

Australia's 'Company Law Watchdog': ASIC and Corporate Regulation

Vicky Comino

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Vicky Comino's *Australia's 'Company Law Watchdog'* is a rigorously argued and forensically detailed analysis of the Australian Securities and Investments Commission's (ASIC's) performance as Australia's corporate regulator. The principal aim of the book is to determine how and the extent to which ASIC can more effectively enforce Australia's corporations law, with particular emphasis on the law with respect to directorial misconduct.¹ Despite the proliferation of literature on Australian corporate law and governance,² Comino's work is the first dedicated entirely to evaluating ASIC's performance – thus filling a gap in comprehensive analysis of one of the most important regulatory bodies in the nation. Moreover, Comino's study is timely. Public interest in corporate regulation and in ASIC's activities has heightened over the last decade in the wake of a number of high profile corporate investigations and collapses, including those of HIH Insurance Limited, One.Tel, James Hardie,³ Andrew 'Twiggy' Forrest,⁴ and the Australian Wheat Board Scandal.⁵

ASIC is responsible for enforcing the *Corporations Act 2001* (Cth), the principal statute governing Australian company law. The scale of ASIC's regulatory burden is highlighted by its responsibilities relative to those of corporate regulators in comparable jurisdictions; in the UK, for example, ASIC's equivalent body is not tasked with enforcing directors' duties.⁶ This perhaps broadly accounts for the disconnect between public expectations of corporate governance and the results that ASIC can actually deliver - a disconnect particularly evident in the post-GFC environment in which public anger towards corporate malfeasance has been most acute. *Australia's 'Company Law Watchdog'* provides a detailed explanation of the shortcomings of ASIC's arguably lacklustre enforcement record, evidenced by the limited number of civil penalty actions commenced and lack of success in court proceedings.⁷

Comino presents her thesis in two parts. The first provides an overview of the relevant regulatory literature, before turning to the strategic regulation

¹ Vicky Comino, *Australia's 'Company Law Watchdog'* (Lawbook Co., 2015), 3.

² Comino provides a comprehensive overview in Chapters 2 and 3 in particular.

³ Comino, above n 1, 1.

⁴ *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486.

⁵ Comino, above n 1, 4.

⁶ *Ibid* 10.

⁷ *Ibid* 405.

theory and pyramidal enforcement regime underpinning ASIC's approach. The second evaluates the effectiveness of ASIC's approach in practice, devoting individual chapters to the problems of the courts' treatment of civil penalties as quasi-criminal offences and ASIC's failure to utilise the full range of remedies available. The book concludes with a summary of ASIC's effectiveness and recommendations for the future – with the notable feature that many recommendations are directed to Parliament, particularly to increase the range and level of penalties available and to implement a 'procedural road map' to get around the courts' avoidance of civil procedural rules.⁸ Comino does not absolve ASIC or corporations themselves, however – ASIC is urged to be more consistent in its implementation and companies are urged to 'self-regulate' (a somewhat optimistic suggestion). Comino's analysis of whether ASIC's regulatory activities have been empirically effective is based on the enforcement record disclosed in ASIC's annual reports, and on how ASIC is *perceived* as performing its role.⁹

Underpinning her argument is the contention that the most significant change in corporate law enforcement is legislative reform that allowed for a transition from a criminal to a civil penalties regime for breaches of directors' duties. The new 'pyramidal' penalties regime escalates the sanctions applied in proportion to the egregiousness of the breach – criminal sanctions are available only for continuous non-compliance or the most serious breaches.¹⁰ Comino argues that this model is at the heart of ASIC's performance as Australia's corporate watchdog. The strategic advantage of the civil penalties regime is that ASIC does not have to grapple with the criminal law's more demanding rules of evidence and procedure,¹¹ with the ostensible consequence being that it is less challenging for ASIC to prove its allegations to the requisite standard of proof. Furthermore, civil penalties can be sufficiently serious to deter corporate wrongdoing whilst falling short of the more serious personal consequences imposed by the criminal law.¹²

However, these advantages have been overshadowed by implementation problems. Although initial difficulties have been addressed through law reform, Comino identifies that a second wave of problems continue to hinder ASIC's regulatory capacity – specifically, the evidential, procedural and enforcement problems that have emerged in civil penalty proceedings. Significantly, the courts have remained guided by the

⁸ Comino, above n 1, 376-7.

⁹ Ibid 3-4.

¹⁰ Ibid 2.

¹¹ *Corporations Act 2001* (Cth) s 1317L.

¹² Comino, above n 1, 240. In *ASIC v Vizard* (2005) 145 FCR 57, for example, Vizard was banned from managing a corporation for ten years and ordered to pay pecuniary penalties of \$390,000.

principle from *Briginshaw v Briginshaw*¹³ that courts ‘should not lightly make a finding on the balance of probabilities’ where that finding is one of guilt of serious misconduct¹⁴ - creating very little difference in practice between the civil and criminal standard of proof.¹⁵ Furthermore, the courts have imposed criminal procedural protections in civil penalty proceedings, particularly since *Rich v Australian Securities and Investments Commission*.¹⁶ Case law reveals that this has drastically hampered ASIC’s capacity to hold errant directors to account for alleged corporate misconduct, with the high profile case of *Forrest v ASIC*,¹⁷ involving prominent mining magnate Andrew ‘Twiggy’ Forrest being illustrative. Finally, Comino lays some blame at the door of ASIC itself, contending that the regulator’s reticence to escalate to criminal sanctions in cases of serious corporate misconduct precludes it from being taken seriously as a corporate regulator – in contrast to the United States’ Securities and Exchange Commission, for example.¹⁸

The logic of Comino’s argument is difficult to fault. Her work is comprehensive and meticulously researched, as shown by the proliferation of references to case authority and statutory provisions. However, the detailed analysis of corporate governance theory and the current statutory regime that strengthens Comino’s book simultaneously undermines its accessibility for readers.

Comino’s work is highly academic in its reliance on regulatory theory and detailed examination of the interoperation of the *Corporations Act* with relevant rules of the criminal law, civil procedure, and evidence. Though this methodology is both appropriate and perhaps necessary given Comino’s intention to evaluate the rationale of ASIC’s approach and its practical implementation difficulties, this approach demands readers have at least a passing familiarity with corporate governance and Australia’s statutory company law framework. Comino’s work will have most utility for corporate law scholars and policymakers, in addition to being a useful work for future law reform bodies to draw upon.

Additionally, some of Comino’s conclusions appear illogical given her preceding analysis. For example, Comino has suggested Parliament legislate a ‘procedural roadmap’ to counter the procedural problems ASIC has encountered. Yet, given that Comino herself notes that the *Act* already mandates civil procedural and evidentiary rules for civil penalty

¹³ (1938) 60 CLR 336.

¹⁴ *Ibid* 361.

¹⁵ Comino, above n 1, 183.

¹⁶ (2004) 220 CLR 129.

¹⁷ (2012) 247 CLR 486.

¹⁸ Comino, above n 1, 278.

proceedings, it is perhaps unrealistic to think that the courts would promptly comply with the new legislation when they have consistently found ways around the current provisions.

Finally, her work would be given more depth by explaining why the legal framework within which ASIC operates might itself be a root cause of the regulatory gap identified. As alluded to above, part of the problem is the scale of ASIC's task - yet Australia's regulatory culture is also arguably more laissez-faire than that of comparable jurisdictions such as Germany or France. A more comprehensive analysis could link this underlying culture with the more tangible obstacles ASIC has encountered in court proceedings to fully explain ASIC's difficulties.

Despite these comparatively minor criticisms, *Australia's 'Company Law Watchdog'* succeeds in making a valuable contribution to the literature, for both academia and policymakers. Comino has both explained ASIC's shortcomings and provided reform suggestions for an enforcement problem that has significant ramifications for the integrity of Australia's corporate sector and, consequently, the Australian public. It would be remiss of lawmakers and corporate law practitioners to ignore Comino's insights.

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