predecessors, ss 232(4), 232(2), 232(6), 232(5), 231, 232A, 243H and 588G of the *Corporations Act 1989* (Cth). The objective was to identify every relevant matter within the ten year study period. The database covers the full range of provisions that are considered to constitute 'directors' duties', as outlined in Part III.

Directors' duties proceedings are typically divided into separate judgments for liability and penalties. Consequently, directors' duties judgments fall into three broad categories: unproven liability judgments (i.e. judgments in which ASIC or the CDPP failed to establish the liability of any of the defendant/s); proven liability judgments (i.e. judgments in which ASIC or the CDPP succeeded in establishing the liability of all or some of the defendant/s); and penalty judgments (judgments in which sanctions are imposed on defendants found liable in proven liability judgments). The 99 'matters' in the dataset are comprised of penalty judgments,[34] which are herein referred to as 'proven matters', and unproven liability judgments, which are herein referred to as 'unproven matters'. In relation to appeals involving a series of penalty judgments, each judgment that was the final penalty judgment for one or more of the defendants was counted as a separate 'proven matter'. For example, in the proceedings relating to James Hardie Industries Ltd, the CEO Peter MacDonald did not appeal the first instance decision and the CFO Phillip Morley only appealed to the NSW Court of Appeal, while the remaining eight defendant directors (the

[34] To avoid inflation of the number of proven matters, the dataset does not separately count penalty judgments that were formally multiple judgments but substantively constituted a single judgment. For example, the three penalty judgments in the proceedings involving Elm Financial Services, handed down on 11, 13 and 21 of October 2005, have been counted as one rather than three proven matters: see *ASIC v Elm Financial Services* [2005] NSWSC 1065 and prior judgments in relation to these proceedings.

seven non-executive directors and the defendant who was both the company secretary and general counsel) appealed to the High Court.[35] These proceedings have been counted as three 'proven matters', one for the MacDonald penalty judgment, one for the Morley penalty judgment, and one for the penalty judgment relating to the eight remaining defendants. In appeals involving a series of unproven liability judgments, only the final appeal was counted as an 'unproven matter'. For example, in the proceedings involving Fortescue Metals Group Ltd, CEO Andrew Forrest was found not liable at first instance, liable on appeal to the Full Federal Court, and not liable on appeal to the High Court.[36] These proceedings have been counted as one 'unproven matter' for the final unproven liability judgment of the High Court.

Because 'proven matters' are classified as matters in which liability was established against all or only some defendants, there are occasional 'proven matters' which involve defendants who were alleged to have contravened directors' duties provisions but found not to have contravened such provisions. Thus, the classification of the data distinguishes between 'liable defendants' in proven matters and 'non-liable' defendants in proven matters.

Public enforcement of directors' duties in Australia is not limited to final court proceedings. Contraventions of directors' duties are also the subject of interlocutory proceedings (e.g. injunctions, restraining orders, and asset preservation orders), administrative decisions (e.g. banning of directors pursuant to ASIC's power of disqualification in s 206F of the *Corporations Act 2001* (Cth)) and negotiated outcomes (e.g. enforceable undertakings and informally negotiated settlements). These matters are not covered in this working paper. However, this research project's final paper on directors' duties will present some additional data on disqualifications pursuant to s 206F and enforceable undertakings involving contraventions of directors' duties.

The database contains judgments from superior courts, encompassing supreme courts, courts of appeal and federal courts, and judgments from inferior courts, encompassing district/county courts and local/magistrates' courts. Different methods were used to identify superior court and inferior court judgments. The following online databases were used to identify superior court judgments: LexisNexis AU, Westlaw AU, the Australasian Legal Information Institute (AustLII) and JADE Professional. A freedom of information request to the CDPP pursuant to the *Freedom of Information Act 1982* (Cth) was used to identify inferior court judgments, as such judgments are not usually available via online databases. It was not necessary to make a freedom of information request to ASIC as it is not possible to bring civil proceedings for contraventions of directors' duties in inferior courts. Section 58AA in conjunction with ss 1317E, 1317G, 1317H, 206C, 206D and 206E of the *Corporations Act 2001* (Cth) provide that only superior courts may make civil

[35] See *Gillfillan v ASIC* [2012] NSWCA 370 and prior judgments in relation to these proceedings.
[36] See *Forrest v ASIC* (2012) 247 CLR 486 and prior judgments in relation to these proceedings.

declarations of contravention and orders imposing pecuniary penalties, compensation and disqualification in relation to contraventions of directors' duties.

To ensure that all relevant superior court judgments during the study period were identified, multiple online legal databases were searched, broad search terms were used and the results were cross-checked against the online edition of *Ford, Austin and Ramsay's Principles of Corporations Law*.[37] The general form of the search term used was as follows: *"corporations act" AND 180 w/15 s OR ss OR subs OR sub-s OR subss OR sub-ss OR sect OR section OR sections OR subsection OR sub-section OR subsections OR sub-sections OR provision OR provisions*. This search term identified all judgments containing the name of the act (e.g. corporations act) and the provision number (e.g. 180) within 15 words of the various possible section descriptors. No single online database identified every superior court matter in the database, confirming the value of searching multiple databases. In total, 64 searches were performed, yielding 21,352 hits and 47 relevant superior court matters. A further three superior court matters were identified via the freedom of information request to the CDPP that are not available on any of the four online legal databases; however, information regarding these matters was available in ASIC media releases. In total, the database contains 51 superior court matters involving 107 defendants.

Once the superior court judgments were identified, several categories of data were extracted in relation to the judgments, including: matter name; citation; jurisdiction; forum; decision-maker; appellate level; media release coverage; date of alleged contravention; date of earliest media release relating to the matter; date of judgment; name, age, sex, position of defendant; name, type and industry of company; prior wrongs/offences by the defendant; outcome; section numbers; number of contraventions; other laws contravened; and sanction type and magnitude.

In respect of the inferior court judgments in the database, the freedom of information application to the CDPP requested the following information:

> 1.A spreadsheet summarising the outcome for all matters under sections 184(1), 184(2), 184(3), 191(1), 195(1), 209(3) and 588G(3) of the *Corporations Act 2001* (Cth) that were finalised between 1 January 2005 and 31 December 2014.
>
> 2.A spreadsheet summarising the outcome for all matters under sections 232(2), 232(4), 232(5), 232(6), 588G (in conjunction with section 1317FA), 231 and 232A of the *Corporations Act 1989* (Cth) that were finalised between 1 January 2005 and 31 December 2014.
>
> Including: matter number; name of defendant/s; referring agency; phase (eg, summary, trial, sentence, appeal against acquittal and/or sentence by CDPP, appeal against conviction and/or sentence by defendant/s); court; jurisdiction; date offence/s committed or allegedly committed; date defendant/s charged; date matter finalised;

[37] R. P. Austin and I. M. Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (Online edition, LexisNexis Butterworths, 2015).

> section/s contravened or allegedly contravened; number of counts by each defendant in relation to each section contravened or allegedly contravened; plea (if applicable); outcome (eg, discontinuance, acquittal, conviction, sentence, appeal dismissed, appeal allowed; penalties imposed on each defendant in relation to each count (eg, terms of imprisonment, non-parole periods, recognisance release orders, fines, other outcomes, such as community based orders), including the extent to which the penalties are cumulative and/or concurrent; and total penalties imposed on each defendant.

The CDPP provided information which included: dates matter received and completed; legislation name; section number; phase (eg, committal, trial, sentence, appeal); plea/outcome (eg, guilty plea, proven, acquitted); appeal outcome (eg, allowed, dismissed); and penalties (eg, imprisonment, fine, good behaviour bond, community service order, along with the amount and/or duration of the penalty). In total, the database contains 48 inferior court matters involving 54 defendants. In some instances, the data provided by the CDPP has been supplemented with information contained in ASIC media releases where additional detail was required.

V RESEARCH FINDINGS

This part of the working paper presents the preliminary findings of an analysis of matters and sanctions contained in the empirical database by reference to the following criteria: jurisdiction (i.e. civil or criminal); quantity (i.e. number of matters and defendants); type (i.e. specific kind of sanction); and magnitude (i.e. amount or duration of sanction). It also analyses a number of broader aspects of the enforcement process, including the liability rates, duration of the enforcement process and ASIC media release coverage of civil and criminal matters.

Section A provides the legal context for the subsequent empirical analysis of matters, sanctions and enforcement, presenting data on the number of matters in which contravention of each civil and criminal directors' duties provision was proven. Section B provides a broad overview of the matters contained in the database, including data on the number of proven and unproven matters and number of defendants involved in these matters. Section C examines the matters in more detail through an analysis of data on the particular types and magnitude of sanctions. Section D discusses liability rates, duration of the enforcement process and ASIC media release coverage of civil and criminal matters.

A *Legal Context: Contraventions of Directors' Duties Provisions*

Tables 2 and 3 show how frequently each civil and criminal directors' duties provision was enforced, based on the number of matters in which contravention of each provision was proven. As ss 191 and 195 do not attract civil liability, these provisions have not been included in Table 2. Likewise, ss 180, 181, 182 and 183 have not been included in Table 3 because they do not attract criminal liability. As outlined in Part III, ss 181, 182 and 183 have counterpart criminal offences in the form of ss 184(1), 184(2) and 184(3), whereas the duty of care and diligence in s 180 has no criminal counterpart.

Table 2: Number of civil matters in which contravention of each directors' duties provision was proven

Section	Matters
180	18
181	11
182	10
183	2
208	3
588G	1
Total	45

Table 2 shows that ss 180, 181 and 182 were the most frequently enforced civil directors' duties provisions. Sections 183, 208 and 588G were rarely enforced. Collectively, ss 180, 181 and 182 accounted for 39 of the total of 45 occasions on which contravention of a civil directors' duties provision was proven (86.67%). Section 180 alone accounted for 18 of the 45 such occasions (40%). These results are broadly consistent with Table 3, which shows that the criminal offence counterparts of ss 181 and 182, ss 184(1) and 184(2), were the most frequently enforced criminal directors' duties provisions.

Table 3: Number of criminal matters in which contravention of each directors' duties provision was proven

Section	Matters
184(1)	13
184(2)	50
184(3)	0
191	0
195	0
208	0
588G	2
Total	65

Table 3 shows that the disparity between the enforcement frequency of ss 184(1)-(2) and the other criminal directors' duties provisions is even greater than the corresponding disparity discussed above regarding ss 180-182 and the other civil provisions. Sections 184(1) and 184(2) collectively accounted for 63 of the total of 65 occasions on which contravention of a criminal directors' duties provision was proven (96.92%). Section 184(2) was particularly frequently enforced, accounting for 50 of the 65 such occasions (76.92%).

Tables 2 and 3 combined show that ss 181 and its criminal counterpart, s 184(1), were enforced with a similar frequency. Sections 181 and 184(1) were proven to have been contravened in 11 and 13 matters respectively. By contrast, s 182 was much less frequently enforced than its criminal counterpart, s 184(2). Sections 182 and 184(2) were proven to have been contravened in 10 and 50 matters respectively. Section 184(2) alone accounted for 45.45% of the combined total of 110 occasions on which contravention of a directors' duties provision was proven (50 of 110).

Overall, the duty to not improperly use position in s 182 and its criminal counterpart, 184(2), was by far the most frequently enforced directors' duty, accounting for 60 (10 civil, 50 criminal) of the total of 110 occasions on which contravention of a directors' duties provision was proven (54.55%). The duty to act in good faith in the best interests of the corporation and the duty to act for proper purposes was the next most frequently enforced duty, accounting for 24 (11 civil, 13 criminal) of the 110 such occasions (21.82%). The duty of care and diligence was the third most frequently enforced provision, accounting for 18 of the 110 such occasions (16.36%). Collectively, ss 180, 181, 182, 184(1) and 184(2) accounted for 102 of the 110 such occasions (92.73%). Sections 183, 184(3), 208 and 588G were rarely enforced and ss 191 and 195 were not enforced at all.

B *Database Overview: Number of Matters and Defendants*

Tables 4 and 5 provide an overview of the matters contained in the database by reference to the number and percentage of proven and unproven matters and the number and percentage of defendants involved in those matters. These tables enable a broad comparison between the prevalence of civil and criminal enforcement of directors' duties.

Table 4: Number of matters and defendants within each jurisdiction

	Civil	Criminal	Total
All matters	27 (27.27%)	72 (72.73%)	99
All defendants	78 (48.45%)	83 (51.55%)	161
Proven matters	24 (27.59%)	63 (72.41%)	87
Liable defendants in proven matters	72 (50.70%)	70 (49.30%)	142
Non-liable defendants in proven matters	2 (100%)	0 (0%)	2
Unproven matters	3 (25%)	9 (75%)	12
Defendants in unproven matters	4 (23.53%)	13 (76.47%)	17
All first instance matters	19 (24.36%)	59 (75.64%)	78
All appeal matters	8 (38.10%)	13 (61.90%)	21
Superior court matters	27 (52.94%)	24 (47.06%)	51
All defendants	78 (72.90%)	29 (27.10%)	107
Proven matters	24 (53.33%)	21 (46.67%)	45

Liable defendants in proven matters	72 (75.79%)	23 (24.21%)	95
Non-liable defendants in proven matters	2 (100%)	0 (0%)	2
Unproven matters	3 (50%)	3 (50%)	6
Defendants in unproven matters	4 (40%)	6 (60%)	10
All first instance matters	19 (63.33%)	11 (36.67%)	30
All appeal matters	8 (38.10%)	13 (61.90%)	21
Inferior court matters	__	48	48
All defendants	__	54	54
Proven matters	__	42	42
Liable defendants in proven matters	__	47	47
Non-liable defendants in proven matters	__	0	0
Unproven matters	__	6	6
Defendants in unproven matters	__	7	7
All first instance matters	__	48	48
All appeal matters	__	0	0

The data presented in Table 4 breaks new ground in the empirical study of public enforcement of directors' duties by analysing the data in greater detail than previous empirical studies. It also presents previously unpublished data on criminal directors' duties matters obtained from the CDPP via an application pursuant to the *Freedom of Information Act 1982* (Cth). As noted in the introduction to this paper, despite the significant role of criminal enforcement of directors' duties, most previous studies have focussed on ASIC and civil enforcement.[38] Previous studies that have investigated the CDPP and criminal enforcement have tended to analyse the data only by reference to the number of matters.[39] Table 4 adds significant depth to previous studies by also examining the number of

[38] See eg J. Varzaly, 'The Enforcement of Directors' Duties in Australia: An Empirical Analysis (2015) 16 *European Business Organization Law Review* 281, 307; A. Keay and M. Welsh, 'Enforcing Breaches of Directors' Duties by a Public Body and Antipodean Experiences (2015) 15 *Journal of Corporate Law Studies* 255; M. Welsh, 'Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia (2014) 42 *Federal Law* Review 217; V. Comino, 'James Hardie and the Problems of the Australian Civil Penalties Regime' (2014) 37 *UNSW Law Journal* 196; R. Jones and M. Welsh, 'Toward a Public Enforcement Model for Directors' Duty of Oversight' (2012) 45 *Vanderbilt Journal of Transnational Law* 343; J. Varzaly, 'Protecting the Authority of Directors: An Empirical Analysis of the Statutory Business Judgment Rule' (2012) 12 *Journal of Corporate Law Studies* 429; V. Comino, 'The Enforcement Record of ASIC since the Introduction of the Civil Penalty Regime' (2007) 20 *Australian Journal of Corporate Law* 183; M. Welsh, 'Eleven Years On – An Examination of ASIC's Use of an Expanding Civil Penalty Regime' (2004) 17 *Australian Journal of Corporate Law* 175.

[39] See eg M. Welsh, 'Civil Penalties and Responsive Regulation: The Gap Between Theory and Practice' (2009) 33 *Melbourne University Law Review* 908; M. Welsh, 'The Regulatory Dilemma: The Choice Between Overlapping Criminal Sanctions and Civil Penalties for Contraventions of the Directors' Duty Provisions' (2009) 27 *Company & Securities Law Journal* 370.

defendants, resulting in a more complex understanding of the relative prevalence of civil and criminal enforcement of directors' duties.

Table 4 shows that criminal matters were significantly more prevalent than civil matters, accounting for 72 of 99 matters (72.73%) and 63 of 87 (72.41%) proven matters. However, when the data is analysed by reference to the number of defendants, there is very little disparity between civil and criminal enforcement. Criminal matters accounted for 83 of 161 defendants (51.55%) and 70 of 142 liable defendants (49.30%), while civil matters accounted for 78 of 161 defendants (48.45%) and 72 of 142 liable defendants (50.70%). The reason for this difference is that civil matters often had multiple defendants, whereas criminal matters usually involved only one defendant. If the measure of the prevalence of enforcement is taken to be the total number of defendants found liable for contraventions of directors' duties, rather than the total number of matters in which liability was established, civil enforcement comes out just ahead of criminal enforcement with 72 of 142 liable defendants (50.70%).

While Table 4 shows that, overall, civil enforcement yielded a slightly higher number of liable defendants than criminal enforcement, Table 4 does not provide the most accurate comparison possible between the prevalence of civil and criminal enforcement. The reason for this is that Table 4 includes matters in which s 180 was the only directors' duties provision contravened, which skews the data in favour of civil enforcement, as s 180 only attracts civil liability. Table 5 is a variation on Table 4 which excludes matters in which s 180 was the only directors' duties provision contravened or allegedly contravened. By default, it also excludes s 191 and 195, which only attract criminal liability, as there were no matters in which these provisions were contravened. Table 5 therefore provides a more meaningful comparison between civil and criminal enforcement based on the same set of duties, all of which can be enforced by both civil and criminal proceedings.

Table 5: Number of matters and defendants within each jurisdiction (excluding matters in which ss 180, 191 and 195 were the only provisions contravened or allegedly contravened)

	Civil		Criminal		Total
All matters	16	(18.18%)	72	(81.81%)	88
All defendants	47	(36.15%)	83	(63.85%)	130
Proven matters	15	(19.23%)	63	(80.77%)	78
Liable defendants in proven matters	45	(39.13%)	70	(60.87%)	115
Non-liable defendants in proven matters	1	(100%)	0	(0%)	1
Unproven matters	1	(10%)	9	(90%)	10
Defendants in unproven matters	1	(7.14%)	13	(92.86%)	14
All first instance matters	13	(18.06%)	59	(81.94%)	72
All appeal matters	3	(18.75%)	13	(81.25%)	16

Superior court matters	16	(40%)	24	(60%)	40
All defendants	47	(61.84%)	29	(38.16%)	76
Proven matters	15	(41.67%)	21	(58.33%)	36
Liable defendants in proven matters	45	(66.18%)	23	(33.82%)	68
Non-liable defendants in proven matters	1	(100%)	0	(0%)	1
Unproven matters	1	(25%)	3	(75%)	4
Defendants in unproven matters	1	(14.29%)	6	(85.71%)	7
All first instance matters	13	(54.17%)	11	(45.83%)	24
Appeal matters	3	(18.75%)	13	(81.25%)	16

When ss 180, 191 and 195 are excluded from the data, it becomes apparent that criminal enforcement is more prevalent both in terms of the number of matters and the number of defendants, accounting for 72 of 88 matters (81.81%), 83 of 130 defendants (64.85%), 63 of 78 proven matters (80.77%) and 70 of 115 liable defendants (60.87%). Nonetheless, even when s 180 matters are excluded from the data sample, civil enforcement still played a significant role, accounting for 45 of 115 liable defendants (39.13%). It is also important not to equate prevalence of enforcement with the overall societal impact of enforcement, as the impact of enforcement is not just a matter of the particular matters won and particular defendants punished, but also the broader deterrent effect of media exposure and public knowledge of the proceedings.[40] Given that civil matters are litigated in the superior courts and in some cases involve high profile corporate defendants as well as director defendants, such as James Hardie Industries Ltd[41] and Centro Properties Group,[42] it may be the case that some civil matters attract greater media coverage and public attention than criminal matters, which are predominantly litigated in the inferior courts and only involve director defendants. Golding and Steinke of King & Wood Mallesons have commented in relation to criminal enforcement of directors' duties, 'While ASIC and the DPP are active in this area, most of the results are below the radar for mainstream corporate Australia.'[43] Further research would be required to ascertain the relative media coverage and public knowledge of civil and criminal proceedings; however, it is important to note that the prevalence and

[40] On the various aims of law enforcement, including deterrence, see eg: A. Ashworth, *Sentencing and Criminal Justice* (Weidenfeld and Nicolson, 1992); C. Beccaria, *On Crimes and Punishments* (Bobbs-Merrill, 1963, first published 1764); D. Garland, *Punishment and Modern Society, A Study in Social Theory* (Clarendon, 1991); and N. Lacey, *State Punishment* (Routledge, 1988). On the role of deterrence in securities regulation, see eg: International Organization of Securities Commissions, *Credible Deterrence in the Enforcement of Securities Regulation* (2015), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD490.

[41] See *Gillfillan v ASIC* [2012] NSWCA 370 and prior judgments in relation to these proceedings.

[42] See *ASIC v Healey* (2011) 196 FCR 291 and prior judgments in relation to these proceedings.

[43] G. Golding and L. Steinke, 'Directors in the Regulatory Enforcement Pyramid – Recent Developments' (University of New South Wales: 2012 Directors Duties Seminar, 20 March 2012), pp. 29-30, http://www.clmr.unsw.edu.au/sites/default/files/attached_files/directors_in_the_regulatory_enforcement_pyramid.pdf

magnitude of sanctions may or may not reflect the broader impact of civil and criminal enforcement of directors' duties.

C *Detailed Examination: Types and Magnitude of Sanctions*

The preceding analysis of the relative prevalence of civil and criminal enforcement is interesting from the point of view of enforcement strategy; however, it only provides the beginnings of an understanding of the substantive effect of enforcement. From the perspective of substantive effect, the distinction between civil and criminal jurisdictions is sometimes not as meaningful as it first appears. For example, criminal sanctions can be lenient, such as a 12 month good behaviour bond, while civil sanctions can be severe, such as a 25 year management disqualification order. To advance the understanding of the substantive effect of sanctions imposed for contraventions of directors' duties, it is necessary to also examine the specific type and magnitude of the sanctions.

1 *Types of Sanctions imposed for Contraventions of Directors' Duties*

The main civil sanctions that are imposed for contraventions of directors' duties provisions of the *Corporations Act 2001* (Cth) include: disqualification orders pursuant to ss 206C-E (which prohibit defendants from managing corporations for the stipulated period of time); pecuniary penalty orders pursuant to s 1317G; standalone declarations of contravention pursuant to s 1317E (i.e. declarations of contravention without any corresponding disqualification or pecuniary penalty order); and compensation orders pursuant to s 1317H. The main criminal sanctions include: prison sentences pursuant to s 1311 and Schedule 3 of the *Corporations Act 2001* (Cth); imprisonment by way of periodic detention pursuant to s 20AB of the *Crimes Act 1914* (Cth); conditional release orders pursuant to s 20 of the *Crimes Act 1914* (Cth), which generally entail a good behaviour bond of some kind; discharge without conviction orders pursuant to s 19B of the *Crimes Act 1914* (Cth), which also generally entail good behaviour bonds; community service orders pursuant to s 20AB of the *Crimes Act 1914* (Cth); and reparation (i.e. compensation) orders pursuant to s 21B of the *Crimes Act 1914* (Cth). Of course, interlocutory orders such as restraining orders and asset preservation orders can also be imposed in civil and criminal matters, however these sanctions fall outside the scope of this working paper.

Table 6 displays the number of matters in which particular types of sanctions were imposed and the number of defendants upon whom such sanctions were imposed within the civil and criminal jurisdictions.

Table 6: Number of matters and defendants that attracted particular types of sanctions

Type of sanction	Matters	Defendants
Civil		
Disqualification	22	63

Pecuniary penalty	16	34
Standalone declaration of contravention	1	7
Compensation*	4	5
Criminal		
Prison sentence	57	63
Fine	4	4
Good behaviour bond only	3	4
Community service order only	1	1
Reparation/compensation*	7	7

**Compensatory outcomes are often regarded as distinct from other sanctions on the basis that they merely involve compensation for loss rather than constituting an additional punitive penalty; however, they have been included in the analysis for the sake of completeness.*

In terms of the number of matters in which particular types of sanctions were imposed, prison sentences were by far the most common sanction. There were 87 proven matters during the ten year study period (see Table 4), meaning that imprisonment was imposed in 65.52% of proven matters (57 of 87). Most of these matters also entailed automatic disqualification pursuant to s 206B of the *Corporations Act 2001* (Cth). As explained in Part III.B of this paper, criminal convictions for breach of directors' duties provisions, except ss 191 and 195, result in automatic management disqualification for a five year period. Civil disqualification was imposed in 25.29% of proven matters (22 of 87), civil pecuniary penalties in 18.39% (16 of 87) and criminal fines in 4.60% (4 of 87). However, imprisonment was not as predominant when the data is analysed according to the number of defendants upon whom the sanctions were imposed. In total, there were 142 defendants who had sanctions imposed on them (see Table 4). Imprisonment and disqualification were each imposed on 44.37% of these defendants (63 of 142 each); that is, imprisonment and disqualification collectively were imposed on 126 of 142 defendants. Pecuniary penalties were imposed on 23.94% of such defendants (34 of 142), while criminal fines were only imposed on 2.82% (4 of 142).

These results show that there was a significant emphasis on incapacitative sanctions, such as imprisonment and disqualification. Imprisonment or disqualification was imposed in 90.80% of matters in which a sanction was imposed (79 of 87) and imposed on 88.73% of defendants upon whom a sanction was imposed (126 of 142). Of these two sanctions, it appears that imprisonment was more prevalent at first glance, at least in the sense that imprisonment was imposed in more matters, if not imposed on more defendants. However, a more complex picture emerges when the data is analysed in more detail.

Imprisonment and disqualification were imposed on equal numbers of defendants during the study period; however, prison sentences sometimes only resulted in automatic

disqualification pursuant to s 206B rather than actual imprisonment. Only two of the 63 proven criminal matters involved discharge without conviction pursuant to s 19B of the *Crimes Act 1914* (Cth), therefore the vast majority of proven criminal matters resulted in an automatic five year disqualification period. At the same time, a significant proportion of the prison sentences for contraventions of directors' duties involved immediate release conditional on a good behaviour bond. Of the 28 defendants in the database who only contravened directors' duties provisions (i.e. defendants who had not contravened any other laws) and received a prison sentence for those contraventions, 13 of the sentences involved immediate release conditional on a good behaviour bond (46.43%). While the sample size is small, this data suggests that almost half of defendants sentenced to imprisonment for contraventions of directors' duties do not serve any prison time but instead receive automatic five year disqualifications as a result of their convictions. It is therefore arguable that disqualification was *effectively* the predominant form of sanction imposed for contraventions of directors' duties during the ten year study period.

Table 7 is a variation on Table 6 that shows the number of matters and defendants that attracted the main monetary sanctions, civil pecuniary penalties and criminal fines, as compared with the main incapacitative sanctions, civil disqualification and prison sentences.

Table 7: Number of matters and defendants that attracted monetary and incapacitative sanctions

Type of sanction	Matters	Defendants
Monetary sanctions		
Pecuniary penalties and fines	20	38
Incapacitative sanctions		
Disqualification and prison sentences	79	126

As noted in the introduction to this paper, previous empirical studies of public enforcement of directors' duties have tended to analyse sanctions along jurisdictional lines, which, as noted above, is not always the most meaningful distinction. Table 7 provides a new perspective on the data by grouping sanctions based on the similarity of their substantive effect, rather than by reference to their formal jurisdiction. While pecuniary penalties are 'civil' and fines are 'criminal', the similarity in terms of their substantive impact is greater than the similarity between pecuniary penalties and civil disqualification orders. Of course, criminal convictions resulting in fines usually entail an automatic five year disqualification period pursuant to s 206B of the *Corporations Act 2001* (Cth), as this applies to all convictions for contraventions of directors' duties, except ss 191 and 195, not only convictions for which a prison sentence is imposed. However, it seems that, in practice, there is not as great a point of distinction between pecuniary penalties and fines as it first appears, as almost all pecuniary penalties in the database were also accompanied by a civil disqualification order. Of the 34 defendants upon whom pecuniary penalties were imposed

(see Table 6), only three did not also receive a disqualification order. In regard to incapacitative sanctions, prison sentences can often be more substantively similar to disqualification orders than they are to fines, given the significant proportion of 'prison' sentences that do not in fact result in imprisonment but instead result in a five year disqualification period, as discussed above.

Table 7 further highlights the significant emphasis on incapacitative sanctions, with 126 defendants receiving either disqualification orders or prison sentences and only 38 defendants receiving either pecuniary penalties or fines. Of the total number of 188 individual sanctions imposed (the sum of the figures in the right-hand column of Table 6), disqualification orders and prison sentences each accounted for 33.51% (63 of 188) of the sanctions (67.02% collectively, 126 of 188), while pecuniary penalties accounted for 18.09% (34 of 188) and fines only accounted for 2.13% (4 of 188). Incapacitative sanctions were imposed approximately three times more often than pecuniary penalties and fines.

2 *Magnitude of Sanctions imposed for Contraventions of Directors' Duties*

This section of the paper analyses the magnitude of sanctions imposed on defendants for contraventions of directors' duties. To conduct this analysis, it was necessary to exclude from the relevant study samples defendants who had contravened other provisions of the *Corporations Act 2001* (Cth) or other laws altogether. In matters where the defendants had breached laws other than directors' duties, it was not usually possible to identify the proportion of the sanction that was attributable to the directors' duties contraventions as distinct from the breaches of the other laws. In many cases the judgments imposed a global sanction for all of the contraventions, while in others the sanctions attached to individual contraventions were partly cumulative and partly concurrent, meaning that it was not possible to identify the precise proportion of the final sanction attributable to the directors' duties contraventions. This has resulted in relatively small sample sizes.

This section of the paper continues the analysis of sanctions by reference to the distinction between monetary and incapacitative sanctions. Table 8 sets out the magnitude of civil pecuniary penalties and fines (monetary sanctions), while Table 9 presents the magnitude of civil disqualification orders and prison sentences (incapacitative sanctions). The sample sizes are indicated in parentheses.

Table 8: Magnitude of civil pecuniary penalties and criminal fines imposed on defendants who contravened only directors' duties provisions

	Civil pecuniary penalties	Criminal fines
Average and median amounts		
Average - Defendants with a single contravention/count	$25,000 (11)	Insufficient data
Median - Defendants with a single contravention/count	$25,000 (11)	Insufficient data

Average - Defendants with multiple contraventions/counts	$177,875 (16)	Insufficient data
Median - Defendants with multiple contraventions/counts	$145,000 (16)	Insufficient data
Average - All defendants	$115,593 (27)	$42,500 (2)
Median - All defendants	$50,000 (27)	$42,500 (2)
Highest amounts		
Defendant with a single contravention/count	$40,000	$10,000
Defendant with multiple contraventions/counts	$500,000	$75,000

The term 'multiple contraventions' in Table 8 refers to the number of contraventions, not the number of provisions contravened. Thus, the defendants who committed 'multiple contraventions' may have committed multiple contraventions of the same provision or multiple contraventions of different directors' duties provisions. In most of the matters where defendants had committed multiple contraventions, it was not possible to identify the precise number of contraventions. This was typically because the unlawful incidents were numerous and tended to be bundled together into groups of contraventions, making it unclear whether the group of incidents constituted a 'contravention' or whether each incident within the group constituted a 'contravention'. It was only possible to identify with precision the number of contraventions in relation to five of the 16 defendants who had committed multiple contraventions as set out in Table 8. Of this sample of five defendants, the average number of contraventions per defendant was five to six.

Table 8 indicates that the civil pecuniary penalties imposed were quite low relative to the statutory maximum of $200,000, keeping in mind that this is the maximum for a *single* contravention and the majority of defendants had committed multiple contraventions (16 out of 27, or 59.26%). The average and median pecuniary penalties imposed on defendants for a single contravention were both $25,000, amounting to only 12.50% of the maximum. However, there is a question as to whether this sample is representative of the typical pecuniary penalty, as seven of the 11 defendants within the sample were the non-executive directors in the James Hardie proceedings, all of whom received penalties of either $20,000 or $25,000.[44] The average and median pecuniary penalties imposed on defendants with multiple contraventions were significantly higher, at $177,875 and $145,000 respectively, but they were still less than the maximum penalty for a single contravention, even though, as explained above, these defendants had typically engaged in numerous incidents of unlawful conduct such that it was not possible to identify the precise number of individual contraventions. The average penalty imposed on all defendants was $115,593, amounting to 57.80% of the maximum for a single contravention. However, the median penalty imposed on all defendants was much lower, at $50,000, due to the large number of penalties at the lower end of the scale. Ten of the 27 penalties ranged from $20,000 to $25,000. Only five of the penalties imposed on defendants who had committed multiple

[44] See *Gillfillan v ASIC* [2012] NSWCA 370, [363].

contraventions exceeded the statutory maximum of $200,000 for a single contravention, which were penalties of $201,000, $220,000, $350,000, $390,000 and $500,000.

In regard to fines for criminal convictions, the sample sizes are too low to yield any meaningful conclusions on the average magnitude of fines. However, the highest fines imposed were very low relative to the maximum fines available pursuant to Schedule 3 of the *Corporations Act 2001* (Cth). The highest (and only) fine imposed on a defendant with a single directors' duties contravention was $10,000, which was 4.55% of the applicable maximum fine for a single contravention of $220,000 at the time.[45] The highest (and only) fine imposed on a defendant with multiple directors' duties contraventions was $75,000, which was 22.06% of the applicable maximum fine for a single contravention of $340,000 at the time. The two additional defendants who contravened other provisions attracting criminal fines in addition to directors' duties provisions were fined $4,000 and $10,000.

Table 9 presents the magnitude of civil disqualification orders and prison sentences imposed on defendants who only contravened directors' duties and did not breach any other laws. The right-hand column displays the average maximum prison sentence imposed (i.e. the maximum period of actual incarceration, if the defendant does not comply with the conditions attached to the sentence) and the average minimum prison sentence imposed (i.e. the minimum period of actual incarceration, if the defendant complies with the conditions attached to the sentence). The 'maximum sentences' that were actually imposed, as referred to in Table 9, are not to be confused with the statutory maximum sentence that could have been imposed, as described in Part III, Section B (i.e. five years per count, except in relation to ss 191 and 195). Similarly, the 'minimum sentences' that were actually imposed, as referred to in Table 9, should not be confused with minimum sentences required by statute, known as 'mandatory sentencing', which applies in some areas of sentencing but not sentencing for contraventions of the directors' duties provisions of the *Corporations Act 2001* (Cth). Table 9 contains two variations on the average minimum sentence, one including defendants who were immediately released and one excluding defendants who were immediately released. Including defendants who were immediately released in the calculations dramatically brings down the average minimum sentence, due to the minimum sentence in such matters being zero.

Table 9: Magnitude of civil disqualification orders and prison sentences imposed on defendants who contravened only directors' duties

	Civil disqualification	Prison sentences
Average duration		
Defendants with single	22.60 months (10)	Max sentence: 25.78 months (9)

[45] Note that the current maximum is $360,000, due to increases in the value of the 'penalty unit' in the *Crimes Act 1914* (Cth).

contravention/count		Min sentence (including defendants immediately released): 9.56 months (9) Min sentence (excluding defendants immediately released): 17.20 months (5)
Defendants with multiple contraventions/counts	80.57 months (21)	Max sentence: 27.84 months (19) Min sentence (including defendants immediately released): 8.53 months (19) Min sentence (excluding defendants immediately released): 16.20 months (10)
All defendants	61.87 months (31)	Max sentence: 27.18 months (28) Min sentence (including defendants immediately released): 8.86 months (28) Min sentence (excluding defendants immediately released): 16.53 months (15)
Highest duration		
Defendant with single contravention/count	27 months	Min sentence: 36 months Max sentence: 51 months
Defendant with multiple contraventions/counts	300 months*	Min sentence: 48 months Max sentence: 48 months

**Three of the total of 63 civil disqualification orders (see Table 6) imposed during the ten year study period were permanent. However, these three defendants had contravened a number of other provisions in addition to directors' duties provisions and were therefore excluded from Table 9.*

Table 9 presents a complex picture of the magnitude of incapacitative sanctions. There was a clear positive correlation between the number of contraventions and the duration of civil disqualification orders, in the sense that disqualification orders imposed on defendants with multiple contraventions (80.57 months) were on average longer than those imposed on defendants with a single contravention (22.60 months). However, there was no such correlation in relation to the number of counts for criminal convictions and the duration of prison sentences. The average civil disqualification order for defendants with multiple contraventions (80.57 months) was almost four times the average for defendants with a single contravention (22.60 months). By contrast, the average minimum prison sentence for defendants with multiple counts (8.53 months) was in fact slightly lower than the average for defendants with a single count (9.56 months). This distinction was also reflected in the highest sanctions imposed. The highest civil disqualification order for a defendant with multiple directors' duties contraventions (300 months) was much higher than the highest order for a defendant with a single contravention (27 months), whereas the highest maximum prison sentence (51 months) was in fact imposed on a defendant with only a single count.

In terms of the relative magnitude of civil and criminal incapacitative sanctions, the average duration of civil disqualification orders imposed on all defendants was 61.87 months (just over five years). The average duration of the maximum prison sentence imposed on defendants with a single count was 25.78 months, amounting to 42.97% of the maximum sentence of five years for a single count applicable to all of the directors' duties provisions except ss 191 and 195. As discussed above, the average duration of prison sentences for defendants with multiple counts did not differ much from the average for those with a single count. The average maximum prison sentence imposed on defendants with multiple counts was 27.84 months. Of course, as discussed previously, any criminal conviction for contravention of directors' duties, except ss 191 and 195, results in an automatic five year disqualification period pursuant to s 206B, so this must be taken into account when comparing the magnitude of civil and criminal incapacitative sanctions. Also, magnitude should not be equated with severity. It is difficult to meaningfully compare the severity of time spent disqualified from managing corporations and time spent serving a prison sentence. While the highest disqualification orders imposed in the 87 proven matters (permanent disqualification) were vastly higher than the lowest minimum prison sentence that did not involve immediate release (six weeks), six weeks of imprisonment could be regarded as more severe than permanent disqualification, given that deprivation of liberty is a much harsher sanction than disqualification from managing corporations.

Together, Tables 8 and 9 show that incapacitative sanctions are not only much more frequently imposed than monetary sanctions but also of a more significant magnitude. The median pecuniary penalty of $50,000 is relatively insignificant compared to the average 61.87 month disqualification order or 16.53 month minimum prison sentence followed by five years of automatic disqualification. However, all but three of the 38 defendants who received pecuniary penalties or fines also received either civil management disqualification orders or automatic disqualification pursuant to s 206B of the Corporations Act, so this must be taken into account when assessing the overall impact of the sanctions imposed on each defendant. There is some judicial authority suggesting that civil disqualification orders are to be treated as the default sanction and that pecuniary penalty orders are only to be imposed where disqualification would be an inadequate or inappropriate remedy.[46] This arguably supplementary role of pecuniary penalties could be part of the explanation why the magnitude of such penalties was relatively low. Given the accompanying disqualification periods, it may have been perceived as unnecessary to impose high monetary sanctions in addition to the disqualification orders.

D *Liability Rates, Duration of the Enforcement Process and ASIC Media Release Coverage*

This section of the paper presents data on a number of broader aspects of the enforcement process, including liability rates (i.e. win/loss rates), duration of the enforcement process

[46] See R. P. Austin and I. M. Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (Online edition, LexisNexis Butterworths, 2015), [3.400.24].

and ASIC media release coverage (i.e. whether the matter was covered in ASIC media releases). These broader aspects contextualise the detailed data presented on matters, defendants and sanctions in the preceding sections and provide an important insight into the relative impact of civil and criminal enforcement.

Table 10 presents the percentage and number of matters in which liability was proven and the percentage and number of defendants who were proven liable.

Table 10: Liability rates of civil and criminal enforcement

	Civil	Criminal
Liability rate by matter		
All matters	88.89% (24 of 27)	87.50% (63 of 72)
Superior court matters only	88.89% (24 of 27)	87.50% (21 of 24)
Liability rate by defendant		
All defendants	92.31% (72 of 78)	84.38% (70 of 83)
Superior court defendants only	92.31% (72 of 78)	79.31% (23 of 29)

Table 10 shows that, despite the higher standard of proof applicable to criminal matters, the liability rates for civil matters were not significantly higher than those for criminal matters. This may in part be due to the fact that the common law *Briginshaw* principle has often been applied to the civil standard of proof in proceedings for contraventions of directors' duties, which has effectively meant that in many civil matters the standard of proof has been higher than the balance of probabilities.[47]

Table 11 presents data on the average duration of the civil and criminal enforcement processes. In regard to superior court proceedings, the duration of the enforcement process is measured from the date of the first detected contravention, as documented in the judgment, to the date of the final judgment. The information provided by the CDPP indicated the 'date received' and 'matter completed', which likely represents the time period between the date on which the CDPP received the brief from ASIC and the date the matter was closed subsequent to the final judgment. Thus, while the figures for superior court proceedings represent the duration of the entire enforcement process, including detection, investigation and litigation, the figures for the inferior court proceedings only represent the duration of the litigation phase of the enforcement process. This would include the time it takes the CDPP to conduct its assessment of the brief from ASIC in order to determine whether the matter is suitable for criminal prosecution.

[47] See T. Middleton, *ASIC Corporate Investigations and Hearings* (Thomson Reuters, 2012) 8.1520; R. P. Austin and I. M. Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (Online edition, LexisNexis Butterworths, 2015) [3.410.6]; V. Comino, 'James Hardie and the Problems of the Australian Civil Penalties Regime' (2014) 37 *UNSW Law Journal* 196, 225; A. Keay and M. Welsh, 'Enforcing Breaches of Directors' Duties by a Public Body and Antipodean Experiences (2015) 15 *Journal of Corporate Law Studies* 255, 268.

Table 11: Duration of civil and criminal enforcement

	Civil	Criminal
Superior court proceedings		
First detected contravention to final judgment	83 months (23)	95 months (23)
Inferior court proceedings		
Date received to matter completed	__	37 months (48)

Table 11 shows that the civil enforcement process was on average only slightly quicker than the criminal enforcement process for superior court proceedings. In percentage terms, civil enforcement was 13.48% quicker than criminal enforcement. However, it is difficult to directly compare the duration of civil and criminal proceedings as in some instances civil proceedings are stayed so that they do not jeopardise concurrent criminal proceedings. Whereas both civil and criminal enforcement had high success rates, the duration of the enforcement process in both jurisdictions was lengthy, with matters on average taking upward of seven years from the date of the first contravention to be finalised.

Finally, Table 12 presents data on the percentage and number of matters that were covered in ASIC media releases. This table shows that, although criminal enforcement was more prevalent than civil enforcement and criminal sanctions were generally more severe, criminal enforcement tends to attract less coverage in ASIC media releases. It is interesting to note that only 70% of proven superior court criminal matters were covered in ASIC media releases, as it might be expected that proven superior court matters would be most likely to attract media attention, given the higher status of the forum involved. However, five of the six superior court criminal matters that were not covered in ASIC media releases involved appeals that were dismissed, so the enforcement outcome was unchanged.

Table 12: ASIC media release coverage of civil and criminal enforcement

	Civil	Criminal
All matters	100% (27 of 27)	88.88% (64 of 72)
Superior court matters	100% (27 of 27)	75.00% (18 of 24)
Proven superior court matters	100% (24 of 24)	71.43% (15 of 21)
Unproven superior court matters	100% (3 of 3)	100% (3 of 3)
Inferior court matters	__	95.83% (46 of 48)
Proven inferior court matters	__	97.62% (41 of 42)
Unproven inferior court matters	__	83.33% (5 of 6)

VI CONCLUSION

The preliminary research findings presented in this working paper have revealed a number of trends in relation to public enforcement of directors' duties that have not been identified or fully investigated in previous empirical studies. The following is a summary of the key findings presented in Part V.

- Sections 180, 181, 184(1) and 184(2) were the most frequently enforced directors' duties provisions. These provisions accounted for 102 of 110 (92.73%) occasions on which contravention of a directors' duties provision was proven. Section 184(2) was the most frequently enforced provision, accounting for 50 of 110 (45.45%) such occasions (see Tables 2 and 3).

- A significant proportion of public enforcement of directors' duties occurred at the inferior court level. Inferior court criminal matters accounted for 42 of 87 (48.28%) proven matters and 47 of 142 (33.10%) liable defendants (see Table 4).

- Criminal enforcement of directors' duties was more prevalent than civil enforcement. Excluding matters in which ss 180, 191 and 192 were the only provisions contravened or allegedly contravened, criminal enforcement accounted for 63 of 78 (80.77%) proven matters and 70 of 115 (60.87%) liable defendants (see Table 5). However, civil enforcement still accounted for a significant 45 of 115 (39.13%) liable defendants (see Table 5).

- Including matters in which ss 180, 191 and 192 were the only provisions contravened or allegedly contravened, civil enforcement accounted for more liable defendants than criminal enforcement, 72 of 142 (50.70%), despite accounting for fewer proven matters, 24 of 87 (27.59%) (See Table 4). This is due to the fact that civil matters often involved several defendants whereas criminal matters usually only involved one defendant.

- Incapacitative sanctions significantly outnumbered monetary sanctions. Of the total number of 188 individual sanctions imposed, disqualification orders and prison sentences each accounted for 33.51% (63 of 188) of the sanctions (67.02% collectively, 126 of 188), while pecuniary penalties accounted for 18.09% (34 of 188) and fines only accounted for 2.13% (4 of 188). Incapacitative sanctions were imposed approximately three times more often than pecuniary penalties and fines (see page 25).

- The median magnitude of monetary sanctions imposed on defendants who contravened only directors' duties provisions was low relative to the statutory maximum sanctions. The median civil pecuniary penalty imposed on defendants with a single contravention was $25,000 (12.50% of the maximum penalty for a single contravention of $200,000). The median penalty imposed on all defendants, including defendants with multiple contraventions, was $50,000. The sample sizes of fines for criminal convictions were too low to yield any meaningful conclusions regarding the average or median magnitude of fines. However, the highest (and only) fine imposed on a defendant with a single count was $10,000 (4.55% of the maximum fine for a single count of $220,000 applicable at the time of judgment). The highest (and only) fine imposed on a defendant with multiple counts was $75,000 (see Table 8).

- Of defendants who contravened only directors' duties provisions, the average civil disqualification order imposed on defendants with a single contravention was 22.60 months and the average imposed on all defendants, including defendants with multiple contraventions, was 61.87 months (see Table 9).

- Of defendants who contravened only directors' duties provisions, the average maximum prison sentence imposed on defendants with a single count was 25.78 months (42.97% of the statutory maximum sentence of five years for a single count applicable to all of the directors' duties provisions except ss 191 and 195). The average maximum sentence imposed on all defendants was 27.18 months. Respectively, the average minimum sentences were 17.20 months and 16.53 months (excluding matters which involved conditional immediate release) (see Table 9). All but two of the 63 proven criminal matters involved convictions and thereby attracted an automatic five year disqualification period pursuant to s 206B of the *Corporations Act 2001* (Cth) (see page 24).

- A significant proportion of prison sentences involved immediate release. Of criminal defendants who only contravened directors' duties provisions, 13 of 28 (46.43%) defendants received prison sentences that involved immediate release conditional on good behaviour (see page 24).

- The liability rate for civil matters was only slightly higher than criminal matters, despite the higher standard of proof applying to criminal matters. Liability was proven in 24 of 27 (88.89%) civil matters and 63 of 72 criminal matters (87.50%). However, more civil defendants were found liable, 72 of 78 (92.31%), than criminal defendants, 70 of 83 (84.38%) (see Table 10).

- The average duration of the enforcement process was somewhat shorter for civil proceedings than criminal proceedings. From the first detected contravention to the final judgment, the average duration of superior court civil proceedings was 83 months while the average duration of criminal proceedings was 95 months (see Table 11).

- Civil matters received more frequent ASIC media release coverage than criminal matters. Despite criminal enforcement of directors' duties being more prevalent than civil enforcement, ASIC media releases covered 100% of civil matters but only 88.88% of criminal matters (see Table 12).

The forthcoming final paper on public enforcement of directors' duties to be published in 2016 will present some additional data on management disqualification orders pursuant to s 206F of the *Corporations Act 2001* (Cth) and enforceable undertakings involving contraventions of directors' duties. This data will allow for an analysis of four different methods of enforcement of directors' duties – criminal, civil, administrative and negotiated enforcement – and consideration of their relative prevalence and importance. Drawing on this empirical database, the paper will consider the extent to which the original aspirations of the civil penalty regime for the enforcement of directors' duties have been put into practice. Among other issues, the paper will address the extent to which the system of responsive regulation and 'pyramid of enforcement'[48] envisaged by those who advocated for the civil penalty regime have been implemented.

[48] See I. Ayres and J. Braithwaite, *Responsive Regulation, Transcending the Deregulation Debate* (Oxford University Press, 1992); G. Gilligan, H. Bird and I. Ramsay, 'Civil Penalties and the Enforcement of Directors' Duties' (1999) 22 *UNSW Law Journal* 417; Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (1989).

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Regulating by numbers: the trend towards increasing empiricism in enforcement reporting by financial regulators

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Regulating by numbers: the trend towards increasing empiricism in enforcement reporting by financial regulators

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This article discusses a trend towards increased empiricism in enforcement reporting by financial regulators that emphasises greater use of numerical indicators. The article examines how the Australian Securities and Investments Commission (ASIC), the UK Financial Conduct Authority (FCA) and the US Securities and Exchange Commission (SEC) report on the outcomes of their enforcement practices, with a particular focus on ASIC. The article begins with a brief introduction to the functions and structure of ASIC, the FCA and the SEC. It then describes how these regulators report on their enforcement outcomes and considers how recent national developments emphasising increased empiricism are likely to influence such reporting practices. Finally, the article provides a detailed case study on ASIC's enforcement functions and quantitative approach to reporting of enforcement outcomes. The article closes by discussing what trends can be discerned regarding reporting of enforcement outcomes and what this could mean for regulators' reporting practices in the future.

A. Introduction

As the impacts of globalisation increase and intensify, regulation has become an increasingly important mechanism to mediate the tensions between societies, their economies and the environment. As the Organisation for Economic Cooperation and Development (OECD) emphasises, regulatory infrastructures and mechanisms are crucial in managing how the domains of politics and the market interact.[1] The global financial crisis (GFC) heightened tensions in many countries regarding how laissez-faire or interventionist governments should be in relation to markets, especially financial markets, on issues such as aligning community protection and reducing the regulatory burden on market participants. Even in highly regulated economies, financial regulators had to confront the sobering reality that the crisis hit despite significant reforms to their structures, processes, powers and rules in the period leading up to the crisis.[2] Regulation had not been able to anticipate or prevent the crisis.[3] Many hypotheses have been advanced to explain the crisis but one common thread attributes part of that responsibility to the poor understanding and implementation of regulation by financial regulators.[4] The effect has been to turn the focus on to the competence and accountability of regulators as the managers of the tools of financial regulation. The crisis has now passed but questions still remain as to how regulators should account for their regulatory actions and whether they do in fact account effectively for what they do.

Regulatory accountability, or the regulation of regulators, is an emerging discipline, the scope of which is not yet settled.[5] Colin Scott argues that the discipline encompasses two broad, interconnected concerns.[6] First, the fidelity of regulators to their mandate, given that they are exercising powers delegated to them by governments. Secondly, an assessment of the outcomes or substance of a regulator's actions in making rules, then monitoring and enforcing them. In relation to the first concern, accountability is fundamentally about democratic legitimacy or reassurance that regulators exercise only the authorised powers delegated to them in the form required by their regulatory remit.[7] The second concern invites more technical questions about how effective a regulator is and how that regulator can demonstrate the quality and effectiveness of what it does.[8] While democratic legitimacy and technical credibility are both significant issues, this article is exclusively concerned with technical credibility. Specifically, it is concerned with one aspect of technical credibility: the emerging trends in the way financial regulators account for the outcomes of one of the most significant parts of their regulatory remit, their enforcement practices.[9] Financial regulators utilise a range of core regulatory strategies including education, enforcement, stakeholder engagement and policy input, but enforcement is the most high profile of these and the one that tends to receive the most focus from governments, the media and the broader community.

The article discusses how three financial regulators, the Australian Securities and Investments Commission (ASIC), the UK Financial Conduct Authority (FCA) and the US Securities and Exchange Commission (SEC), report on their enforcement practices in periodic reports, media releases and other digital materials. ASIC is the primary focus of discussion with the FCA and SEC experience providing comparative support for the article's central observation; namely, that there is a trend towards increased empiricism in enforcement reporting by financial regulators. By "empiricism" what is meant is that there is an increasing trend on the part of

financial regulators to report objective, measurable, quantitative data on enforcement outcomes in a systematic manner. This empirical approach is distinct from the approach that traditionally has been adopted by financial regulators, which is to report qualitative data consisting of individual case studies in an ad hoc fashion. Until recently financial regulators typically have not attempted to conduct systematic quantitative analyses of the individual case data, instead letting the case studies speak for themselves. This article suggests that a change is occurring in that financial regulators are breaking away from the traditional approach and adopting increasingly empirical approaches to enforcement reporting. The jurisdictions of Australia, the UK and the US have been selected because they are at the forefront of this trend.

The trend towards empiricism is seemingly no accident but rather is a deliberate strategy adopted by financial regulators in response to the pressures they face in the post-financial crisis era of economic uncertainty, including pressures from their state and government hierarchies (courts, legislature and ministers of government), the regulatory community (other agencies, audit institutions, information regulators and networks such as the OECD[10]) and the market (actors, stakeholders, the media and consumers).[11] In an era of budgetary pressures and deteriorating national balance sheets governments increasingly demand that regulators do more with less. A rising focus and premium are placed on achieving *better value for money regulation*; that is, more efficient regulation that can still achieve the core social, political, environmental and economic goals set by the government.[12] The regulatory community demands transparent governance by regulators with a results-oriented approach to its regulatory practices to make possible information sharing, performance assessment and measurement of enforcement risks.[13] Market participants depend on having reasonable levels of confidence in the regulatory oversight of financial markets, demonstrated in part by the production of data on the regulator's activities including enforcement actions taken.[14] Each of these concerns has helped to propel regulators to produce technical reports detailing supposedly reliable, measurable, evidence-based outcomes as a means of justifying what they do and assessing their regulatory performance. In the case of enforcement practices, these reporting practices are a means of demonstrating their enforcement activity and helping to justify both the legitimacy of their regulatory activity and the value of their regulatory budget. However, despite these pressures and the resulting upward trend in empiricism in enforcement reporting, it will become apparent in the course of this article that it is a very challenging task to accurately measure, let alone evaluate, the enforcement activity of financial regulators.

This article begins with a brief overview of the structure and functions of ASIC, the FCA and the SEC and the financial size of the markets they regulate. The article then examines how those regulators report on the outcomes of their enforcement practices and highlights their increasing emphasis on empiricism. Next, it discusses some recent national and international developments that indicate a continued trend towards empiricism in enforcement reporting practices.[15] Finally, it presents a detailed case study of ASIC's enforcement functions and reporting practices, highlighting areas in which ASIC's data collection, classification and analysis could be improved. The article concludes by considering the implications of the trend towards empirical enforcement reporting practices for regulatory accountability in the future.

B. A brief introduction to the structure and funding of ASIC, the FCA and the SEC

The increasing performance pressures on financial regulators and the heightened prominence of their enforcement activity reflect the reality that the financial sector is a crucial and indeed increasingly important component of both the global economy and specific national economies. Based on data from the International Monetary Fund (IMF) and the McKinsey Global Institute, it has been estimated that the size of the global financial services sector was US$13.1 trillion in 2014, approximately 16.9% of the US$77.6 trillion global economy as measured in GDP.[16] Data published by the Australian Trade Commission reveals the scale and contribution of the finance and insurance sector to Australia's national economy, indicating that it:

- contributes 9% of Australia's real gross value added by industry;
- employs 3.6% of Australia's total workforce;
- had an annual average growth rate of 6% between 1991 and 2014;
- holds assets of AU$6,386 billion (more than four times Australia's nominal GDP);
- has US$2.4 trillion pools of funds under management (the largest in Asia and third largest in the world);
- has stock market capitalisation of US$1,123 billion (the eighth largest in the world); and
- has financial markets turnover annually of AU$125 trillion (79 times the size of Australia's nominal GDP).[17]

It is a similar situation in the UK. Data from the UK Parliament in 2014 reveals that the UK's financial and insurance services sector:

- contributed £126.9 billion in gross value added (GVA) to the UK economy, 8% of the UK's total GVA (up from 5.6% in 2001);
- provided 1,100,000 jobs (3.4% of the UK's total jobs); and
- delivered a trade surplus on insurance and pensions of £20.9 billion and £38.3 billion on financial services (these two sectors therefore account for a large proportion of the UK's overall services trade balance of £78.9 billion).[18]

Data published by SelectUSA in 2014 shows the importance of the financial and insurance sector to the US, as the sector:

- represented 7.2% (or US$1.26 trillion) of US gross domestic product;
- exported US$92.5 billion and had a US$23 billion surplus;
- employed 5.99 million people; and
- held, in managed assets, more than US$39.6 trillion of long-term conventional assets under management or 45% of the global total for these funds.[19]

Consequently for governments and regulators in Australia, the UK and the US, protecting the integrity of their financial and insurance sectors is of crucial importance to the well-being of their national economies and populations. There are several factors that shape how regulatory agencies operate to meet these obligations to protect market and sector integrity. One key variable is how the regulators are governed and funded, which will have important implications for all facets of their activities including enforcement. Using data drawn from the 2015 *OECD Corporate Governance Factbook*,[20] Table 1 offers some insights into the structural dynamics that shape ASIC, the FCA and the SEC.

Table 1 shows that the FCA is self-funded with its main funding source being fees from regulated entities, ASIC is publicly funded from the national budget, and the SEC receives fees from the regulated entities, but the US Congress determines the SEC's funding and the amount of funding received is offset by fees collected. In an era of increasing fiscal pressure on public budgets, there is a heightened focus on the subject of funding models for regulatory agencies. Whether ASIC should move more towards a user-pays approach is an especially live issue in Australia given ASIC's lobbying for such an approach. For example, ASIC Chair Greg Medcraft stated in his opening address to the ASIC Annual Forum in March 2015:

> "Those who participate in our markets should have a price signal for the cost of ASIC's oversight to incentivise them to meet the outcomes the Australian Government expects … To provide this, ASIC should have a user-pays funding model, as recommended by the Financial System Inquiry. Under a user-pays system, those industries needing the most attention would pay the most."[21]

The capability review of ASIC announced on 25 July 2015 by the Australian Government is almost certain to consider this funding question as part of its overall deliberations.[22] Funding, of course, has a direct relationship with regulatory capability. Most recently, the Australian Government on 28 August 2015 released a consultation paper seeking stakeholder views on the potential introduction of an industry funding model for ASIC's regulatory activities.[23] Assistant Treasurer The Hon Josh Frydenberg MP stated, when releasing the consultation paper, that the Government's decision on how ASIC should be funded will be informed by both the consultation process and the capability review.[24] ASIC's funding arrangements may well change in the future but Table 2 provides a snapshot of the regulatory and enforcement resources currently available to ASIC, the FCA and the SEC, sourced from the regulators' annual reports and business plans.[25]

While Table 2 provides a general indication of the resources available to each of the regulators and shows that there are significant differences in resources available to each of them, it is very difficult to compare funding and budget allocations with any precision based on the publicly available information. ASIC allocates proportions of its budget across seven categories (2014 percentage allocations in parentheses): education (4%); enforcement (35%); engagement (9%); guidance (3%); policy advice (4%); registry (25%); and surveillance (20%).[26] The FCA and SEC classify their budget allocations differently, making meaningful comparisons between the jurisdictions problematic.

It is inevitable that different jurisdictions will have different perceptions in regard to economic and social priorities, legitimate interests and appropriate regulatory strategies. In turn these differences will result in variances not only in the scale of national regulatory budgets but also in the allocations of regulatory finance and other resources. These broader political, economic and structural factors are continually shaping the regulatory environment in general and have ongoing significant implications for the reporting and evaluation of enforcement. How the enforcement activity of financial regulators is perceived by government, industry and the broader community is crucial in the assessment of their overall regulatory performance. However, perceptions regarding enforcement activity are not simply a one-way process because how financial regulators actually report on their enforcement activity is pivotal in shaping the perceptions of their stakeholders regarding that regulatory performance. The reflexive and dynamic character of these interactions is a major explanatory factor in recent trends towards increased empiricism in enforcement reporting as can be seen below in the discussion of the enforcement reporting practices of ASIC, the FCA and the SEC.

C. How ASIC, the FCA and the SEC report the outcomes of enforcement practices

1. Australian Securities and Investments Commission

ASIC reports on enforcement outcomes via four main avenues: Media Releases;[27] "ASIC enforcement outcomes" reports ("Enforcement Reports");[28] Annual Reports;[29] and "ASIC supervision of markets and participants reports" ("Market Supervision Reports").[30] The latter three documents reveal a recent trend towards empirical reporting of enforcement outcomes, which began around 2011. Enforcement Reports and Market Supervision Reports were first published in 2011. The 2011–2012 Annual Report also sees the beginning of a greater emphasis on being "outcomes-focused", particularly in relation to enforcement. Section E.2 of this article provides a detailed examination of ASIC's Enforcement Reports. This section focuses on the other of ASIC's main enforcement reporting avenues: Media Releases, Annual Reports, and Market Supervision Reports.

ASIC's Media Releases are published on its website from 2001 onward. From 2001 to 2014, ASIC published an average of about 400 Media Releases per year, the majority of which concerned enforcement activities. For example, in 2014 ASIC published 350 Media Releases, of which approximately 240 (69%) relate to specific enforcement actions against individuals or corporate entities. Several more concerned systemic matters relevant to enforcement, such as ASIC reporting on its enforcement practices or raising community awareness about corporate law rights and obligations. The rate of media release coverage was even higher for more significant enforcement activities. In a sample of 48 superior court penalty judgments in directors' duties matters from 2005 to 2014, Media Releases accompanied 41 of the

Table 1. Governance and funding of ASIC, the FCA and the SEC

Jurisdiction	Regulator	Form of funding	Main funding resource	Ruling body	Members (current)	Term of members	Members appointed by
Australia	ASIC	Public	National budget	Commission	3–8 (5)	3–5 years	Governor General
UK	FCA	Self	Fees from regulated entities	Board	12	3 years	Treasurer
US	SEC	Public/Self	National budget & fees from regulated entities	Commission	5	5 years	President

judgments (85%). The conclusion to be drawn is that the primary purpose of ASIC's Media Releases is to report on enforcement activity.

ASIC's Media Releases tend to present data in a qualitative, not quantitative, form by way of individual case reports. These releases are published with great frequency but are inconsistent in the amount of detail they include. Lack of consistency across data categories makes meaningful quantitative analysis of the data contained in the Media Releases difficult, if not impossible. In terms of ASIC's four main enforcement reporting avenues, the Media Releases are therefore the exception to the rule in that there is no readily apparent trend towards a more empirical approach to enforcement reporting. If the trend towards such an approach continues, it will be interesting to observe whether it also begins to influence the content of ASIC's Media Releases, resulting in a more systematic and uniform approach.

Transparency and "outcomes-focused" reporting, especially of ASIC's enforcement practices, has been a key theme of ASIC's Annual Reports since 2010. The "Chairman's Report" in the 2011–2012 Annual Report explained:

> "ASIC is outcomes-focused. We have a number of tools available to achieve the desired outcomes. These are:
>
> - engagement with industry and stakeholders
> - surveillance
> - guidance
> - education
> - enforcement
> - policy advice.
>
> ***
>
> We have improved the transparency and accountability of our enforcement work, by publishing information sheets that describe how, when and why we take enforcement action and the circumstances in which we may make public comment on it, by publishing bi-annual reports on enforcement action outcomes, and by reporting on the use of our compulsory information-gathering powers in the Annual Report … "[31]

The heightened focus on outcome reporting is also reflected in the structure of the 2010–2011 Annual Report,[32] which recast the section on "ASIC's Priorities and Key Achievements" as "Major Outcomes" and extended the discussion of those outcomes by about ten pages. In terms of increased transparency, the 2010–2011 Annual Report introduced a quantitative breakdown of ASIC's regulated populations and key responsibilities, which specifies the number of responsible staff and regulated entities within each regulatory area. Similarly, it added a quantitative breakdown on ASIC's surveillance coverage of regulated populations, which provides estimates of the number of entities subjected to surveillance and the frequency of surveillance within each regulatory area. A new statistical summary of "major deterrence outcomes" was also included in the appendices.

The trend towards a more empirical approach to enforcement reporting continued in subsequent annual reports. The 2011–2012 Annual Report[33] further emphasised the language of "Outcomes", re-titling the discussion of outcomes as "Outcomes in detail" and making it a separate sub-heading. The 2012–2013 Annual Report[34] introduced a new section on "Key Outcomes" which provides a quantitative assessment of major outcomes against each of ASIC's key priorities. This section also included a new statistical breakdown of ASIC's resource allocations, again reflecting a heightened focus on transparency and more efficient regulation. The 2012–2013 Annual Report also relocated the statistical summary of "major enforcement outcomes" from the appendices to the first section of the Report "About ASIC", giving it greater prominence. The 2013–2014 Annual Report[35] moves this section even further forward into the "Key Outcomes" section. Overall, the annual reports show a clear trend towards a greater focus on enforcement outcomes and, in particular, in presenting those outcomes in an empirical fashion.

First published in January 2011, the stated purpose of ASIC's Market Supervision Reports is to summarise key outcomes of ASIC's market and participant supervisory and

Table 2. Regulatory and enforcement resources available to ASIC, the FCA and the SEC

Regulator	Total budget	Total personnel	Enforcement (% operational budget)	Surveillance (% operational budget)
ASIC	AU$405 million	1,785	35**	20**
FCA	£445.7 million	2,488	17	24
SEC	US$1,463.6 million	4,544	31	26

Note: ** These figures are sourced from page 7 of ASIC's Annual Report 2013–2014 and appear to be inconsistent with the figure cited at page 3 of the Annual Report, which states that ASIC uses around 70% of its regulatory resources on surveillance and enforcement. The 70% figure may include ASIC's registry and licensing services, which account for 25% of ASIC's budget according to page 7 of the Annual Report.

surveillance functions and highlight markets-related enforcement outcomes.[36] Similar to ASIC's Enforcement Reports, the Market Supervision Reports contain a mix of qualitative and quantitative data on ASIC's enforcement outcomes. Several pages of the Market Supervision Reports are devoted to various statistical analyses of ASIC's activity within the market integrity regulatory area.[37] The Market Supervision Reports have become significantly more detailed over time, with almost every report longer than the previous one.

Publication of ASIC's Market Supervision Reports and Enforcement Reports coincides with the trend towards a greater focus on quantitative reporting of enforcement outcomes in ASIC's Annual Reports. Taken together, they evidence a deliberate push towards increasing empiricism in enforcement reporting by ASIC. This push is also apparent in ASIC's strategic documentation. For example, in the section of ASIC's 2014–2015 Strategic Outlook dealing with community expectations, ASIC states that it will "[c]ontinue to promote [its] strategic framework, key risks and regulatory responses, and be transparent about [its] approach and achievements – for example, communicate [its] enforcement outcomes through six-monthly enforcement reports".[38] ASIC's Stakeholder Survey 2013 also takes up the issues of community perceptions of its enforcement activity, stating that ASIC is " … committed to improving transparency and increasing the public's understanding of how we operate".[39] The following passages from ASIC's July 2014 Statement of Intent provide further evidence of ASIC's commitment to an empirical approach to reporting of enforcement outcomes:

> *"Outcomes-focused, principles-based regulation*
>
> ASIC supports the Government's preference for outcomes-focused regulation. We welcome broad strategic direction from Government on regulatory outcomes. We will seek to achieve these outcomes in the most effective way, using the resources available to us.
>
> ***
>
> *Performance indicators*
>
> ASIC looks forward to the development of specific performance indicators to provide objective measures of success in achieving our statutory role. This would also provide greater transparency for end-users, industry and Government."[40]

ASIC's development of key performance indicators in response to the Australian Government's Regulator Performance Framework[41] is discussed in section D.1 of this article, along with other recent developments indicating an increasing empiricism in relation to enforcement reporting by financial regulators. The article now turns to consider briefly what measures are taken in the UK and the US to report on the enforcement outcomes of the FCA and the SEC respectively. These jurisdictions serve to highlight that the trend towards empiricism in enforcement reporting observed in Australia is part of a broader, international movement in this direction.

2. UK Financial Conduct Authority

The FCA reports on enforcement outcomes via a number of avenues, including: Press Releases;[42] Final Notices;[43] Supervisory Notices;[44] Fines;[45] Market Abuse Outcomes;[46] Data Bulletins;[47] Enforcement Annual Performance Accounts;[48] and Annual Reports.[49] This section briefly describes each of these reporting avenues. Of these documents, the Market Abuse Outcomes and the Data Bulletins are the only new documents published by the FCA that were not also published by its predecessor, the Financial Services Authority (FSA). The other documents have been published mostly from 2002 onwards, initially by the FSA, and later, by the FCA. Further, the Market Abuse Outcomes and Data Bulletins do not provide any new information; instead, they reformulate data contained in the other documents. This presents an important point of difference between the FCA and ASIC, as the latter has commenced two significant new enforcement reporting practices as recently as 2011: the Enforcement Reports and Market Supervision Reports. This might initially suggest that there is not the same trend in the UK as seen in Australia, towards greater enforcement reporting and quantitative analysis. However, as discussed below in section D.2, there are several recent developments indicating that this trend is also occurring in the UK, even if it is not yet reflected in the FCA's periodic reporting practices to the same degree as it is in ASIC's reporting practices.

The FCA's Press Releases[50] serve a slightly different function from ASIC's Media Releases. The FCA produces fewer releases and they do not tend to focus on individual enforcement actions to the same extent as ASIC's Media Releases. In the five years from 2010 to 2014, the FCA/FSA produced an average of 142 releases per year, which falls far short of the average of 400 produced by ASIC per year. However, this difference is probably explained by the fact that the FCA has a number of different reporting avenues that serve a similar function to ASIC's Media Releases, including its Final Notices and Supervisory Notices.

The FCA website indicates that the FCA/FSA has produced 1,836 Final Notices[51] since 2002. Final Notices report on enforcement actions taken by the FCA/FSA, such as cancellations, refusals, prohibitions and fines. It is unclear whether the Final Notices are comprehensive in their coverage of the FCA/FSA's enforcement actions, but the coverage certainly appears to be wider in scope and more systematic than the Press Releases. The FCA also produces Supervisory Notices,[52] which operate similarly to the Final Notices but relate to supervisory functions such as varying permissions and imposing additional requirements on regulated entities.

The FCA's Fines database[53] provides access to a list of fines imposed on regulated entities and links to the relevant Press Release reporting each fine. It therefore serves to reorganise the Press Releases relating to fines into a more systematic and easily accessible form. This is similar to the Market Abuse Outcomes database,[54] which provides a list of links to Final Notices and Press Releases that relate to market abuse and related conduct. Again, the Market Abuse Outcomes database does not provide independent data, it merely serves to reorganise the Press Release and Final Notices data.

The FCA began publishing its Data Bulletin[55] in October 2014 in response to the consultation process on transparency it conducted in 2013. The FCA has published three Data Bulletins to date, which present key statistics in relation to the demographics of regulated entities, complaints received about such entities, numbers of Final Notices in relation to individuals and companies, and suspicious transaction reports, among other things. The statistics are typically presented in graphical form and the Data Bulletins are indicative of a trend towards this type of quantitative analysis in enforcement reporting in the UK, discussed in further detail in section D.2.

The FCA's Enforcement Annual Performance Accounts (EAPAs)[56] are published at the same time as its Annual Reports. The EAPAs examine the fairness and effectiveness of the FCA's enforcement functions. The EAPAs are predominantly comprised of qualitative data in the form of case studies of enforcement actions. However, they do provide quantitative data in relation to the length and cost of civil and criminal actions, to support the FCA's commitment to being a transparent regulator.[57] The quantitative data in the EAPAs appears to be either partly or entirely replicated from the FCA's Annual Reports (see, for example, 2014-2015 Annual Report).[58] The latter contain relatively basic quantitative data on market cleanliness, suspicious transactions, whistleblowing reports, authorisations, supervision of regulated entities, enforcement actions commenced, financial penalties imposed, decisions of the Regulatory Decisions Committee, the length and cost of civil and criminal actions, and a breakdown of final enforcement outcomes.

This section shows that the FCA goes to some length to report on its enforcement activities via the various avenues discussed. The FCA's systematic publication of Final Notices and Supervisory Notices provides a level of uniform coverage and detail that is arguably lacking from ASIC's Media Releases. At the same time, the FCA's quantitative enforcement reporting techniques are arguably not as comprehensive and detailed as those used in ASIC's Enforcement Reports and Market Supervision Reports. However, since 2011 NERA Economic Consulting, an independent consulting firm, has produced quantitative analyses that to some degree compensate for the lack of detail in the FCA's own periodic reporting. These and other developments in the UK showing a trend towards increased empiricism in enforcement reporting are discussed below in section D.2.

3. US Securities and Exchange Commission

The SEC reports on enforcement outcomes via a number of avenues, including: Press Releases;[59] Administrative Proceedings Notices and Orders;[60] Litigation Releases;[61] Appellate Court Briefs;[62] Annual Performance Reports;[63] Financial Reports;[64] and Summaries of Performance and Financial Information.[65] Each of these reporting avenues is outlined briefly below.

Press Releases[66] provide substantial qualitative data on the SEC's enforcement activities. The SEC utilises Press Releases in a manner similar to ASIC's use of Media Releases. The vast majority of the Press Releases relate to enforcement action against individuals and there is a high volume of releases per year. In the five-year period from 2010 to 2014, the SEC issued an average of 285 Press Releases per year. The Press Releases date back to 1997, although the rate of reporting has increased significantly since then. In the five years from 1997 to 2001, the average number of Press Releases per year was about 163. The content of the Press Releases tends to be variable in detail and information, similar to ASIC's Media Releases. However, in the case of the SEC, the Press Releases are supplemented by more specific releases in relation to administrative proceedings,[67] litigation releases concerning civil lawsuits,[68] and releases regarding appellate court briefs.[69] Taken together, these various releases mean that the SEC is relatively comprehensive in its qualitative coverage of its enforcement activities.

The SEC's Annual Performance Reports (APRs)[70] contain a detailed performance indicator framework, including: broad "strategic goals" of the SEC and the resources allocated to each goal; the narrower "strategic objectives" involved in achieving each strategic goal; and then the even narrower "performance goals" and "performance indicators" involved in achieving each strategic objective. One of the "strategic goals" is to "Foster and Enforce Compliance with the Federal Securities Laws". This section of the APRs is aimed at evaluating the SEC's enforcement practices. The performance goals and indicators are measurable targets and empirical data is used to record the performance of the SEC against those targets. The empirical database generally spans back four years but in some cases only one or two years of data is available, indicating the recent nature of the trend towards empirical enforcement reporting. The APRs also contain a section on verification and validation of performance data, which is critical if an empirical enforcement reporting system is to yield meaningful results that impact on enforcement policy and practice. Due to resource constraints this article does not critically examine the SEC's data and how comprehensive and accurate its data is. However, the case study on ASIC's Enforcement Reports data in section E of this article does draw attention to some of the potential pitfalls if data collection, classification and analysis processes are not sufficiently transparent and rigorous. Claims by financial regulators regarding the accuracy and completeness of their enforcement data should not be taken automatically at face value.[71] Rather the numbers ought to be carefully scrutinised to determine how they have been calculated and whether they present an accurate account of the regulators' enforcement activities.

The SEC's Financial Reports[72] replicate some of the key data from the APRs and also contain a substantial section of qualitative data on "Major Enforcement Cases" in Appendix B. The Summaries of Financial Performance and Financial Information[73] draw on the APRs and Annual Reports to provide an accessible snapshot of key performance and financial information, fulfilling a similar function to the Data Bulletins produced by the FCA. These Summaries appear to have been introduced in 2012, arguably pointing to increased pressure on financial regulators to present readily accessible information on their regulatory and financial performance.

Similar to ASIC, and to a lesser extent the FCA, the trajectory of the SEC's enforcement reporting practices shows an increasing focus on enforcement outcomes and empirical methods of reporting. Up until 2003 the SEC's "Annual Reports"[74] did not have any formal system for measuring

performance outcomes. The primary focus of the Annual Reports was financial accountability. The current structure for the SEC's performance measurement system was introduced in its 2004 "Performance and Accountability Report";[75] however, more detail was progressively added to the "performance section" of this report from 2004 to 2011. In 2012 the report was divided into two separate reports, the APRs and the Financial Reports,[76] the former dealing with performance evaluation and the latter dealing with financial accountability. The separate APRs are not significantly more detailed than the "performance section" of the previous "Performance and Accountability Reports", although a notable addition is that a "Performance Plan"[77] now accompanies the APRs and sets out the SEC's performance targets and strategies for the future. It can be observed that there is a trend towards an increasing focus on quantitative performance evaluation, including enforcement, first by devoting a section to performance in 2004 and subsequent years, and then by devoting a whole report to it in 2012. While the SEC appears to be somewhat ahead of ASIC and the FCA in relation to this trend, having introduced a performance indicator framework in 2004, the gaps in the data in the most recent APR suggest that the empirical approach to enforcement reporting is also still evolving in the US.

D. Recent developments emphasising increased empiricism in enforcement reporting

1. Australia

The issue of increased accountability of regulatory actors is very much a live issue in Australia. In October 2014, the Commonwealth Government of Australia published its Regulator Performance Framework (RPF) as part of its ongoing drive to "cut red tape" and reduce the regulatory burden on industry. From 1 July 2015, the RPF acts as a regulatory audit tool by requiring all Commonwealth regulators to report objectively on their regulatory outcomes against these six key performance indicators (KPIs):

- KPI 1: Regulators do not unnecessarily impede the efficient operation of regulated entities.
- KPI 2: Communication with regulated entities is clear, targeted and effective.
- KPI 3: Actions undertaken by regulators are proportionate to the regulatory risk being managed.
- KPI 4: Compliance and monitoring approaches are streamlined and coordinated.
- KPI 5: Regulators are open and transparent in their dealings with regulated entities.
- KPI 6: Regulators actively contribute to continuous improvement of regulatory frameworks.[78]

These KPIs apply across the whole spectrum of regulatory oversight and so inevitably are broad in nature. In July 2015 ASIC published the evidence metrics that it would use to report its outcomes against the six mandated KPIs of the RPF.[79] These are summarised in Table 3.

ASIC's Enforcement Reports are classified to apply to KPIs 3 and 5 with other outputs and processes deemed to meet the remaining KPIs. As this new national system of regulatory performance reporting evolves it will be interesting to see whether the Commonwealth Government introduces further benchmarks either across the whole of government or targeted at specific regulatory agencies that demand increased empirical measures of reporting activity and effect. Such moves would place a higher emphasis on the auditing of regulatory activity for impact. It is reasonable to assume that this may well happen and ASIC seems to expect a trend towards increased rigour in the measurement of performance indicators as flagged last year by its July 2014 Statement of Intent:

> "ASIC looks forward to the development of specific performance indicators to provide objective measures of success in achieving our statutory role. This would also provide greater transparency for end-users, industry and Government."[80]

The concept of "objective measures of success" that ASIC anticipates implies greater levels of empiricism than currently are displayed by the RPF KPIs or the evidence metrics that have been produced by ASIC in response. The Australian National Audit Office (ANAO) is pushing hard for increased empirical measures in regulatory performance reporting, recommending in June 2014 that regulators: "Define relevant effectiveness and efficiency indicators to support reporting for internal management and external accountability purposes."[81] The ANAO admits that developing such indicators "is particularly challenging for many regulators", but nevertheless the ANAO flags that this is indeed exactly what should occur.[82]

Table 3. ASIC's evidence metrics response to the Regulator Performance Framework

ASIC evidence metric	Relevant KPIs
Stakeholder panels/engagement	1, 2, 3, 6
Feedback	1
Stakeholder surveys	1, 2, 4, 5
Corporate plan	1, 3 ,5
Attend relevant international gatherings	1
Publish peer review results	1
Relief appropriately granted and details published	1, 5
Compliant with Office of Best Practice Regulation requirements	1, 3
Available guidance and information	2, 5
Appropriate complaints guidelines and processes	2
Enforcement reports	3, 5
Published reports	3, 5
Consultation papers	3, 5
Targeted information requests	4
Risk based surveillance	3, 4
Self-assessment published and validated annually	5
Utilise media	6
Annual Forum	6
ASIC provides policy input	5

The issue of developing more substantive indicators of regulatory performance is also a challenge for bodies with responsibility for the oversight of ASIC or the investigation of ASIC's performance. For example, the Final Report of the Australian Senate Economics References Committee into the performance of ASIC did not make any recommendations on the issue of direct measurement of regulatory performance, but expressed the following view in Recommendation 52:

> " … the Parliamentary Joint Committee on Corporations and Financial Services could be well-placed to monitor ASIC's performance against the government's statement of expectations and ASIC's statement of intent. The committee recommends that the Parliamentary Joint Committee consider this as part of its statutory ASIC oversight function."[83]

It remains to be seen what specific steps the Parliamentary Joint Committee may in the future recommend on the issue of ASIC's regulatory performance, especially in the area of enforcement reporting.

The recent Financial System Inquiry (FSI) chaired by Mr David Murray AM, was the first major review of Australia's financial system in almost two decades. The FSI's final report was published in December 2014.[84] The FSI noted the issue of patchy parliamentary oversight of ASIC: "parliamentary scrutiny tends to be episodic and focus on particular issues or decisions".[85] The FSI stressed that "[g]overnment lacks a regular mechanism to assess the overall performance of its financial regulators".[86] The FSI acknowledged that financial regulators currently receive little guidance about how they should balance their regulatory objectives and so more explicit oversight and performance direction from government should be introduced. Consequently the FSI proposed Recommendation 27:

> "Create a new Financial Regulator Assessment Board to advise Government annually on how financial regulators have implemented their mandates. Provide clearer guidance to regulators in Statements of Expectation and increase the use of performance indicators for regulatory performance."[87]

Although the Commonwealth Government did not accept this recommendation in its response to the FSI Final Report, the capability review of ASIC is wide-ranging and includes as part of its terms of reference a focus on accountability and a direction to have regard to how comparable international regulators operate.[88] Consequently the structures and reporting processes of comparable regulators such as the FCA and SEC are likely to be examined by the review, including the specifics of how they report upon their enforcement activity.

2. United Kingdom

Recent developments in the UK provide comparative support for the observation that there is a trend towards increasing empiricism in enforcement reporting by financial regulators. One interesting and pertinent recent development is the quantitative analysis of the FCA's enforcement activity produced by NERA Economic Consulting, *Trends in Regulatory Enforcement in UK Financial Markets*.[89] The first of these reports was published in July 2011 and further editions were published in June 2012 and October 2014. The reports provide detailed quantitative analysis of the FCA's enforcement activity based on a database compiled from the publicly available FCA and FSA Final Notices. NERA's analysis bears certain similarities to the quantitative analysis of ASIC's enforcement activity in section E of this article, which is based on a database drawn from ASIC's Enforcement Reports. However, the analysis in the NERA reports is more detailed and covers a wider range of aspects of the enforcement process. The NERA reports represent a sophisticated empirically informed quantitative analysis of enforcement activity and may be indicative of an international trend in this direction. It is unclear from the reports whether they were commissioned by the FCA or whether NERA conducted the analyses of its own accord. In either case, these reports will almost certainly be looked to as a source of inspiration and information by those advocating an empirical approach to enforcement reporting.

Turning to developments within the public sphere, one recent relevant initiative was the UK Treasury's *Review of Enforcement-Decision-making at the Financial Services Regulators*,[90] the final report of which was published in December 2014. This review was conducted "[to] ensure the Financial Conduct Authority (FCA) and Prudential Regulation Authority (PRA) continue to make fair, transparent, timely, and efficient enforcement decisions … ".[91] While this review was mostly directed towards how the FCA and PRA make strategic enforcement decisions, rather than how they report on their enforcement practices, it made the following recommendations in relation to transparency of enforcement activity:

> "6. The government recommends that the FCA continue to publish information about its enforcement activities to enhance transparency, and that both regulators explore how better information might be provided. That information should relate not only to formal enforcement outcomes, but to 'early interventions', where enforcement staff work with supervisors to persuade firms to take action to address risks.
>
> 7. In its annual report, the FCA should clearly state the enforcement action that it has taken – whether opening investigations or formal outcomes – in priority areas.
>
> 8. The FCA should also publish information following thematic reviews, to explain – generally, and without identifying firms – why certain cases were referred for investigation but others were not."[92]

It is implicit in these recommendations that the Treasury is recommending that the FCA adopt a clearer and more detailed quantitative approach to enforcement reporting.

The UK National Audit Office (NAO), which became the statutory auditor of the FCA pursuant to the Financial Services Act 2012, has expressly urged the FCA to adopt a more empirical approach to enforcement reporting in its March 2014 report, *Regulating Financial Services*.[93] This report " … examines the progress made by the FCA and the

PRA in developing and implementing their regulatory approaches to date".[94] In the section entitled "Performance Measurement", the NAO makes the following observation:

> "Both regulators have translated their statutory objectives into more specific objectives, and have frameworks for measuring performance against their objectives and are continuing to develop these further. The FCA has identified four desired outcomes for each of its three operational objectives (for example, under the consumer protection objective: fair products and services; improved consumer experience; building trust and engagement; effective remedies). Each desired outcome has one or two indicators. To measure its own performance, the FCA also currently reports divisional activities under seven interim success measures, and has published eight success measures which it is considering using to measure its own performance for the longer term."[95]

However, the report concludes that the FCA has more work to do in relation to its development of a performance measurement framework:

> "There is scope for the performance metrics of each regulator to bring together more clearly whether their desired outcomes are met, how much influence they have over those outcomes, and how they are performing where they can exert influence. The FCA has indicators of desired outcomes but (because these do not yet link strongly to its proposed success criteria) a less clear picture of how the FCA's actions have affected these. The PRA's performance indicators are linked more closely to what they can influence, but they could link more clearly to the (more outcome-based) success criteria that they are still developing."[96]

This statement appears to be broadly consistent with the FCA's own assessment of the status of its performance measurement framework in its 2015–2016 Business Plan: "The framework as a whole, the outcomes, indicators and certainly the performance measures are likely to evolve over time as we continue to develop our performance framework and identify better measures."[97]

Transparency in relation to enforcement activities has clearly been on the radar of the FCA for some time, as demonstrated by the transparency consultation process it conducted in 2013. In March 2013 the FCA published Discussion Paper DP13/1: Transparency, in which it stated that it was considering making its enforcement processes more transparent by:

- "saying more about what we are seeking to achieve through our enforcement activities;
- bringing together themes and explaining why we have focused on particular topics in our work;
- highlighting the achievements and any lessons learned;
- enhancing the brief summaries of the feedback meetings we have with firms at the end of cases, by providing more information about the issues covered; and
- including more information about our work such as the average length and cost of investigations, our allocation of resource by sector, and some of the challenges we face in carrying it out."[98]

In August 2013 the FCA published the Transparency Feedback on DP13/1, which found that respondents agreed that the FCA's enforcement processes should be more transparent.[99] The respondents suggested that the FCA publish the following additional information:

- "the number of referrals to enforcement;
- allocation of resource by sector and by type of activity;
- outcomes of each case; and
- fine calculations and how fines compare to revenues of firms."[100]

It is interesting to note the particular data categories suggested by the respondents in the consultation process, as they show a clear community interest in more quantitative enforcement reporting techniques.

This section has shown that recent developments in the UK point towards the FCA developing an empirical and quantitative performance measurement system, with a particular focus on enforcement reporting. This observation is supported by examples from the private sector (eg, NERA Economic Consulting), the UK government, the statutory auditor, the FCA itself and the stakeholder community. In April 2014 the FCA established an empirically informed key performance indicator system for its activities relating to its authorisation, permission and payment services.[101] Given the recent developments discussed in this section of the article, it seems likely that in the future the FCA will adopt such a system for its enforcement activities as well, as the SEC has done in its Annual Performance Reports.

3. United States

In regard to the United States, it is more a matter of identifying the developments that have *already* occurred, rather than the developments that *are* occurring, which show a trend towards increased empiricism in enforcement reporting practices. As noted in section C.3, the United States appears to be somewhat ahead of ASIC and the FCA in developing a performance indicator framework. As discussed, the SEC began to develop a quantitative approach to enforcement reporting based on key performance indicators in 2004. The SEC's progress in developing an empirical reporting system is noted in the June 2015 report by the International Organization of Securities Commissions (IOSCO): *Credible Deterrence in the Enforcement of Securities Regulation*.[102] IOSCO cites the SEC as an example of a regulator that uses data and metrics to better assess and determine priorities and enforcement strategies:

> "The US SEC tracks performance indicators to understand how it is using its resources to meet its objectives. One of these indicators assesses the quality of the cases filed by the US SEC's Division of Enforcement that involve factors reflecting enhanced risk to investors and markets. Such cases may involve: (i) those identified through risk analytics and cross-disciplinary initiatives to reveal difficult-to-detect or early stage misconduct, minimising investor loss and preventing the spread of unlawful conduct and

practices; (ii) particularly egregious or widespread misconduct and investor harm; (iii) vulnerable victims; (iv) a high degree of scienter; (v) involvement of individuals occupying substantial positions of authority, or having fiduciary obligations or other special responsibilities to investors; (vi) involvement of recidivists; (vii) high amount of investor loss prevented; (viii) misconduct that is difficult to detect due to the complexity of products, transactions, and practices; (ix) use of innovative investigative or analytical techniques; (x) effective coordination with other law enforcement partners; and/or (xi) whether the matter involves markets, transactions or practices identified as an enforcement priority, or that advances the programmatic priorities of other US SEC Divisions or Offices."[103]

IOSCO's endorsement of the SEC's system of empirical enforcement reporting is indicative of the international nature of the trend towards such reporting, given IOSCO's role as the global standard setter for the securities sector. This international aspect is further evidenced by the OECD's May 2014 report, *Best Practice Principles for Regulatory Policy: Regulatory Enforcement and Inspections*.[104] The OECD spells out the growing expectation that regulatory enforcement will be empirically evaluated:

> "A principle of evidence-based enforcement and inspections would require that regulatory enforcement agencies' actions and their effectiveness should be regularly evaluated, against a set of well-defined indicators, and based on reliable and trusted data. Collecting data on activities and outputs (e.g. how frequently an agency conducts inspections, how many entities are subject to inspections, how much time, private or public is taken up with inspections – and what are the administrative sanctions or criminal prosecutions that may follow) is important to assess resource use and burden on businesses. However, these should not be taken as a reflection of the effectiveness (or lack thereof) of an agency."[105]

The OECD is encouraging a note of caution about conflating reporting of quantitative indicators as proxies for regulatory effectiveness or ineffectiveness. While the developments in Australia, the UK and the US indicate a trend towards increasing empiricism in enforcement reporting, it is important to keep in mind what is driving this trend and whether it will deliver what it promises. Ultimately, the purpose of greater empiricism in enforcement reporting must be to improve assessment of regulatory effectiveness, but, as the OECD observes, the former does not automatically entail the latter. Section E of this article shows that, although ASIC has adopted an increasingly empirical approach to enforcement reporting, imprecision in how the data is classified hinders accurate interpretation of the data and assessment of regulatory effectiveness. This highlights the importance of transparency in respect of financial regulators' collection, classification and presentation of enforcement data. It is critical to scrutinise the numbers to determine how they have been calculated and whether they present an accurate account of the regulators' enforcement activities. Nevertheless, provided that the indicators are "well-defined" and the data is "reliable and trusted", as the OECD stipulates, empirical enforcement reporting promises a more meaningful assessment of regulatory effectiveness than traditional qualitative reporting based on case studies. As the OECD goes on to note, "it remains crucial to monitor [enforcement] outcomes in order to judge whether enforcement is having any positive contribution".[106] It is becoming increasingly accepted that accurate empirical enforcement reporting systems are necessary, but not sufficient on their own, to assess regulatory effectiveness and develop better enforcement practices.

E. Case study: ASIC's enforcement functions and quantitative approach to reporting enforcement outcomes

This part of the article presents a case study on ASIC and the quantitative approach it adopts to enforcement reporting in its six-monthly Enforcement Reports.[107] It begins with an introductory discussion of ASIC's enforcement functions, powers and strategies and then turns to a detailed examination of the data presented in the Enforcement Reports. While the primary purpose of the case study is to describe rather than critically evaluate ASIC's enforcement reporting, it also draws attention to some aspects of the data that would benefit from further elaboration or clarification. The examination of the data serves to illustrate some of the advantages, but also some of the pitfalls, of the trend towards increased empiricism in enforcement reporting by financial regulators.

1. ASIC's enforcement functions, powers and strategies

ASIC is a corporate law enforcement agency with three strategic priorities:

(a) "promoting investor and financial consumer trust and confidence;
(b) ensuring fair, orderly and transparent markets; and
(c) providing efficient and accessible registration."[108]

Based on information in ASIC's 2013–2014 Annual Report, the regulated populations corresponding to the above three strategic priorities include:[109]

(a) Investors and financial consumers

- Deposit-takers, credit and insurers: 168 authorised deposit-takers; 5,837 Australian credit licensees; 29,798 credit representatives; 97 licensed general insurance companies; 28 life insurers; 12 friendly societies; 636 non-cash payment facility providers; 12 trustee companies.
- Financial advisers: Australian Financial Services (AFS) licensees licensed to provide personal advice (3,391 licensees) or general advice (1,454 licensees); 2 ASIC-approved external dispute resolution schemes.
- Investment banks: 25 investment banks; 250 hedge fund managers/ responsible entities; 61 retail OTC derivative providers; 7 credit rating agencies; 29 wholesale electricity derivatives dealers.

Table 4. ASIC's surveillance of regulated populations

Regulated populations	No of employees	Frequency of surveillance
Investors and financial consumers		
Deposit-takers, credit and insurers	68	Largest 4 Authorised Deposit-taking Institutions (ADIs): 1 year Remaining 164 ADIs: 13 years 125 insurers: 7 years 12 trustee companies: 7 years 5,706 non-ADI credit licensees: 37 years
Financial advisers	28	Top 20 AFS licensees authorised to provide personal advice: 0.7 years Next 30 AFS licensees authorised to provide personal advice: 0.8 years
Investment banks	25	25 investment banks: 0.5 years 61 retail OTC derivative providers: 1 year 7 credit rating agencies: 1 year
Investment managers and superannuation	39	Top 25 active responsible entities: 2 years 9 highest risk active responsible entities: 1 year 5 highest risk superannuation fund trustees: 1 year 20 major custodians: 2.9 years
Small business compliance and deterrence	**	6,223 companies in the 5 highest risk industries for the potential to conduct illegal phoenix activity: 29 years
Markets		
Corporations	48	21,767 public companies, including 2,252 listed entities: • all control transactions for listed entities • a significant proportion of prospectuses • a small sample of entities in areas of emerging risk: 1 year
Financial market infrastructure	22	18 licensed financial markets: 1 year 6 licensed clearing and settlement facilities: 1 year
Insolvency practitioners	23	696 registered liquidators: 3.7 years
Financial reporting and audit	30	Financial reports of: • top 500 listed entities: 3 years • remaining 1,500 listed entities: 9 years • 2,100 unlisted public interest entities: 25 years • 100 large proprietary companies: 54 years Audit firms that audit listed entities: • largest 4: 1.5 years • next 18: 2.5 years • remaining 64: 10.3 years
Market and participant supervision	62	133 market participants: 3.3 years 100 larger securities dealers: 4 years

Note: ** It is unclear from ASIC's Annual Report 2013–2014 how many employees are responsible for the "small business compliance and deterrence" population within the area of "investor and financial consumers".

- Investment managers and superannuation: more than AU$1 trillion funds under management; 165 superannuation fund trustees; 485 active responsible entities; 3,6733 registered managed investment schemes; 614 foreign financial service providers; 718 custodial service providers.

(b) Markets

- Corporations (including emerging mining and resources companies): 2.12 million registered companies, of which 21,767 are public companies, and 2,252 are listed entities (including registered schemes and foreign companies).
- Financial market infrastructure: 40 authorised financial markets; 6 licensed clearing and settlement facilities.
- Insolvency practitioners: 696 registered liquidators; 9,822 companies entering external administration.
- Financial reporting and audit: 4,729 registered company auditors; 28,000 companies required to produce financial reports; 7,073 self-managed superannuation fund (SMSF) auditors.
- Market and participant supervision: 133 market participants; 800 securities dealers; 7 markets.

(c) Registry and licensing services for 2.12 million companies, 1.99 million business names, 5,101 AFS licensees, 5,837 credit licensees, 4,729 registered company auditors, 7,073 registered SMSF auditors, 696 registered liquidators, 3,673 registered managed investment schemes.

Table 4 shows how many ASIC employees are responsible for each group of regulated populations and how frequently

ASIC conducts routine surveillance of selected populations within those groups. In some instances, ASIC supplements this routine surveillance with reactive surveillance to target particular risks or concerns. For ease of expression, populations that are not subject to routine surveillance but are instead reviewed on a solely reactive or primarily reactive basis have been excluded from the right-hand column of Table 4.[110]

ASIC's regulatory remit is extensive and its enforcement functions and powers are summarised in these terms:

> "We regulate corporations, managed investment schemes, participants in the financial services industry and people engaged in credit activities under a number of Commonwealth laws. These laws include the *Corporations Act 2001* (Corporations Act), the *Australian Securities and Investments Commission Act 2001* (ASIC Act) and the *National Consumer Credit Protection Act 2009* (National Credit Act).
>
> The ASIC Act directs ASIC to 'take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it.'
>
> We use our enforcement powers to detect and deal with unlawful conduct, to recover money in appropriate circumstances and sometimes to prevent unlawful conduct before it happens. By doing this we deter future misconduct."[111]

The central strategic considerations that inform ASIC's enforcement practices are: strategic significance (eg, extent of the harm or loss); benefits of pursuing misconduct (eg, cost-effectiveness); features of the matter (eg, available evidence); and non-investigative alternatives.[112] ASIC may adopt enforcement strategies that are: punitive; compensatory; corrective; preservative (eg, ensuring assets remain within jurisdictional authority); protective (eg, disqualification orders); or aiming for a negotiated resolution (eg, enforceable undertakings).[113] The punitive outcomes that ASIC may seek include civil financial penalties, criminal financial penalties, prison terms and community service orders.[114] There are several factors that ASIC may consider in deciding which remedy to pursue, including: the nature and seriousness of the suspected misconduct; the conduct of the person or entity after the alleged contravention; the relative strength of the case; the expected levels of public benefit; mitigating factors; the likelihood that the person's or entity's behaviour will change in response to a particular action; and the likelihood that the business community is generally deterred from similar conduct through greater awareness of its consequences.[115]

The regulatory pyramids first promoted by Ayres and Braithwaite provide a helpful illustration of how regulators might seek to design their enforcement strategies.[116] These pyramids, which form part of responsive regulation theories, have been widely espoused by regulators and those analysing regulation in practice. For example, Gilligan, Bird and Ramsay in Figure 1 show how directors' duties could be enforced in a pyramid fashion in corporate law in Australia.[117]

It is beneficial for regulators, the regulated, and other key stakeholders, such as the state and consumers, if the vast proportion of regulatory interaction, including enforcement, takes place at the lower levels of the pyramid, especially its base. Assuming that good compliance outcomes are achievable via persuasion, education and negotiation, these strategies constitute a much more cost-effective approach. Difficulties of course arise with actors who do not understand or pay attention to their obligations. In respect of such actors, a stronger enforcement strategy from higher up the pyramid may be appropriate. The core rationale is that, depending on the circumstances of the actor and the contravention, different levels of enforcement response, ranging from a warning letter to imprisonment, may be applied. ASIC's enforcement activity would ideally reflect this rationale. However, the empirical data examined in the following section suggests that there is little correlation between ASIC's enforcement outcomes and the pyramid model.

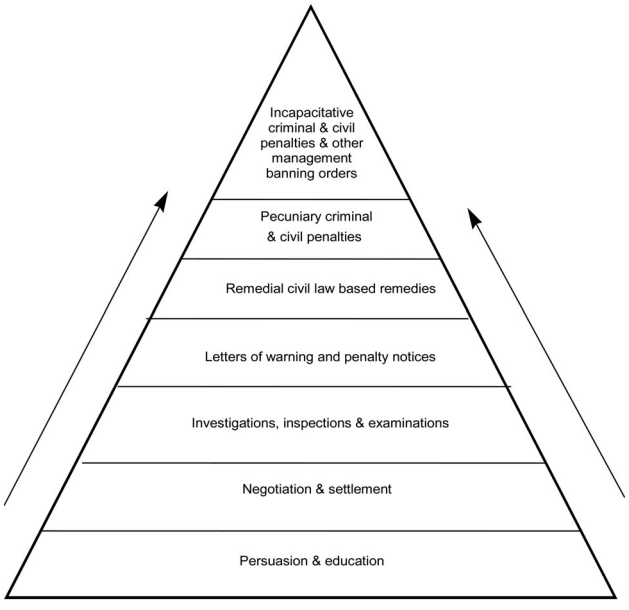

Figure 1. Enforcement of directors' duties in Australian corporate law

2. ASIC's quantitative approach to reporting enforcement outcomes

This section of the article examines in detail the quantitative data presented in ASIC's Enforcement Reports. This serves to illustrate some of the advantages, but also some of the pitfalls, of the trend towards increased empiricism in enforcement reporting by financial regulators. One advantage worth noting at the outset is that empirical approaches may reveal that there is a disjoint between theory and practice. As noted above, even though the pyramid approach to enforcement is widely espoused by regulators and theorists, the data in ASIC's Enforcement Reports reveals a different picture, which is that there is little correlation, and potentially even a rough inverse correlation, between ASIC's enforcement outcomes and the pyramid model.

ASIC's first Enforcement Report was issued in March 2012 covering the period July to December 2011 and the most recent was issued in August 2015 covering the period

January to June 2015. As discussed earlier in section C.1, the Enforcement Reports contain both qualitative and quantitative data. The quantitative data is divided into four broad regulatory areas: market integrity; corporate governance; financial services; and small business compliance and deterrence. Enforcement activity in these four areas is classified across five enforcement methods: criminal; civil; administrative remedies; enforceable undertakings/negotiated outcomes; and public warning notices.

The tables and figures in this section present a set of data extracted from the Enforcement Reports from 2011 to 2014.[118] For the purposes of the data analysis presented in this article, ASIC's classification and definitions of regulatory areas and enforcement activities have been adopted. This presents certain challenges in terms of being able to interpret accurately the data. For example, the authors' research suggests that ASIC's definition of an "enforcement outcome" includes interim stages of the enforcement process. In a criminal proceeding, a guilty plea is treated as an enforcement outcome, even where the defendant has yet to be sentenced. The subsequent sentencing and imposition of a criminal penalty are treated as separate, additional enforcement outcomes. Defining enforcement outcomes in this way inflates the number of outcomes and makes it more difficult to obtain a true picture of ASIC's enforcement activity.

This raises an important issue, which is that, in adopting quantitative approaches to reporting of enforcement outcomes, there is a risk of imprecision in the ways that regulators present and classify the data.[119] For example, it is noteworthy that, despite ASIC presenting relatively detailed empirical data on its enforcement outcomes, it has omitted explanatory notes that would clarify the data and arguably make ASIC more accountable for whatever the data might reveal. It is beyond the scope of this article to conduct a detailed evaluation of ASIC's classification of the data in the Enforcement Reports, but caution is certainly warranted where regulators may have an interest in boosting numbers, whether to meet key performance indicators or political or community expectations. This point has been noted by the OECD in its May 2014 report on *Best Practice Principles for Regulatory Policy: Regulatory Enforcement and Inspections*:

> " … any data that is recorded or produced by the agency should be treated with caution in terms of evaluation, because of the potential for conflict of interest and there may be incentives for the inspectorate to alter the data so as to improve its apparent performance."[120]

Table 5 presents the aggregate "enforcement outcomes", as defined by ASIC, in the period 1 July 2011 to 31 December 2014. This data was prepared by aggregating the data from the seven individual Enforcement Reports published from 2011 to 2014. From 2013 onward, ASIC has prepared tables which aggregate the previous two years' of data. However, some inconsistencies between the individual tables and the aggregate ones were identified. To ensure

Table 5. ASIC Enforcement outcomes from 1 July 2011 to 31 December 2014

ENFORCEMENT METHOD → REGULATORY AREA & WRONGDOING TYPE ↓	Criminal	Civil	Administrative remedies	Enforceable undertakings /negotiated outcome	Public warning notice	Total
Market integrity	**43**	**6**	**48**	**9**	**0**	**106**
Insider trading	33	1	0	0	0	34
Market manipulation	6	0	1	1	0	8
Continuous disclosure	0	2	14	2	0	18
Market integrity rules	0	0	33	2	0	35
Other market misconduct	4	3	0	4	0	11
Corporate governance	**51**	**24**	**35**	**20**	**1**	**131**
Action against directors	48	19	2	2	1	72
Insolvency	1	1	2	0	0	4
Action against liquidators	1	4	10	5	0	20
Action against auditors	0	0	2	12	0	14
Other corporate governance misconduct	1	0	19	1	0	21
Financial services	**63**	**66**	**208**	**109**	**6**	**452**
Unlicensed conduct	4	7	0	0	0	11
Dishonest conduct, misleading statements, unconscionable conduct	31	36	45	24	1	137
Misappropriation, theft, fraud	16	2	22	5	0	45
Credit	9	5	73	31	3	121
Other financial services misconduct	3	16	68	49	2	138
Subtotal	**157**	**96**	**291**	**138**	**7**	**689**
Small business compliance and deterrence	**1,497**	**2**	**218**	**0**	**1**	**1,718**
Action against directors	1,454	0	215	0	1	1,670
Efficient registration and licensing	43	2	3	0	0	48
Total	**1,654**	**98**	**509**	**138**	**8**	**2,407**

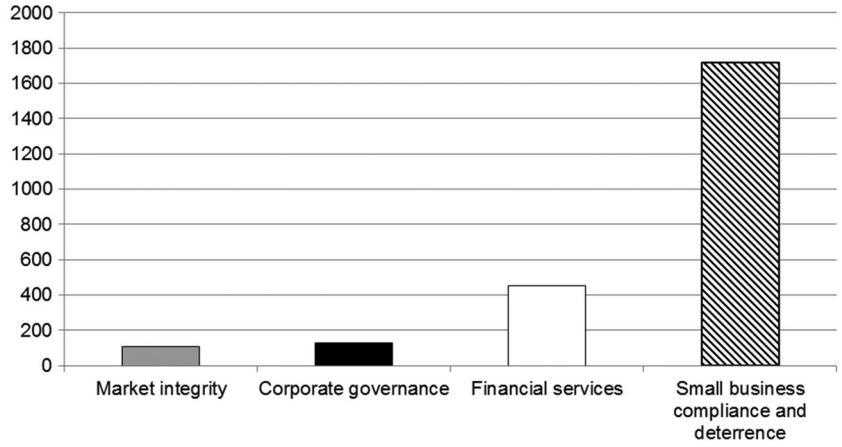

Figure 2. ASIC enforcement outcomes by regulatory area from 1 July 2011 to 31 December 2014

that the data is accurate, only the individual tables have been relied upon in preparing Table 5 and Figures 2 through to 11.

Figure 2 displays the aggregate enforcement outcomes in each regulatory area from 1 July 2011 to 31 December 2014. This Figure shows that "small business compliance and deterrence" accounts for the vast majority of ASIC's enforcement outcomes. In turn, Table 5 indicates that "action against directors'" accounts for most of the enforcement outcomes within "small business compliance and deterrence". The small business "action against directors" category (1,454) accounts for well over half of all of ASIC's enforcement outcomes (2,407).

The sheer scale of the small business "action against directors" category raises the question as to what *specific* enforcement outcomes it includes. There is no guidance on this issue in the Enforcement Reports. ASIC's 2013–2014 Annual Report indicates that misconduct, compliance with licensing and registration requirements and illegal phoenix activity are some of the matters addressed within the area of "small business compliance and deterrence" generally.[121] ASIC's work in this area also includes the Liquidator Assistance Program,[122] which is one of the measures it utilises to combat illegal phoenix activity.[123] However, considerable ambiguity remains as to the specific breakdown of this category.

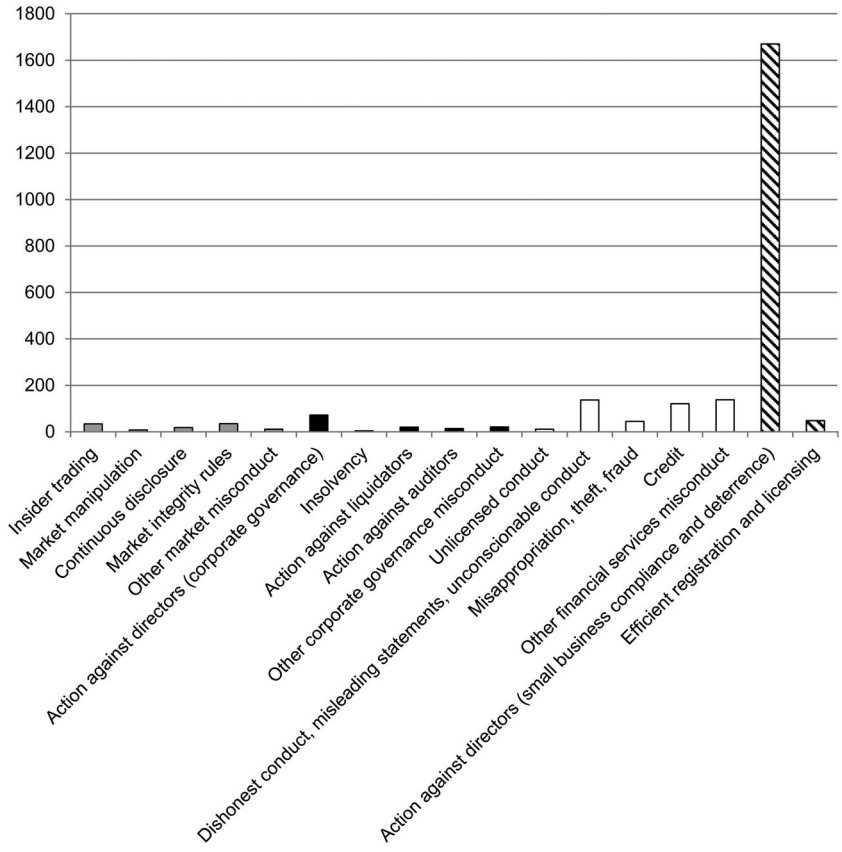

Figure 3. ASIC enforcement outcomes by wrongdoing type from 1 July 2011 to 31 December 2014

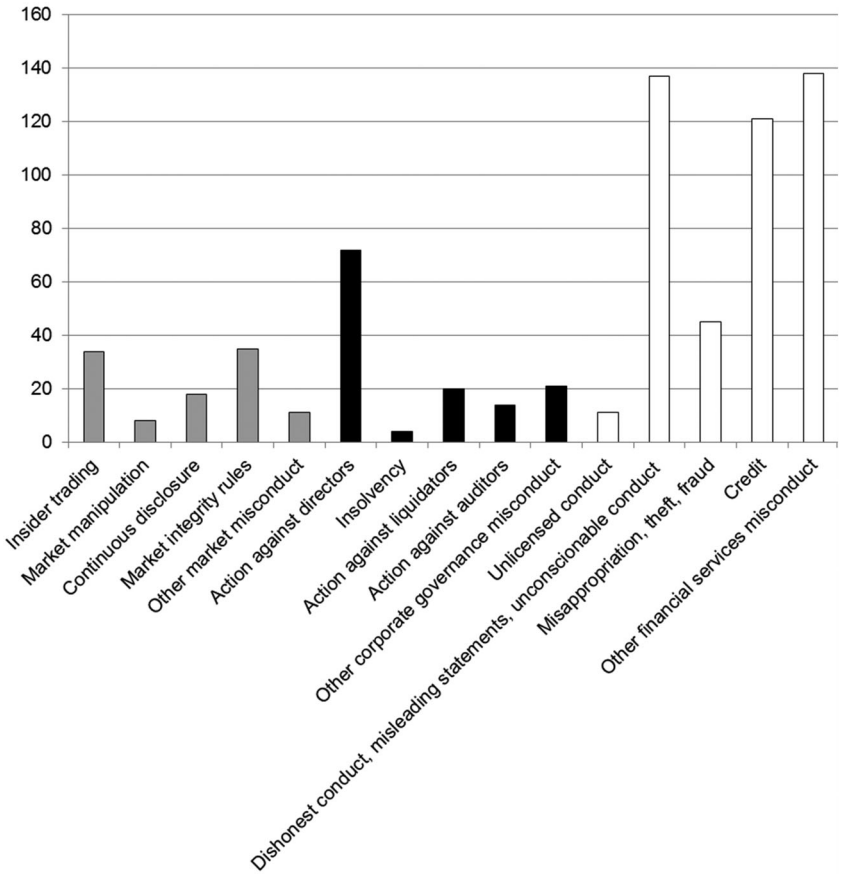

Figure 4. ASIC enforcement outcomes by wrongdoing type from 1 July 2011 to 31 December 2014, excluding small business compliance and deterrence data

The ambiguity surrounding this category points to broader issues in regard to the ASIC data, which is that a number of the categories are too broad and the categories are not logically consistent. For example, categories such as "action against directors" and "action against auditors" could encompass various causes of action. Further, the sub-categories in the left-hand column of Table 5, which have been dubbed "wrongdoing types" for ease of expression, include not only causes of action, but also categories defined by reference to the type of actor, such as "action against directors" or "action against auditors", and categories defined by reference to a more specific regulatory area, such as "insolvency" or "credit". If the trend towards increasing empiricism in enforcement reporting identified in this article continues, it is likely

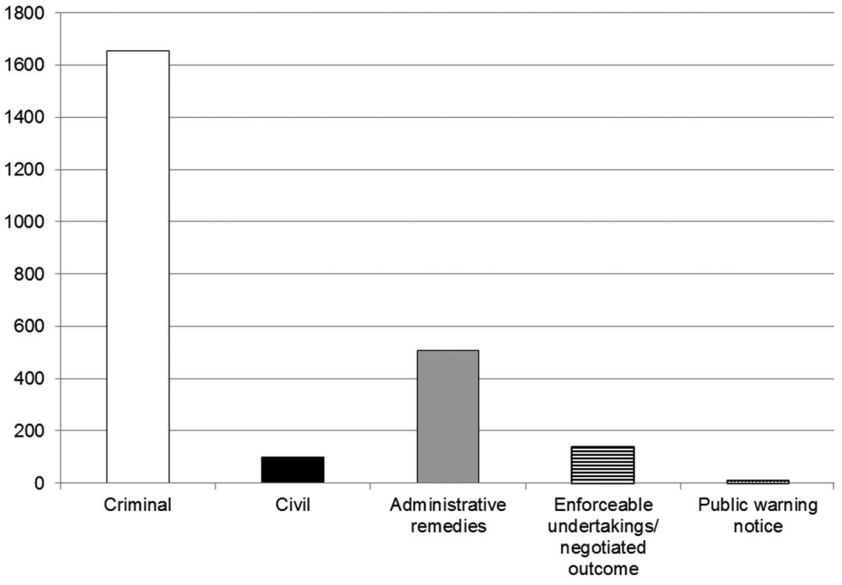

Figure 5. ASIC enforcement outcomes by enforcement method from 1 July 2011 to 31 December 2014

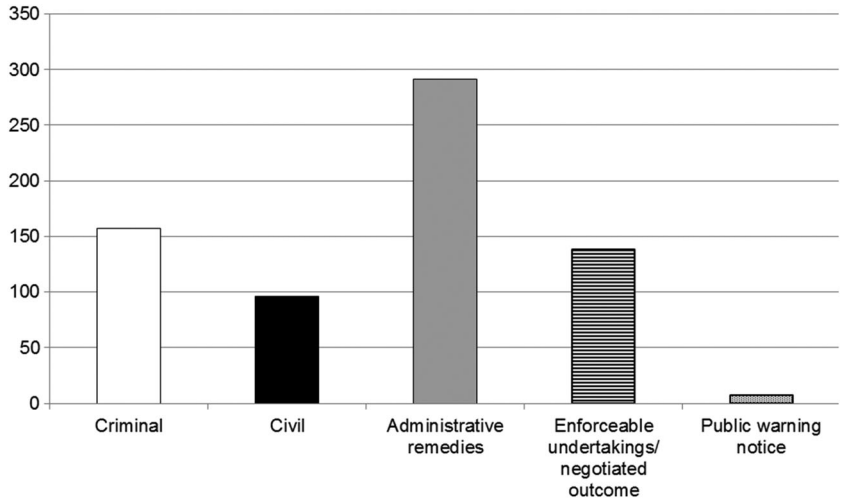

Figure 6. ASIC enforcement outcomes by enforcement method from 1 July 2011 to 31 December 2014, excluding small business compliance and deterrence data

that regulators such as ASIC will come under pressure to produce data that is more specific and logically consistent than the quantitative data in the Enforcement Reports, as it is difficult to see how such data could meet anything but the most general of key performance indicators.

Figure 3 shows the aggregate enforcement outcomes for each specific "wrongdoing type" from 1 July 2011 to 31 December 2014. As noted above, the "wrongdoing types" are not necessarily causes of action; some of the categories are defined by reference to actors or more specific regulatory areas. The shading scheme in Figure 2 has been maintained in Figures 3 and 4 to represent the different regulatory areas.

Figure 3 further emphasises the degree to which the "action against directors" category within "small business compliance and deterrence" dominates ASIC's enforcement activity (at least in terms of the sheer number of enforcement outcomes). The next most commonly enforced wrongdoing types are within the "financial services" regulatory area, including wrongdoing in relation to "dishonest conduct, misleading statements, unconscionable conduct", "credit" and "other financial services misconduct". Once again, it is unclear what causes of action might be included within the "credit" or "other financial services misconduct" categories, pointing to the need for more specificity if this data were called upon to respond to particularised key performance indicators.

Figure 4 is a variant on Figure 3, which excludes the data for "small business compliance and deterrence". By excluding the small business data, it is possible to differentiate clearly between the wrongdoing types in the other regulatory areas. Figure 4 shows that, apart from enforcement activity in relation to small businesses, most of ASIC's enforcement activity is occurring within financial services. This is perhaps not surprising given the heightened scrutiny on the financial services sector following the GFC.

After the three leading "financial services" categories, the next most significant category in Figure 4 is the "action against directors" category within "corporate governance".

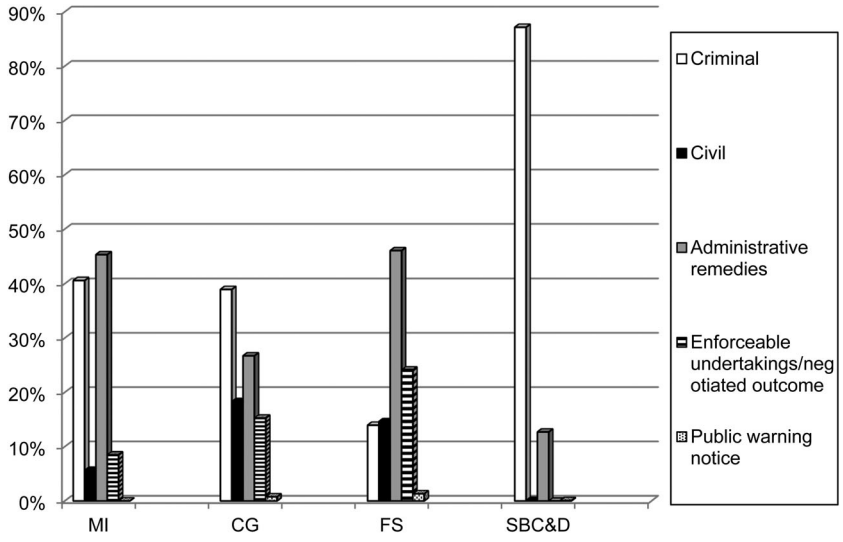

Figure 7. ASIC enforcement methods as percentages of regulatory areas from 1 July 2011 to 31 December 2014 (see corresponding Table A1 in the Appendix)

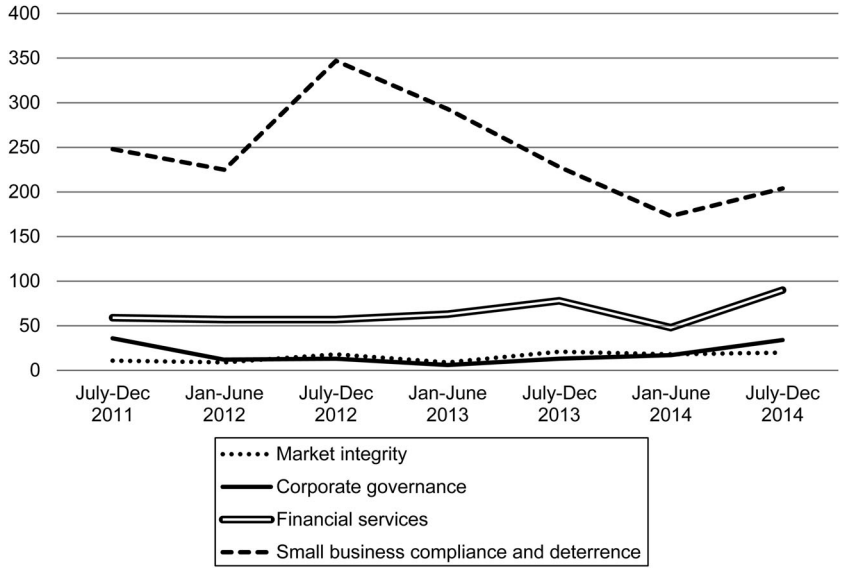

Figure 8. Trends in ASIC regulatory areas from 1 July 2011 to 31 December 2014 (see corresponding Table A2 in the Appendix)

This is yet another broad category defined by reference to an actor, not a cause of action, and therefore it is not possible to identify what specific enforcement outcomes this category includes.

Turning now to focus on enforcement methods, Figure 5 displays the aggregate enforcement outcomes reached via each enforcement method. This Figure shows that criminal enforcement methods are by far the most common, although this is due to the large number of criminal enforcement outcomes in the "action against directors" category within "small business compliance and deterrence". It can be seen from Figure 6 that, once the small business data is excluded, administrative enforcement methods are the most common and enforceable undertakings are almost as numerous as criminal methods.

Figures 5 and 6 show that ASIC's choice of enforcement methods does not appear to correlate to the pyramid model of enforcement discussed earlier in this article. Negotiated settlements are located in the second lowest segment of the pyramid, therefore one would expect such methods to predominate, yet enforceable undertakings/negotiated outcomes are outnumbered by both criminal and administrative methods, which are most likely to occupy the two uppermost segments. Meanwhile, criminal methods significantly outnumber civil methods and public warnings are barely used at all. The data from ASIC's Enforcement Reports indicates that there is little correlation between the enforcement methods apparently used by ASIC and the enforcement pyramid, and one might even suggest that there may be inverse correlation; that is, there is a trend towards the methods at the top of the pyramid being used the most and those at the bottom of the pyramid being used the least.

The problem of the excessively broad nature of the data categories also applies to the "enforcement method" categories. In particular, it is not possible to determine from

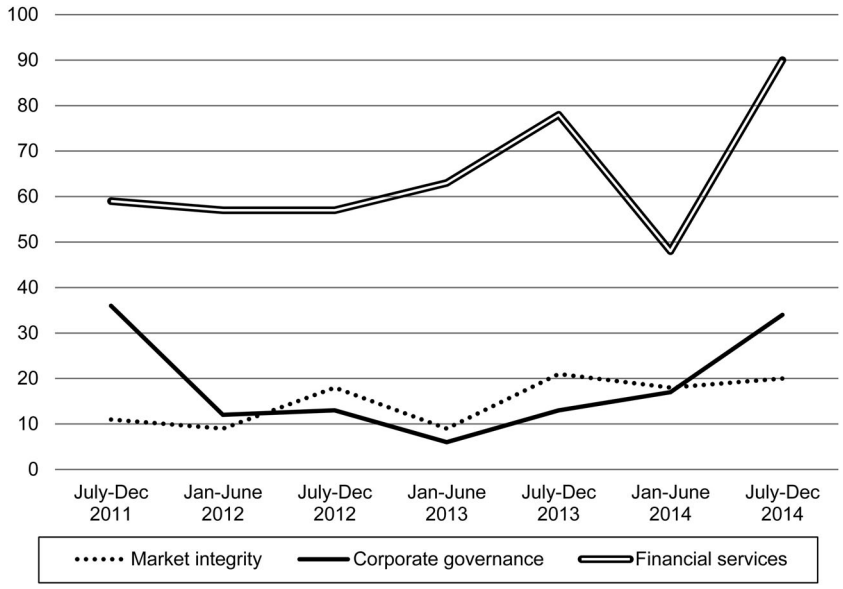

Figure 9. Trends in ASIC regulatory areas from 1 July 2011 to 31 December 2014, excluding small business compliance and deterrence data (see corresponding Table A2 in the Appendix)

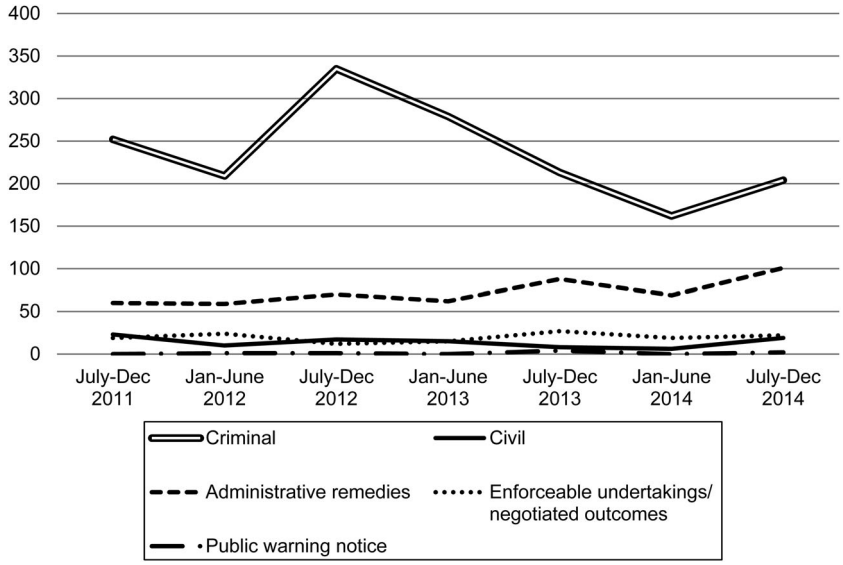

Figure 10. Trends in ASIC enforcement methods from 1 July 2011 to 31 December 2014 (see corresponding Table A3 in the Appendix)

these categories which outcomes are financial and which are incapacitative. The "criminal" category includes both fines and imprisonment. The "civil" category includes both pecuniary penalties and disqualification orders. The "administrative" category may refer to serious disqualification orders or negligible variations of licences. This highlights a critical flaw in the data, which is that it is simply not possible to determine whether more severe or less severe enforcement outcomes are being imposed. An "administrative" outcome might entail a serious disqualification order, while a "criminal" outcome might entail a negligible fine. This suggests that, rather than there being no correlation or an inverse correlation with the enforcement pyramid, it is simply *not possible* to determine the level of correlation, as the pyramid is structured according to the severity of sanctions, which is precisely what cannot be determined from the ASIC Enforcement Reports data.

Figure 7 adds further detail to the picture of which "enforcement methods" ASIC is choosing to adopt. This Figure shows the number of enforcement outcomes reached via particular enforcement methods as a percentage of the total enforcement outcomes within each regulatory area. For example, it can be seen that about 45% of enforcement outcomes within "market integrity" are reached via administrative enforcement methods, while only about 6% are reached via civil enforcement methods. Administrative enforcement methods are particularly dominant in relation to "financial services" (46%) and criminal enforcement is overwhelmingly used in "small business compliance and deterrence" (87%) and also the most common enforcement method in the "corporate governance" area (39%).

While the ASIC data has certain limitations in relation to the breadth of the "enforcement method" categories, as discussed above, Figure 7 is striking in the sense that it shows that ASIC's enforcement strategy varies significantly depending on the regulatory area within which it is operating. This might indicate that ASIC is tailoring its approach to the particular regulatory area or that there is an element of randomness involved. This is precisely the kind of question that a more rigorous empirical approach to enforcement reporting might seek to answer, by requiring regulators to provide not only

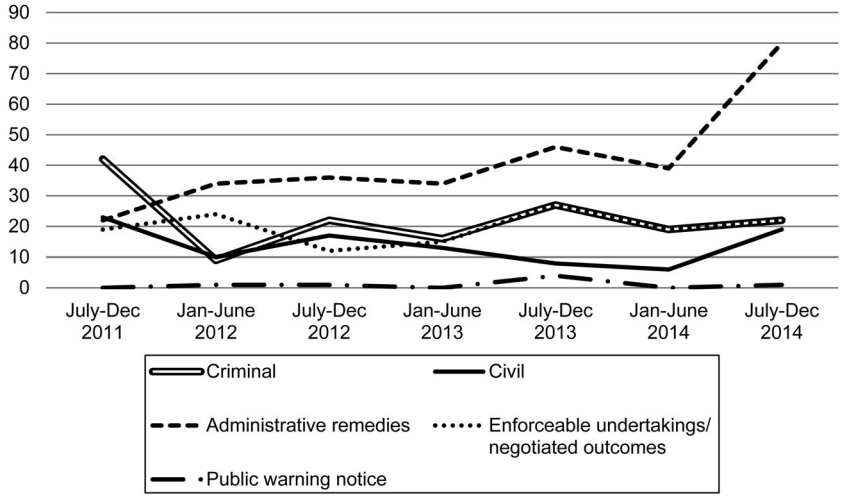

Figure 11. Trends in ASIC Enforcement Methods from 1 July 2011 to 31 December 2014, excluding small business compliance and deterrence data (see corresponding Table A4 in the Appendix)

sufficiently particularised quantitative data but also detailed explanatory notes that contextualise the variation in the data.

Looking at trends in ASIC's enforcement activity over time, Figure 8 displays the number of enforcement outcomes within each regulatory area over the 2011 to 2014 period. Overall, there has been a moderate downward trend in "small business" activity and a slight upward trend in the other areas since July 2012. Figure 9 is a variant on Figure 8, which excludes the "small business compliance and deterrence" data to get a better picture of trends in the other regulatory areas.

Figure 10 shows the number of enforcement outcomes reached via each "enforcement method" over the 2011 to 2014 period. Figure 11 is a variant on Figure 10 that excludes the "small business compliance and deterrence" data. Figure 10 shows a moderate downward trend in criminal methods of enforcement since July 2012, which corresponds to the aforementioned downward trend in enforcement outcomes within "small business compliance and deterrence" due to the large number of criminal small business matters. Figure 11 shows a moderate upward trend in the use of administrative methods of enforcement across the 2011 to 2014 period, which accelerates notably in the final six months.

Overall, it is not possible to discern any significant trends over time in the data extracted from the ASIC Enforcement Reports, primarily because of the limited 2011 to 2014 duration of the data sample. Should the trend of increased empiricism in enforcement reporting continue, this would no doubt reveal some informative patterns over time in the degree to which regulators focus on particular regulatory areas, methods or enforcement or types of wrongdoing. However, the usefulness of such data would also be dependent on the regulators devising an appropriately particularised and logically consistent classification system with accompanying explanatory notes. It is one thing to identify whether categories increase or decrease over time, but this is of little use if it is not possible to identify the content of the categories with sufficient precision. It is apparent that there is substantial scope for improvements in the rigour of ASIC's data collection, classification and analysis. Although this article has not critically examined the enforcement data produced by the FCA and the SEC, similar issues may arise in those jurisdictions with respect to data classification and interpretation.[124] While empirical enforcement reporting systems ultimately promise to produce more meaningful information on regulatory effectiveness, such systems need to be transparently and rigorously designed in order to deliver on that promise.

F. Conclusion

This article has identified a trend of increased empiricism in the enforcement reporting practices of three significant national financial regulatory agencies, the FCA in the UK, the SEC in the US and ASIC in Australia, the latter in some detail. The FCA, SEC and ASIC are influential regulatory actors who have led international best practice in the regulation of contemporary financial markets. Consequently it is not unreasonable to expect that many of their regulatory peers are likely to integrate increased empiricism in enforcement reporting into the processes that they practise and promote. This trend is part of a broad-based response from governments, industry and other stakeholders since the GFC involving increasing national and international scrutiny of financial regulators. This scrutiny is not only a fiscally motivated push to generate further value from the regulatory dollar spend in an era of growing pressures on national budgets, but also is part of a deeper drive to impose greater accountability on regulators and improve regulatory outcomes according to delineated key performance indicators.

The ASIC case study shows how ASIC utilises its Enforcement Reports to self-report its enforcement activity and provide an overview of its organisational response to wrongdoing. The increased detail regarding enforcement activity is welcome in terms of a greater commitment to transparency and accountability, but, as noted in section E, the lack of accompanying explanatory information regarding classification processes and ambiguity in elements of the data dilute the transparency and accountability benefits. This attests to the OECD's warning[125] that calculative practices have the potential to divert attention towards targeted measurable numbers and away from other important normative aspects of regulation that are less amenable to quantification. There is a risk that regulatory actors may game the numbers, prioritising the numerical representation of a regulatory outcome over the actual delivery of that regulatory outcome.[126]

The reality of performance evaluation, as noted by Coglianese is that it is hard to measure.[127] It is inevitable that forms of data deficiencies will persist or evolve in terms of regulation in general and the reporting of financial regulation enforcement in particular. Nevertheless, the momentum towards increased empiricism in financial regulation enforcement reporting directly related to external key performance indicators seems inexorable, as evidenced both by national developments, such as the RPF in Australia and the UK NAO's assessment of the FCA's enforcement reporting practices in its *Regulating Financial Services* report,[128] and by lobbying by international organisations, such as the OECD[129] and IOSCO.[130] That momentum is likely to see similar evolution in enforcement reporting in order to mitigate various kinds of data deficiency. The challenge for the future is to produce data on financial regulation enforcement that not only is more precise and capable of responding meaningfully to the emerging key performance indicators, but also has both legitimacy and the capacity to generate traction and commitment in financial markets that have significant global influences. ■

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Appendix. Tables corresponding to Figures 7 to 11

Table A1. Table corresponding to Figure 7

	Criminal	Civil	Administrative remedies	Enforceable undertakings/ negotiated outcome	Public warning notice
Market integrity	41%	6%	45%	8%	0%
Corporate governance	39%	18%	27%	15%	1%
Financial services	14%	15%	46%	24%	1%
Small business compliance and deterrence	87%	0%	13%	0%	0%

Table A2. Table corresponding to Figures 8 and 9

	July–Dec 2011	Jan–June 2012	July–Dec 2012	Jan–June 2013	July–Dec 2013	Jan–June 2014	July–Dec 2014	Total
Market integrity	11	9	18	9	21	18	20	106
Corporate governance	36	12	13	6	13	17	34	131
Financial services	59	57	57	63	78	48	90	452
Small business compliance and deterrence	248	225	347	293	228	173	204	1,718
Total	354	303	435	371	340	256	348	2,407

Table A3. Table corresponding to Figure 10

	July–Dec 2011	Jan–June 2012	July–Dec 2012	Jan–June 2013	July–Dec 2013	Jan–June 2014	July–Dec 2014	Total
Criminal	252	209	335	279	213	162	204	1,654
Civil	23	10	17	15	8	6	19	98
Administrative remedies	60	59	70	62	88	69	101	509
Enforceable undertakings/ negotiated outcomes	19	24	12	15	27	19	22	138
Public warning notice	0	1	1	0	4	0	2	8
Total	354	303	435	371	340	256	348	2,407

Table A4. Table corresponding to Figure 11

	July–Dec 2011	Jan–June 2012	July–Dec 2012	Jan–June 2013	July–Dec 2013	Jan–June 2014	July–Dec 2014	Total
Criminal	42	9	22	16	27	19	22	157
Civil	23	10	17	13	8	6	19	96
Administrative remedies	22	34	36	34	46	39	80	291
Enforceable undertakings/ negotiated outcomes	19	24	12	15	27	19	22	138
Public warning notice	0	1	1	0	4	0	1	7
Total	106	78	88	78	112	83	144	689