*Rick Sarre**

KEEPING AN EYE ON FRAUD: PROACTIVE AND REACTIVE OPTIONS FOR STATUTORY WATCHDOGS

INTRODUCTION

In order to control crime in general and fraud in particular, governments in Australia have put in place a combination of proactive and reactive regulatory strategies. *Proactive* strategies have to do with crime prevention, that is, the setting in place of administrative structures in order to deter deviance by a culture of compliance, in preference to the time-honoured policies of deterrence based upon the force of law and the threat of severe legal sanction. Reactive strategies are what takes place when wrongdoing is suspected. The key *reactive* strategy, the criminal prosecution, is now often replaced with what have been termed 'civil' or 'administrative' remedies. Thus, both proactive and reactive strategies have witnessed shifts away from a heavy reliance upon the criminal law towards self-regulation and administrative responses. This essay provides a brief critique of the reasons for these shifts, the philosophies that have driven them and the difficulties associated with them. While the emphasis of the critique is upon reactive strategies to control fraud, the same comments could apply equally to official responses to the full range of criminal activity.

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* LL B (Adel), M A (Toronto); Associate Professor, School of Law, University of South Australia. The author is grateful to Bill Moore, Paul Martin and Helen Pertsinidis for their research assistance, Detective Commander Arthur Brown (Australian Federal Police), Tony Payne (Federal DPP office), Independent Commission Against Corruption Chief Investigator John Scott, the anonymous *Adelaide Law Review* reviewer for their comments on an earlier draft, and Win Sarre for her editorial advice. This article has its roots in a paper presented to the Fighting Fraud Seminar of the Royal Institute of Public Administration Australia, Sydney, May 16 1994 and cited as Sarre, "Prosecution of Administrative Law Measures?" in Bilney (ed), *Fraud, Ethics and Accountability* (Royal Institute of Public Administration Australia and the Commonwealth Law Enforcement Board, Sydney 1994).

PROACTIVE STRATEGIES

It is a time-honoured axiom that it is better to prevent illegal activity by reducing the opportunities for its perpetrators to engage in it, than to have statutory watchdogs come along after the event and prosecute wrong-doers. Policy-makers have thus been keen to set in place strategies, procedures and structures that clarify parameters and resolve issues before they become problems. For example, many governments nowadays require strict evaluation of public service performance. Moreover, policy-makers have discovered that encouraging and rewarding moves towards industry self-regulation and propriety in business affairs is preferable to being committed to a process of enlarging the formal (and therefore expensive) apparatus of external public regulation when something goes awry. Indeed, there is evidence from the United States, for example, to suggest that corporations can be penalised if they are not actively engaged in the development of an ethos or corporate policy in which law-breaking is discouraged.[1] Codes of good administrative practice are becoming commonplace in both the public and private corporate sectors. Many administrators have adopted initiatives designed to build a 'culture' of compliance. Indeed, Braithwaite has suggested that the key to the control of corporate crime is the integration of corporations into the community to allow the influence of informal social controls to take hold.[2]

Grabosky lists three specific proactive strategies which have proved valuable in challenging the traditional view that only reactive regulatory enforcement by governments is effective. First, he suggests that *private* regulatory enforcement can be an important method of control. He notes that most actions under the *Trade Practices Act*, for example, are brought by private parties. In addition, as part of a general compliance strategy, the Australian Securities Commission (ASC) encourages third parties to take action where their own interests have been harmed.[3] Secondly, governments may require regulated entities to subject themselves to independent scrutiny. In this regard the regulatory function of professional advisers in the prevention and control of white collar and

1 Tomasic, "Corporate Crime" in Chappell & Wilson (eds), *The Australian Criminal Justice System: The Mid-1990s* (Butterworths, North Ryde 1994) p264.

2 Braithwaite, *Crime, Shame and Reintegration* (CUP, Cambridge 1989) p144.

3 Grabosky, "Beyond the Regulatory State" (1994) 27 *ANZJ Crim* 192 at 193; Australian Securities Commission, *Annual Report 1991-1992* p7; Hartnell, "Regulatory Enforcement by the Australian Securities Commission: an Inter-relationship of Strategies" in Grabosky & Braithwaite (eds), *Business Regulation and Australia's Future* (Australian Institute of Criminology, Canberra 1993) p30.

corporate crime is becoming increasingly important especially with regards to professional codes of conduct and the emergence of business ethics as an academic discipline.[4] Finally, there is a trend in governmental regulation to foster market forces as a regulatory tool. The pressure from within the private sector to enhance corporate candour well in advance of government pressures is becoming increasingly apparent. Investors in the 1980s who were falsely reassured of the security of their investments by 'clean' audit reports have forced these (and other) auditors to eschew an image of corporate lap dog in favour of a role as client watchdog.[5]

Equally, simple administrative changes have been found to reduce the opportunities for dishonest conduct. Researchers report cases where administrative strategies detected fraud in hospital administration and rorts in customs and excise departments far more effectively than police investigations and external reviews of operations:

> [T]he initiatives demonstrate the effect that the administrators and managers of any agency can have when they choose to embrace a responsibility for crime prevention within their other more commonly recognised functions. In short, they provide specific examples of instances where the police have recognised that effective preventive action lies beyond their control and where they have taken the important step of prompting other public authorities, namely those that can modify or change the opportunities offered to the crime in question, to initiate preventive actions of their own.[6]

Proactive regulatory strategies, therefore, that are sensitive to commercial priorities that foster compliance cultures and that harness the power of aggrieved citizens can be far more effective in the fight against fraud than any traditional strategy based upon a finding of legal culpability.[7]

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4 Enfield, "Ethics, Fraud and the Public Service" (1988) 56 *Canberra Bulletin of Public Administration* 34; Denhardt, *The Ethics of Public Service: Resolving Moral Dilemmas in Public Organizations* (Greenwood, New York 1988); Grabosky, "Professional Advisers and White Collar Illegality: Towards Explaining and Excusing Professional Failure" (1990) 13 *UNSW LJ* 73.

5 Grabosky, "Beyond the Regulatory State" (1994) 27 *ANZJ Crim* 192 at 195.

6 Smith & Burrows, "Nobbling the Fraudsters: Crime and Prevention Through Administrative Change" (1986) 25 *Howard Journal of Criminal Justice* 13 at 21.

7 Braithwaite, *To Punish or Persuade* (State University of New York Press, Albany 1985); Braithwaite, "Self Regulation: Internal Compliance Strategies to Prevent Crime by Public Organisations" in Grabosky (ed), *Government Illegality*

REACTIVE STRATEGIES

Reactive strategies fall into, essentially, two categories: firstly, prosecution through the traditional criminal law; and secondly, administrative remedies. It is interesting to note the shift in public and private enforcement policy that has occurred in the last decade away from the adversarial method towards less formal resolution of conflict (often referred to as alternative dispute resolution or 'ADR') in the civil litigation and family law fields especially. In the same way in the criminal law context, traditional prosecutions have, to a large extent, been replaced by administrative remedies and sanctions, driven chiefly by economic necessity and the belief that too many relatively minor matters were clogging the criminal law courts, causing delays and denying justice.[8] Furthermore, the costs of the traditional approach were becoming (and continue to be) unpalatable to the tax-paying public. A decade ago the National Companies and Securities Commission investigation and prosecution budget was only $150,000 (of a $7m annual budget). In 1991, the replacement Australian Securities Commission first year budget for legal work and investigations was $50m,[9] a figure comparable to the costs of financing the total annual budget of the Commonwealth Director of Public Prosecutions.[10] It may not be possible nor appropriate to continue to expend huge sums from the public purse by proceeding down the traditional prosecutorial road, a view reiterated by the authors of the *Costs of Justice Report* in 1993.[11] In the discussion that follows, the advantages and disadvantages of the two alternative *reactive* strategies are reviewed.

(Australian Institute of Criminology Seminar, Proceedings No 17, Canberra 1987); Braithwaite & Fisse, "Self Regulation and the Control of Corporate Crime" in Shearing & Stenning (eds), *Private Policing* (Sage, Newbury Park 1987); Fisse, "Rethinking Criminal Responsibility in a Corporate Society: An Accountability Model" in Braithwaite & Grabosky (eds), *Business Regulation and Australia's Future* (Australian Institute of Criminology (Australian Studies in Law, Crime and Justice Series), Canberra 1993).

8 Sarre, "Alternative Remedies for Fraud: The Rule of Law Versus Administrative Remedies" (1988) 56 *Canberra Bulletin of Public Administration* 110 at 111.

9 Halstead, "Entrepreneurial Crime: Impact, Detection and Regulation" in Wilson (ed), *Issues in Crime Morality and Justice* (Australian Institute of Criminology, Canberra 1992) p128.

10 Aust, Parl, Director of Public Prosecutions, *Annual Report* 1993-1994 p117.

11 Aust, Parl, Senate Standing Committee on Legal and Constitutional Affairs, *The Cost of Justice: Foundations for Reform* (1993) para 45.

PROSECUTION THROUGH THE CRIMINAL LAW

The prosecution process involves a series of steps through investigation, pre-trial decision-making and then the trial itself. It is, for the most part, slow and cumbersome. Delays and adjournments are common. The prosecution processes set the state against the individual and assign criminal responsibility and guilt if appropriate. The decision to prosecute plans for the imposition of sanctions upon a finding of guilt. Should that happen, the sentencer selects from a rather narrow range of punishment options that centre upon the imposition of a term of imprisonment or a substantial fine.[12]

Prosecutions for corporate fraud can be long, tedious and expensive. In April 1994 the Full Court of the Supreme Court of Victoria in *Grimwade's Case* quashed the 1992 convictions of the defendants Sir Andrew Grimwade and Jon Wilson, declaring that the jury could not have been able to reach a satisfactory verdict given the 440 sitting days and the complex nature of the financial and other commercial evidence. For all of the time and money expended, little was achieved. Some estimates put the costs to the community (leaving aside the legal fees) of any court trial at $70 a minute in administration alone or $100 000 per week. The Victorian Full Court, in their May 1994 ruling, placed much of the blame at the feet of legal counsel, referring to the 'fractured presentation' of the evidence and the 'prolonged and disconnected' cross-examinations. There is little doubt that more is required of the legal system to address the concerns raised by complex fraud trials. Cases that drag on for months at a cost of millions of dollars are luxuries that we, as a community, may no longer be able to afford.

There have been some legislative attempts to speed up the process, for example, the requirement that corporate crime investigations carried out by the Australian Securities Commission lead to the laying of charges within five years of the offence. Limitations periods, however, have been criticised by the ASC in the past, and appear to have had little effect in streamlining procedures, especially when those periods can be extended by application to the Attorney-General. In addition, in most States there has been a deliberate attempt to streamline complex cases with what is referred to as principles of 'case-flow management'. These administrative changes, however, cannot solve the problem entirely.

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12 Fisse, "Sentencing Options Against Corporations" (1990) 1 *Criminal Law Forum* 211.

Ironically, the legal safeguards provided for accused persons ensure that prosecutions are more often than not prolonged. There are the standard criminal law requirements that there be a presumption of innocence and that the prosecution prove its case and establish the requisite *mens rea* beyond reasonable doubt. There are other rules of fairness and justice (often referred to in Australia by the American term 'due process') which include the privilege against self-incrimination[13] (included in the right to remain silent) and the right to elect a jury trial (which lengthens the trial process) on an indictable offence. A prosecution, from beginning to end, may last perhaps six or seven years depending upon the complexity of the matter and the financial reserves of defendants anxious to proclaim their innocence.

One suggestion that was made in order to reduce litigation and in particular the number of matters that went to trial was to ration the availability of legal aid money. The idea fell foul of the High Court, however, in the decision in *Dietrich v R.*[14] The defendant was prosecuted on serious drug charges (importing heroin) by the Melbourne office of the DPP. The Victorian Legal Aid Commission refused Dietrich legal aid unless he wished to plead guilty. He appeared at his trial unrepresented and was duly convicted. On appeal, in November 1992, the High Court unanimously concluded that an accused person who is indigent does not have the right to be legally represented. But, they concluded, Dietrich did have the right to a fair trial, and fairness required some representation in this case, and it was on this basis that a majority of the court quashed the conviction and a new trial was ordered. In a situation where an accused is charged with a serious offence,

> in the absence of exceptional circumstances, the trial in such a case should be adjourned, postponed or stayed until legal representation is available. If, in those circumstances, an application that the trial be delayed is refused and, by reason of the lack of representation of the accused, the resulting trial is not a fair one, any conviction of the accused must be quashed.[15]

There are some questions left unanswered by the Court, for example, when is an offence a *serious* offence and what amounts to *exceptional*

13 The privilege is available only to natural persons, not companies, as settled by the High Court in *EPA v Caltex* (1993) 118 ALR 392.

14 (1992) 109 ALR 385.

15 At 399-400 per Mason CJ and McHugh J.

circumstances sufficient to render the trial a 'fair' one notwithstanding the lack of representation? Putting these questions to one side, however, it is clear that the decision has major repercussions for prosecution authorities, with the possibility that some defendants will rely upon the *Dietrich* decision purely for tactical reasons. There is some evidence already to suggest that prosecution agendas have been frustrated by defendants being granted a stay of prosecution on the basis of a refusal of legal aid.[16] Indeed, it is possible, currently, for defendants to delay criminal proceedings against them by resorting to the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) for the purpose of reviewing prosecution decisions in exceptional cases.[17] One might argue that judicial review of administrative action has no place in a prosecution, considering the ample powers available to a court to exclude evidence in the exercise of judicial discretion. However, the Administrative Review Council's Report in 1989 resisted such a recommendation, taking the view that prosecution decisions, as opposed to committal decisions, should remain subject to the Act.[18]

The fact of the matter is, simply, that the traditional prosecution process has some major contemporary difficulties.

PURSUING ADMINISTRATIVE REMEDIES

It is not surprising, therefore, that alternative administrative remedies have been explored by policy-makers in their desire to find a better range of responses to fraud and other criminal conduct. The objective of such remedies is primarily to examine and discipline the offender by *ad hoc* procedures rather than through the formal prosecution process. It seeks to avoid pushing the matter, and the wrong-doer, through the criminal justice system. Not only is this designed to save time and expense, it is hoped that by removing offenders from the processes of the criminal justice system, and the attendant 'labelling' process, offenders will be less likely to become embittered by the experience, and more likely to move quickly to re-integrate themselves into mainstream society. The matter is dealt with, ideally, as quickly and as expeditiously as possible without the heavy-handed and cumbersome intervention of the adversarial process. This amounts to a very tall order for administrative law: to overcome all of the difficulties of the formal process, yet, at the same time, remain

16 Aust, Director of Public Prosecutions, *Annual Report 1992-1993* p85.
17 *Newby v Moodie* (1989) 83 ALR 523.
18 Aust, Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act Report 32: "The Ambit of the Act"* (1989) pp78-80.

flexible, revenue-effective,[19] protective of an individual's rights and sufficiently punitive to act as a deterrent.

Some commentators are referring to administrative remedies as another example of what has to be known as 'restorative justice'.[20] One of the best examples of this concept is the family group conference which began in the juvenile justice system of New Zealand a decade ago. Offenders are forced to confront their wrongdoing (for the most part concerning less serious offences) while being empowered to develop their own negotiated settlement. The aim of the process is to bring about reconciliation and restitution, not to exact punishment. On January 1 1994 the *Young Offenders Act* 1993 (SA) came into operation in South Australia putting in place a similar system. In many respects the model incorporates the concept of 'shame and reintegration' that criminologist John Braithwaite promotes as an alternative punishment model. He creates a model of 'reintegrative shaming', that is to say, one in which there is a clear acknowledgment of wrongdoing by the offender and a desire to rebuild links with the community. He contrasts this with the notion of 'disintegrative shaming', that is, where condemnation of the wrongdoer occurs but without the rebuilding of social bonds, thereby setting up potentially serious tensions within the community. The traditional prosecution process, leading to a punitive response, is typical of *disintegrative* shaming.

Administrative remedies are well entrenched in many federal jurisdictions. Commonwealth legislative amendments have enabled administrative responses to be selected in preference to prosecution, for example, under the *Crimes Act* 1914 (Cth), *Proceeds of Crime Act* 1987 (Cth), *Crimes (Taxation Offences) Act* 1980 (Cth), *Health Insurance Act* 1973 (Cth), *Social Security Act* 1947 (Cth), *Customs Act* 1901 (Cth), *Trade Practices Act* 1974 (Cth) and *Public Service Act* 1922 (Cth). Paragraph 2.12 of the *Prosecution Policy of the Commonwealth* permits the implementation of alternative 'enforcement mechanisms' to prosecutions where such are 'deemed appropriate' and efficacious.

The Australian Securities Commission is provided under the *Corporations Law* with a range of non-prosecutorial options which provide interim protection of the interests of shareholders and creditors when wrongdoing

19 Freiberg, "Enforcement Discretion and Taxation Offences" (1986) 3 *Australian Tax Forum* 65 at 81.

20 Van Ness, "Restorative Justice" in Galaway & Hudson (eds), *Criminal Justice, Restitution and Reconciliation* (Criminal Justice Press, Monsey 1990).

is suspected. These options include injunctions and the appointment of receivers and provisional liquidators. While power exists to initiate prosecutions (s49 *Australian Securities Commission Act* 1989 (Cth), s1315 *Corporations Act*), the emphasis is upon civil recovery in order to protect the wider public interest.[21] The ASC has power to initiate disciplinary action by reference to a specialist disciplinary board which may ban directors or representatives from corporate life. The ASC may provide assistance to private litigants.

Administrative responses put punitive discretion in the hands of administrators rather than in the laps of detached prosecutorial bodies. This authority, especially in the public sector, has been devolved to administrative agencies themselves. For example, powers are available to the Australian Taxation Office to levy penalties in the event of irregularities by tax-payers. Even though powers to refer matters to prosecution are contained in the statutes that are designed to regulate fraud (for example, at the federal level the *Financial Transactions Reports Act* 1988 (Cth) - formerly the *Cash Transactions Reports Act* 1988 (Cth), the *Secret Commissions Act* 1905 (Cth), the *Income Tax Assessment Act* 1936 (Cth)), there is nevertheless an administrative ethos alive in many regulatory agencies to treat prosecution, for the most part, as an option of last resort. Administrative remedies also have great flexibility. What takes place in modern government, it is argued, is too complex, technical, transient and esoteric to be effectively enshrined in principles of law.[22] Legislative change can take an exceedingly long time. Far easier is an administrative adaptation to changing situations. Far better also are procedures of negotiation, persuasion, restitution and reparation in bringing about quick and efficient responses.

Administrative remedies are becoming commonplace for breaches of State laws too, for example, occupational health and safety regulations, food and health regulations, equal opportunity laws, fishing regulations and environmental standards. Administrative remedies in such circumstances may include the closing down of an unsafe or environmentally unfriendly industrial plant or disqualification from government contracts of those guilty of deceptive and misleading practices. Other options range from the mild (organisational management reform orders) to the more Draconian (licence revocation and company dissolution) as explained and examined

21 Australian Securities Commission, *Annual Report 1990-1991* p6.

22 Grabosky, "Concluding Observations on Public Sector Illegality and its Control" in Grabosky (ed), *Government Illegality* (Australian Institute of Criminology Seminar, Proceedings No 17, Canberra 1987) p223.

by researchers Fisse and Braithwaite,[23] Grabosky and Braithwaite,[24] Braithwaite,[25] Clarke,[26] and Tomasic.[27]

The above examples highlight the possibilities of cheaper and more cost-effective methods in the armoury of corporate regulators.

Administrative Remedies: Debating the Issues

For every advantage of alternatives to traditional prosecution, however, theorists find disadvantages. The first is the problem with inconsistencies and anomalies. Some government departments and regulatory agencies rely upon administrative penalties more than others. The reliance of the Australian Tax Office and the Department of Social Security upon administrative remedies is well documented, with the former placing greater reliance upon administrative remedies than the latter. Specifically, Department of Social Security administration is far more likely to refer dishonest behaviour to the Commonwealth DPP for prosecution. Even where the amount defrauded is significantly more in taxation fraud than in social security fraud, the use of imprisonment as a penalty and the term of imprisonment in tax matters is, surprisingly and perhaps unfairly, significantly less than for social security matters.[28] The likelihood of inconsistency and caprice under an administrative regime is significantly higher, arguably, than under a more traditional prosecutorial system.

Another anomalous situation was discovered by Grabosky and Braithwaite in their study of the powers used by regulatory agencies to police unlawful

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23 Fisse & Braithwaite, "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" (1988) 11 *Sydney Law Review* 468; Fisse & Braithwaite, "Accountability and the Control of Corporate Crime: Making the Buck Stop" in Findlay and Hogg (eds), *Understanding Crime and Criminal Justice* (Law Book Co, Sydney 1988).

24 Grabosky & Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (Oxford University Press, Melbourne 1986).

25 Braithwaite, *To Punish or Persuade* (State University of New York Press, Albany 1985).

26 Clarke, "Prosecutorial and Administrative Strategies to Control Business Crimes: Private and Public Roles" in Shearing & Stenning (eds), *Private Policing* (Sage, Newbury Park 1987) pp270, 284.

27 Tomasic, "Corporate Crime" in Chappell & Wilson (eds), *The Australian Criminal Justice System: The Mid 1990s* (Butterworths, North Ryde 1994) p262.

28 Ruschena, *Taxation Offenders, Social Security Offenders and the Criminal Justice System: A Study of Attitudes* (Unpublished LLM thesis, Melbourne University, 30 June 1993).

conduct. Administrative (non-adversarial) options are more likely to be chosen, they discovered, where there was a chance that the target would resist investigation and threats of prosecution. They singled out the Australian Tax Office for special mention, noting the reluctance of the ATO to proceed to formal prosecution where significant work lay ahead of them in proving their case:

> This was short-sighted cost-effectiveness indeed. It created a climate in Australia where ruthless offenders knew that so long as they maintained their affairs in a sufficiently complicated manner as to render taxation investigation 'cost-ineffective', they would be left alone while the authorities chased the easy dollars of less dishonest citizens. This has not only encouraged tax fraud, it has discouraged more honest citizens from being totally open with a tax system which they have increasingly perceived as rotten.[29]

The authors found, generally, that, in the mid-1980s, no major business regulatory agency in Australia was aggressively prosecutorial. In fact, they concluded, the vast majority preferred to rely upon persuasion and negotiation to achieve industry compliance with the law, a 'manners gentle' approach with a considerable measure of symbolic activity. Their research led them to the conclusion that this approach was so capricious as to be largely ineffective.

A second key drawback of the administrative option is that what it gains in expediency and flexibility, it loses in fairness and 'due process'. That is, without the safeguards provided by the common law requiring, for example, proof beyond reasonable doubt, the presumption of innocence and the rules against hearing evidence unfairly, illegally or improperly obtained, there is always the risk that 'kangaroo' justice will prevail. Legalists point to the unsatisfactory

> growth of 'bureaucratic-administrative' law, where public policy predominates over individual rights, [where] ...

29 Grabosky & Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (Oxford University Press, Melbourne 1986) p163.

> regulation rather than adjudication become[s] the primary form of dispute management.[30]

Similarly, one commentator points to the chance of a relatively casual administrative interview eliciting evidence which could be used in a prosecution without the defendant being given the requisite warnings against self-incrimination.[31] Quick, inquisitorial hearings are ripe with the potential of injustice.

Moreover, administrative decisions are unlikely to be publicly viewed and debated. It is worrisome to many commentators that, in the private sector, many companies and firms engage in private justice (such as demotion of an officer caught in fraudulent activities) rather than engage in the time-consuming task of having the police (or other investigative agency) inquire into the conduct, with its attendant bad publicity for the company or firm. It is in the public's interests to reveal conduct of this type, not to bury it in administrative *in camera* hearings. There is really no answer to this objection in the private sector. There is nothing that can be done about making public 'private' justice. Nevertheless, a conscious effort could be made to encourage administrators in the public sector who apply administrative sanctions and remedies to publicise their findings and recommendations to the wider community even though their deliberations have not been conducted in any public forum. They could take a lead from s11 of the *Independent Commission Against Corruption Act* 1988 (NSW) which requires principal officers of public authorities to report suspected corrupt conduct.

Furthermore, critics of the administrative approach point to the likelihood that, without the full force of the law behind the sanctioning process, there may be a lack of deterrent force, and, consequently, the incidence of criminality may rise. This was clearly the view of the Commonwealth DPP when he wrote, in his 1991-92 Annual Report:

> The important point that must be made is that civil action cannot, in cases of fraud or dishonesty, be an adequate and effective deterrent. In my view ... there must exist a real

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30 Freiberg, "Reward, Law and Power: Towards a Jurisprudence of the Carrot" (1986) 19 *Australian and New Zealand Journal of Criminology* 91 at 110; see also Tomasic & Lucas (eds), *Power, Regulation and Resistance: Studies in the Sociology of Law*, CCAE Series p15).

31 McClements, "Criminalisation of the Poor?" (1990) 15 *Legal Service Bulletin* 22 at 24.

> deterrent in the form of criminal prosecution with appropriate penalties for those convicted ... Whilst there is a place for administrative penalties and alternative responses short of prosecution in minor or routine cases, prosecution should be considered in all the more serious cases ... No doubt advances can be made to streamline the investigation and prosecution of these sorts of cases but at the end of the day the offender must have his or her guilt proved to the criminal standard. The frustrations that are felt resulting from such long lead times must not lead to the conclusion that the criminal process is inappropriate ... the only real and effective deterrent for the criminal is the perceived likelihood of detection followed by the certainty of punishment. To advocate otherwise is to simply encourage corporate wrongdoers to factor into the cost of doing business the cost of having to pay back ill-gotten gains.[32]

Yet the notion of deterrence is fraught with difficulty and anomaly too. Simply stated, it is impossible to say with any degree of certainty that the threat of receiving a 'mere' administrative remedy will foster in the minds of the population generally the idea that it is acceptable to engage in fraud and other dishonest conduct. To make that assertion is to ignore the host of other control mechanisms which exist in society outside of the threat of legal sanction. Indeed, regulatory enforcement, using 'emphatic stigmatising',[33] for example, double and triple damages and expulsion from chosen professions, can be a devastatingly effective means of deterrence. But whether administrative remedies are seen by the general community as sufficiently penal in effect is a moot point. One can recall the general dismay expressed by the public when it was recommended in 1993 that no criminal prosecutions should flow from the Report of the Royal Commission into the State Bank conducted by Samuel Jacobs QC (followed later by John Mansfield QC) even though there was cogent evidence that such prosecutions would lead to nought.

Perhaps the *Grimwade* case, referred to above, could have been better handled by avoiding prosecution and, rather, ordering that company assets be available to shareholders to finance legal suits against culpable directors, an approach generally favoured by Federal Attorney-General

32 Aust, Director of Public Prosecutions, *Annual Report 1991-1992* p5.

33 Fisse & Braithwaite, *The Impact of Publicity on Corporate Offenders* (SUNY Press, New York 1983) p313.

Michael Lavarch. The difficulties, however, of allowing the civil justice system to supplant the criminal/administrative penal system cannot be overstated, particularly if it smacks of allowing offenders to buy their way out of a public prosecution. This 'privatisation' of the criminal justice system is a development that shows no sign of abating and is a topic worthy of further monitoring and continued exploration.

Simply stated, administrative remedies are unlikely to be enthusiastically embraced by a community that wishes to register how seriously it regards fraud. Prosecution is still regarded, rightly or wrongly, as the best declaratory statement of the condemnation by society of dishonest conduct.[34] It will not disappear easily.

STRATEGIES OF COMPROMISE: MIXING THE OPTIONS

Are there ways of combining the two reactive strategies consonant with the aims of fairness, deterrence and efficiency? There are three related issues that require consideration in this respect:

(1) Attempts to streamline complex criminal trials;

(2) Government directions to the ASC and the DPP; and

(3) Creation of a 'tandem' model wherein the choice of strategy is made according to certain criteria.

Reducing the Length and Cost of Complex Criminal Trials

Commonwealth, State and Territories Attorneys-General met in Melbourne in August 1992 to consider changes to procedural and evidentiary rules with a view to reducing the excessive length and costs associated with complex criminal trials in general and complex fraud trials in particular. The overall efficiency of the flow of cases through the legal process was in the spotlight. A study by Mark Aronson of the Australian Institute of Judicial Administration had recommended a system of pre-trial hearings as one way of addressing the problem.[35] Thus the centre-piece of the reforms, first enacted in Victoria, is the concept of a 'directions hearing' which provides for a limited form of criminal pleading. This

34 Zervos, "Prosecution of Fraud on Government" (1988) 56 *Canberra Bulletin of Public Administration* 81.

35 Aronson, *Managing Complex Criminal Trials: Reform of the Rules of Evidence and Procedure* (Australian Institute of Judicial Administration, Carlton 1992) p45ff.

hearing forms part of the trial, although the jury is not empanelled until its completion. It is designed to identify the issues which are likely to be material to the jury verdict, to aid the jury's comprehension and to assist the judge's management of the trial process. Not only is the prosecution required to serve on the defence a 'case statement', but the defendant is required to serve a response to that statement which takes issue with specific facts and inferences. The enthusiasm which greeted these changes has been dampened by tales of the experience of the practitioners operating under the British equivalent (ushered in during 1987 by the *Criminal Justice Act* 1987 (UK)) who report that, unless defence counsel are provided with real incentives, they are unlikely to comply with the spirit of the new procedures.[36] An administrative guideline is only as effective as protagonists wish it to be.

Government Directions

Regulatory agencies often have different political, bureaucratic and commercial interests to protect. It is clear that there is no single voice pushing prosecutorial or administrative policies in fraud control, an issue that was evident in the very public verbal joust between the Director of the Australian Securities Commission and the Commonwealth Director of Public Prosecutions which occurred in 1992. The issue concerned the appropriate strategy to be employed by each organisation in the fight against corporate irregularities.[37] The 'rift' can best be described as a difference over functions and priorities.

> At its most simplistic, a commercial regulator will tend to lean towards recovery of funds or protection of funds over leisurely retribution, while the prosecutor will tend to put justice ahead of money.[38]

The ASC is given a substantial degree of autonomy under the *Australian Securities Commission Act* 1989 (Clth). With powers gleaned from the various comparable State and Territory Acts and the *Corporations Law*,

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36 Aust, Director of Public Prosecutions, *Annual Report 1992-1993* p92.

37 Aust, Parl, Joint Statutory Committee on Corporations and Securities, "The Australian Securities Commission Versus the Director of Public Prosecutions" (1992) 3 *Committee Bulletin* 9; Harrison, "Civil or Criminal Remedies and the ACS" (1993) 64 *Charter* 10; Findlay, Odgers & Yeo, *Australian Criminal Justice* (Oxford University Press, Melbourne 1994) p87.

38 Stephen Bartholomeusz of *The Age*, 10/9/92, quoted in Fairchild, "Hoogenboom and Australian InterAgency Cooperation" (1994) 27 *Australian and New Zealand Journal of Criminology* 111 at 121.

the ASC presides over a national companies and securities scheme. The DPP assumed the responsibility of prosecuting offences arising under the Corporations Law and the National Cooperative Scheme Codes on 1 January 1991. The ASC wished to preserve its options to enforce the law through civil, criminal and disciplinary action while the DPP wanted to encourage the prosecutorial role. At the time there were no special guidelines for deciding which way to proceed in these matters other than the general *Prosecution Policy of the Commonwealth.* Once these differences in strategy became public, both the DPP and the Chairman of the ASC were invited to address a Parliamentary Joint Committee. On 22 September 1992, the ASC and the DPP signed a Memorandum of Understanding which set out, in broad terms, a framework for future dealings between the two, including the establishment of a National Steering Committee on Corporate Wrongdoing. Until the directions were promulgated by the then federal Attorney-General (Mr Duffy) on September 30 1992, corporate Australia had every reason to assume that criminal prosecutions would become a tool of lesser resort.[39] Instead, the general criminal law, said the Attorney-General, was to be given the same consideration as is given to the Corporations Law,[40] in a sense, a victory of the DPP over the ASC. The directions have attracted some academic attention, one practitioner suggesting that the DPP is obliged to comply with the directions, although the ASC is not.[41]

Guidelines for the working arrangements between the ASC and the DPP for the investigation and prosecution of serious corporate wrongdoing were signed in December 1992. The outcome is clear. The DPP now plays a stronger advisory role earlier in the investigatory process, a strategy aimed at focussing on the criminal side of the conduct under scrutiny in the formative stages of an investigation. The relationship appears to be working successfully. To 1994, there have been no disputes requiring formal resolution by the National Steering Committee on Corporate Wrongdoing.[42]

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39 Australian Securities Commission, *Annual Report 1991-1992*, Appendix 3.

40 Aust, Parl, Parliamentary Joint Statutory Committee on Corporations and Securities, *Report of the Relationship Between the Australian Securities Commission and the Director of Public Prosecutions* (1992).

41 O'Bryan, "Will the ASC Toe the Attorney-General's (guide) Line?" (1993) 11 *Company and Securities Law Journal* 47 at 48.

42 Australian Securities Commission, *Annual Report 1992-1993*, p7; Australian Securities Commission, *Annual Report 1993-1994*, p9.

A Tandem Model of Choice

There is little doubt that, at the end of the day, government regulators will be driven to a position where both administrative and prosecution options operate in tandem. By way of illustration, Vincent concluded his report on the regulatory functions of Telecom with a series of recommendations limiting the use of administrative remedies essentially to minor matters (for example, for offences of dishonesty he set a limit of $5,000) and setting a schedule designed to strike the 'balance' which he found lacking in pre-1984 structure.[43] Where there was an argument that the investigation and remedy proposed by the administrative agency was inadequate or unsatisfactory, Vincent proposed referral of the matter by the DPP to the Australian Federal Police for further investigation. There is a difficulty which many may find with this proposal, however. That is, it may tend to defeat the time and cost advantages of the administrative process if there is a two-stage prosecutorial review of the administrative remedy.

Nevertheless, policy-makers could institute a scheme wherein there is a presumption in *minor* matters that an administrative remedy will prevail until such time as prosecutors decide that there are overriding factors that displace it, for example, the importance of the openness of the inquiry, the complexity of the legal questions involved or where the speed with which resolution of the issue is required is important. In relation to *major* matters, there should be a presumption of traditional prosecution, displaced only, for example, where the defendant opts for an administrative remedy, where it is shown that the possibilities of restitution are not hampered thereby and where the openness of the inquiry is not crucial. The only difficulty is in determining the dividing line between major and minor matters. Perhaps the classification could be based upon a decision of an administrative agency or the DPP under legislative guidance and, if disputed, the decision could be resolved at a pre-trial or 'mediation' session convened by a judge or registrar of a court. In that forum, the traditional criteria such as the scope of the fraud and the number of protagonists involved should not be ultimately determinative of the issue (as is often the case currently).

It is important that, whatever approach is finally chosen, legal protections are afforded defendants whose cases are ultimately determined administratively. Furthermore, there should be in place a rule against

43 Vincent, *Review of Matters Affecting the Australian Telecommunications Commission: Report to the Special Minister of State* (AGPS, Canberra 1984).

double jeopardy, that is, the administrative remedy should take the place of any potential prosecution. Similarly, no administrative penalty should be capable of imposition if a prosecution is withdrawn, a recommendation made by the Joint Committee of Public Accounts Committees in their review of the Australian Tax Office in 1993.[44]

SUMMARY

There are a number of proactive and reactive strategies employed currently by regulatory bodies in Australia in the fight against fraud and other criminal conduct. On the proactive front, public sector agencies, market forces and professional advisers can all play a part in fostering a culture of corporate compliance and will continue to play a key role in regulation. Reactive strategies, however, will continue to play the *major* role in regulation. One can observe in reactive strategies a move towards administrative remedies in preference to traditional prosecution policies notwithstanding the Attorney-General's guidelines concerning the options available to the ASC in 1992. These alternatives are not without their difficulties, but the prosecution process, favoured by many regardless of its cost, cannot assume that its pre-eminence is unshakeable. Simply stated, administrative remedies must be seen as a complement to criminal law enforcement.[45] Negotiated justice, privatised justice and cost-effective justice will continue to develop as strategies in the fight against corporate and white collar fraud in the years to come. The vast number of questions that persist when this subject is raised merely points to the difficulty of assuming that a universal panacea for the problems outlined in this critique lies just around the corner.

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44 Scott, "The Public Accounts Committee Inquiry into the Australian Tax Office Report tabled in Federal Parliament November 1993", summarised in an unpublished paper presented to the Administrative Law Conference, convened by AIC Co, May 2 1994, Canberra.

45 Braithwaite, "Self Regulation: Internal Compliance Strategies to Prevent Crime by Public Organisations" in Grabosky (ed), *Government Illegality* (Australian Institute of Criminology Seminar, Proceedings No 17, Canberra 1987) p145.