ASIC and its enforcement record since the introduction of the civil penalty regime in 1993

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Introduction

> Regulators, under unprecedented pressure, face a range of demands, often contradictory in nature: be less intrusive - but more effective; be kindlier and gentler - but don't let the bastards get away with anything; focus your efforts - but be consistent; process things quicker - and be more careful next time; deal with important issues - but don't stray outside your statutory authority; be more responsive to the regulated community - but don't get captured by industry.[1]

It has been 14 years since major reforms were made to the regime of sanctions relevant to the duties of corporate officers in Australia when the civil penalty regime, currently contained in Pt 9.4B of the *Corporations Act* 2001 (Cth) (the *Corporations Act*), was introduced.[2] By adopting this approach, it was hoped that the Australian Securities and Investments Commission (ASIC) could more effectively regulate corporate misconduct and that civil penalties would constitute a significant enforcement tool.

My paper will discuss the introduction of the civil penalty regime and its effectiveness to date. At first, Pt 9.4B failed to operate as an effective enforcement measure with very few civil penalty applications being made by ASIC.[3] In the six years from 1993

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1 Sparrow M, *The Regulatory* Craft (Brookings Institution Press, Washington DC, 2000) p 17.

2 The civil penalty regime in the *Corporations Act*, Pt 9.4B, was introduced by the Co*rporate Law Reform Act* 1992 (Cth) and became effective from 1 February 1993. The original civil penalty rules in Pt 9.4B were reformed and rewritten by the *Corporate Law Economic Reform Program Act* 1999 (Cth) (*CLERP Act*), which became operative on 13 March 2000. More recently, the operation of the regime was amended by the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act* 2004 (Cth) (*CLERP 9 Act*).

3 See Bird H, "The Problematic Nature of Civil Penalties in the Corporations Law" (1996) 14 C&SLJ 405 and Gilligan G, Bird H and Ramsay I, *Research Report: Regulating Director's Duties – How Effective are the Civil Penalty Sanctions in the Australian Corporations Law?* (Centre for Corporate Law and Securities Regulation, The University of Melbourne,1999).

to 1999, it commenced a mere 14 penalty applications relating to 10 case situations.[4] Since then, however, ASIC has increasingly issued these proceedings and succeeded in recent years in obtaining many of the civil penalty orders it has sought, particularly against directors involved in high profile corporate collapses, such as those of the HIH Insurance (HIH)[5] (although criminal proceedings have also been instituted)[6] and Water Wheel[7] groups of companies, and to a lesser extent, One.Tel.[8] Despite these successes and more recent ones,[9] including the civil penalty orders ASIC obtained against Stephen Vizard, former lawyer and television celebrity turned businessman, for insider trading,[10] the adverse press and perceptions surrounding ASIC's failure to institute criminal proceedings against such a high profile wrongdoer as Vizard[11] may be undermining its credibility as an effective regulator. Accordingly, this paper argues that ASIC, like its much admired United States counterpart, the Securities and Exchange Commission (SEC) which focuses on promptly bringing criminal indictments against suspected major corporate wrongdoers[12] should undertake criminal proceedings in cases of corporate wrongdoing where it is clear that the conduct is not inadvertent or minor to ensure that it is regarded as a credible regulator.

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4 See Gilligan et al, n 3, pp vii, 23-4.

5 See discussion below, *HIH, Civil Penalty Proceedings*.

6 See discussion below, *HIH, Criminal Proceedings.*

7 See discussion below, *Water Wheel*.

8 See discussion below, *One.Tel*. For a fuller discussion of the One.Tel proceedings, see Comino V, "High Court relegates strategic regulation and pyramidal enforcement to insignificance" (2005) 18 Aust Jnl of Corp Law 48.

9 See discussion at n 63.

10 See discussion below, *Vizard case*.

11 See, eg, Sexton J, "Vizard was 'too well connected' for jail", *The Australian* (6 July 2005) pp 1-2.

12 Recent action by the SEC in the Enron case, for example, resulted in the criminal convictions of former top two executives, Jeffrey Skilling and Kenneth Lay (now deceased), for fraud, conspiracy and insider trading on 26 May 2006 and the subsequent sentencing of Skilling to 24 years and four months in prison.

Reasons for the introduction of the civil penalty regime

The regime of sanctions for enforcement of the duties of company officers[13] was fundamentally reformed in 1993 when the current civil penalty approach was introduced.[14] This drastically reduced the role of the criminal law. Previously, in the 1980s, when State and Territory Corporate Affairs Commissions (CACs) acted under the direction of the former National Companies and Securities Commission (NCSC),[15] and early 1990s, when ASIC assumed responsibility for corporate regulation,[16] company officers who breached their statutory duties were subject to criminal sanctions[17] and of course, civil remedies, which enabled recovery of loss or damage resulting from the breach.[18] Reliance upon criminal sanctions, however, made enforcement difficult.[19] ASIC, like its forerunner, the NCSC, generally failed to obtain criminal convictions, especially in relation to the 'hit list' of sixteen matters

13 See earlier discussion at n 2.

14 The provisions relating to these duties are now found in the *Corporations Act*, ss 180-184, formerly the Corporations Law, s 232, and the Companies Code (Code), s 229.

15 The NCSC was the national body established in 1980 under the earlier co-operative scheme of companies and securities regulation. That scheme, which had clear weaknesses and did not prevent the corporate excesses of the 1980s, comprised State and Federal corporate regulatory agencies, the State and Territory CACs and the peak federal NCSC: see generally Comino V, "National Regulation of Corporate Crime" (1997) 5 Current Commercial Law 84.

16 ASIC began operating on 1 January 1991 as the Australian Securities Commission (ASC). Its sole responsibility was for regulation of companies and securities and futures markets but, on 1 July 1998, when it was renamed ASIC, it took on further responsibilities. Although ASIC is the primary investigative body in relation to complex criminal matters involving corporate law and has the power to prosecute these matters under *ASIC Act* 2001 (Cth), s 49 and *Corporations Act*, s1315, major offences are generally prosecuted by the Commonwealth Director of Public Prosecutions (DPP) in accordance with a Memorandum of Understanding (MOU) between the DPP and ASIC. A new MOU, entered into in March 2006, has replaced the earlier MOU dated 22 September 1992 "to substantially the same effect": see MOU dated 1 March 2006 available on the ASIC website <www. asic.gov.au> viewed on 15 June 2006.

17 When the Corporations Law commenced operating on 1 January 1991, the criminal penalty regime mirrored the provisions of the Code. For instance, contraventions of the statutory duties owed by corporate officers in the Corporations Law, s 232, formerly the Code, s 229 were offences. The criminal sanctions which could be imposed were a fine or imprisonment for up to five years or both under the Corporations Law, s 1311, formerly the Code, s 570.

18 Corporations Law, ss 232(7), (8) and (11), formerly the Code, ss 229(6), (7) and (10).

19 See discussion below at nn 22-5.

designated as areas of 'national priority'[20] and in its dealings with the 'corporate cowboys' of the 1980s.[21]

ASIC's poor track record with respect to these matters demonstrated well recognised difficulties associated with the use of the criminal process.[22] They included the requirement to satisfy the criminal rules of evidence and standard of proof, as well as, the additional time, cost and resources required to investigate and pursue criminal proceedings over that needed for civil and administrative cases. The need for ASIC to liaise with the DPP over significant enforcement matters exacerbated these problems and caused further delays.[23] According to Tomasic, although there were many investigations, corporate criminal offences were often not prosecuted,[24] and even when they were prosecuted, the difficulties of proving the criminal offence beyond a reasonable doubt and the ability of the defence to take procedural points meant that few

20 In September 1991, Tony Hartnell, then ASIC Chairman, announced a 'hit list' of sixteen companies which would be investigated by ASIC as a matter of priority because of their complexity or public significance. The Bond, Qintex, Lintner, Budget, Duke and Equiticorp Groups, as well as Rothwells, Spedley and Estate Mortgages appeared as part of this famous 'hit list': see ASC, *Annual Report 1991/92*, pp 40-1, which sets out a table showing the progress made in the sixteen 'priority matters'. While 252 charges had been laid in these matters, there were only 6 prosecutions. In its 1992/93 Annual Report, ASIC noted that while charges had been laid in thirteen of those sixteen major 1980s matters, legal proceedings were already "proving protracted and costly": see ASC, *Annual Report 1992/93*, p 6.

21 They included well-known business identities such as Christopher Skase, Laurie Connell, Alan Bond and John Elliott, see Comino, above note 15, which discusses not only the NCSC's regulatory failure, but also ASIC's poor enforcement record in relation to the 'corporate cowboys' of the 1980s. There have, however, been some successful criminal cases, notably those against Bond, Peter Mitchell and recently, Antony (Tony) Oates, who after a special investigation by John Sulan, QC, and a five-year ASIC investigation into the spectacular collapse of Bond Corporation, were charged in January 1995 over conduct that stripped $1.2 billion out of Bond Corporation subsidiaries, including the one-time cash cow of the Bond empire, Bell Resources Ltd (Bell Resources).

22 See, eg, Schlegel K, *Just Desserts for Corporate Criminals* (Northeastern Uni Press, Boston Mass, 1990).

23 See earlier discussion n 16.

24 See Tomasic R, "Corporate Crime: Making the Law More Credible" (1990) 8 Company and Securities Law Journal 369.

criminal proceedings were completed.[25]

Introduction of Pt 9.4B

ASIC's failure to deal expeditiously with the 'corporate cowboy' cases or to conduct successful criminal prosecutions led to the reform of the penalty regime by the introduction of Pt 9.4B. Many important provisions, notably those regulating the duties of corporate officers in s 232 Corporations Law,[26] became "civil penalty provisions".[27] The majority of cases attracted civil penalty sanctions,[28] with criminal sanctions applying only to the most serious contraventions.[29] By reducing the role of the criminal law, it was hoped that ASIC could more effectively regulate corporate

25 For instance, in the *Spedley* litigation, the accused delayed proceedings by claiming a denial of natural justice. For a discussion of this case, see Tomasic R, "Corporate Crime and Corporations Law Enforcement Strategies in Australia" Discussion Paper 1/193 (Centre for National Corporate Law Research, Canberra, 1993) p 17, n 70. Of the many cases involving Spedley: see, eg, *Yuill v Spedley Securities Ltd (in liq)* (1992) 8 ACSR 272 and *Spedley Securities Ltd (in liq) v BR Yuill (No. 4)* (1991) 5 ACSR 758.

26 The provisions relating to these duties in the Corporations Law, s 232, are now found in the *Corporations Act*, ss 180-183.

27 Pursuant to s 1317DA, now s 1317E of the *Corporations Act*, certain provisions of the Corporations Law were defined as civil penalty provisions. In addition to s 232, designated civil penalty provisions were, until 30 June 1998, ss 243ZE(2) and (3) – giving financial benefits to related parties, s 344(1) (formerly s 318(1)) – contraventions in relation to company accounts and s 588G – duty to prevent insolvent trading. On 1 July 1998, by virtue of reforms made to the law by the *Company Law Review Act* 1998 (Cth) and the *Managed Investments Act* 1998 (Cth), the application of civil penalties was extended to s 254L(2) – contraventions of requirements regarding redemption of redeemable preference shares, s 256D(3) – contravention of requirements regarding capital reductions, s 259F(2) – contravention of restriction on company acquiring its own shares and taking security over its own shares, s 260D(2) – contravention of restriction on company providing financial assistance in connection with the acquisition of its shares, and ss 601FC(1), 601FD(1), 601FE(1), 601FG and 601JD(1) – contravention of duties imposed on those involved in the management of managed investment schemes. The *Financial Services Reform Act* 2001 (Cth) extended the civil penalty regime to also apply to offences relating to all market misconduct provisions, such as insider trading, s 1043A and continuous disclosure, ss 674-5, thus creating two kinds of civil penalties: financial services civil penalties and corporation/ scheme civil penalties.

28 Where a civil penalty provision was breached, the consequences could include the court, under the former Corporations Law, s 1317EA, prohibiting the person from managing a corporation for a specified period of time and/or imposing a pecuniary penalty of up to $200,000 upon that person.

29 Under the former Corporations Law, s 1317FA, a person who contravened a civil penalty provision was guilty of a criminal offence if that person contravened the provision knowingly, intentionally or recklessly and (i) was dishonest and intended to gain an advantage or (ii) intended to deceive or defraud someone. The criminal sanctions which applied for a successful prosecution of the criminal offence were a fine of up to $200,000 or imprisonment for up to 5 years or both.

misconduct and that civil penalties would constitute an important part of the overall enforcement mechanism.

The regulatory framework underpinning Pt 9.4B

Policy source: Cooney Committee Report

The civil penalty reforms resulted from two principal recommendations of the *Cooney* Committee[30] report, where the Senate Standing Committee on Legal and Constitutional Affairs conducted an inquiry into the duties and obligations of company directors. These were that criminal liability apply only where conduct is "genuinely criminal in nature",[31] that is, where directors had acted "fraudulently' or "dishonestly",[32] and that civil penalties be provided for breaches by directors where no criminality is involved.[33]

Strategic regulation theory and pyramidal enforcement

Central to these recommendations was the implementation of "strategic regulation theory".[34] This theory provides perspectives on how regulatory compliance can be secured most effectively. It argues that sanctions should escalate as contraventions of the law become more serious.

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30 Senate Standing Committee on Legal and Constitutional Affairs, *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Director*s (AGPS, Canberra, 1989) (the *Cooney* Committee). See also House of Representatives Standing Committee on Legal and Constitutional Affairs, *Corporate Practices and the Rights of Shareholders* (AGPS, Canberra, 1991) (the *Lavarch* Committee), p 211. The *Lavarch* Committee reported that "much greater emphasis should be placed on the use of administrative action and civil litigation to prevent harm to investors and to recover assets". For a discussion on the history and theory of civil penalties in Australian corporations law: see Bird above, n 3; Gething M, "Do We Really Need Criminal and Civil Penalties for Contraventions of Directors' Duties?" (1996) 24 ABLR 375 and Gilligan et al above, n 3, Pt III, pp 4-17.

31 *Cooney* Committee report, n 30, p 190.

32 *Cooney* Committee report, n 30, p 188.

33 *Cooney* Committee report, n 30, p 191.

34 *Cooney* Committee report, n 30, p 190.

The core strategic concept of a pyramid of enforcement was first put forward by Braithwaite[35] to depict the hierarchical escalation of sanctions available to the regulator where contravention occurs. At the base are informal methods of control, such as education and persuasion, through various other stages in the middle to criminal liability at the apex for continued non-compliance or for serious breaches of the law. The regulator should move from one level to the next, beginning at the lowest level in most cases.

This approach was adopted by the *Cooney* Committee as it sought to construct a pyramid of enforcement mechanisms in the law regulating company officers by proposed reforms to the sanctions for contraventions.[36]

Despite the difficulties identified with the prevailing criminal enforcement regime,[37] where criminal sanctions applied to all contraventions of the statutory duties owed by corporate officers,[38] the aim of the Cooney Committee's first reform proposal was to

35 See Braithwaite J, *To Punish or Persuade: Enforcement of Coal Mine Safety* (State University of New York Press, Albany, 1985). It was later elaborated by Ayres I and Braithwaite J, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, New York, 1992) and incorporated as part of the Accountability Model by Fisse B and Braithwaite J, *Corporations, Crime and Accountability* (Cambridge University Press, Melbourne, 1993), pp140-1. The Accountability Model seeks to harness the ability of corporate internal justice systems to achieve accountability. It recognises that legal responses to non-compliance should escalate progressively.

36 *Cooney* Committee report, n 30, p 190.

37 The *Cooney* Committee considered that the existing law lacked credibility: "Although many sanctions of the Companies Code and Corporations Act provide for gaol terms, in lieu of or in addition to monetary penalties, it appears that the courts are reluctant to impose them. When gaol terms are provided for breach of the law but the courts are disinclined to impose them … the law tends to fall into disrepute. The modest fines which are imposed instead caused some discontent in the community": *Cooney* Committee report, n 30, p 188.

38 These duties in the Corporations Law, s 232, were formerly found in the Code, s 229.

re-assert the importance of criminal sanctions, fines and imprisonment.[39] They were at the apex of the pyramid and provided ASIC with effective enforcement tools for the most serious contraventions, those "genuinely criminal in nature".[40] The Committee stated that:

> The criminal law is a necessary means of enforcing proper behaviour. Where offences are genuinely criminal in nature, criminal sanctions are appropriate.[41]

However, the Committee also stated that:

> It is draconian to apply such penalties in the absence of criminality. This appears to be the case with section 229 of the Companies Code (Corporations Act, s 232).[42]

Accordingly, the *Cooney* Committee's second proposal was that civil penalties with the benefit of the civil standard of proof be available to take enforcement action in relation to misconduct by directors where "the conduct falls short of a criminal offence".[43]

The *Cooney* Committee recommended that the parliament enact an enforcement pyramid, which proposed three vital levels of sanctions to regulate directors by ASIC. There would be civil remedies at the base, civil penalties in between and criminal sanctions at the top, instead of the then existing two levels of criminal sanctions and

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39 Section 1311 of the Corporations Law, formerly s 570 of the Code, established these sanctions. Criminal sanctions continue to be prescribed by the Corporations Act, 1311(2)-(3), Sch 3, Penalties, although the penalties have been increased. This is because of the *Cooney* Committee's criticism of the level of fines. Breach of the directors' duties provisions in s 232 Corporations Law, for instance, had exposed wrongdoers to a maximum penalty of $20,000 or imprisonment for five years or both. The Committee stated: "Penalties must suit the offence. They will have no deterrent value if their level is insufficient", see *Cooney* Committee report, n 30, p 191.

40 See also discussion in Gilligan et al, n 3, p 8.

41 *Cooney* Committee report, n 30, p 190.

42 *Cooney* Committee report, n 30, p 176.

43 *Cooney* Committee report, n 30, p 80.

civil remedies.[44] By increasing the range of sanctions available to ASIC, the *Cooney* Committee's proposals rebuilt the former hierarchy into a more cohesive structure. The retention of criminal sanctions at the apex of the enforcement pyramid, so that sanctions could be applied as part of a systematic hierarchy of increasingly severe punishments, meant that a strategic approach to regulatory enforcement could be achieved.[45]

Failure of the original Pt 9.4B regime

Although the government adopted the *Cooney* Committee's report, it did not accept all its recommendations so that the enforcement pyramid under Pt 9.4B differed from that proposed by the *Cooney* report. Most fundamentally, criminal and civil penalties were placed on the same level instead of civil penalties occupying the middle level of regulation between civil remedies and criminal sanctions proposed by the *Cooney* Committee. This resulted because the legislation permitted ASIC to pursue either criminal or civil penalty proceedings for many contraventions but placed a bar on subsequent criminal proceedings if civil proceedings were initiated,[46] which meant that criminal and civil penalties in Pt 9.4B operated as "separate and mutually exclusive" regimes in competition with one another.[47] The principled and progressive hierarchy of regulatory responses required by strategic regulation theory had not been

44 See *Cooney* Committee report, n 30 , pp 190-191 and earlier discussion at nn 17-8.

45 See also Bird, n 3, p 410.

46 Pt 9.4B contained detailed provisions to ensure that a person who contravened a civil penalty provision would be punished only once for the contravention whether by criminal sanction or civil penalty: Corporations Law, s 1317FB; ss 1317GA-1317GL. In particular, where civil penalty proceedings were instituted for contravention of a civil penalty provision, this precluded later criminal proceedings (irrespective of the outcome of the civil penalty proceedings): s 1317FB.

47 See Bird, n 3, p 411.

implemented.[48]

It has been argued,[49] that structural weaknesses in Pt 9.4B played a significant role in its failure to operate as an effective enforcement measure. Research undertaken in 1996[50] and 1999,[51] revealed that very few penalty orders were obtained by ASIC. There was only one prosecution commenced under Pt 9.4B in its first three years of operation, despite reports of substantial contraventions[52] and ASIC commenced only 14 civil penalty applications concerning 10 case situations from 1993 to 1999.[53]

Introduction of *CLERP* Act reforms

The *Corporate Law Economic Reform Program Act* 1999 (Cth) (the *CLERP* Act)[54] reformed the civil penalty rules in Pt 9.4B to address the weaknesses identified in the

48 Bird, n 3, p 411. See also Dellit C and Fisse B, "Civil and Criminal Liability under Australian Securities Regulation: The Possibility of Strategic Enforcement" in Walker G and Fisse B (eds), *Securities Regulation in Australia and New Zealand* (Oxford University Press, Auckland, 1994) p 588. This chapter was not retained in the later 1998 edition. The required election by ASIC to pursue either criminal or civil proceedings weakened ASIC's ability to operate as a "benign big gun" in securing enforcement by co-operation. It removed criminal sanctions as an additional deterrent threat if ASIC opted to take the civil route. Pursuit of criminal penalties in Part 9.4B was possible only if an additional evidentiary burden was satisfied. (Under s 1317FA Corporations Law, a person who contravened a civil penalty provision was guilty of an offence if that person contravened the provision knowingly, intentionally or recklessly and (i) was dishonest and intended to gain an advantage or (ii) intended to deceive or defraud someone). The reduced opportunity for criminal convictions lessened the deterrent value of criminal sanctions: see also Mann K, "Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law" (1992) 10 The Yale Law Journal 1795 at 1845.

49 See Bird, n 3, p 405. In addition to structural weaknesses, Bird blamed the uncertainty surrounding the evidentiary requirements for proceedings under Pt 9.4B, particularly problems of interpretation of the directors' duties provisions in s 232 Corporations Law, and time delays in ASIC prosecution activity for the failure of Pt 9.4B to operate effectively: see pp 413- 420. See also Gilligan et al, n 3, pp 51-2, 55 and 57, whose report found that lack of clarity in s 232 Corporations Law and delays caused enforcement problems.

50 Bird, n 3.

51 Gilligan et al, n 3.

52 For statistical evidence, see Bird, n 3, pp 420-427. The statistical analysis presented by Bird relies upon the annual Litigation Reports in the *ASIC Digest (1991-1995)* - a compilation of literature produced by ASIC on its activities under the Corporations Act and other national legislation, including Litigation Reports in both numerical and descriptive forms and on the *ASIC Annual Reports* covering the periods 1 June 1991 to 30 June 1995.

53 See Gilligan et al, n 3, pp vii, 23-4.

54 The *CLERP Act* was passed in October 1999 and became operative in March 2000.

original regime. Most notably, the bar on the use of both criminal and civil penalty proceedings was removed[55] and criminal and civil liability have been placed at separate levels on the enforcement ladder.[56] The issue of penal competition has been overcome. Thus, the enforcement pyramid supporting the present Pt 9.4B more closely resembles that advanced by the *Cooney* Committee. Pt 9.4B is a more cogent structure and ASIC is better placed to regulate corporate misconduct.

ASIC's enforcement record

This largely explains why in recent years ASIC has been successful in using the civil penalty regime, particularly in dealing with directors involved in high profile cases, such as those of HIH and Water Wheel.[57] Research conducted in 2004[58] showed that as at 31 May 2004, a total of 25 civil penalty applications had been issued by ASIC. Welsh has concluded that while the number of applications is not large, ASIC has been making increasing use of the civil penalty regime. Her research revealed that many of the actions issued between 2000 and May 2004 were issued against directors involved in high profile cases and that, from 19 out of the 25 applications which were

55 Under the *Corporations Act,* s 1317P, criminal proceedings can now be brought against a person who has previously been the subject of civil proceedings. Evidence used in any civil proceedings is not admissible in criminal proceedings if the conduct alleged to constitute the offence is substantially the same as the conduct which gave rise to the civil proceedings: s 1317Q.

56 Pt 9.4B of the *Corporations Act* now deals only with civil penalties. Criminal sanctions remain, but are contained in the substantive provisions within this Act. For example, the new s 184 deals with criminal breaches of the statutory duties of corporate officers and s 1311 provides a general penalty provision.

57 See discussion below, *HIH and Water Wheel.*

58 Welsh M, "Eleven years on- An examination of ASIC's use of an expanding civil penalty regime" (2004) 17 Aust Jnl of Corp Law 175 at 187 and Table 1, "Number of civil penalty applications issued by ASIC by year" at 193. Table 1 contains a breakdown of the number of civil penalty proceedings issued by ASIC per year until the end of May 2004. The data has been taken from ASIC Media Releases. Table 2 at 194, sets out the "No of applications by ASIC alleging contraventions of specific provisions". While the application of the civil penalty regime has been expanded to include other provisions of the *Corporations Act*, such as the market misconduct provisions, the vast majority of the applications (23 out of 25) alleged a breach of the original civil penalty provisions namely, the directors' duty or insolvent trading provisions: see earlier discussion at n 27. For a detailed discussion of ASIC's enforcement patterns generally, see Bird H, Chow D, Lenne J and Ramsay I, *Research Report: ASIC Enforcement Patterns* (Centre for Corporate Law and Securities Regulation, The University of Melbourne, 2003).

finalised, there was only one case where ASIC was not successful.[59] "Success" was defined for the purposes of her study as the obtaining of a declaration that a contravention of a civil penalty provision had occurred and the subsequent making of civil penalty orders.[60] According to Welsh, the successful use of the civil regime in these cases "sends an important message to the community" that "ASIC has at its disposal enforcement mechanisms which allow it to successfully pursue actions against directors who contravene the provisions of the *Corporations Act*".[61]

More recently, ASIC Media Releases indicate that this enforcement pattern has continued with ASIC issuing further civil penalty applications and enjoying success in obtaining many of the orders it has sought. Interestingly, however, in contrast to the type of applications made by ASIC up until the end of May 2004 where ASIC alleged a breach of the directors' duty or insolvent trading provisions in the majority of cases,[62] many of ASIC's applications since that time have alleged contraventions of the market misconduct provisions, such as the insider trading and continuous

59 That case was the application issued against Nicholas Whitlam, see Welsh, n 58 at 190. See also Table 3 "ASIC's success rate- civil penalty orders obtained" at 194 and Table 4, "ASIC's success rate- Contraventions established and orders obtained" at 195. Table 4 sets out a more detailed consideration of the applications and shows that, of the 13 out of the 19 matters which were finalised where the details of the alleged contraventions and orders sought were available, all contraventions alleged were established in 11 of these cases and in 8 cases, all of the civil penalty orders that ASIC sought were obtained.

60 Welsh, n 58 at 190.

61 Welsh, n 58 at 188.

62 See earlier discussion at n 58. Prior to 31 May 2004, ASIC only made two applications that did not allege a contravention of either of these provisions, and of those, only one application alleged a contravention of the market misconduct provisions. That was the application issued against Southcorp Ltd on 26 February 2003, alleging that Southcorp had contravened the continuous disclosure provisions.

disclosure provisions.[63] This fulfills the hopes expressed by the ALRC[64] and others[65] when the civil penalty regime was expanded in 2002 to cover contraventions of the market misconduct provisions,[66] that ASIC's capacity to achieve superior regulatory outcomes in such cases would be enhanced by its ability to issue civil penalty as well as criminal prosecutions.[67]

HIH

Until its collapse in March 2001 with a $5.3 billion shortfall, HIH was Australia's second largest general insurance company. The primary cause of HIH's failure was that it did not have sufficient reserves against future claims.[68] There were difficulties with its overseas operations, especially its UK branch, which were exacerbated by its takeover of FAI.[69] According to John Farrar, these problems were brought about "by

63 Examples of such cases include the civil penalty proceedings ASIC brought in December 2004 against the pharmaceutical company, Chemeq Limited, for contravention of the continuous disclosure provisions, which resulted in that company being ordered to pay $500,000 in pecuniary penalties: see ASIC, "Chemeq Limited ordered to pay $500,000 in fines for breach of continuous disclosure provisions" (Media Release 06-246, 25 July 2006) and the action against Fortescue Metals Group Ltd (Fortescue) for failing to comply with its continuous disclosure obligations where ASIC is seeking civil penalties of up to $3 million against Fortescue: see ASIC, "ASIC commences proceedings aginst Fortescue Metals Group and Andrew Forrest" (Media Release 06-062, 2 March 2006). The *CLERP 9 Act*, enacted in 2004, increased the maximum penalty payable by a corporation for a contravention of a financial services civil penalty provision (as opposed to a corporation/ scheme civil penalty provision): see earlier discussion at n 23, from $200,000 to $1 million.

64 See ALRC, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, (ALRC 95, 2003) at para 5.25.

65 See, eg, Longo J, "Civil Penalty Regime to Extend to Market Misconduct" (2001) *Keeping Good Companies* 635.

66 See earlier discussion at n 27.

67 Many of the reasons put forward for the extension of the civil penalty regime to include the market misconduct provisions are the same as those given by the *Cooney* Committee for the introduction of the civil penalty regime in 1993 discussed earlier. For example, the criminal nature of the insider trading provisions was considered one of the reasons for the relatively few criminal prosecutions in this area prior to the civil penalty regime covering such provisions. For a fuller discussion of the reasons for the expansion of the civil penalty regime to cover the market misconduct provisions: see Welsh, n 58 at 182-4.

68 See HIH Royal Commission website<www.hihroyalcom.gov.au>, Final Report, HIH Royal Commission, Ch 15: 'Under-provisioning for claims'.

69 See Final Report, HIH Royal Commission , n 68, Ch 3: 'A brief corporate history', which provides a brief account of the history of HIH and the changing nature of its business operations in the years leading up to its liquidation. See also Ch 13: 'Unprofitable international operations' and Ch 14: 'The impact of FAI acquisition' for a more detailed discussion of these problems.

arrogance, greed, and stupidity, and then later panic".[70]

HIH came to the attention of ASIC as late as February 2001 as a disclosure issue.[71] This was well after its position had become the subject of public scrutiny through both the media and stockbrokers' reports,[72] following HIH reporting a significant deterioration in its profitability and capital base. Its share price suffered accordingly during 2000.[73] By May 2001, however, at the same time that the government announced a Royal Commission into HIH's collapse,[74] ASIC obtained injunctions to freeze assets to preserve them for claims by investors and creditors. In June 2001, pre-empting the Royal Commission's findings, it instituted civil penalty proceedings against Rodney Adler, a former director, Raymond Williams, its Chief Executive Officer, and Dominic Fodera, its Chief Financial Officer, alleging most importantly, breaches of directors' duties.[75]

In an address to the Australian Institute of Company Directors in May 2001, David Knott, then ASIC Chairman, made the following statement, which signalled the course ASIC proposed to take:

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70 Farrar J, *Corporate Governance: Theories, Principles, and Practice* (2nd ed) (Oxford University Press, Melbourne, 2005) p 390.

71 See ASIC, "ASIC launches investigation into HIH Insurance's market disclosure" (Media Release 01/063, 27 February 2001). On 27 February 2001, ASIC announced that it was commencing a formal investigation into HIH's market disclosure and sought the suspension of trading in its shares, following discussions between it and HIH, which led to concerns that the market was inadequately informed about the company's trading position.

72 See HIH Final Report, HIH Royal Commission , n 68, Ch 3, par 3.5. There were several negative reports relating to the company's management, in particular the management style of Williams, as well as, HIH's business and investment practices.

73See HIH Final Report, HIH Royal Commission , n 68. Indeed, HIH's problems were starting to become apparent earlier. The 1998–1999 annual report showed a substantial increase in the value of reported total assets and liabilities, noting that these increases had occurred in a commercial environment characterised by weak premium rate returns, volatile investments, and a series of significant losses in overseas businesses, where HIH reported an end-of-financial-year loss for the first time in its history.

74 See ASIC, "ASIC statement (re announcement of Royal Commission)" (Media Release 01/162, 21 May 2001).

75 J. Redfern, 'ASIC and Enforcement', unpublished paper presented at 'Directors' Duties: Recent Developments and their Implications for Directors and Advisors' Centre for Corporate Law and Securities Regulation Seminar (Melbourne, 4 August 2004). Jan Redfern is Executive Director, Enforcement of ASIC.

> I expect ASIC to be more visible in enforcing the Corporations law; to be more strategic in its enforcement activity; and to meet the public expectation that we should be a vigilant and effective corporate watchdog.[76]

Armed with a dedicated HIH Taskforce,[77] not only did ASIC bring civil penalty proceedings, but criminal proceedings were also subsequently launched against those involved in what Knott described as "one of the largest and most significant financial failures in Australia's history".[78]

Civil penalty proceedings

In *Australian Securities and Investments Commission v Adler*,[79] ASIC sought declarations and civil penalties for breaches of the *Corporations Act* against the three defendant directors of HIH, Adler, Williams and Fodera. Williams and Fodera were also directors of HIH Casualty and General Insurance Co. Ltd (HIHC), a wholly owned subsidiary of HIH. The fourth defendant was Adler Corp Pty Ltd (Adler Corp), a company of which Adler was the sole director and Adler and his wife the only shareholders.

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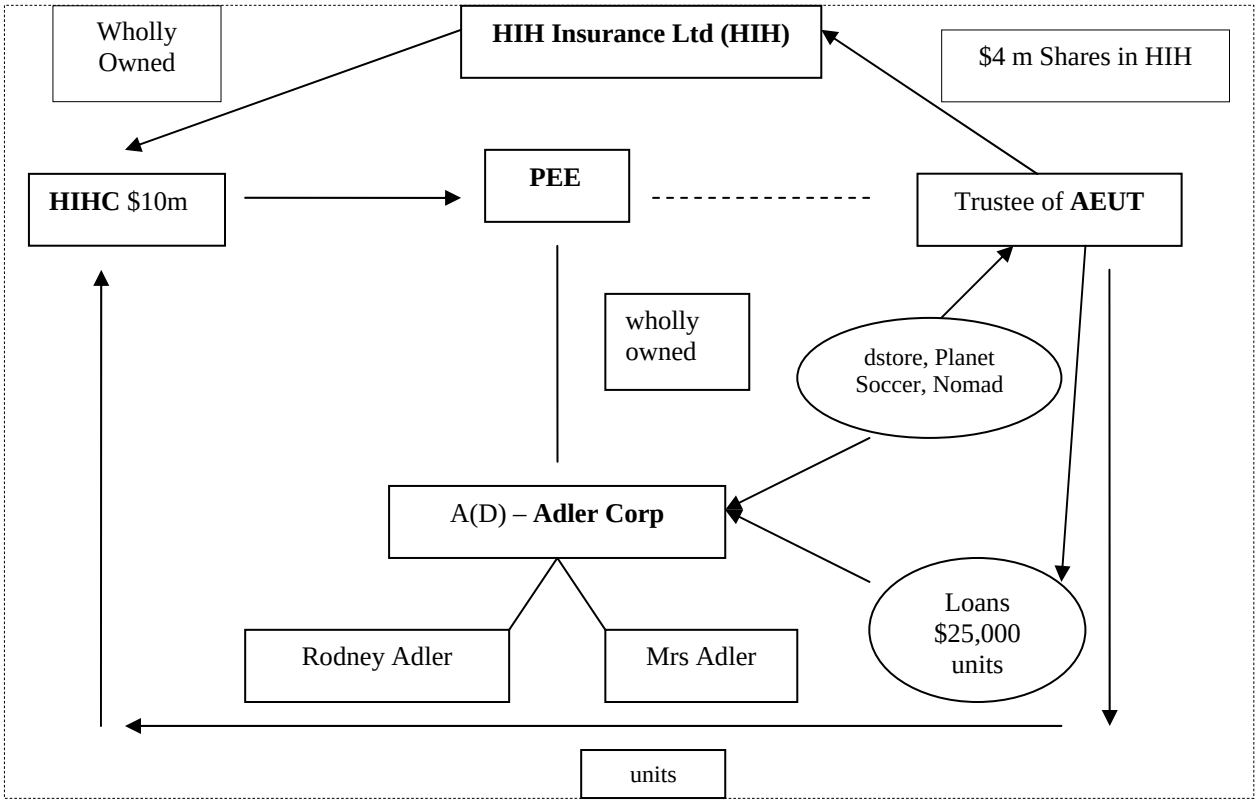
76 See printed version of "Chairman David Knott's address to the Australian Institute of Company Directors", Adelaide, 23 May 2001, ASIC, (Media Release, 23 May 2001).

77 The HIH Taskforce, comprising ASIC's existing HIH team, ASIC investigators and external parties including legal counsel and other relevant experts was formed in order to take forward the work arising from the HIH Royal Commission: see ASIC, "HIH Royal Commission referrals" (Media Release 03-130, 16 April 2003). It should be noted that the government allocated special funding to ASIC in the Budget to carry out this work without impeding the balance of its enforcement work. See also Pheasant B, "ASIC sharpens its claws", *Australian Financial Review* (19 May 2003) p 16 for a discussion of the extra funding ASIC received.

78 See ASIC, "HIH Insurance Investigation" (Media Release 01/152, 16 May 2001).

79 (2002) 41 ACSR 72; 20 ACLC 576 (Santow J).

The facts,[80] which are complicated, are summarised below:



The proceedings concerned an undocumented $10 million payment made in June 2000 by HIHC to Pacific Eagle Equity Pty Ltd (PEE), a company controlled by Adler,[81] and later investments by PEE using that sum. Around the time of the payment, PEE became the trustee of the Australian Equities Unit Trust (AEUT), a unit trust partly controlled by Adler Corp. Units in the trust were later issued by AEUT to HIHC at a price of $10 million, thereby appropriating the $10 million paid over. The units entitled HIHC to receive 90% of AEUT's distributable income with Adler Corp having an existing entitlement to the balance 10%. The payment of $10 million was used to make three investments.

80 This summary of the facts is taken from the report in 41 ACSR 72.

81 Adler was the sole director of PEE and Adler Corp the only shareholder.

First, at Adler's instigation, approximately $4 million was used by PEE to purchase HIH shares on the stock market.[82] ASIC alleged that this was in circumstances where the stock market was led to believe that the acquisitions were made by Adler or family interests associated with him and not HIH funds, in order to "shore-up" the HIH share price[83] for Adler's own benefit as a substantial shareholder. Nevertheless, when PEE later sold the HIH shares, it sold them at a loss in excess of $2 million.

Second, $3.86 million of the $10 million was used by PEE to purchase various unlisted venture capital investments in technology and communications stocks, namely dstore, Planet Soccer and Nomad, from Adler Corp at cost. The purchases were made without any independent appraisal of the worth of the shares after the collapse of the stock market for technology and communications stocks in mid-April 2001 and after a decision had been reached to reduce the HIH Group's exposure to technology stocks. ASIC alleged that these purchases were only made because of the failure to find other potential investors. Not surprisingly, PEE lost all $3.86 million on these investments.

Third, three unsecured loans totalling $2.04 million were made to entities associated with Adler and/or Adler Corp.

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82 The shares were purchased by PEE before the AEUT trust deed was completed or subscribed to by HIHC.

83 See HIH Final Report, HIH Royal Commission , n 68, Ch 3, para 3.6, which discusses HIH's share performance in its last years of operation. HIH's share price had peaked at $3.70 in July 1997. It then fell steadily over the ensuing 12 months, to $2.80. Thereafter, it continued to fall, with a few exceptions, until the company's collapse. HIH continued to pay dividends through its last years of operation – 13 cents (fully franked) in 1996, 15 cents (franked to 75%) in 1997, 16 cents (franked to 50%) in 1998, 12 cents (fully franked) in 1999, and 6 cents (fully franked) in 2000. Taking account of both dividends and share price movements, HIH shareholders lost, on a compounding basis, around 20% of their investment in each of 1997-98 and 1998-99. In 1999-2000, they lost a further 40%. They completely lost their investment when HIH collapsed.

The $10 million payment by HIHC to PEE was made in such a way that it would not come to the attention of the directors of HIH, apart from Adler, Williams and Fodera. There was no proper documentation in place relating to the payment at the time that it was made. Nor was there collective disclosure – either prior to the $10 million payment or upon PEE making the subsequent investments – to the Board or to the Investment Committee, which had responsibility for overseeing the investment portfolio of the HIH group of companies. None of the transactions were approved or ratified by the Investment Committee, and PEE's investment mandate was not approved, contrary to the requirements of the Investment Committee's guidelines. Interestingly, Farrar comments:

> Self-regulation had conspicuously failed when confronted by self-interest and increasing panic as the group's affairs declined.[84]

ASIC sought declarations under s 1317E against the defendants for contraventions of the *Corporations Act*,[85] orders, pursuant to ss 206C and 206E for disqualification from managing or being a director of any company and for compensation under s 1317H, as well as, pecuniary penalties under s 1317G.

The defendants disputed several matters of fact alleged by ASIC and contended that the contraventions had not been made out. They argued in particular, that the $10 million payment was not a loan, but from the outset was impressed with a trust in favour of HIHC. Each of the defendants also sought to rely on the business judgment rule under s 180(2) in relation to the allegations of breaches of the duty of care in s 180(1). Further, none of the defendants elected to give evidence, but submitted that the court should not draw adverse inferences from such an election.

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84 Farrar, n 70, p 391.

85 Most notably these included breach of directors' statutory duties contained in ss 180-183.

Santow J in a lengthy and considered judgment found contraventions of s 209(2)[86] and also s 260D(2)[87] by Adler, Adler Corp and Williams. Most significantly, he held that Adler contravened ss 180(1), 181(1), 182(1), and 183(1)[88] in relation to the $10 million payment by HIHC to PEE and the subsequent use of those funds by PEE in all three transactions discussed above.

Santow J found that Williams, who was one of the other most senior figures associated with the HIH group of companies also breached s 180(1) in respect of the $10 million payment, because he failed to put in place proper safeguards, including independent analysis of the investment by way of proper due diligence, and failed to ensure that the investment was approved or ratified by the Investment Committee, if not the Board of HIH. He failed to ensure that HIH complied with its own safeguards for the approval of such an investment. Further, he found that while Williams had not contravened s 181(1) in relation to the $10 million investment, he breached s 182(1) because he improperly used his position to gain an advantage for Adler to the detriment of HIH and HIHC with Adler also contravening s 182(2) because he was involved in the contravention by Williams.

In relation to Fodera, Santow J found that he also breached s 180(1) by failing to ensure that the investment was approved or ratified by the Investment Committee or the HIH Board. He held that Fodera, however, had not contravened ss 181(1) or 182(1) in connection with the $10 million investment.

The business judgment defence in s 180(2) was not available to any of the defendants.

Santow J, accordingly, imposed a number of penalties on them. Adler was

86 Section 209(2) concerns financial benefits to a related party.

87 Section 260D(2) deals with financial assistance to acquire shares.

88 The duties contained in these provisions are the duty of care and diligence in s 180(1), duty of good faith in the best interests of the company and for a proper purpose in s181(1), duty not to misuse position in s 182(1) and duty not to misuse information in s 183(1).

disqualified for twenty years and Williams was disqualified for ten years.[89] Adler and Williams were also ordered to pay compensation of $7,958,112 plus interest.[90] Further, Adler and Adler Corp were ordered to pay $450,000 each; Williams was ordered to pay $250,000 and Fodera to pay $5,000 in pecuniary penalties.

Adler appealed to the NSW Court of Appeal, but his appeal was largely dismissed by the court in *Adler v Australian Securities and Investments Commission*.[91] The court held that Adler and Adler Corp had not breached s 183(1), but confirmed all other contraventions decided by Santow J. The court also upheld the disqualifications, pecuniary penalties and compensation ordered against the defendants, subject to varying the interest payable as part of the compensation order. Costs of the appeal were awarded to ASIC, in addition to the $600,000 costs payable to ASIC in relation to the original proceedings.

Leave to appeal to the High Court was refused in May 2004.[92]

Criminal proceedings

In spite of the success of ASIC's civil penalty proceedings, justice would not have been served nor would ASIC be viewed as an effective regulator if it had failed to also bring criminal prosecutions, especially when the Royal Commission into HIH's

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89 In *Australian Securities and Investments Commission v Adler (No 5)* (2002) 20 ACLC 1146; 42 ACSR 80, Santow J (at ACSR 97-9) took the opportunity to summarise the case law on the court's power of disqualification in a number of propositions. Prior to the High Court's decision in *Rich* v *Australian Securities and Investments Commission* (2004) 220 CLR 129, this was the leading authority on the reasons for a court exercising its powers under ss 206C and 206E to order the disqualification of a person from managing corporations.

90 It was Adler, however, who paid Williams' $2.6 million share of the almost $8 million compensation that was awarded to HIH liquidator, Tony McGrath. Williams is now also bankrupt. On 29 August 2005, Mark Robinson of accountants, PPB, was appointed trustee in bankruptcy to Williams. The arrangement was made at the request of Williams, the target of a $1 million claim by HIH liquidator McGrath over $3 million in termination payments he collected after resigning from HIH in late 2000. Williams also faces a number of other legal actions, including a class action brought on behalf of former HIH shareholders concerning statements he made to them about company finances in 2000 for more than $30 million: See Main A, "One more indignity for Williams", *Australian Financial Review* (30 August 2005) p 3.

91 (2003) 46 ACSR 504; 21 ACLC 1810.

92 See ASIC, "High Court rejects Adler's Application to Appeal" (Media Release 04-166, 28 May 2004).

collapse had recommended criminal proceedings in addition to civil penalty proceedings.[93]

The laying of criminal charges against Adler arising out of his conduct as a director of the HIH group of companies in 2000,[94] was vindicated by the comments made by Dunford J of the NSW Supreme Court in sentencing him to four-and-a-half years jail, with a non-parole period of two-and-a-half years, after he had pleaded guilty to those charges:[95]

> *The offences are serious* and display an appalling lack of commercial morality…Directors are not appointed to advance their own interests but to manage the company for the benefit of its shareholders to whom they owe fiduciary duties… *They were not stupid errors of judgement but deliberate lies, criminal and in breach of his fiduciary duties* to HIH as a director. (emphasis added)

Similarly, when Williams was sentenced to four-and-a-half years jail, with a minimum of two years and nine months[96] in relation to the criminal charges to which he pleaded guilty relating to his management of the group in the three-year period 1998 to 2000,[97] Jeffrey Lucy, the current Chair of ASIC stated:

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93 See HIH Final Report, HIH Royal Commission , n 68. In its three-volume report published in April 2003, the HIH Royal Commission, eg, recommended that Fodera be investigated on eleven different issues, the most of any executive at the commission, for possible civil and criminal charges.

94 The four criminal charges against Adler were: two counts of disseminating information on 19 and 20 June 2000, knowing it was false in a material particular and which was likely to induce the purchase by other persons of shares in HIH contrary to *Corporations Act*, s 999; one count of obtaining money by false or misleading statements, contrary to *Crimes Act* 1900 (NSW), s 178BB; and one count of being intentionally dishonest and failing to discharge his duties as a director of HIH in good faith and in the best interests of that company contrary to *Corporations Act*, s 184(1)(b).

95 See ASIC, "Rodney Adler sentenced to four-and-half years' jail" (Media Release 05-91, 14 April 2005). See also *R v Adler* (2005) 53 ACSR 471 and *Adler v R* (2006) 57 ACSR 675, where Adler's appeal against this sentence was dismissed by the NSW Court of Criminal Appeal.

96 William's non-parole period is slightly longer because he is serving cumulative sentences, whereas Adler's are concurrent.

97 The three criminal charges against Williams were that he was reckless and failed to properly exercise his powers and discharge his duties for a proper purpose as a director of HIH when, on 19 October, he signed a letter that was misleading; that he authorised the issue of a prospectus by HIH on 26 October 1998 that contained a material omission; and that he made or authorised a statement in the 1998-99 Annual Report, which he knew to be misleading, that overstated the operating profit before

> ASIC welcomes the strong message that today's sentencing sends to corporate Australia. ASIC, the courts and the community will not tolerate company directors who do not act honestly and in the best interests of shareholders.
> Mr Williams was sentenced today in relation to offences concerning three substantial transactions, which significantly distorted the true financial position of HIH. These matters involved hundreds of millions of dollars and *Mr William's criminal conduct occurred over an extensive period*.[98] (emphasis added)

To date, ASIC has achieved a number of further jailings as part of its HIH investigation.[99] Terry Cassidy, former Managing Director, Australia, of HIH was sentenced to fifteen months imprisonment relating to three criminal charges also arising from his management of the group from 1998 to 2000.[100] More recently, ASIC won its case against entrepreneur Bradley Cooper, securing his conviction on thirteen charges of bribery and extracting money in the last days of HIH in late 2000 and early 2001.[101] Cooper was sentenced eight years' jail,[102] which is one of the longest sentences for a white-collar criminal in Australia in recent years.[103]It has also won its case against Tony Boulden, a former financial controller of FAI General Insurance Company (FAIG), who pleaded guilty to breaching s 590 (1) of the *Corporations*

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abnormal items and income tax by $92.4 million: see ASIC, "Ray Williams sentenced to four-and-a-half years' jail" (Media Release 05-94, 15 April 2005). See also *R v Williams* (2005) 216 ALR 113.

98 See ASIC, Media Release, n 97.

99 William Howard, a former senior executive of HIH, had also been convicted in the NSW Supreme Court on 23 December 2003 on two counts of criminal conduct under s 184 (2) of the Corporations Act and sentenced to a total term of three years imprisonment, but his prison sentence was fully suspended because of his undertakings to provide the prosecution with assistance in the future: see ASIC, "Former HIH executive sentenced"(Media Release 03-416, 23 December 2003).

100 See ASIC, "Former HIH managing director jailed" (Media Release 05-108, 29 April 2005). In sentencing Cassidy to only fifteen months, to be released on 28 February 2006 after serving ten months, Wood J of the NSW Supreme Court recognised the assistance that he has, and will continue to provide to ASIC during the course of its investigations just as the assistance that Howard would provide was recognised by Kirby J in fully suspending his prison sentence.

101 See Main A, "Cooper joins HIH mates behind bars", *Australian Financial Review* (1 November 2005) pp1 and 4. Interestingly, Cooper is the first defendant who has pleaded not guilty to go down before a jury unlike Charles Abbott, the former Deputy Chairman of HIH. In June 2005, Abbott walked free from the District Court in Sydney after a magistrate found that there was insufficient evidence to justify a trial. The criminal charge against Abbott was that the day before HIH went into liquidation, he had dishonestly used his position as a director to procure a payment to a company associated with him, namely Ashkirk Pty Limited: see ASIC, "Charge dismissed against Charles Abbott" (Media Release 05-151, 7 June 2005). It is also interesting, that Howard provided evidence, which was instrumental in ASIC's successful prosecution of Cooper.

102 See ASIC, "Bradley Cooper Sentenced to Eight Years' Jail" (Media Release 06-210, 23 June 2006).

103 See Main A, "Cooper Gets Eight Years for Bribes", *Weekend Australian Financial Review* (24-5 June 2006) pp1 and 3.

Act,[104] while Robert Kelly, the former assistant company secretary of HIH Insurance Ltd also pleaded guilty to one charge of concurring in the making of a misleading statement under the *Crimes Act* 1900 (NSW).[105]

While there are ongoing criminal prosecutions against other former senior executives and directors of HIH, FAI and associated entities, including Fodera,[106] where the outcomes are uncertain, the jailing thus far of Adler, Williams, Cassidy and Cooper demonstrate that ASIC can be serious about enforcement and restore faith in the criminal justice system as an effective device for dealing with corporate crime, notwithstanding the well-known limitations upon reliance on criminal sanctions, which Lucy himself recognised in an ASIC media release on Adler's sentencing when he said:

> [T]hese types of matters are notoriously difficult to investigate and successfully prosecute.
> ASIC would like to thank the Commonwealth Director of Public Prosecutions, who has worked closely with ASIC's HIH Taskforce and prosecuted this matter in the courts.[107]

Interestingly, however, HIH is the only high profile case to date in which both civil penalty and criminal proceedings have been brought, although this has occurred in

104 See ASIC, "Former FAI financial controller pleads guilty" (Media Release 06-177, 2 June 2006). On I December 2006, Boulden was sentenced to imprisonment for a term of 12 months to be served by way of periodic detention: see ASIC, "Former FAI officer sentenced" (Media Release o6-417, 1 December 2006).

105 See ASIC, "Another HIH Guilty Plea" (Media Release 06-220, 4 July 2006). On 3 November 2006, Kelly was sentenced to 500 hours of community service: see ASIC, "Former HIH assistant company secretary sentenced" (Media Release 06-385, 3 November 2006).

106 The prosecutions against former FAI executives, Daniel Wilkie, Timothy Mainprize and Stephen Burroughs, however, concluded with their acquittal on 14 November 2005: see ASIC, "FAI officers acquitted" (Media Release 05-357, 14 November 2005). On 22 November 2005, fresh charges were laid against Wilkie along with Ashraf Kamha and Boulden, former officers of FAIG: see ASIC, "ASIC lays charges against FAI officers" (Media Release 05-363, 22 November 2005). To date, only the proceedings against Boulden have been finalised.

107 See ASIC, "Rodney Adler sentenced to four-and-half years' jail"(Media Release 05-91, 14 April 2005).

some other less publicised cases, including Harris Scarfe[108] and Clifford Corporation Limited Group (Clifford).[109]

Water Wheel

Water Wheel was a company listed on the ASX. Trading in its shares was suspended on 16 February 2000 at the directors' request. The directors placed the company into voluntary administration on 17 February 2000, after announcing a loss of $6.7 million for the year to December 1999. When the companies were placed under administration, they owed over $18 million to more than 220 unsecured creditors, which included wheat and rice farmers in NSW and near the former Water Wheel mill at Bridgewater, near Bendigo, Victoria, as well as suppliers of agricultural products, transport and other business services.[110]

ASIC commenced civil penalty proceedings in the Supreme Court of Victoria on 27 November 2000, against Bernard Plymin,[111] John Elliott[112] and William Harrison,[113] in relation to their conduct as directors of Water Wheel and its subsidiary Water Wheel Mills Pty Ltd (the companies). ASIC alleged that between 14 September 1999 and 17 February 2000, the defendants allowed the companies to incur further debts after the companies became insolvent in breach of the *Corporations Act*, s 588G.[114]

Typically, in the week before the Supreme Court trial was due to start, Elliott made an application to the Federal Court for an order restraining the trial's commencement and sought to quash the decision made by ASIC to bring the Supreme Court action. That

108 ASIC's investigation into the collapse of Harris Scarfe in 2001 resulted in criminal charges being laid against the company's former Chairman, Adam Trescowthick, Chief Operating Officer, Daniel Mc Laughlin and Chief Financial Officer, Alan Hodgson. Hogson has since been jailed for six years, while proceedings against the other defendants have been discontinued: see Drummond M, "Scarfe action settled", *Australian Financial Review* (13 October 2006) p 16.

109 Ian Robert Hall and John Barrie (Barrie) Loiterton, former directors of Clifford, for example, have both been jailed in relation to the criminal charges laid against them of insider trading and making false statements: see ASIC, "Former director of Clifford Corporation jailed for insider trading" (Media Release 05-270, 9 September 2005) and "Former director of Clifford jailed" (Media Release 05-275, 13 September 2005).

110 See ASIC, "Court finds against Water Wheel directors"(Media Release 03-144, 5 May 2003).

111 Plymin was the former Managing Director of Water Wheel.

112 Elliott was a non-executive director.

113 Harrison was the Chairman of directors.

114 See ASIC, Media Release, n 110.

application was dismissed and the trial commenced on 19 August 2002. Once the trial began, Elliott again applied unsuccessfully to the Supreme Court trial judge for orders staying the trial, and in October 2002, also applied unsuccessfully to the High Court for it to hear certain constitutional law issues that he wished to raise against ASIC.[115]

When *Australian Securities and Investments Commission v Plymin,*[116] was finally heard in May 2003, Mandie J of the Supreme Court of Victoria found that the defendants[117] had failed to prevent the companies incurring debts after they became insolvent on 14 September 1999. ASIC obtained banning orders, pecuniary penalties and compensation against Plymin, Elliott and Harrison. Plymin and Elliott were banned for ten years[118] and four years respectively from managing a corporation and ordered to pay compensation jointly of $1.428 million. Plymin was ordered to pay a pecuniary penalty of $25,000 and Elliott was ordered to pay $15,000. In relation to Harrison, while the court ordered that he be banned for seven years in view of his 'serious dereliction of duty', he was only ordered to pay $300,000 compensation, which reflected the settlement he had reached with ASIC early in the proceedings.[119]

The finding that the directors of Water Wheel had breached the insolvent trading provisions was heralded as "a significant win for ASIC",[120] especially in the light of such cases often involving complex evidentiary issues that make them challenging for both ASIC and liquidators to pursue.

As far as Elliott is concerned, despite his past ability to emerge triumphant with his business reputation relatively intact, as in the National Crime Authority (NCA)/Elders

115 See ASIC, Media Release, n 110.

116 (2003) 46 ACSR 126; (2003) 21 ACLC 700.

117 In the course of proceedings, while Harrison reached a settlement with ASIC under which he made full admissions relating to the contraventions, Mandie J found that Plymin and Elliott breached their duty to prevent insolvent trading.

118 On appeal to the Court of Appeal of the Supreme Court of Victoria, the court accepted that Plymin's period of disqualification be reduced to seven years, but otherwise the orders of Mandie J were confirmed: see *Elliott v Australian Securities and Investments Commission*; *Plymin v Australian Securities and Investments Commission* [2004] VSCA 54 (7 April 2004) accessed through austlii. See also ASIC, "Court dismisses appeal by former Water Wheel directors"(Media Release 04-102, 7 April 2004).

119 See earlier discussion at n 117. See also ASIC, "Court hands down Water Wheel penalties" (Media Release 03-203, 30 June 2003).

120 See ASIC, Media Release, n 119.

IXL Ltd (IXL) saga,[121] it seems that Legge's[122] description of him, since the collapse of Water Wheel that shanghaied him into bankruptcy, as 'the fallen business tsar' rings true:

> Now this former colossus[123] is a debt man walking. He must surrender his passport for three years, unless travelling overseas to generate income towards repaying debts of $9.2 million. He must relinquish 50 per cent of any after-tax earnings above $45,000. The Establishment clubs he patronises will turf him out. He cannot accept directorships… His Midas touch scrap metal.[124]

One. Tel

In June 2001 within a month of One. Tel's collapse, ASIC succeeded in freezing $45 million assets belonging to former One. Tel directors to preserve them for investors and creditors,[125] just as it had frozen assets initially for this purpose in the HIH matter. The original asset-freezing undertakings were later modified,[126] apart from the undertakings to preclude Maxine Rich from transferring out of Australia any assets

121 Criminal charges of theft and conspiracy to defraud Elders creditors were laid against former Elders executives, including Elliott in December 1993 following an inquiry by the NCA into the controversial 1986 takeover attempt of Broken Hill Proprietary Limited (BHP) by the late Robert Holmes a Court's Bell Resources Ltd (Bell) and the cross investments that occurred between BHP and Elders. The NCA's case related to a $105 million bond scheme that allegedly netted a $78 million profit to Elliott and other former senior executives of Elders and a $66.5 million payment to New Zealand entrepreneur Allan Hawkins, disguised as foreign exchange transactions. The NCA's case collapsed in August 1996 as a result of Elliott's successful challenge in the Supreme Court of Victoria before Vincent J that most of the evidence was inadmissible. For a fuller discussion of this matter, see Comino, "National Regulation of Corporate Crime", n 15 at 89-90.

122 See Legge K, "His fatal flaw: Friends, foes and the man himself explain how John Elliott lost it all" The Weekend Australian Magazine (19-20 February 2005) p14 at 15. It is interesting, that Elliott has always maintained that the NCA's investigation and aborted trial were political persecution.

123 Legge, n 122, pp 16-17. In 1983, not only had Elders taken over Carlton & United Breweries where Elliott, whose wealth was put at $80 million, announced plans to "Fosterise the world", but he began his 20-year reign as the Carlton Football Club's longest- serving president. In 1987- 90, he became president of the Liberal Party and was touted as a future prime minister.

124 Legge, n 122, p 15.

125 See ASIC, "ASIC restrains Rich assets"(Media Release 01/199, 8 June 2001). ASIC obtained orders from Austin J of the Supreme Court of New South Wales restraining the disposal of assets by John David (Jodee) Rich, a former Joint Managing Director of One. Tel, his wife, Maxine and his sister. See also ASIC, "ASIC obtains court undertakings freezing assets of former One. Tel managers" (Media Release 01/205, 13 June 2001). ASIC obtained enforceable undertakings restraining the disposal of assets by Jodee Rich, Bradley Keeling, the other Joint Managing Director and Mark Silbermann, its former Finance Director and restricting them leaving Australia without giving notice to ASIC.

126 See ASIC, "ASIC obtains modified undertaking from former One. Tel officers" (Media Release 01/343, 24 September 2001). Although the new undertakings precluded the former officers of One. Tel from transferring assets outside Australia and continued travel restrictions on them, ASIC did not seek to renew the more onerous terms of the previous undertakings preventing the former officers from dealing with their assets within Australia.

that were transferred to her under the financial agreement reached between her and her husband pursuant to the *Family Law Act* 1975 (Cth), s 90C.[127]

Civil penalty proceedings

In December 2001, ASIC commenced civil penalty proceedings in the Supreme Court of NSW against Rich, Silbermann, Keeling and the former Chairman of One.Tel, John Greaves, seeking declarations under s 1317E of the *Corporations Act* that they had breached s 180(1).[128] ASIC also sought orders, pursuant to ss 206C and 206E, that each of the defendants be disqualified from managing or being a director of any company for such period as the court thinks fit in addition to compensation orders[129]

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127 That agreement, whereby Jodee Rich transferred approximately $5 million in assets to his wife, including his interest in the family home at Vaucluse, had been entered into on 31 May 2001, just two days after One. Tel was placed into administration on 29 May 2001 and after Jodee Rich resigned his position as joint Managing Director of One. Tel on 17 May 2001. When ASIC later applied to the Family Court of Australia in August 2002 for an order to set this agreement aside, Mr and Mrs Rich were successful in having the application dismissed on the ground that the Family Court did not have jurisdiction to hear ASIC's application: see ASIC, "Family Court lacks jurisdiction to set aside Rich financial agreement" (Media Release 03-350, 24 September 2001). This was the case despite O'Ryan J finding:

> In my view there is prima facie evidence that the husband and wife entered into the agreement in order to reduce the extent and value of the husband's assets. … Prima facie the evidence supports the contention by Senior counsel for ASIC that the agreement was entered into because of a concern about claims on the husband's property by third parties as a result of the collapse of One. Tel Limited. It was therefore entered into to defeat the interests of third parties.

Knott also commented:

> It is of great concern to ASIC that company directors such as Mr Rich may be using the provisions of the Family Law Act to shield themselves from the legitimate claims of creditors.
>
> The comments of Justice O'Ryan indicate that the Court shares these concerns and would welcome jurisdiction to deal with such transactions. ASIC will discuss this issue with the Attorney-General for consideration of appropriate amendments to the Family Law Act.
>
> In the meantime, ASIC will contest the validity of the property transfer under relevant New South Wales law.

ASIC, however, did not pursue proceedings in the Supreme Court of New South Wales challenging the validity of the agreement under the voidable disposition provisions of the *Conveyancing Act* (NSW), s 37 A, because of Jodee and Maxine Rich's announcement on 13 November 2003 that they had terminated the asset transfer agreement: see ASIC, "Jodee and Maxine Rich asset transfer agreement" (Media Release 03-362, 13 November 2003).

128 Section 180 (1) concerns the duty of care and diligence. It was also alleged that they traded while insolvent breaching s 588G and breached other provisions of the Corporations Act, including ss 181(1) and 588 FE, as well as, crimes, including false accounting, false documents and false statements by directors under the Crimes Act (Vic) 1958, ss 83, 83A and 85. Rich, Silbermann and Keeling had also paid themselves large bonuses while the company was insolvent, and violated the Trade Practices Act 1974 (Cth): see Acquaah- Gaisie G, "Toward more effective corporate governance mechanisms" (2005) 18 Australian Journal of Corporate Law 1 at 3.

129 One.Tel went into voluntary administration on 29 May 2001, having experienced a net trading loss of at least $92 million and reductions in net realisable value in 2001. In these months, the net liquidity position of One.Tel worsened by very large amounts, from a deficiency of $24.5million on 28 February 2001 to a deficiency of $98.7 million on 29 May 2001: see *Australian Securities and Investments Commission v Rich* (2003) 21 ACLC 572; 44 ACSR 682.

under s1317H, for the benefit of creditors. ASIC claimed that all four defendants were jointly and severally liable for this compensation of $93 million.[130] ASIC alleged that Rich, Keeling and Silbermann had information or access to information regarding the financial position of One. Tel which was withheld from the Board of Directors and the market and that their conduct amounted to a breach of their duties as officers of the company.[131] It further contended that Greaves breached his duty to exercise the standards of care and diligence required by a company chairman.[132]

To date, only proceedings against two defendants, Keeling and Greaves, have been finalised. In March 2003 and September 2004, ASIC reached settlements with Keeling and Greaves respectively. Keeling acknowledged his breaches of duty and accepted orders banning him from being a director for ten years and requiring him to pay $92 million compensation to One. Tel in addition to ASIC's costs of $750,000.[133] Greaves accepted orders that he be prohibited from managing a corporation for four years, pay compensation of $20 million to One.Tel and ASIC's costs of $350,000.[134]

As far as Rich and Silbermann are concerned, despite the expectation that the hearings in front of Justice Robert Austin of the NSW Supreme Court which resumed in September 2004 following an appeal to the High Court in *Rich v Australian Securities and Investments Commission (Rich v ASIC),*[135] would have concluded by Christmas

130 See ASIC, "ASIC commences civil proceedings against former One. Tel officers and Chairman" (Media Release 01/441, 12 December 2001). $93 million represented the reduction in the value of One. Tel over a period approximately eight weeks from March 2001 to 29 May 2001, when One. Tel continued to trade because of the alleged failure of the defendants to properly discharge their responsibilities.

131 ASIC, Media Release, n 130. Evidence available to ASIC at the time (December 2001) indicated that the remaining directors, Lachlan Murdoch, James Packer, Rodney Adler, Peter Howell-Davies and Pirjo Kekalainen-Torvinen were not aware of the true financial position of One.Tel until shortly before the appointment of the administrator on 29 May 2001.

132 ASIC, Media Release, n 130. See also ASIC, "Landmark decision on chairman's duties"(Media Release 03-068, 24 February 2003). Austin J of the NSW Supreme Court refused an application to strike out ASIC's claim against him in the One.Tel civil penalty proceedings.

133 See Australian Securities and Investments Commission v Rich (2003) 21 ACLC 572; 44 ACSR 682. Bryson J of the NSW Supreme Court made orders giving effect to the settlement of ASIC's civil penalty proceeding against Keeling.

134 See ASIC, "ASIC reaches agreement with John Greaves in One.Tel proceedings" (Media Release 04-283, 6 September 2004).

135 (2004) 220 CLR 129.

of that year, they only finished in August 2006, where the court has yet to hand down its judgment.

Rich v ASIC

Rich v ASIC[136] deserves special attention, since ASIC's ability to continue to use the Pt 9.4B pyramid of enforcement, in particular civil penalties to better regulate corporate misconduct may be undermined as a result of this decision.

Rich and Silbermann, in their appeal to the High Court in 2004, in relation to the civil penalty proceedings that ASIC had brought against them concerning their management of One.Tel, argued that the disqualification orders sought were penal, in the sense that exposure to disqualification orders exposed them to penalties and that, accordingly, the privilege against exposure to penalties and forfeiture (the penalty privilege) could be relied upon and discovery should be refused. The majority of the High Court upheld their appeal and found that the penalty privilege was available in civil penalty proceedings.

Consequently, unless the law is changed,[137] ASIC will be unable to require possibly delinquent company managers to make full disclosure of all documents relating to possible contraventions.[138] Kirby J, who delivered the dissenting judgment, pointed out that:

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136 (2004) 220 CLR 129.

137 In reaching their decision, the majority relied on the fact that Parliament had not excluded common law rights in the case of company officers in relation to discovery in civil penalty proceedings: see (2004) 220 CLR 129 at 142-3. The author argues that Parliament must act to remedy the position by removing this common law right.

138 Civil libertarians would undoubtedly argue, however, that no one should be compelled to expose themselves to penalties.

> By this Court's order, the appellants in the present case will be released from the obligation that the [Corporations] Act would otherwise have imposed on them in civil proceedings for disqualification**.** They would have had to produce documents in their possession that are relevant to the issues concerning their management of One**.** Tel Ltd.[139]

ASIC's task in these proceedings, and in any subsequent proceedings of a similar nature, has been made more difficult than envisaged. Rich and Silbermann by not having to comply with the usual requirement to make discovery and file witness statements were placed in a position where they could refuse any demands that ASIC might have made for discovery when the proceedings against them resumed in the NSW Supreme Court.[140] Moreover, by imposing heightened procedural protections in relation to civil penalties and treating civil penalty proceedings more like criminal proceedings, the case may undermine the ability of the civil penalty regime in Pt 9.4B to provide an effective method of corporate regulation.

Vizard case

Also tarnishing ASIC's reputation as an effective regulator is the criticism often levelled at it of failing to bring criminal cases, particularly against high profile wrongdoers, even though the responsibility for making its own criminal enforcement decisions does not rest with it, but with the DPP.[141] A recent example concerns Steve Vizard.

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139 (2004) 220 CLR 129 at 180.

140 Indeed, there were difficulties for ASIC, which led to further delays in its long-running case against these defendants. After Rich filed a 511-page statement in his defence, plus 233 pages for Silbermann, and another 8,977 pages of related information in March 2006, Austin J announced that he was forced to hold off the restart of hearings until 5 June 2006. This was to allow ASIC's barristers to check recollections with the many reported participants in phone calls with Rich, where much of Rich's statement was comprised of his recollections of phone calls with directors, colleagues and One.Tel staff. It is also significant that the case cost ASIC an estimated $20 million up until that time, which was before Rich and Silbermann had actually had their defences tested in court and where it had twice been granted special funding by the Treasurer to keep running the case. Rich's legal costs, on the other hand, were reported to be approximately $11 million at that time: see Main A, "One.Tel: from Rich dream to costly nightmare", *Australian Financial Review* (29 May 2006) p 6.

141 See previous discussion at n 16.

On 4 July 2005, ASIC announced that it had commenced civil penalty proceedings, rather than criminal proceedings, against Vizard.[142] ASIC alleged that, in 2000, Vizard had breached his duty as a director of Telstra Corporation Limited (Telstra) by improperly using secret boardroom information to trade shares in listed public companies in which the **t**elco had an interest to gain an advantage for himself and/or others.[143] Just two days later, an article condemning ASIC's decision not to bring criminal proceedings appeared on the front page of *The Australian.* The headline read "Vizard was 'too well connected' for jail".[144] Although ASIC defended itself, claiming that it was "a without-fear-or-favour regulator",[145] such a condemnation of its decision not to prosecute such a high profile wrongdoer attests to the widely held perception that the criminal law is the most appropriate way to deal with corporate misconduct and that corporate wrongdoers should not be treated any differently from street criminals.[146]

In the Vizard case, the question must be posed: why hasn't the decision to launch a criminal prosecution been made when the evidence seems clear, with Vizard effectively confessing to insider trading? On 4 July 2005, when ASIC announced its decision to bring civil penalty proceedings, it issued a media release, where it stated:

> ASIC has filed a Statement of Agreed Facts with the Federal Court of Australia in which Mr Vizard agrees with the facts that give rise to the allegations.
> Mr Vizard has agreed with ASIC that it is appropriate for the Federal Court to declare that he contravened his duty to Telstra in using the Telstra information.[147]

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142 See Cornell A, Johnston E and Hughes D, "Steve Vizard quits over share-trading offences", *Australian Financial Review* (5 July 2005) p 1.

143 See ASIC, "ASIC commences civil proceedings against Stephen Vizard" (Media Release 05-190, 4 July 2005).

144 Sexton J, "Vizard was 'too well connected' for jail", *The Australian* (6 July 2005) pp 1-2.

145 Sexton, n 144.

146 In the academic literature, however, a distinction is usually made between regulatory offences and 'real crimes', that is, indictable offences, such as murder and robbery, as opposed to summary or simple offences. Those who deny the criminal status of regulatory offences argue the opposite. They contend that regulatory offences are 'lesser matters', which people do not regard in the same way as traditional crimes so that their criminalisation is inconsistent with public morality. For a brief but good discussion of not only the legal debate about the use of the criminal law as a regulatory tool, but also sociological studies of white-collar crime, see, eg, Hutter B, *The Reasonable Arm of the Law? The Law Enforcement Procedures of Environmental Health Officers* (Clarendon Press, Oxford, 1988), pp 30-34.

147 See ASIC, Media Release, n 143. Although Vizard sought to deny his insider trading confession: see Speedy B, "Vizard denies insider trading confession", The Australian (18 July 2005) p 29, he later admitted his wrongdoing and expressed contrition when the matter was heard by Federal Court judge Ray Finkelstein. It was because of Vizard's admission and contrition that ASIC requested just a five-year ban on managing companies and $390,000 in fines from Finkelstein J, compared to what would

ASIC has said that the decision not to pursue a criminal case was not theirs, but was "entirely up to the federal Director of Public Prosecutions",[148] who stated that "it did not have enough evidence to institute a criminal charge".[149] The DPP would not prosecute Vizard in the absence of a signed witness statement from his former accountant, Greg Lay, who refused to provide one. This is despite the fact that Lay had already given sworn evidence to ASIC concerning Vizard's insider trading activities and could have been compelled to testify against Vizard- although not himself- under the *ASIC Act* 2001 (Cth) (the *ASIC Act*), s 19.

Interestingly, Tony Hartnell, a former ASIC chairman, was reported at the time as saying that:

> [A] major problem is that prosecutors refuse to use that section of the *ASIC Act*. The criminal procedure acts of the various states which do require signed witness statements are not in line with the federal law. The DPP simply ignores the federal legislature. That section about compulsory examination may as well be removed from the Act.[150]

Irrespective of whether or not one agrees with Hartnell's views, in the final analysis, witnesses cannot be compelled to sign statements.[151] For a start, they could expose themselves to prosecution if the statement is proven to be misleading or wrong, which led some commentators to also ask the obvious question, which remains a mystery: why wasn't an immunity deal offered to Lay by the DPP?[152]

Accordingly, even though the civil penalty proceedings ASIC brought against Vizard were ultimately successful and resulted in him being banned for ten years from

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otherwise be recommended- up t0 $525,000 in fines and a seven-to-twelve-year ban: see See Johnston E, "Disgraced director Vizard 'motivated by greed'", *Australian Financial Review* (22 July 2005) pp 1 and 24.

148 See Speedy, n 147. See also earlier discussion at n 16.

149 See Hewett J, "Two men and a case to answer", *Weekend Australian Financial Review* (23-24 July) p 20.

150 Hewett, n 149, quoting Hartnell.

151 Hewett, n 149.

152 Hewett, n 149. Hewett suggests that a possibility is that an immunity deal requires immunity on specific offences which, in Lay's case, may have seemed difficult to pin down.

managing a corporation and ordered to pay pecuniary penalties of $390,000,[153] the overwhelming view seems to be that ASIC and the DPP went soft on Vizard: "[H]ere is Steve Vizard, clearly an insider abusing a position of trust, potentially many times - not just once - and he gets a slap on the wrist."[154]

However, with ASIC maintaining that its insider trading file on Vizard remains open, it will be interesting to see if criminal charges will be laid in the future in view of the evidence, Vizard's accountant, Lay, provided as a witness at the hearing of the civil proceedings that Westpac bank brought against Vizard's former bookkeeper, Roy Hilliard, to recoup nearly $3 million it repaid to Vizard.[155] Lay told the Victorian Supreme Court on 8 September 2006, that share trading by the vehicle, known as Creative Technology Investments (CTI), was made under instruction from Vizard, thus connecting Vizard to the shelf company that was used to hide his illegal investments in companies connected to Telstra.[156] Further, Lay said that CTI was structured to give Vizard "a level of confidentiality".[157] Lay's previous silence and refusal to sign a witness statement had been the reason why the DPP had not originally brought a criminal charge against Vizard,[158] but presumably, ASIC could prevail upon Lay to provide similar evidence against Vizard in a criminal case.

Conclusion

Although ASIC has enjoyed success in recent years in using the civil penalty regime in Pt 9.4B, the resentment and criticism surrounding ASIC's handling of the Vizard case demonstrates that ASIC may be at risk of not being regarded as an effective

153 See ASIC, "Steve Vizard banned for 10 years and fined $390,000" (Media Release 05-215, 28 July 2005).

154 See, eg, Mc Cullough J, "One law for rich, another for richer", *The Courier Mail* (30-31 July 2005), p 27.

155 Vizard testified that he trusted Hilliard with his financial affairs, and alleged the bookkeeper embezzled the money by writing unauthorised cheques on his companies' accounts. Hilliard maintained that he was acting on Vizard's instructions to set up a secret stash of cash for his former boss: see, eg, Glyas R, "Back off' on Vizard accounts", *The Australian* (9 September 2006) at http://www.theaustralian.news.com.au/story/0.20867.20378989-2702.00html viewed on 11 September 2006. Although the case was ultimately decided in favour of Westpac, the trial judge made scathing remarks concerning the credibility of Vizard's testimony, which was widely reported in the press.

156 See Johnston E and Phillips, "Lay links Vizard to hidden share deals", *Weekend Australian Financial Review* (9-10 September 2006) p 3.

157 Johnston and Phillips, n 156.

158 See earlier discussion at n 149.

regulator if it fails to bring criminal proceedings in appropriate cases, especially against high profile violators. Additionally, there are the difficulties ASIC faces following *Rich v ASIC*[159] to obtain civil penalties, not only against Rich and Silbermann, but possibly against other corporate officers who are guilty of corporate wrongdoing.

Yet, there are some good signs for ASIC that it is a credible regulator. A number of favourable reports recently appeared in the press praising ASIC's performance in the criminal arena, such as its action against one-time rich list member, Wallace Cameron, who faces 35 criminal charges for allegedly hiding a $122million controlling interest in pathology company Gribbles Group, and obstructing investigations into the matter.[160] The *Weekend Australian Financial Review* reported generally on ASIC's performance in 2006, highlighting that 22 people were jailed in that year. [161] It also discusses the action ASIC has taken against financial advisers since it has had considerable compliance and investigation resources dedicated to a full-scale probe into the role of financial advisers in the Westpoint collapse. Among ASIC's big wins are its action against several illegal investment schemes, such as the failed ProCorp and Central Development groups and the main promoter, Donald Richard Maxwell.[162] Maxwell was banned for life from running a company and from the financial services industry and ordered to pay $1.2 million in compensation, penalties and costs.[163]

159 (2004) 220 CLR 129.

160 See Drummond M, "From rich list to charge sheet", *Australian Financial Review* (5 December 2006) pp1 and 4.

161 See Dunstan B, "Enforcers make compliance count", *Weekend Australian Financial Review* (1 January 2007) p 35.

162 The Queensland groups collapsed in 2004 with debts totalling more than $14 million run up by promoting illegal mezzanine funding schemes through ads in suburban newspapers promising "secured and guaranteed" returns of about 30%.

163 See Dunstan, n 161.

Moreover, the string of victories by the SEC in criminal cases, particularly the case against Enron's previously high-flying executive, Skilling, whose sentence of twenty-four years and four months is tantamount to life imprisonment[164] should buoy corporate regulators like ASIC to pursue criminal sanctions in serious cases.

164 See Guy R, "Jury's still out on Enron's impact", *Weekend Financial Review* (27-28 May 2006) p 17 and discussion at n 12. Besides Skilling, other successful criminal prosecutions by the SEC include those against former chief executives include WorldCom chief executive Bernie Ebbers who will probably die in jail after being sentenced to twenty-five years, John Rigas, founder of cable group Adelphia, sentenced to fifteen years and former Tyco chief, Kozlowski who will spend a minimum of eight years in jail.