

TESTING THE REGULATOR’S PRIORITIES: TO SANCTION WRONGDOERS OR COMPENSATE VICTIMS?

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As Australian corporate conduct came under intense and highly publicised scrutiny during the banking Royal Commission, so too did the conduct of the conduct regulator: the Australian Securities and Investments Commission (‘ASIC’). Following the Royal Commission, the regulator has adopted what it describes as “‘Why not litigate?’ operational discipline’ — a concept elaborated and recommended by Commissioner Hayne which is now the central tenet of ASIC’s updated enforcement model. This article discusses the hierarchy of strategic priorities evident in that enforcement model and asks: should the regulator focus its resources on compensating those harmed by regulatory contraventions rather than sanctioning those who have broken the law?

I INTRODUCTION

In the Final Report of the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (‘Final Report’ and ‘Royal Commission’, respectively), Commissioner Kenneth Hayne said:

The Australian community expects, and is entitled to expect, that if an entity breaks the law and causes damage to customers, it will compensate those affected customers. But the community also expects that financial services entities that break the law will be held to account. The community recognises, and the community expects its regulators to recognise, that these are two different steps: having a wrongdoer compensate those harmed is one thing; holding wrongdoers to account is another.¹

In response to the Royal Commission, and specifically the ‘Why not litigate?’ mantra elaborated and recommended by Commissioner Hayne,² the Australian Securities and Investments Commission (‘ASIC’) has significantly reshaped its enforcement model.³ It is quite clear that this model prioritises the sanctioning of

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¹ Commonwealth, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, 2019) vol 1, 3–4 (‘Final Report’).

² Ibid 427.

³ ASIC, ‘Corporate Plan 2019–2023’ (28 August 2019) 5–8 (‘Corporate Plan 2019–23’).

wrongdoers over the delivery of redress to victims. The aim of this article is to test the theoretical and practical justification for such a preference. The central question — should the regulator focus its resources on compensating those harmed by regulatory contraventions rather than sanctioning those who have broken the law? — arises because, while it will sometimes be possible to achieve both goals simultaneously, the prudent allocation of finite resources usually dictates that the enforcement strategy be tailored to the regulator's priority. As Commissioner Hayne put it, the 'regulator must approach [its] work ... with a clear view of what kinds of outcome' it wants to achieve;⁴ those desired outcomes — especially the *most* desired outcome — will guide the regulator's choice of enforcement tools.

Part II of this article demonstrates, as a preliminary factual matter, that ASIC's current enforcement model does not prioritise the delivery of redress to victims of misconduct. Part III examines whether, if such a priority were adopted, it would be theoretically justified, evaluating insights from regulatory scholarship, social psychology and sociology. The discussion commences with an analysis of the breadth of the regime that ASIC is required to enforce and the considerable discretion it is given to calibrate its enforcement style and determine its priorities when regulatory objectives conflict. The Part concludes that regulatory and interdisciplinary theory does not provide a secure foundation for either a punitive or a compensatory priority where those aims are in tension. As such, the article turns to resolve the question by reference to two key practical issues: whether regulatory mechanisms are more effective than others at achieving compensation, considered in Part IV; and whether, assuming a compensatory priority were adopted, this would unduly hinder the fulfilment of other regulatory objectives, considered in Part V.

Part IV commences with the recognition that the regulator ought properly to be mindful of both the availability and efficacy of alternative avenues for victims to obtain redress before determining its strategic priorities and resource allocation in response to a particular contravention or class of contravention. Interestingly, however, the analysis finds that regulatory mechanisms are among the most available and effective in delivering compensation when compared with private litigation, alternative dispute resolution ('ADR') and external dispute resolution ('EDR'). Despite this, Part V argues that a compensatory priority would unduly impede both the regulator's ability to achieve deterrence through enforcement and to improve compliance through its softer activities of persuasion, education and policy advice. The article therefore endorses ASIC's updated enforcement model to the extent that it conceives the agency's statutory role as best fulfilled where it prioritises the punishment or censure of regulated entities who contravene the law.

⁴ *Final Report* (n 1) vol 1, 427.

II 'WHY NOT LITIGATE?'

Before a normative discussion of the optimal ranking of regulatory priorities can commence, it is necessary to briefly establish this article's factual premise: ASIC's current enforcement model does not prioritise the delivery of redress to victims. This is made clear, first, by ASIC's own regulatory guidance that reflects Commissioner Hayne's discouragement of a compensatory priority, and, secondly, because the 'Why not litigate?' model de-emphasises the use of enforcement tools that could achieve compensation for victims without recourse to litigation.

A *Lessons from the Royal Commission*

In the Interim Report,⁵ Commissioner Hayne made clear that, while 'vitally important', remediation for consumers was not the 'only relevant consideration' for a regulator in taking enforcement action.⁶ The Commissioner explained:

[P]aying attention to how the entity will remedy those hurt by its conduct must never be allowed to detract from the fact of the contravention. What is to be done about the contravention? The regulator is not called on to choose between remediation and enforcement. Often, enforcement will induce an entity to set about remedying the consequences of its default, or committing to do so, before the penalty is fixed.⁷

The observation that the regulator need not choose between remediation and enforcement should not be read as a claim that the regulator ought to regard these outcomes as equally important. Rather, the Commissioner's view seems to be that the fact of a contravention requires the regulator to pursue appropriate sanctions regardless of whether compensation has been or is likely to be paid to victims.

This position is made more explicit in the Final Report, where the Commissioner offered the most detailed exposition of the question 'Why not Litigate?', which ASIC now endorses as its 'operational discipline'.⁸ Specifically, the Commissioner said:

Litigation takes time. It costs money and often great effort. There is always some uncertainty. What is to be made of time, cost and uncertainty? All three considerations

⁵ Commonwealth, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Interim Report, 2018) vol 1 ('Interim Report').

⁶ Ibid 294.

⁷ Ibid 296.

⁸ ASIC, 'Corporate Plan 2019–23' (n 3) 2, 5, 7, 8, 26.

will always be there. Why not avoid them? If a compromise can be reached without those risks, why not take it?

The answer lies in recognising that litigation of the kind now under consideration is the exercise of public power for public purposes. It is litigation by a public authority to enforce the law ... Breach of the law carries consequences. Parliament, not the regulators, sets the law and the consequences. There are cases where there is good public reason not to seek those consequences. Prosecution policies have always recognised that there may be good public reasons not to pursue a particular case. But the starting point for consideration is, and must always be, that the law is to be obeyed and enforced. The rule of law requires no less. And, adequate deterrence of misconduct depends upon visible public denunciation and punishment.⁹

In other words, where statute prescribes that sanctions should attach to particular misconduct, it is the regulator's obligation to see that those sanctions are applied, unless powerful public considerations militate against this. Whatever else the regulator may want to achieve through enforcement, including the delivery of adequate redress to victims of misconduct, it *must* prioritise the enforcement of the law against those who break it.

ASIC's own guidance adopts and gives effect to the Commissioner's position. In its updated 'Corporate Plan', ASIC announced the creation of a new Office of Enforcement to implement "'Why not litigate?" operational discipline', stating plainly: 'the aim of our enforcement work is to effectively bring wrongdoers to account through punishment and public denunciation'.¹⁰ Delivering 'appropriate and timely consumer compensation' is last on a list of 'positive behaviours' that ASIC wants to inculcate in regulated entities;¹¹ ensuring that this occurs satisfactorily is not one of the agency's stated 'missions'.¹² Indeed, well before the Royal Commission, regulatory guidance as to ASIC's approach to enforcement, and its participation in private court proceedings, emphasised that its role is not primarily to advance the financial interests of injured parties.¹³ In the post-Royal Commission regulatory landscape this stance has been reinvigorated within the context of a new operational structure and updated enforcement model.

B *Choice of Enforcement Tools*

A litigation-centric enforcement approach necessarily prefers the sanctioning of wrongdoers over the compensation of victims. Part IV of this article contains a

⁹ *Final Report* (n 1) vol 1, 432–3.

¹⁰ ASIC, 'Corporate Plan 2019–23' (n 3) 2, 7.

¹¹ *Ibid* 16.

¹² *Ibid* 42–7.

¹³ See ASIC, 'ASIC's Approach to Involvement in Private Court Proceedings' (Information Sheet 180, June 2013) 1–3 ('Private Court Proceedings'); see generally ASIC, 'ASIC's Approach to Enforcement' (Information Sheet 151, September 2013) ('Approach to Enforcement').

detailed analysis of ‘regulatory redress’ — the collection of tools (litigious and non-litigious) by which a regulator can achieve the delivery of compensation — and its effectiveness when compared with other mechanisms. The purpose of this section is to briefly identify three reasons why the “‘Why not litigate?’ operational discipline’ de-emphasises the use of enforcement tools that can return money to victims more reliably and cost-effectively than contested litigation.

The first reason concerns the newly maligned status of the Enforceable Undertaking (‘EU’). Crucially, Commissioner Hayne explained the ‘Why not litigate?’ mantra precisely in opposition to the supposedly too-frequent reliance by the regulator on negotiated outcomes, including those that make provision for compensation.¹⁴ In the past, ASIC has negotiated EUs that force regulated entities to return substantial sums to injured parties, as when Multiplex Ltd ‘agreed to establish a \$32 million fund to compensate investors’ following an investigation for continuous disclosure breaches.¹⁵ Commissioner Hayne’s relatively dim view of EUs fuelled a public impression that the regulator was ‘going soft’, prompting ASIC Deputy Chairman Daniel Crennan QC to state that ‘in the “post-royal commission world” enforceable undertakings are “fairly unlikely to be provided” by the regulator because they do not require an admission of liability’.¹⁶ In the light of the fact that there will be many cases in which an entity would prefer to negotiate a sum total of payable redress in exchange for not admitting liability — continuous disclosure breaches being an obvious example — the regulator’s new stance clearly demonstrates that the pursuit of appropriate sanctions is its priority.

In recognising that ASIC has decided to sideline the EU, it should not be thought that this reflects an eschewal of negotiated outcomes on the part of government generally. The Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2020 (Cth), currently before the Senate, proposes to introduce Deferred Prosecution Agreements (‘DPAs’) as a tool available to the Commonwealth Director of Public Prosecutions (‘CDPP’) in some cases of

¹⁴ See, eg, *Final Report* (n 1) vol 1, 424.

¹⁵ Vicki Waye and Vince Morabito, ‘Collective Forms of Consumer Redress: Financial Ombudsman Service Case Study’ (2012) 12(1) *Journal of Corporate Law Studies* 1, 8–9.

¹⁶ Quoted in Misa Han, James Eyers and Edmund Tadros, ‘ASIC’s “Why Not Litigate” Strategy Kills Enforceable Undertakings’, *The Australian Financial Review* (online, 16 May 2019) <<https://www.afr.com/companies/financial-services/asic-s-why-not-litigate-strategy-kills-enforceable-undertakings-20190516-p51014>>.

suspected corporate criminality. Of course, the DPA and the EU differ in design,¹⁷ rationale¹⁸ and history — the Law Council of Australia has pointed out that the current Bill is a resurrection of one from 2017, meaning that the government's contemplation of a DPA scheme pre-dates Commissioner Hayne's criticism of ASIC's use of EUs.¹⁹ Whatever may be the fate of the DPA proposal, the point for present purposes is that the negotiated tools available to ASIC can be expected to have a marginal role in its 'Why not litigate?' enforcement model.

The second reason reflects the history and likely future of the financial services compensation scheme directions power — which this article will for simplicity describe as ASIC's 'redress power'. In the United Kingdom, the Financial Conduct Authority ('FCA') has long been able to order firms to set up and administer compensation schemes where it takes the view that a regulatory contravention has caused loss to consumers.²⁰ ASIC flagged in its 2018–22 Corporate Plan that it envisaged receiving a comparable power, to direct regulated entities 'to take particular remedial actions, such as consumer compensation programs', as part of a suite of capability upgrades that will 'significantly transform [the agency's] regulatory work'.²¹ This was recommended by the Enforcement Review Taskforce, which reported in December 2017.²² Commissioner Hayne, in his Final Report, stated that such a power was likely to be included in the 'Tougher Penalties' legislation then before Parliament.²³ This did not transpire; no such power was included in the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth). However, after the passage of that Act, a formal media release stated that ASIC still envisages that Parliament will legislate for this new directions capability:

ASIC Commissioner Danielle Press 'welcomed the Government's commitment to give ASIC new directions powers that could speed up remediation programs in future ... 'We

¹⁷ For example, the DPA must be approved by a judge, ensuring independent oversight of the balancing exercise between the need to ensure that the law is enforced and the promotion of cooperation as a way to better secure that enforcement: see Commonwealth, *Parliamentary Debates*, Senate, 2 December 2019, 4715 (Jonathon Duniam, Assistant Minister for Forestry and Fisheries and Assistant Minister for Regional Tourism).

¹⁸ The DPA is not intended as a general discretionary tool for the CDPP but is confined to specified, particularly serious crimes: *ibid.*

¹⁹ Law Council of Australia, 'Crimes Legislation Amendment (Combating Corporate Crime) Bill 2020' <<https://www.lawcouncil.asn.au/resources/submissions/crimes-legislation-amendment-combatting-corporate-crime-bill-2019>>.

²⁰ *Financial Services and Markets Act 2000* (UK) ss 384, 404, 404F.

²¹ ASIC, 'Corporate Plan 2018–22' (31 August 2018) 12.

²² Australian Government, *The Treasury, ASIC Enforcement Review Taskforce* (Final Report, December 2017) 102.

²³ *Final Report* (n 1) vol 1, 441.

are pleased that the Government has agreed to adopt recommendations from the 2017 *ASIC Enforcement Review Taskforce Report*, which includes a directions power. This would allow ASIC to direct AFS licensees to establish suitable customer review and compensation programs.²⁴

ASIC Chairman James Shipton has been careful to point out that ‘Why not litigate?’ is a different concept than ‘litigate first’ or ‘investigate everything’.²⁵ Nevertheless, it seems obvious that with the power to order financial services entities to compensate consumers without the need to take court action, ASIC would be *less likely* to take court action if consumer redress were its strategic priority. Given ASIC’s updated enforcement model, we can expect that if it receives a ‘redress power’ it will be used far more often in addition to than in lieu of litigation in pursuit of appropriate penalties.

The third and final reason is that there is an emerging emphasis on the need to take enforcement action against individuals rather than, or in addition to, corporations. Given, as Malcolm Sparrow puts it, that ‘[s]ocial norms act less upon complex organizations than upon individuals’,²⁶ there is a view that in order to achieve more consequential and durable change in the future behaviour of regulated entities, ASIC should be much quicker to focus its enforcement on the individuals responsible for breaches rather than the corporations they work for or manage.²⁷ The Australian Law Reform Commission (‘ALRC’), in the Discussion Paper released for its inquiry into corporate criminal responsibility, emphasised that individual liability ‘reflects the reality that while corporations are distinct legal entities ... they are also ultimately composed of individuals’ and ‘there is widespread agreement in the literature ... [about] the importance of personal accountability in ensuring corporate compliance’.²⁸ Thus, in ASIC’s most recent Corporate Plan, the agency states that ‘a key objective ... is to understand and strengthen director and officer oversight in large, listed companies’,²⁹ and that it intends to make use of increased penalties to ‘focus on both corporate

²⁴ ASIC, ‘ASIC provides update on further reviews into fees-for-no-service failures’ (Media Release, 19-051MR, 11 March 2019) <<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-051mr-asic-provides-update-on-further-reviews-into-fees-for-no-service-failures/>>.

²⁵ Quoted in Han, Evers and Tadros (n 16).

²⁶ Malcolm K Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* (Brookings Institution Press, 2000) 63, quoted in *Final Report* (n 1) vol 1, 424.

²⁷ See, eg, Commissioner Hayne’s discussion of the difficulties taking action against individual financial advisers and the compliance problem this generates: *Final Report* (n 1) vol 1, 215–16.

²⁸ ALRC, ‘Corporate Criminal Responsibility’ (Discussion Paper DP 87, 2019) [7.3], [7.68] (‘Corporate Criminal Responsibility’).

²⁹ ASIC, ‘Corporate Plan 2019–23’ (n 3) 7.

responsibility and individual responsibility' and 'scrutinise whether individuals at executive and board level are carrying out their legal responsibilities'.³⁰ It is trite to point out that individuals typically have less funds than corporate entities with which to satisfy the claims of injured parties;³¹ as such, the expenditure by ASIC of its resources in enforcement action against individuals demonstrates a renewed strategic priority of ensuring appropriate punishment or censure of wrongdoers, irrespective of whatever capacity they may have to pay compensation. The following Part examines whether there is a satisfactory theoretical basis for such a priority.

III A THEORETICAL PRINCIPLE?

The rules administered by regulators are designed to assist the proper functioning of the modern economy; breach of them, owing to the size and complexity of that economy, can cause significant harm to vast numbers of people.³² Lurking behind this somewhat anodyne observation is a question of principle far more interesting and complicated: *Who* or *what* does the regulator serve by taking enforcement action: victims, the state, or the more nebulous 'society at large'? In this Part, I consider whether relevant theory supplies a satisfactory answer to this question. The first section examines the views of leading regulatory scholars on the goals or aims of regulation and argues that their formulations do not offer an adequate theoretical explanation for the regulator's prioritisation of either victim compensation or the sanctioning of wrongdoers where these aims might conflict. The second section picks up the amorphous notion of 'public expectations' to which reference is often made, including by Commissioner Hayne in the introductory quote to this article, without an explanation of *how* we can meaningfully claim to apprehend the public's expectations or precisely *why* they are a legitimate guide for the regulator. I problematise the notion of 'public expectations' by reference to social psychological research and then contrast it with the broader and arguably more legitimate concept of the 'public interest'. The outcome of the discussion is that a regulator compensatory priority lacks a secure basis in theory; thus, the question posed by this article must be resolved by reference to the practical and operational factors raised in Parts IV and V below.

³⁰ Ibid 8.

³¹ Jonathon Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002) 15.

³² Ibid 1; Michael Legg, 'A Comparison of Regulatory Enforcement, Class Actions and Alternative Dispute Resolution in Compensating Financial Consumers' (2016) 38(3) *Sydney Law Review* 311, 311.

A *Theoretical Justifications for Regulatory Objectives*

This section begins by interrogating the capacity of ASIC's legislative remit to function as a predetermined guide for structuring strategic priorities. It then comparatively evaluates the views of leading regulatory scholars on the question of whether the regulator ought to prioritise the censure of wrongdoers or the delivery of compensation to victims where these aims are in tension. The absence of a sufficiently comprehensive, principled answer to that question invites a broader inquiry into other disciplines — notably sociology and social psychology — which commences in Part III(B) below.

At the outset, it is worth noting that to some extent a regulator's goals or aims are pre-determined by the legislative 'blueprint' that defines the scope of its remit and confers the powers and functions necessary to discharge it.³³ ASIC as the corporate and financial services conduct regulator is usually described by, and understood through, the 'cop on the beat' metaphor — a corporate watchdog. It might be thought, then, that the question posed by this article is a simple one when applied to ASIC because, even where the agency takes an interest in assisting victims, it is ultimately acting as the corporate police officer motivated to ensure compliance with, and obedience to, the law. But I do not think this is sufficient, for four reasons. First, ASIC's legislative remit is exceedingly broad — too broad, indeed, for it to be determinative as a general 'blueprint' for structuring regulatory priorities.³⁴ In some areas of its responsibility, of which negligent or conflicted financial advice is an obvious example, the significant risk that misconduct will lead to substantial or widespread loss is likely to prompt the agency to consider the interests of victims before it makes a judgement about what sanctions it ought to pursue and in what manner it ought to pursue them.³⁵ With the ever-present problem of resource limitation, the regulator might be unable or unwilling to pursue both objectives to the maximum extent possible. It must choose. By contrast, in other areas of its responsibility, of which insider trading is a paradigmatic example, the lack of a defined class of victims is a key reason why ASIC almost always pursues criminal sanctions — its avowed purpose being to send a message that the conduct is 'wrong'.³⁶

³³ Robert A Kagan, 'Editor's Introduction: Understanding Regulatory Enforcement' (1989) 11(2) *Law & Policy* 89, 94.

³⁴ See the 'objects' provision of the *ASIC Act 2001* (Cth) s 1(2).

³⁵ See generally Legg (n 32).

³⁶ Ian Ramsay and Miranda Webster, 'ASIC Enforcement Outcomes: Trends and Analysis' (2017) 35(5) *Companies & Securities Law Journal* 289, 303–7.

Secondly, ASIC is equipped with a diverse range of enforcement tools, some of which are clearly punitive in nature while others are directed to securing private compensation, a survey of which can be found in Part IV(A) of this article. The regulator has considerable latitude to choose among these tools, and formulate combinations of them, in order to achieve its specific objectives in relation to the particular contravention or class of contravention with which it is dealing. This breadth of capacity is reflected also in ASIC's governing legislation, which empowers it 'to do whatever is necessary for or in connection with, or reasonably incidental to, the performance of its functions'.³⁷ This is an important sense in which the role of 'corporate police officer' is somewhat more expansive than that of an actual police officer, whose powers and responsibilities are more narrowly tailored to the specific function of securing compliance with the law.³⁸ Thirdly, and relatedly, changes in the regulator's patterns of use of its enforcement tools are apt to occur as much through internal reform of its policies and procedures as through legislative change. Part II(B) of this article supplied a clear example — the drastic repositioning of the EU, a tool that may be used, and in the past was commonly used, to secure victim redress without the need to pursue sanctions in contested litigation. This is a significant change in approach brought about by the regulator's internal response to the Royal Commission and not through any change to its governing legislation or the regime it is required to enforce. This discretionary width reflects the limitations of viewing ASIC's statutory remit as a prescriptive 'blueprint' that is determinative of its priorities and objectives.

Finally, and perhaps most importantly for present purposes, recent decades have witnessed a shift among legislators, regulators and theorists alike away from the monochromatic question of 'whether regulations result in "compliance"' to the more technicolour issue of 'whether the regulations, as administered, produce socially desirable outcomes'.³⁹ Parliament has charged ASIC with striving to 'maintain, facilitate and improve the performance of ... [and] promote the confident and informed participation of investors and consumers in, the financial system'.⁴⁰ Scholars have noted that in pursuit of such broad aims framed in the language of principles rather than rules, regulatory enforcement styles differ

³⁷ ASIC Act 2001 (Cth) s 11(4).

³⁸ See, eg, *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), the long title of which is: 'An Act to consolidate and restate the law relating to police and other law enforcement officers' powers and responsibilities; to set out the safeguards applicable in respect of persons being investigated for offences ... and for other purposes.'

³⁹ Kagan (n 33) 90.

⁴⁰ ASIC Act 2001 (Cth) s 1(2)(a)–(b).

widely both between and within agencies, as officers adapt their broad powers to their own more specific structure of strategic priorities.⁴¹ Johnstone and Sarre have gone so far as to say that ‘regulation in the 21st Century is *characterised* by flexibility’, both as to aims and process.⁴² The problem faced by the modern regulator is that it is *not* given the certainty of a single or overriding objective like ‘compliance’; as Haines and Gurney put it, ‘multiple goals exist, some of which conflict ... In cases of conflict, exhortation to focus on outcomes, to engender a singular “compliance culture” or to follow an ordered enforcement strategy misunderstands the regulatory task and overemphasises its simplicity.’⁴³ In my view, two of the most important goals in corporate and financial services regulation are among those that are apt to conflict: the need to ensure that the law is enforced against those who break it; and the need to ensure that those who are injured by the breaking are made whole. When those goals do conflict, how should they be prioritised? This is a question on which regulatory theorists supply different answers; ultimately, I do not consider any of the leading formulations sufficiently comprehensive.

Christopher Hodges rejects what he describes as the ‘classical’ understanding — that the state’s interest in enforcing the law takes priority to the interests of victims — and claims it is ‘axiomatic that redress should be paid whenever due’;⁴⁴ thus, he and Stefaan Voet advocate a model of regulatory objectives that ranks the delivery of compensation above the sanctioning of contraveners.⁴⁵ John Braithwaite extends this position even to criminal conduct in the regulatory sphere, arguing that the optimal strategy is a ‘restorative justice’ approach, which embraces financial and non-financial redress, rather than punishment of perpetrators.⁴⁶ In my view, these scholars base their formulations on a strong *prima facie* commitment to the *general principle* that

⁴¹ See, eg, Bridget M Hutter, ‘Variations in Regulatory Enforcement Styles’ (1989) 11(2) *Law & Policy* 153; Kagan (n 33) 94, 99.

⁴² Richard Johnstone and Rick Sarre, ‘Introduction’, in Richard Johnstone and Rick Sarre (eds), *Regulation: Enforcement and Compliance* (Australian Institute of Criminology, Research and Public Policy Series No 57, 2004) 4, 5 (emphasis added).

⁴³ Fiona Haines and David Gurney, ‘Regulatory conflict and regulatory compliance: the problems and possibilities in generic models of regulation’ in Johnstone and Sarre, *Regulation: Enforcement and Compliance* (n 42) 11.

⁴⁴ Christopher Hodges, ‘Mass Collective Redress: Consumer ADR and Regulatory Techniques’ (2015) 23(5) *European Review of Private Law* 829, 837 (‘Mass Collective Redress’); Christopher Hodges, ‘Collective Redress: The Need for New Technologies’ (2019) 42(1) *Journal of Consumer Policy* 59, 60 (‘The Need for New Technologies’).

⁴⁵ Christopher Hodges and Stefaan Voet, *Delivering Collective Redress: New Technologies* (Hart, 2018) 9.

⁴⁶ See generally John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2001).

those who suffer harm should be compensated or 'made whole'. This does not, I submit, adequately account for the unique position of the regulator, straddling public and private law, which is tasked also with conserving the systemic integrity of markets and industries. Ultimately, this article will argue that this unique position requires a regulator compensatory priority to be justified according to its relative effectiveness at delivering redress and its impact on other regulatory goals.

Others such as William Allen and Neil Gunningham take a broader view, identifying the goals of regulation to be securing 'complex human welfare',⁴⁷ fulfilling 'social objectives' and instilling 'community confidence'.⁴⁸ But what do these concepts mean? No doubt each *includes* the interests of injured parties, but how important is this compared with other considerations like the need to ensure that the law is enforced? Any theory must acknowledge that these considerations can be in tension; Michael Legg and Joanna Bird point out that regulatory contraventions frequently place the 'private' interests of injured consumers in conflict with 'public' or systemic goals.⁴⁹ The critical question for present purposes, unanswered by the extant body of regulatory scholarship, is whether there is a clear principled reason to resolve the tension one way or the other. One possible method of doing so, exemplified by Commissioner Hayne and ASIC, is by reference to the expectations of the community. The next section interrogates the merit of relying on 'public expectations' as a guide to structuring regulatory priorities.

B '*Public Expectations*' and the '*Public Interest*'

This section raises two questions. First, how do we know what the community 'expects' its regulators to focus on or prioritise? Secondly, assuming we can reliably ascertain the public's expectations, is this the best guide to structuring a model of regulatory priorities?

⁴⁷ William T Allen, 'Commentary on the Limits of Compensation and Deterrence in Legal Remedies' (1997) 60(4) *Law and Contemporary Problems* 67, 75.

⁴⁸ Neil Gunningham, 'Enforcement and Compliance Strategies', in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press, 2010) ch 7, 120.

⁴⁹ Joanna Bird, 'ASIC's Role as Intervener: When Should the Regulator Intervene in Private Litigation?' (2010) 28(7) *Company and Securities Law Journal* 460, 460–1; Michael Legg, 'Public and Private Enforcement: ASIC and the Shareholder Class Action', in Michael Legg (ed), *Regulation, Litigation and Enforcement* (Thomson Reuters, 2011) 151, 155, 164.

1 *Ascertaining Public Expectations*

Part I of this article commenced with an excerpt from the Royal Commission Final Report, in which Commissioner Hayne stated that the community *expects* its regulators to recognise that holding wrongdoers to account is a discrete and indispensable function of their enforcement activity. For its part, ASIC describes it as a ‘community expectation’ that ‘unlawful conduct should be punished and publicly denounced through the courts’.⁵⁰

It may be that the regulator and the Commissioner are deploying the concept of ‘public expectations’ in a manner akin to the concept of ‘public confidence in the administration of justice’⁵¹ or the ‘reasonable person’. That is, the phrase is a juristic device, not an empirical claim about the desires or preferences of actual members of the community. Yet the question of prioritising the compensation of victims over the punishment of perpetrators is a real philosophical dilemma about which human intuitions are likely to differ. In theory, then, if it is possible to more precisely apprehend the *actual* expectations and preferences of the community, this would be a surer guide to structuring regulatory priorities. Indeed, in the criminal sentencing context, techniques such as surveys, focus groups and deliberative polls have been used to ascertain ‘community attitudes’ about the performance of sentencing judges, in recognition of the fact that ‘public opinion ... has a major impact on the state of public confidence in the criminal justice system’.⁵²

However, scientific research, while a fruitful avenue of inquiry here, has yielded results ultimately too contingent to provide a satisfactory answer. Social psychological studies show that most people prefer authorities to compensate victims rather than punish perpetrators,⁵³ but this result is reversed where the perpetrator accrued unjust gains⁵⁴ and where the conduct was technically ‘criminal’.⁵⁵ What is interesting about these results is the relationship between outcomes, behaviour and normative labels. Let us consider a hypothetical example. A financial adviser, in breach of their obligation to exercise proper care

⁵⁰ ASIC ‘Corporate Plan 2019–23’ (n 3) 7, 44.

⁵¹ See, eg, *R v Whyte* [2002] NSWCCA 343, [160].

⁵² New South Wales Parliament, ‘Public Opinion on Sentencing: Recent Research in Australia’ (e-brief 08/2014, June 2014) 1–2 <<https://www.parliament.nsw.gov.au/researchpapers/Documents/public-opinion-on-sentencing-recent-research-in-/public%20opinion%20on%20sentencing.pdf>>.

⁵³ Yingjie Liu et al, ‘Punish the Perpetrator or Compensate the Victim: Gain versus Loss Context Modulates Third Party Altruistic Behaviours’ (2017) 8 [issue?] *Frontiers in Psychology* 2066; Sebastian Lotz et al, ‘Punitive versus Compensatory Reactions to Injustice: Emotional Antecedents to Third-Party Interventions’ (2011) 47(2) *Journal of Experimental Social Psychology* 477, 480.

⁵⁴ Liu et al (n 53).

⁵⁵ Jan-Willem Van Prooijen, ‘Retributive versus Compensatory Justice: Observers’ Preference for Punishing in Response to Criminal Offences’ (2010) 40(1) *European Journal of Social Psychology* 72.

and skill, negligently advises their client to make an inappropriate and high-risk financial decision that culminated in loss to the client. Presented only with this information about the case, social psychological research suggests that most people would prefer the relevant authorities to focus their efforts on *compensating* the injured client. However, if informed that the financial adviser obtained a sizeable commission from the transaction, it is more likely that most people would prefer the authorities to ensure that the adviser was *stripped of his or her gains*. If informed, further, that the adviser's conduct was dishonest or deceptive in relation to their obtaining of the commission, such as would amount to an offence under s 192E(1)(b) of the *Crimes Act 1900* (NSW), the fact that the conduct can be labelled 'criminal' makes it more likely that most people would prefer the authorities to focus on *punishment*.

In other words, even where research can shed light on the actual content of public expectations about the actions of public enforcers, there are complex variables that hinder the reliability of this as a general guide to structuring regulatory priorities.

2 *The Public Interest: Democracy, Sociology*

For now, let us assume that 'public expectations' *could* be precisely ascertained through research, or reliably approximated as a kind of juristic device. It is an entirely separate question whether this is the most legitimate guide to determining the resource allocation and strategic priorities of regulators. It is not difficult to see why one might presume so: the regulator is a government entity; Australia's constitutional system establishes a line of accountability from the government to the Parliament and, ultimately, to the people, whose democratic will is supposed to be respected and given effect. As Commissioner Hayne put it, the community has expectations of '*its*' regulators⁵⁶ — in some basic sense, public enforcers *belong to* and are answerable to the public. But in a representative system such as ours, the agencies of state should not act according to perceived public opinion from time to time but rather according to what seems *to them* to be in the public interest. Sometimes, an unpopular course of action, contrary to the expectations of the general public, is nonetheless the right one.

So, is this concept of the 'public interest' any more helpful? In *Deloitte Touche Tohmatsu v ASIC*, Lindgren J held that when deciding whether to exercise its power under s 50 of the *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act'), a provision which allows the regulator to commence a civil suit on

⁵⁶ *Final Report* (n 1) vol 1, 3–4.

behalf of a private plaintiff, ASIC must not be guided solely by the interests of that plaintiff but rather the interests of the public.⁵⁷ Here, the 'public interest' is taken broadly to embrace the full gamut of other considerations of which the regulator may properly be mindful, for instance: whether the case gives rise to an important question of principle that has broader regulatory significance; the prospects of success in the matter and therefore ASIC's extent of financial exposure; or the need to promote public confidence in the financial system.

But what if the broader 'public interest' is actually best served where public authorities focus their resources on remedying private injury rather than imposing public censure? Sociological theories of law and punishment invite contemplation of this question. Contemporary economies are highly differentiated, with various organs such as consumers, manufacturers, marketers, advisers, financiers, insurers, brokers, and others operating in fields that are diverse but functionally interdependent. As the authors of the final report of the Ramsay Review point out, the contemporary financial system is a 'complex, adaptive network' in which the frequency of 'interactions' between participants 'inevitably increases the demand for dispute resolution'.⁵⁸ This reflects the Durkheimian sociological theory that modern, complex societies depend for their cohesive functioning mainly on 'restitutive' law aimed at repairing broken social relations rather than 'repressive' law aimed at sanctioning wrongdoers to reconfirm norms of conduct.⁵⁹ Braithwaite's advocacy of a restorative justice approach to corporate criminal conduct⁶⁰ clearly reflects this sociological perspective, which views the goal of regulatory enforcement as the prompt and satisfactory resolution of disputes so that the various 'organs' that comprise the economy can resume functional relations.

It can be taken as given that the modern financial system is a complex web of interactions which requires adequate remedial mechanisms. However, the classical sociological understanding of the primacy of 'restitutive' rather than 'repressive' law is riddled with difficulties⁶¹ and, in my view, cannot ultimately be sustained. A number of scholars have pointed to the historical inaccuracies of

⁵⁷ *Deloitte Touche Tohmatsu v ASIC* [1996] FCA 1370, [39]–[40]; see ASIC, 'Private Court Proceedings' (n 13) 1–3; see generally ASIC, 'Approach to Enforcement' (n 13).

⁵⁸ Commonwealth, *Review of the Financial System External Dispute Resolution and Complaints Framework* (Final Report, April 2017) 7, 19–20.

⁵⁹ Emile Durkheim, *The Division of Labor in Society* (Macmillan, 1933) 174.

⁶⁰ See generally John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2001).

⁶¹ Steven Lukes, *Emile Durkheim: His Life and Work — A Historical and Critical Study* (Peregrine, 1975) 160.

Durkheim's theory of the development of law and its supposed connection with the increasing complexity and differentiation of the social and economic system.⁶² I consider there to be at least two other major reasons why the theory underestimates the importance of punitive law in the contemporary economy: first, because there has been a general expansion of criminal law, including into areas that could also be (and in many cases once were) dealt with by civil law; and, secondly, because even restitutive or remedial law, when brought about by the intervention of public enforcers, is, in the final analysis, punitive in nature.

Expansion of the criminal law into ever new domains is a widely noted phenomenon.⁶³ It is true that many new offences are of what might be described as a bureaucratic or administrative type,⁶⁴ yet crimes have emerged in areas where, on a Durkheimian interpretation, they never should have, such as offences associated with the mismanagement of private companies, punishable by imprisonment.⁶⁵ ALRC research furnishes stark evidence of this phenomenon: 2,898 criminal offences are potentially applicable to corporations, including among them 'the failure to place an ACN on certain company documents' and the 'failure to notify ASIC of a change in company office hours'.⁶⁶ In addition to this numerical expansion, and despite Durkheim's claim in his 'Two Laws of Penal Evolution',⁶⁷ research from Spitzer demonstrates that the *severity* of punishment has actually increased rather than decreased as societies and economies have become more differentiated and complex.⁶⁸ Indeed, in some areas of its regulatory responsibility, ASIC's preference has been for the more severe enforcement option where a less severe one is available, for example with insider trading, a form of market misconduct which *can* be dealt with civilly by ASIC but almost always is prosecuted criminally for the express purpose of 'sending a message' that the conduct is wrong.⁶⁹ Similarly, public sentiments in the

⁶² See, eg, Leon Shaskolsky Sheleff, 'From Restitutive Law to Repressive Law: Durkheim's *The Division of Labor in Society* Revisited' (1975) 16(1) *European Journal of Sociology* 16; Steven Lukes and Andrew Scull (eds), *Durkheim and the Law* (Martin Robertson, 1983) 10.

⁶³ Lukes and Scull (n 62) 14.

⁶⁴ In 'Two Laws of Penal Evolution', Durkheim discussed the difference between usual criminal law and more mundane offences such as fishing or hunting in the closed season: Emile Durkheim, 'Two Laws of Penal Evolution' (1901) 4 *Année Sociologique* 65, 65–9, quoted in Roger Cotterell, *Emile Durkheim: Law in a Moral Domain* (Edinburgh University Press, 1999) 69.

⁶⁵ Eg, *Corporations Act 2001* (Cth) s 184.

⁶⁶ ALRC, 'Corporate Criminal Responsibility' (n 28) [3.10]–[3.11].

⁶⁷ Durkheim (n 64).

⁶⁸ Steven Spitzer, 'Punishment and Social Organization: A Study of Durkheim's Theory of Penal Evolution' (1975) 9(4) *Law and Society Review* 613, 631; see also Lukes and Scull (n 62) 14–15.

⁶⁹ Ian Ramsay and Miranda Webster, 'ASIC Enforcement Outcomes: Trends and Analysis' (2017) 35(5) *Companies & Securities Law Journal* 289, 303–7.

contemporary economy are often marked by the *desire for punitive treatment* of conduct that could be dealt with in a compensatory and restitutive way, for instance the strong demand by some in the community to imprison bankers whose misconduct was exposed by the Royal Commission.⁷⁰ These trends are radically different from what Durkheim predicted and suggest a greater importance of the desire to punish in complex and differentiated economies.

Secondly, scholars have pointed out Durkheim's under-emphasis of the way repressive sanctions ultimately support the obligatory character of restitutive remedies.⁷¹ Durkheim was critical of Spencer's apparent belief that the pursuit of individual self-interest in complex societies would coordinate automatically such that defective relations between people would self-correct, believing instead that for a 'stable social order' it was necessary that 'self-interested action' be united with 'dutiful action'.⁷² Although Durkheim did point out that the two types of law — 'restitutive' and 'repressive' — could be blended, he maintained that when the state steps in to enforce a contract (for example) it is acting as the 'essential cog in the machine' for the restitutive process, not as a repressive agent.⁷³ That is, Durkheim would probably view such crimes as contempt of court or perjury as restitutive adjuncts: they are there to support the goal of repairing broken social relations, not to *punish* in order to reaffirm collective moral norms. Like Schluchter, I do not find this persuasive;⁷⁴ the obligation to obey the rulings of relevant authorities has a *moral* valence, albeit a different one to the obligation not to murder or not to steal. This is the *sine qua non* of judicial authority. Recognition of this fact can be seen to underpin Commissioner Hayne's view, quoted in Part II of this article, that the promotion of respect for and observance of the law, through its enforcement, is and ought to be a salient concern for a conduct regulator.⁷⁵

C Conclusion

Nevertheless, it seems to me that an analysis of the sociological theory of law and its enforcement — as with an analysis of regulatory scholarship and the insights from social psychology — allows us only to conclude that *both* remedial and punitive outcomes are important regulatory goals; these theories do not on their

⁷⁰ See Rick Sarre, 'Yes, We Can Put Bank Bosses in Jail, but is that the Best Way to Hold Them to Account?' *The Conversation* (online, 13 February 2019) <<http://theconversation.com/yes-we-can-put-bank-bosses-in-jail-but-is-that-the-best-way-to-hold-them-to-account-111507>>.

⁷¹ See a review of the literature by Lukes and Scull (n 62) 13.

⁷² Wolfgang Schluchter, 'The Sociology of Law as an Empirical Theory of Validity' (2002) 2(3) *Journal of Classical Sociology* 257, 262.

⁷³ Emile Durkheim, *The Division of Labor in Society* (New York, trans G Simpson, 1933) 127–9.

⁷⁴ Schluchter (n 72) 262.

⁷⁵ *Final Report* (n 1) vol 1, 432–3.

own supply a sufficient reason, in point of principle, for the regulator to focus its resources on one or the other where the aims conflict. One standard that is often touted as the basis for such a principle — the ‘expectations’ of the public — is, when analysed, ultimately unreliable. The notion of the ‘public interest’ seems more apposite; however, while this concept suggests a range of considerations including, but not limited to, the interests of injured parties, it does not provide a useful guide to a general structuring of the priorities of regulatory enforcement. In my view, then, the question posed by this article must be answered by reference to practical and operational considerations, namely, whether regulatory mechanisms are comparably effective at delivering compensation, and whether the adoption of a compensatory priority would have an adverse impact on the fulfilment of other regulatory goals. These issues are discussed in Parts IV and V below.

IV ‘REGULATORY REDRESS’ AND ITS RELATIVE EFFECTIVENESS

It is appropriate and desirable that the regulator consider the availability and efficacy of non-regulatory mechanisms for injured parties to obtain redress when determining its response to a particular contravention or class of contravention. Correspondingly, if the powers and functions of a regulator are less effective than those other mechanisms at delivering redress, this provides a strong reason against a regulator compensatory priority. This Part outlines ‘regulatory redress’ and then compares it with private litigation, ADR and EDR, against the criteria of access, cost, duration and quality of outcome, and finds that, in general, regulatory redress is among the most effective.

A *Regulatory Redress*

Regulatory redress has been defined generally as ‘redress *ordered or brought about* by the intervention of public enforcers’.⁷⁶ ASIC has a number of mechanisms available to it that satisfy this definition. First, it can commence proceedings under s 50 of the *ASIC Act* to recover compensation ‘in the name of, or on behalf of, another person’, providing the proceedings arise out of a formal investigation or examination and ASIC considers them to be in the broader public interest.⁷⁷ ASIC is unlikely to commence a s 50 action if other redress mechanisms are

⁷⁶ Hodges and Voet (n 45) 2 (emphasis added).

⁷⁷ Bird (n 49) 462; ASIC, ‘Private Court Proceedings’ (n 13) 5.

available;⁷⁸ importantly, Joanna Bird notes that even the impecunious plaintiff may have recourse to legal aid, litigation funding, EDR or ADR.⁷⁹ Secondly, under s 1330 of the *Corporations Act 2001* (Cth) ('Corporations Act') ASIC has a right to intervene in proceedings relating to a matter arising under that Act, which allows ASIC to bring its resources and the evidentiary fruits of its investigations to assist private plaintiffs. This power, too, is reserved for cases where the cost to ASIC is justified because of the matter's broader regulatory significance.⁸⁰ Thirdly, when taking civil penalty proceedings, ASIC can seek a compensation order under s 1317H of the *Corporations Act*. Waye and Morabito observe that, consistently with the escalatory logic of responsive regulation, these three mechanisms are reserved for 'more egregious' or 'widespread' cases of breach.⁸¹ Fourthly, ASIC can seek that compensation arrangements are made a term of an enforceable undertaking, as in the case of Multiplex Ltd referred to in Part II(B) of this article.⁸² Lastly, ASIC can take informal action, as it did by participating as a non-party in the mediation that led to \$253 million of compensation for creditors of Opes Prime Group Ltd.⁸³ Not included in this list is ASIC's approval of EDR schemes for financial services licensees,⁸⁴ because it is such schemes themselves — of which the largest and most important is the Australian Financial Complaints Authority ('AFCA'), the successor to the Financial Ombudsman Service ('FOS')⁸⁵ — that determine and administer entitlements to compensation.

Notably, ASIC does not yet have the power to *order* that compensation be paid or a compensation scheme be established. In Part II(B), above, I outlined the history and current status of this 'redress power', which both the Enforcement Review Taskforce and the ALRC recommended that ASIC receive,⁸⁶ modelled on that available to the United Kingdom FCA. As discussed in Part II(B), ASIC has confirmed that this power remains on the legislative agenda as part of its broader

⁷⁸ ASIC, 'Private Court Proceedings' (n 13) 5–6.

⁷⁹ Bird (n 49) 464.

⁸⁰ ASIC, 'Private Court Proceedings' (n 13) 3.

⁸¹ Vicki Waye and Vince Morabito, 'Collective Forms of Consumer Redress: Financial Ombudsman Service Case Study' (2012) 12(1) *Journal of Corporate Law Studies* 1, 8–9.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ See ASIC, 'Private Court Proceedings' (n 13) 1.

⁸⁵ Waye and Morabito (n 81) 5–6; AFCA is also the successor to the Superannuation Complaints Tribunal and the Credit and Investments Ombudsman.

⁸⁶ Australian Law Reform Commission, *Integrity, Fairness and Efficiency: An Inquiry into Class Action Proceedings and Third Party Litigation Funders* (Report No 134, 2018) 235–55 [8.1]–[8.76] ('Class Action Proceedings'); James Eysers, 'ASIC Seeks New Power to Force Bank Compensation', *Australian Financial Review* (online), 17 April 2018 <<https://www.afr.com/news/asic-seeks-new-power-to-force-bank-compensation-20180417-hoyvkc>>.

capability upgrade; as such, the following analysis includes such a power in the phrase 'regulatory redress', along with ASIC's existing mechanisms.

B A Note on Internal Dispute Resolution

One mechanism that this Part does not deal with is Internal Dispute Resolution ('IDR'), the direct negotiation of a remedial outcome between an injured party and the entity responsible. There is one major reason for this exclusion: there is a marked lack of data on IDR processes, both generally and in relation to specific industries and specific regulated entities.⁸⁷ This is despite the fact that Australian Financial Services Licence ('AFSL') holders are obliged to maintain adequate IDR procedures.⁸⁸ ASIC has attempted to compensate for the lack of a statutorily mandated reporting requirement by issuing regulatory guidance that confirms its expectation that adequate records will be kept of internal dispute and complaints handling, and that these will remain available for ASIC's inspection if required.⁸⁹ Notwithstanding this guidance, it remains — as noted by the authors of the final report of the Ramsay Review — simply too difficult to assess IDR against other compensation mechanisms given the lack of transparency.⁹⁰ This is unfortunate because IDR is usually the first process available to an injured party and performs a crucial 'stepping stone' or gateway function to other dispute resolution mechanisms; if IDR is functioning properly, it can relieve pressure on EDR, ADR and court-based processes.⁹¹ The only point to make for present purposes is that with the enactment of ASIC's contemplated 'redress power', it may be that the regulator's supervisory function with respect to IDR is enhanced, leading to better outcomes and also better transparency.

C Criteria for Evaluation

There are four criteria that this article will use to compare regulatory redress with the mechanisms of private litigation, ADR and EDR schemes: access, cost,

⁸⁷ Commonwealth, *Review of the Financial System External Dispute Resolution and Complaints Framework* (n 58) 186.

⁸⁸ Ibid.

⁸⁹ ASIC, 'Regulatory Guide 165: Licensing: Internal and External Dispute Resolution' (May 2018), 33 (RG165.128), 47 (Guiding Principle 4.9).

⁹⁰ Commonwealth, *Review of the Financial System External Dispute Resolution and Complaints Framework* (n 58) 186.

⁹¹ Ibid 189.

duration and outcomes.⁹² In general, regulatory redress can be considered the most effective mechanism, or at least equally effective to appropriately designed EDR and ADR schemes.

1 Access

Any compensatory mechanism must be accessible to be effective. Of particular relevance in the context of financial services and markets is the ability to facilitate the participation of individuals in mass claims. Hodges and Voet demonstrate that the 'outstanding feature' of the regulatory redress mechanism is 'the ability to achieve a generic solution for all those affected ... on an opt-out basis'.⁹³ By contrast, EDR schemes such as the AFCA usually resolve claims individually, which must be initiated by the affected consumers themselves; however, I would contend that as they are typically low-cost, their opt-in nature is only a minor barrier to access.⁹⁴ Formerly, an issue with the accessibility of FOS was that the monetary limits prescribed by statute were outdated and too small — as the authors of the final report of the Ramsay Review pointed out, a \$500,000 limit was inappropriate given the typical value of retail financial products such as home loans.⁹⁵ This difficulty has been somewhat ameliorated with the AFCA receiving jurisdiction for disputes up to \$1 million.⁹⁶

In response to Hodges and Voet's analysis that mass, opt-out participation is the outstanding feature of regulatory redress, it could be argued that class actions are, at least in Australia, usually conducted on an opt-out basis and resourced by litigation funders rather than the plaintiffs themselves. However, a significant limitation to accessibility is that only those matters that are commercially viable are likely to be funded. This problem is made particularly acute by emphasis in the Federal Court of Australia that settlements in class actions must genuinely be in the interests of group members and not simply commercially acceptable from the funders' point of view.⁹⁷ A recent decision by the High Court of Australia in *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* ('Lenthall') appeared to confine the number of matters that

⁹² See, eg, ALRC, *Class Action Proceedings* (n 86) 246–7 [8.45]–[8.47]; Hodges and Voet (n 45) 5–6.

⁹³ Hodges and Voet (n 45) 291.

⁹⁴ See Waye and Morabito (n 81) 5–6.

⁹⁵ Commonwealth, *Review of the Financial System External Dispute Resolution and Complaints Framework* (n 58) 151.

⁹⁶ AFCA, 'AFCA at a Glance' (Factsheet, 24 October 2018) <file:///Users/amelialoughland/Downloads/Factsheet%20-%20AFCA%20at%20a%20glance.pdf>.

⁹⁷ See, eg, Murphy J's rejection of a proposed settlement order in *Kelly v Willmott Forests Ltd (in liq)* (No 4) [2016] FCA 323, [78]–[109].

funders are likely to view as commercially viable by finding that the Federal Court lacked statutory power to make a 'common fund order'.⁹⁸ A common fund order is a mechanism designed to deal with the problem of group members who do not opt out of the proceedings but also do not sign a litigation-funding agreement — in effect, absent a common-fund order, such plaintiffs would be entitled to their share of the benefit of a successful outcome without bearing a corresponding responsibility for costs.⁹⁹ Not to be deterred, however, a decision of Lee J upon the remittal of *Lenthall* to the Federal Court has paved the way for a new and conceptually similar device of 'expense sharing orders' to meet this problem.¹⁰⁰ For now, it seems, funders remain able to distribute costs among unfunded plaintiffs, avoiding a contraction in the number of class actions and, therefore, a reduction in the accessibility of class actions as a compensatory mechanism in the financial services context.

There is another important caveat, or rather set of caveats, to Hodges and Voet's view of regulatory redress as the most accessible mechanism, although in ASIC's case these caveats do not disturb the strength of that view. These are the widely noted problems with state-regulator enforcement, most importantly: detection, industry capture, and deficient or perverse enforcement incentives.

(a) *Detection*

As is obvious, 'uncovering undesirable behaviour is a first step in regulatory enforcement';¹⁰¹ however, the challenges regulators face in detection can be 'severe'.¹⁰² The need for evidence to emerge and come to the regulator's attention 'impedes precautionary enforcement'.¹⁰³ In addition, the more complex the regulatory scheme or regulated activity, the more difficult it will be to discern 'levels and patterns of compliance'.¹⁰⁴ There is an information asymmetry between regulator and regulatee that can never fully be overcome. However, in the context of ASIC's remit the detection problem is mitigated by at least two safeguards, one legal and the other practical. First, there is the breach-reporting

⁹⁸ [2019] HCA 45.

⁹⁹ See Vicky Wayne and Vince Morabito, 'When Pragmatism Leads to Unintended Consequences: A Critique of Australia's Unique Closed Class Regime' (2018) 19(1) *Theoretical Inquiries in Law* 303, 305.

¹⁰⁰ *Lenthall v Westpac Banking Corporation* [No 2] [2020] FCA 423.

¹⁰¹ Robert Baldwin and Julia Black, 'Really Responsive Regulation' (2008) 71(1) *Modern Law Review* 59, 77.

¹⁰² *Ibid.*

¹⁰³ *Ibid* 80.

¹⁰⁴ *Ibid.*

regime for holders of an Australian Financial Services Licence ('AFSL').¹⁰⁵ The obligation on entities to detect and report their own breaches is onerous and taken very seriously by both the regulator and Parliament, which is currently considering a bill that would expand markedly the scope of the regime and the consequences of non-compliance with it.¹⁰⁶ Secondly, there is the fact that loss-causing contraventions are frequently sizeable, widespread and increasingly likely to be publicised following the spotlight of the Royal Commission. If there are parties aggrieved by corporate misconduct or contravention of the financial services laws, ASIC is likely to hear about it.

(b) *Capture*

Scholarly writing on this issue has evolved over time. Traditional 'capture theory' held that 'repeated contact with representatives of a single industry, intensely interested in regulatory policy and appointments, would gradually draw regulatory officials toward an "industry orientation", in which their view of the public interest coincided with that of the dominant firms in the regulated industry'.¹⁰⁷ This is unlikely now to be accepted as a universal proposition, although industry influence remains an important variable on regulatory approach;¹⁰⁸ indeed, research by Hutter into the causes of diversity in enforcement style within and between agencies concluded that the most important factor is the 'relationship between enforcement official and the regulated'.¹⁰⁹ Hutter suggests that in the regulatory sphere, Black's 'relational distance' hypothesis has much explanatory force: officials who are less 'acquainted with those they regulate' have less 'fear' of the 'negative consequences of legal action, and are likely to adopt a cynical and less charitable view of the regulated'.¹¹⁰ ASIC's updated enforcement model reflects a heightened sensitivity to any perception that it is 'too cosy' with the entities it regulates, as this was a point examined by the Royal Commission that was eagerly seized upon

¹⁰⁵ Sourced principally in the obligation imposed by s 912D of the *Corporations Act 2001* (Cth).

¹⁰⁶ See the Exposure Draft of the Financial Sector Reform (Hayne Royal Commission Response — Protecting Consumers (2020 Measures)) Bill 2020 <<https://treasury.gov.au/sites/default/files/2020-01/c2020-48919b-exposure-draft.pdf>>.

¹⁰⁷ Kagan (n 33) 106–7, citing Marver Bernstein, *Regulating Business by Independent Commission* (Princeton University Press, 1955) and David Truman, *The Governmental Process* (Alfred Knopf, 1953).

¹⁰⁸ Kagan (n 33) 107.

¹⁰⁹ Hutter (n 41) 171.

¹¹⁰ *Ibid* 169.

by the media.¹¹¹ That perception is a non-trivial problem for the agency's reputation, which, if left unchecked, would have adverse consequences for its relationship with government and its broader efficacy as a regulatory enforcer. While I think the allied but lesser risk of inconsistent treatment¹¹² continues to be material in ASIC's case given the diversity in entity size and industries that it regulates, the general problem of industry capture is in my view a subsiding one.

(c) *Incentives*

Regulation has been described as an essentially 'political process'.¹¹³ The phenomenon of 'retreatism'¹¹⁴ — that is, a regulator's focus on easy targets to appear effective while avoiding more difficult challenges — is usually a result of deficient or perverse incentives: 'deficient' where government or the public fail to adequately measure the regulator's performance on the most consequential problems and entities within its remit; and 'perverse' where budgetary or political pressure positively tends against a regulator's focus on those problems or entities. This issue, too, is on the ebb in ASIC's case, for two main reasons. First, industry funding arrangements have been in place since 2017 under the *ASIC Supervisory Cost Recovery Levy Regulations 2017* (Cth). The purpose of this scheme is to allow ASIC to recover most of its enforcement costs from regulated entities directly, rather than being totally reliant on government decisions as to funding.¹¹⁵ Two of the factors that govern the payable levy for an entity are its size and the quantum of regulatory costs spent by ASIC in the entity's particular industry.¹¹⁶ This alleviates the financial disincentive that, under a solely government funding model, would discourage the regulator from taking on the most 'difficult targets' within its remit — that is, those entities with the most resources to resist and contest enforcement actions. Secondly, the political and public scrutiny brought to bear on the agency in recent years was particularly focused on its treatment of large financial institutions, the most systemically

¹¹¹ See, eg, Chris Pash, 'Australia's Corporate Cop Just Got Grilled on its "Cosy" Relationship with the Banks', *Business Insider* (online) 23 November 2018 <<https://www.businessinsider.com.au/australias-corporate-regulator-just-got-grilled-on-its-cosy-relationship-with-the-banks-2018-11>>; Patrick Durkin, 'Banking Royal Commission: ASIC's Role "Unacceptable"', *Australian Financial Review* (online, 28 September 2018) <<https://www.afr.com/companies/financial-services/banking-royal-commission-interim-report-asics-role-unacceptable-20180928-h15zzl>>; Killian Plastow, 'ASIC, the Mega-Regulator Failing to Keep Our Banks Honest', *The New Daily* (online, 2 October 2018) <<https://thenewdaily.com.au/finance/finance-news/2018/10/02/asic-failing-to-regulate-banks/>>.

¹¹² Kagan (n 33) 91.

¹¹³ Ibid 105.

¹¹⁴ Ibid 93.

¹¹⁵ ASIC, 'Regulatory Costs and Levies' <<https://asic.gov.au/about-asic/what-we-do/how-we-operate/asic-industry-funding/regulatory-costs-and-levies/>>.

¹¹⁶ See generally sub-div 2.2 of the *ASIC Supervisory Cost Recovery Levy Regulations 2017* (Cth).

consequential entities that it regulates. ASIC's desire to remedy the negative perceptions of its performance in the community and among government is a powerful positive incentive against retreatism.

In any event, these problems of detection, capture and incentives apply equally to a regulator's pursuit of sanctions. They do not, on their own, tend to support either conclusion on the issue the subject of this article: how conflicting regulatory aims ought to be prioritised. Nonetheless, these problems should be taken into account when comparing regulatory redress with other mechanisms against the criterion of *access* because they affect the availability of regulatory mechanisms for injured private parties. For the reasons discussed above, however, they do not disturb my view that Hodges and Voet are basically right to identify regulatory redress — at least where this includes the power to make compensatory orders — as more reliably accessible than non-regulatory mechanisms.

2 *Cost and Duration*

As a general rule, the most resource-efficient mechanisms will be those that avoid litigation and for which the cost is borne by the wrongdoer or the regulated community rather than the state or injured parties. That is, both the quantum of costs and the entities responsible for bearing them are important. Private and regulator-initiated proceedings alike are highly resource-intensive. On the other hand, EDR schemes such as the AFCA and its predecessor, FOS, are usually funded by levies and case fees imposed on members.¹¹⁷ The ALRC and scholars have identified the cost-efficient manner in which such schemes tend to deliver their services as a key advantage of them.¹¹⁸ Michael Legg, in a detailed case study, has also drawn attention to ad-hoc ADR schemes such as that established by the Commonwealth Bank of Australia ('CBA') to meet claims by clients of Storm Financial Ltd and concluded that these offered a similarly cost-effective mechanism to FOS when compared with private suit and regulatory proceedings.¹¹⁹ Of course, the quicker that claims are able to be resolved, the lower the costs, but speedy compensation is intrinsically worthy. In Legg's case study, the cheaper ADR and FOS mechanisms were also markedly quicker.¹²⁰

¹¹⁷ Financial Ombudsman Service Australia, 'What We Do' <<https://www.fos.org.au/about-us/what-we-do/>>.

¹¹⁸ ALRC, *Class Action Proceedings* (n 86) 238 [8.13]; Waye and Morabito (n 81) 5–6; see also Legg, 'Compensating Financial Consumers' (n 32) 338.

¹¹⁹ Legg, 'Compensating Financial Consumer's' (n 32) 338.

¹²⁰ Ibid.

Hodges acknowledges the cost-efficiency of such schemes but argues that regulatory redress powers of the sort possessed by the FCA and contemplated for ASIC are equally cost-effective, and for the same reasons: avoidance of litigation and timeliness.¹²¹ I hasten to point out, though, that the cost of exercising regulatory redress powers may not be recoverable, or not entirely recoverable, from wrongdoers or the regulated community; there is always the risk that some cost, including opportunity cost, is borne ultimately by the regulator and therefore the state. Nevertheless, it can be accepted that a well-structured suite of regulatory redress powers can be similarly cost-effective to EDR and ADR schemes, and certainly more cost-effective than court proceedings.

3 Outcomes

The quality of compensation, meaning the amount recovered as a percentage of the loss sustained, is vitally important. Private litigation may seem intuitively attractive because there is no ceiling on the damages payable;¹²² however, there are significant burdens on plaintiff recovery. In the case of class actions, 'intermediaries' rents¹²³ or 'agency costs'¹²⁴ — namely, lawyers' fees and funders' commissions — impose a sizeable tariff on the amount ultimately received by group members. Individual proceedings, too, involve significant costs that, even if mostly recovered from the defendant, can diminish the funds available for compensation.¹²⁵ The Storm Financial case study examined by Legg reflects these limitations; there, the class action commenced against the CBA achieved a recovery rate no better, and for some plaintiffs worse, than that achieved by participants in the CBA's ad-hoc ADR scheme.¹²⁶ On the other hand, Legg notes that a contested court battle may be systemically advantageous in establishing a precedent for determining liability or assessing quantum.¹²⁷ Though important, this consideration should in my view be secondary to recovery rate in measuring compensation outcomes.

Regulatory proceedings such as an ASIC s 50 action are more attractive from the injured parties' point of view because the costs are borne by the state and, if

¹²¹ See generally Hodges, 'Mass Collective Redress' (n 44).

¹²² Legg (n 49) 162–3.

¹²³ Hodges, 'The Need for New Technologies' (n 44) 60.

¹²⁴ Amanda Rose, 'Reforming Securities Litigation Reform: Restructuring the Relationship between Public and Private Enforcement of Rule 10b-5' (2008) 108(6) *Columbia Law Review* 1301, 1317.

¹²⁵ See Legg (n 32) 334.

¹²⁶ Ibid 334–5.

¹²⁷ Ibid 337.

the action is successful, ultimately by the wrongdoer.¹²⁸ But they remain costly and carry the risk of an adverse outcome. In contrast, non-litigious regulatory redress powers avoid these problems. In his cross-industry analysis of the use of such powers in Denmark and the United Kingdom, Christopher Hodges concludes that they offer superior, even ‘full’, recovery, ‘often in small individual amounts’, and are therefore the optimal mechanism.¹²⁹ It is not apparent to me from Hodges’ analysis exactly *why* regulatory powers to order redress are superior to EDR and ADR schemes, which Legg’s study of Storm Financial showed can be impressively effective where appropriately designed. It seems that, for Hodges, the ultimate benefit of regulatory redress lies in its capacity to dovetail with other enforcement goals such as compliance and to affect future behaviour, rather than its pure potential to deliver compensation.¹³⁰ As such, I am prepared only to conclude that a suite of regulatory redress powers that includes orders for compensation delivers possibly better, but at least equally effective, compensation to other well-designed non-litigious dispute resolution mechanisms.

V FULFILLMENT OF OTHER REGULATORY OBJECTIVES

This Part argues that prioritising the delivery of compensation over sanctioning of wrongdoers would have an adverse impact on the fulfilment of other regulatory objectives. The primary aim in sanctioning contraveners is to achieve deterrence, but there are also other strategic and systemic goals — such as improving compliance through education, persuasion and policy guidance — which the pursuit of sanctions may aid in fulfilling. This Part first considers what is meant by deterrence and whether it is a realistic goal. Secondly, it predicts how ASIC’s approach to enforcement would change if it adopted a compensatory priority, before moving to consider the effect of this on achieving deterrence and other regulatory objectives.

I discuss these issues within the context of ‘responsive regulation’, the framework developed by Ian Ayres and John Braithwaite.¹³¹ This model is based on an escalatory logic: as the regulator confronts contraventions of increasing seriousness, it is able to deploy enforcement tools of correspondingly greater

¹²⁸ See Bird (n 49) 463.

¹²⁹ Hodges, ‘Mass Collective Redress’ (n 44) 836, 860, 871.

¹³⁰ See *ibid.*

¹³¹ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

severity. As Commissioner Hayne put it in the Interim Report, this framework 'reflects two very practical observations: not all contraventions of law are of equal significance; and regulators do not have unlimited time or resources'.¹³² This Part takes the position that because ASIC's approach operationalises the concept of responsive regulation, the merits of any shift in its priorities must be evaluated within the same framework, by considering how the regulator's choice of enforcement tools, and pursuit of its broader strategic goals, would likely be affected.

A *Achieving Deterrence*

There is scholarly disagreement about whether deterrence is a realistic regulatory goal. Deterrence is premised on the assumed preference of regulated entities, acting rationally, to avoid incurring a sanction that is more costly than a contravention of the law would be rewarding.¹³³ Gunningham notes that although this is a central notion in the framework of responsive regulation as developed by Ayres and Braithwaite, the relationship between deterrence and the behaviour of regulated entities is not straightforward and likely varies across classes of contravention, types of enterprise, and other factors.¹³⁴ Some scholars go further. For example, Hodges and Voet contend that the concept itself is 'unreliable' and has been 'demolished' by behavioural psychology, which highlights the irrational, context-driven, subconscious and culturally bound influences on human decision-making.¹³⁵ Other scholars nevertheless remain proponents of the rational cost-calculation theory of deterrence. Popper describes the view that pure economic incentives do *not* reliably modify behaviour as tantamount to assuming 'some level of widespread masochism at the individual and corporate level — and that is nonsensical'.¹³⁶ Similarly, Minzner contends that regulatory enforcement is at its most effective and justifiable when sanctions are in pursuit

¹³² Interim Report (n 5) vol 1, 433.

¹³³ International Organization of Securities Commissions ('IOSCO'), 'Credible Deterrence in the Enforcement of Securities Regulation' (June 2015) 6–8.

¹³⁴ Gunningham (n 48) 122–3.

¹³⁵ Hodges and Voet (n 45) 276–8; see also Christopher Hodges, *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance and Ethics* (Hart, 2015) 18–25.

¹³⁶ Andrew F Popper, 'In Defense of Deterrence' (2012) 75(1) *Albany Law Review* 181, 188.

of deterrence.¹³⁷ Coffee, too, perceives a direct link between the size of a sanction and its impact on an entity's future behaviour.¹³⁸

My own view is a *via media* between these two strands of thinking. In contrast to Hodges and Voet, it seems to me that accepting the lessons from behavioural economics is not incompatible with a view that rational cost-calculation shapes conduct.¹³⁹ Behavioural psychology simply reminds us to *also* consider the impact of institutional, cultural, social and other factors. In this respect, Parker and Nielsen's concept of 'extended deterrence', which draws attention to these broader phenomena, has much to commend it.¹⁴⁰ There are some similarities between 'extended deterrence' and Baldwin and Black's intriguing concept of 'really responsive regulation', both in theoretical substance and intent.¹⁴¹ Baldwin and Black augment Ayres and Braithwaite's framework by contending that in order to be 'really' responsive to the behaviour of regulated entities, the enforcer must consider: the firm's cognitive or 'attitudinal' setting; the broader institutional environment of the regulatory regime; the different logics that underpin particular regulatory tools and strategies; the performance and efficacy of the regulatory regime itself; and changes in each of those elements.¹⁴² Enlightened by these more developed and inclusive theories, 'achieving deterrence' is a finely calibrated mission, not a blunt and universal assumption. Moreover, while I accept that deterrence, especially general deterrence, is difficult to measure, there is no need to suppose that it is 'theoretically perfect'¹⁴³ — it is reasonable to perceive that an enforcement action has helped deter wrongdoing even if one can't discern *precisely* how much. And if that is true, it remains a valid regulatory objective. I also do not see any reason in principle why delivering compensation is a *more* valid goal simply because it is easier to measure in an ex-post fashion by calculating an injured party's recovery percentage. If deterrence works, then it follows that sanctions can yield fewer regulatory contraventions and therefore less harm that needs compensating. As such, this

¹³⁷ Max Minzner, 'Why Agencies Punish' (2012) 53(3) *William & Mary Law Review* 853.

¹³⁸ John C Coffee, "'No Soul to Damn, No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79(3) *Michigan Law Review* 386, 435.

¹³⁹ See generally Richard Thaler and Cass Sunstein, *Nudge: Improving Decisions about Health, Wealth and Happiness* (Yale University Press, 2008); see also Daniel Kahnemann, *Thinking Fast and Slow* (Farrar, Straus and Giroux, 2011).

¹⁴⁰ Christine Parker and Vibeke Lehmann Nielsen, 'How Much Does It Hurt? How Australian Businesses Think About the Costs and Gains of Compliance and Noncompliance with the *Trade Practices Act*' (2008) 32(2) *Melbourne University Law Review* 554, 563.

¹⁴¹ Baldwin and Black (n 101) 61 (emphasis in original).

¹⁴² *Ibid.*

¹⁴³ Hodges and Voet (n 45) 278.

Part takes the view that if a compensatory priority unduly impedes the regulator's capacity to deter wrongdoers, it should not be adopted.

B *ASIC's Approach to Enforcement*

Part II above demonstrated that ASIC's current approach to enforcement does not prioritise the recovery of compensation.¹⁴⁴ It is therefore worth considering how ASIC's choice of enforcement tools would be likely to change if this prioritisation were adopted. There are three points to make here.

First, ASIC's preference would be to deliver compensation without litigating. Once possessed of its new 'redress power', in turn allowing more practical involvement in both IDR and EDR processes, the need to pursue court-based remedies to ensure the return of compensation would diminish.¹⁴⁵ Moreover, ASIC would likely accept an enforceable undertaking that, as with the Multiplex case discussed in Part II, included a compensation scheme. Obviously, this enforcement approach would be inconsistent with the 'why not litigate?' mantra that ASIC 'now accepts must' be adopted.¹⁴⁶

Secondly, where it did litigate, ASIC would prefer action against corporate entities rather than individuals, and would prefer civil proceedings to civil penalty or criminal proceedings. The first of these preferences is based on the simple fact that, as Clough and Mulhern point out, corporate offenders 'are often better placed than individuals to "make amends"'.¹⁴⁷ As for the type of proceedings, criminal prosecution involves greater substantive and procedural hurdles without any corresponding increase in the extent of redress for injured parties; equally, a civil penalty action invokes the *Briginshaw* gloss on the civil standard of proof, requiring the more demanding 'reasonable satisfaction' of the fact-finder.¹⁴⁸ In addition, a recent amendment to the *ASIC Act* requires a court, in assessing a civil penalty, to consider its impact on the entity's ability to pay compensation, providing a further reason for ASIC to avoid civil penalty proceedings if its primary goal was the delivery of redress.¹⁴⁹

¹⁴⁴ See ASIC, 'Approach to Enforcement' (n 13); ASIC, 'Private Court Proceedings' (n 13); ASIC, 'Corporate Plan 2018–22' (n 21) 10.

¹⁴⁵ ASIC, 'Corporate Plan 2018–22' (n 21) 12–13.

¹⁴⁶ *Final Report* (n 1) vol 1, 427.

¹⁴⁷ Clough and Mulhern (n 31) 215.

¹⁴⁸ *ASIC v Vines* [2005] NSWSC 738, [1104]–[1105] (Austin J).

¹⁴⁹ *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth) sch 2, pt 1 (amendment to *ASIC Act* s 12GCA).

Lastly, it should not be assumed that ASIC's approach to enforcement would change in the same way across each area of its regulatory responsibility. For example, ASIC may retain its clear preference for criminally prosecuting individuals in cases of insider trading.¹⁵⁰ However, this would likely be because, as a former ASIC Chairman put it, private loss in such cases is 'less easily identifiable', and so ASIC is concerned instead with the 'public cost' of compromised market integrity.¹⁵¹ By definition, the question the subject of this article only concerns contraventions that are apt to cause identifiable (and thus compensable) loss or damage.

C Impact of Compensatory Priority on Achieving Deterrence

This section compares the deterrent effect of compensatory orders and punitive sanctions and concludes that an enforcement strategy modified in the ways I have described would be sub-optimal from the point of view of impact-calibration and extended deterrence.

1 Deterrent Effect of Compensation

If a requirement to pay compensation has a credible deterrent effect, this would be a strong reason in favour of a regulator compensatory priority. The traditional mechanism for obtaining compensation has been private suit, the deterrent effect of which is doubted by some scholars¹⁵² and advocated by others,¹⁵³ while some — such as Coffee,¹⁵⁴ Dorman¹⁵⁵ and Calkins¹⁵⁶ — go so far as to say that proper compensation is a necessary condition for deterrence. A survey conducted by Parker and Nielsen in the competition context found that regulated entities were most worried about enforcement that required compensatory awards.¹⁵⁷ However, it appears that these scholars attribute the deterrent effect to the fact

¹⁵⁰ Ian Ramsay and Miranda Webster, 'ASIC Enforcement Outcomes: Trends and Analysis' (2017) 35(5) *Companies & Securities Law Journal* 289, 296.

¹⁵¹ Tony D'Aloisio, 'Insider Trading and Market Manipulation' (speech delivered to the Supreme Court of Victoria Law Conference, 13 August 2010) 3.

¹⁵² See, eg, Hodges and Voet (n 45) 267.

¹⁵³ Popper (n 136) 188.

¹⁵⁴ Coffee (n 138) 435 n 133.

¹⁵⁵ Roderick G Dorman, 'The Case for Compensation: Why Compensatory Components are Required for Efficient Antitrust Enforcement' (1980) 68(5) *Georgetown Law Journal* 1113, 1117.

¹⁵⁶ Stephen Calkins, 'Corporate Compliance and the Antitrust Agencies' Bi-Modal Penalties' (1997) 60(3) *Law and Contemporary Problems* 127, 149–54.

¹⁵⁷ Parker and Nielsen (n 140) 573, 579–80.

that the quantum of compensatory remedies will often — in cases of mass injury — far exceed any pecuniary penalty that an entity would be liable to pay. A deterrent effect should not be assumed where this is not the case or where the compensation is insignificant given the size of the entity's balance sheet.

Moreover, the quantum of compensation can present a problem for regulators. At the heart of responsive regulation is *proportionality* — enforcement tools should be tailored to the contravention and escalated or de-escalated as appropriate; that way, both over- and under-deterrence are avoided and entity behaviour can be more effectively moulded.¹⁵⁸ In some areas, for example shareholder class actions for breach of continuous disclosure obligations, the settlement or damages award can be astronomical, even in cases where ASIC considers the conduct amounting to breach to have been 'less serious' and therefore deserving of a smaller penalty by way of infringement notice.¹⁵⁹ The problem with this is that the regulator's threat of escalation in the event of future non-compliance pales in comparison to the compensation payout already made; thus, the 'dialogic' regulatory engagement is undermined.¹⁶⁰ This effective, calibrated deterrence is difficult to achieve if the priority is to deliver compensation whatever its quantum.

2 *Deterrent Effect of Punitive Sanctions*

There are two key deterrent benefits from punitive sanctions that, in my view, would be hindered by a regulator focus on delivering compensation. The first is the exact counterpoint on the quantum issue: punitive sanctions are *calibrated*. When ASIC does not litigate, it can impose a fine by way of infringement notice. When it does litigate, the civil penalty is subject to judicial oversight and contested submissions.¹⁶¹

Secondly, sanctions offer better 'extended deterrence', which is concerned with the indirect social and economic impacts of a punitive measure. Deterrence is more effective the greater the 'notoriety of the misconduct',¹⁶² because injury to reputation is highly consequential.¹⁶³ It is true that a large compensation

¹⁵⁸ See Legg (n 34) 161–2; Rose (n 124) 1303.

¹⁵⁹ ASIC, 'RG 73: Continuous Disclosure Obligations: Infringement Notices' (Regulatory Guide 73, October 2017) 4.

¹⁶⁰ Gunningham (n 48) 120.

¹⁶¹ See, eg, *ASIC v Hochtief AG* [2016] FCA 1489.

¹⁶² Popper (n 136) 188.

¹⁶³ Michael Legg and Dimity Kingsford Smith, 'Banks Risk All by Neglecting Image', *The Australian* (Sydney [is this correct?], 7 September 2018) 26; Brent Fisse and John Braithwaite, *The Impact of Publicity on Corporate Offenders* (State University of New York Press, 1983) 1.

payout can be damaging to an entity's reputation; hence, IOSCO and Fisse argue that compensation delivers 'accountability' that merely 'writing a cheque' to the state does not.¹⁶⁴ In my view, however, sanctions offer a distinct and irreplaceable kind of accountability — namely, that conduct that is *wrong* requires reprimand. Social-psychological research demonstrates the normative power of wrongness as it is contained in concepts like 'crime'.¹⁶⁵ These subtle, often subconscious factors play a role in shaping behaviour and are important for the perceived legitimacy of a system of law enforcement. Sanctions can also involve important non-financial measures such as the cancellation or variation of licences to operate, or the disqualification or imprisonment of company officers. As Hanlon reminds us, 'individual accountability and responsibility' is a core legal value that should be fulfilled even if action against corporations has been taken, or harm has been repaired or compensated.¹⁶⁶ Moreover, targeting *individual* wrongdoing can impact the behaviour of companies,¹⁶⁷ and may offer one tangible way to modify a corporate 'culture' that permits breaches to occur.¹⁶⁸

A regulator compensatory priority would likely lead to the avoidance of enforcement tools that offer these benefits — in my view, an undesirable outcome from a responsive regulation perspective.

D *Impact on Other Regulatory Goals*

Enforcement is only one aspect of regulation. An agency such as ASIC must consider the broader 'strategic regulatory significance' of any action that it takes.¹⁶⁹ Other activities like education, persuasion and policy advice have an important function in securing compliance.¹⁷⁰ IOSCO suggests that it is a benefit of compensatory measures that they can be paired with education and compliance training.¹⁷¹ This is true, but is also the case with punitive sanctions. I have greater concern about the broader strategic detriment of regulators being less interested in sanctioning wrongdoers. The clarification and development of legal principle,

¹⁶⁴ IOSCO (n 133) 37; Brent Fisse, 'Redress Facilitation Orders as a Sanction against Corporations' (2018) 37(1) *University of Queensland Law Journal* 85, 87.

¹⁶⁵ Van Prooijen (n 55).

¹⁶⁶ James Patrick Hanlon, 'Individual Criminal Liability Related to the Corporation', in James T O'Reilly et al (eds), *Punishing Corporate Crime: Legal Penalties for Criminal and Regulatory Violations* (Oxford University Press, 2009) 41.

¹⁶⁷ See, eg, Clough and Mulhern (n 31) 4–10.

¹⁶⁸ See generally the discussion regarding 'changing culture' in the *Final Report* (n 1) 388–93.

¹⁶⁹ ASIC, 'Private Court Proceedings' (n 13) 3.

¹⁷⁰ ASIC, 'Approach to Enforcement' (n 13) 1.

¹⁷¹ IOSCO (n 133) 37.

which is furthered by contested litigation, is an important adjunct to ASIC's education, policy advice and persuasion initiatives. But more fundamentally, there is a practical harmony between 'softer' regulatory engagement with industry and 'harder' enforcement action; in a 'dialogic regulatory culture', each reinforces the other.¹⁷² It would be unfortunate if the regulator neglected one side of this equation — the upper levels of the enforcement pyramid — in an attempt to function mainly as a consumer compensation agency.

VI CONCLUSION

As Australian corporate conduct came under intense and highly publicised scrutiny during the Royal Commission, so too did the conduct of the conduct regulator. ASIC has fully embraced the recommendations made by Commissioner Hayne that deal with its own approach to enforcement. In updating its enforcement model, ASIC has been and will continue to be supported by legislative reform, both to its own powers and to the scheme of duties and penalties that apply to regulated entities. The central change to ASIC's enforcement approach is its adoption of the 'Why not litigate?' operational discipline. That mantra effects a renewed strategic prioritisation of the need to ensure appropriate punishment or censure of those who break the law, above and beyond other goals that the regulator may be interested in achieving, such as the delivery of adequate redress to victims of misconduct. The purpose of this article has been to interrogate that prioritisation and consider whether it would be preferable for the regulator to adopt the opposite position, and more readily focus its resources on the delivery of compensation to victims of misconduct.

The central argument advanced in this article — that a regulator compensatory priority would be an effective way to deliver redress to victims but would unduly impede other desirable regulatory objectives — used the assumptions and logic of responsive regulation as its yardstick. It was beyond the scope of the article to engage in a substantive critique of that theory or its symbolic manifestation in the enforcement pyramid. However, given the extensive adoption of responsible regulation, including by ASIC, it is logical to discuss the merits of a compensatory priority, or indeed any shift in regulator focus, from that perspective. The article began by considering the underlying theoretical question: *whom* or *what* does the regulator serve? This discussion was approached broadly, evaluating insights from diverse sources: conventional regulatory scholarship, social psychology, and sociology. The answer was the amorphous 'public interest', which leaves little secure theoretical footing for a compensatory priority. As such, the practical implications of such a shift were

¹⁷² Gunningham (n 48) 120.

taken to be the most important considerations. There is sufficient evidence, in my view, for concluding that regulatory mechanisms are among the most effective at delivering compensation. However, a regulator's choices are complex and its resources must be deployed to ends other than compensation alone, particularly deterrence and compliance. My analysis suggests there is a credible risk that substantial violence would be done to the fulfilment of those goals if the interests of victims were to be preferred in a case of conflicting regulatory objectives. Such a priority should not be adopted.