Dealing with corporate defaulters: Curbing the unfettered exercise of criminal law

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The 1973 Companies Act used the criminal law extensively to enforce numerous provisions of the Act. This process of criminalisation proved ineffective and many provisions of the Act were honoured in the breach rather than the compliance. The drafters of the 2008 Act, following comparative precedent, sought to decriminalise the enforcement mechanisms contained in the Act by introducing a complaint procedure to be investigated by a newly created Companies Commission or the Takeover Panel, as well as introducing compliance notices. This paper examines the international trend to remove criminal sanctions from company law and to introduce alternative means of enforcement. It then proceeds to evaluate the new measures contained in the 2008 Act.

I INTRODUCTION

A primary goal of new company law will be to ensure that through a proper system of corporate governance, disclosure and exposure to market forces, wrongdoing will be discouraged and punished. Traditionally, company laws have left the enforcement of their provisions to shareholders, the liquidator in winding-up, and the Director of Public Prosecutions. Experience has shown that these methods of enforcement are inherently defective.[1]

Professor Baxt, who was a representative to the Australian Law Reform Commission, said the following while arguing in favour of decriminalisation of company law:

> If I were rewriting the Companies Act I would decriminalize a lot of it. I think that there are far too many criminal penalties in areas where there should not be. I query why you want criminal penalties in some of the situations where there are not major problems ie: failure to file accounts etc.

He says:

> Certainly you can penalize them monetarily but keep the criminal element out of it.[2]

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[1] The Department of Trade and Industry, South Africa *South African Company Law Reform for the 21st Century: Guidelines for Corporate Law Reform* (May 2004) at 45.

[2] The Parliament of the Commonwealth of Australia *Company Directors' Duties: Report by the Senate Standing Committee on Legal and Constitutional Affairs* (November 1989) ch 13 at 189.

In its 2004 policy paper, the Department of Trade and Industries proposed, as an important issue for review, that an examination be instituted concerning the appropriate balance to be struck between civil, criminal and administrative sanctions. The reason for this recommendation was that the Companies Act 61 of 1973 was replete with provisions which imposed criminal penalties, whereas alternative remedies such as civil or administrative penalties were too easily eschewed within the legislative scheme.

The policy paper recognised that the decriminalisation of company law could not take place simply by way of a straight replacement of criminal law with the imposition of personal liability on directors. Such enforcement, while potentially effective, would impose excessive burdens upon shareholders and liquidators who would then be faced with the ultimate burden of enforcement. For this reason, the policy document went on to state:

> While the continued role of criminal and civil courts in company law enforcement is not questioned, there is also a need for a body with the power to issue administrative orders and impose fines to ensure the quick resolution of some commercial matters, especially those relating to mergers and take-overs. Thus, a combination of criminal, civil and administrative remedies should be introduced. In addition, measures to disqualify persistent violators from access to public markets and to promote dispute resolution will be considered.[3]

The policy document therefore squarely faced the question of the costs and benefits of employing criminal as opposed to non-criminal measures of enforcement. Even if the benefits of employment of criminal law exceeded the costs, it was contended that various civil and administrative regulatory measures could prove to be either more effective or less costly than the employment of criminal sanctions. In the first place, non-criminal measures may not be subject to the strict procedural requirements which are applied to criminal statutes, now buttressed further by a vast body of related constitutional jurisprudence. Secondly, the traditional criminal law requirements of proof of a culpable mental state, the *mens rea*, often constitutes an insurmountable evidential burden for the prosecuting agency whereas the imposition of strict liability may itself be the subject of constitutional challenge. Furthermore, non-criminal procedures may be better adapted to controlling and regulating violations of a continuing nature. Thus, an interdict procedure which employs a pattern of proof of misconduct to formulate a rule which is tailored specifically to the possibility of future conduct together with the censure triggered by

[3] Op cit (n 1) 46.

contempt proceedings may, each time that the order is violated, be a more effective measure than the employment of more burdensome criminal law mechanisms.[4]

In addition as Tomasic has noted:

> Corporate regulatory authorities have for a variety of reasons had difficulty in dealing with corporate crime as 'crime' and have instead tended to deal with such misconduct in more genteel ways. This is often a very pragmatic decision made as a result of the nature of corporate crime and the difficulties of dealing with such conduct through a legal system that has been based on a model of criminality that is more attuned to what might be described as street crime. Courts have tended to leave the internal governance of corporations to be dealt with within the company through its various organs, such as by the ratification of conduct by an adequately informed general meeting or by the board of directors, and have therefore tended to be reluctant to intervene in internal corporate matters except where there was a clear case of fraud or illegality. It could also be argued that we have two cultures of criminal law and that only one of these is comfortably handled by the criminal justice system.[5]

As Bauchus and Dworkin have contended, much of the analysis of corporate clients' crime tends to blur an important distinction between corporate crime and illegal corporate behaviour, in that not all illegal corporate behaviour is criminal.[6]

There is also a temptation to diminish the importance of the use of administrative penalties and civil action in the context of corporate activities because of the weaknesses of the regulatory system, all to often underfunded and not staffed with sufficient expertise to impose an adequate regulatory supervision on potential corporate offences. Absent such difficulties, this problem would be more appropriately dealt with by way of non-criminal sanctions. In this connection, the caution of Luca and Volpin is relevant:

> Another type of regulatory intervention is enforcement of corporate and security laws through a supervisory agencies and criminal sanctions. Little evidence exists that public enforcement matters_. Yet public enforcement may be the most effective tool to prevent specific forms of expropriation, for

[4] See in general N Morris and G Hawkins *The Honest Politician's Guide to Crime Control* (1970).

[5] R Tomasic 'Corporate Collapse, Crime and Governance – Enron, Anderson and Beyond' (2002) 14 *Australian Journal of Corporate Law* 1 at 7.

[6] Op cit, cited by Tomasic *Corporate Crime and Corporations Law Enforcement Strategies Australia: Centre for National Corporate Law research discussion paper* 1/1993 at 3.

> example insider trading, which are otherwise hard to detect. It may also be needed to impose sufficiently severe sanctions like prison terms in extreme cases.[7]

Significantly for the purposes of the analyses of the 2008 Companies Act the authors consider, in their view, three other more effective legal tools including: strength in internal governance mechanisms, empowering shareholders by granting them the rights to sue the company's directors and by empowering shareholders through ensuring that they have a role in key corporate governance decisions by means of an extension of subject matters to be decided at the shareholders meeting, the provision of super majority requirements, in relation to key decisions, lowering the costs of voting and the mandating of minority shareholder representatives on the board. Further, the authors recommend enhancing disclosure requirements, shareholders rights to sell, vote and sue which is effectively exercised only when such a constituency has adequate access to information. Thus, an extensive regime of disclosure may help alleviate agencies problems and listed companies or as Brandeis so famously said: 'Sunshine is the best disinfectant'.[8]

II COMPARATIVE EXPERIENCE

Before canvassing the legislative response to the policy document, it is instructive to examine, albeit briefly, some relevant comparative application of criminal law to corporate activity.

The United Kingdom's Steering Committee on Company Law Review found that a criminal sanction would remain appropriate where the wrongdoing may prove difficult to detect and there was little incentive for private litigation. In addition, it was important that:

> the criminal sanction be proportionate to the effect of the prohibited: if not an excessive sanction will meet with judicial resistance. For this reason, it is suggested that it would be inappropriate to attach a criminal penalty to the directors' duty of loyalty or to the prohibition against financial assistance.[9]

After the report carefully considered the use of civil sanctions it concluded:

> An example of a civil sanction with an efficient deterrent effect is the 'prophylactic' rule which strips a fiduciary of his profit if he acts (without appropriate authority) where there is a conflict between his interest and duty.

[7] E Luca and P Volpin 'Corporate Governance Reforms in Continental Europe' (2007) 21 *Journal of Economic Perspectives* 117.

[8] Cited by Luca et al supra (n 8) 126.

[9] United Kingdom Steering Group on Company Law Review *Modern Company Law for a Competitive Economy: Completing the Structure* (London, DTI, 2000) ch 13 at 296.

> The sanction thus goes beyond giving the injured party compensation for loss; it is justified in this case because of difficulties of detection and risks of enforcement error.[10]

This approach mirrored an earlier Australian report, which had noted that:

(i) criminal sanctions were perceived as too draconian since these often included custodial sentences, which may not be appropriate;
(ii) courts were reluctant to impose imprisonment as a penalty and instead imposed modest fines that gave the appearance that the law was weak; and
(iii) the criminal standard of proof made it very difficult for the contravention to be publicly enforced.[11]

Consequently, in Australia, a new category of sanctions were introduced known as 'civil penalties' to supplement the traditional criminal sanctions. Under the Australian Corporations Act 2001, criminal sanctions are imposed only when the contravention is accompanied by dishonest intent or recklessness. A civil penalty provision is enforced by the Australian Securities and Investment Commission '(ASIC)' where a civil standard of proof is employed. The civil penalty provision was first introduced to help enforce compliance of duties of directors, but it has since been expanded to cover failure to comply with the statutory requirement to keep financial records and reports, a prohibition against insolvent trading, the provision of financial benefits to related parties, share capital transactions, duties imposed on those involved in the management of managed investment schemes and market misconduct provisions which include the continuous disclosure obligation, market manipulation, insider trading, false trading, market rigging and dissemination of information about illegal transactions.[12]

The remedies available for the authorities in the event of a contravention are:

(i) a pecuniary order (ie payment of a sum of money to ASIC);
(ii) a compensation order for the corporation; or
(iii) a disqualification order.

In addition to the civil penalties under the Australian Corporations Act, 2001, the ASIC may also initiate public interest litigation under s 50 of the

[10] Ibid.

[11] Senate Standing Committee on Legal and Constitutional Affairs *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (November 1989) AGPS, Canberra.

[12] G Gilligan, H Bird and I Ramsay 'Regulating Directors' Duties: How Effective are the Civil Penalty Sanctions in the Australian Corporations Law?' *University of Melbourne Legal Studies Research Paper No. 156.*

Australian Securities and Investments Commission Act 2001, if it appears to the ASIC that it is in the interests of the public for a company to sue a director to recover compensation from the director who has breached his duty.

More recently, the Corporate Law Reform Committee of the Companies Commission of Malaysia examined the use of criminal sanctions in terms of the Malaysian Companies Act of 1966. In dealing particularly with directors' duties, the report concluded the following:

(a) A contravention of the statutory provisions on directors' duties should be enforced by a range of sanctions comprising of criminal sanctions enforceable by initiating criminal proceedings and/or civil penalty proceedings.

(b) Criminal sanctions for the contravention of director's duties should be imposed where the contravention is accompanied by fraud or dishonesty. Where there is no fraud or dishonesty, the contravention should be criminalised.

(c) Where there is no fraud or dishonesty in relation to the contravention of the legislative provision on directors' duties, the regulator should be empowered to bring civil penalty proceedings.

(d) The regulator should be given a general power to initiate civil proceedings on behalf of the company if it appears that it is in the interest of the public to do so.

(e) Criminal sanctions should still be generally used to ensure compliance with the obligation to disclose but not all failures to comply with any procedural requirements should give rise to criminal sanctions.[13]

Broadening its enquiry to the possible use of criminal sanctions to other areas of company law, the Malaysian Commission found that:

(a) in cases where a contravention involves fraud or deliberate wrongdoing or dishonesty, the criminal sanctions should be imposed on officers involved in the contravention and not the company.[14]

(b) In the case of non-compliance with procedural requirements, the criminal liability on the company should be removed where there are meaningful and alternative sanctions available on individuals who are involved in the contravention.[15]

In summary, recourse to the record in these jurisdictions reveals that the treatment of criminal sanctions for breaches of company law should be

[13] Corporate Law Reform Committee for the Companies Commission of Malaysia *A Consultative Document on the Review of Criminal, Civil and Administrative Sanctions in the Companies Act 1965*, at 36. Available at http://www.ssm.com.my/clrc/CD11.pdf.

[14] Op cit (n 14) 39.

[15] Op cit (n 14) 40.

addressed by a forensic examination of the scope for criminal offences to be included effectively in legislation which deals with company law and the balance to be struck between the employment of the potentially draconian criminal justice mechanism and non-carceral techniques of enforcement. In turn that drives the enquiry towards an analysis of the conduct that may need regulation.

In short, the following categories of conduct focus attention on the possible justification for the concomitant sanction:

(a) criminal dishonesty, ie sanctions for offences where dishonest intent needs to be proved;
(b) should criminal law employed for offences where dishonesty is likely but the law merely forbids commission, usually knowingly, of an act that breaches a provision in the legislation which has more than merely procedural significance and which may be regarded as raising a presumption of dishonesty (such as a director authorising a transaction in which he or she has an interest);
(c) similarly, should criminal sanction be used for a procedural or minor regulatory obligations such as the filing of documents;
(d) administrative penalty could be used where a civil penalty is imposed by the act of a public authority for non-compliance with a legislative provision;
(e) civil (private) action can be brought by ordinary stakeholders, whether they are minority shareholders, employees, or creditors.[16]

From this categorisation, it follows that there is a need to examine the potential application of differing forms of enforcement for different forms of conduct. These can be broken down as follows:

(a) specific enforcement; that is, action to compel actual implementation of a requirement in a specific case, as distinct from generally applicable sanctions;
(b) naming and shaming; arrangements for increasing the effectiveness of sanctions by drawing attention to breaches of the law; and
(c) persons who should be held liable in criminal law and, in particular, the liability of companies and the officers of the company including directors, managers, employees, and professional advisers.[17]

III RECENT SOUTH AFRICAN INITIATIVES: 2008 ACT

Taking this categorisation of conduct and the consequent potential range sanctions into account, a return can be made to South African company law by way of a comparison between the 1973 Act and the 2008 Act.

[16] Op cit (n 10) 414.
[17] Op cit (n 10) 415.

(1) *The Companies Act 61 of 1973*

Under the 1973 Act, the legislation was replete with criminal offences. Briefly stated, the position can be summarised thus: s 161 of the 1973 Act read with ss 143 to 149, s 153, s 156 and s 162 imposed criminal liability for a range of activities relating to the offer of shares to the public, to the contents of the prospectus, the registration and issue of the prospectus and untrue statements contained therein.

Section 189 imposed criminal liability on directors or officers who breached provisions relating to Chapter XI of the Act, which contained a series of provisions relating to proxies, the production of accounting records and financial statements. Section 425 of the Act incorporated specific offences under the Insolvency Act.

Sections 234 to 241 governed the position of a director with a direct or indirect interest in significant contracts entered into by the company of which he or she was a director. These provisions thus imposed an obligation upon such a director to disclose these interests; failure to so do could be met with a criminal sanction. Sections 249, 250 and 251 imposed criminal liability for acts that related to the falsification of rewards as well as the suppression of records, documents, certificates and similar evidence.

In addition, the company could be held criminally liable for a failure to comply with the formal requirement of respecting names, the misuse of the company seal, failure to comply with the registrar's request for amended articles, and a failure to provide a member with a copy of the memorandum of articles.

This brief summary reveals the manner in which the 1973 Act made extensive use of criminal law. Its employment was undertaken in a haphazard and unsystematic way, without any recourse to the core purpose of the imposed sanction or the significance of the provision, non-compliance with which could be visited with a criminal sanction.

(2) *The Companies Act 71 of 2008*

The 2008 Act has radically reduced the use and scope of criminal law. Sanctions are employed, in essence, where the Act seeks to strengthen the other tools which can ensure governance of the corporation, such as the provision of adequate information to all applicable stakeholders. Thus, in terms of s 26, it is an offence to fail to provide access to the member's register or to the minute books. Similarly, the importance of information to stakeholders is strengthened, in that the offences relating to the making of false statements and falsification of books or records have all been incorporated into the new Act. The use of criminal law relating to the protection of financial statements has also been retained.

In certain instances, the Act has relied exclusively on the common law of fraud to provide the sanction; for example forgery of security certifi-

cates. Significant changes have been introduced to the regime governing the liability of directors, where the concept of a sanction shifts from the use of criminal law to the imposition of civil liability upon the individual director of the company. But there are some innovations which are even more important in tilting the emphasis away from the employment of criminal law. It is to these that the analysis must turn.

(a) Compliance notices

The most novel feature of the 2008 Act is the introduction of a compliance notice provision. A newly established Companies and Intellectual Property Commission '(CIPC)', or in the case of a takeover, the Takeover Regulation Panel '(TRP)' may issue a compliance notice in the prescribed form to any person, whom the CIPC/TRP, on reasonable grounds, believes has:

- contravened the Act; or
- assented to, was implicated in, or directly or indirectly benefited from, a contravention of the act unless the alleged contravention could otherwise be addressed in terms of the Act by an application to a court.[18]

A compliance notice may require the person to whom it is addressed to:

- cease, correct or reverse any action in contravention of the Act;
- take any action mandated by the Act;
- restore assets or their value to a company or any other person;
- provide a community service, in the case of a CIPC notice or
- take any other steps reasonably related to the contravention and designed to rectify its effect.[19]

When the compliance notice is issued, the CIPC or the executive director of the panel must send a copy of the notice to the regulatory authority which granted a licence or similar authority to the entity, in terms of which that person was authorised to conduct business.

A compliance notice indicates the person or the association to whom the notice applies, the provisions of the Act which have been contravened, the details and nature and extent of the non-compliance, any steps that are required to be taken, the period in which those steps must be taken and the penalty that may be imposed if the steps contained in the compliance notice are not so taken.

Given the importance of the compliance notice, a person issued with such a notice may apply, in terms of s 172 of the Act, to the Companies Tribunal, in the case of a notice issued by the Commission, or to the Take

[18] Section 171(1) of the 2008 Act.
[19] Section 171(2) of the 2008 Act.

Over Special Committee, in the case of a notice issued by the executive director of the panel, or to a court, in either case, for a review of the notice within[20] a specified period. The Tribunal or the Special Committee or a court can confirm, modify or cancel all or part of the compliance notice.[21]

The compliance notice remains in force until it is set aside by either:

- the Companies Tribunal, or a court (in the case of a CIPC notice), or the Take-over Special Committee, or a court (in the case of TRP Executive Director notice); or
- the CIPC or TRP Executive Director; or
- the CIPC or TRP Executive Director issues a compliance certificate[22] to the effect that there has been compliance with the requirements of the notice.[23]

If a matter has been investigated and the CIPC and the respondent have agreed to a resolution of the compliant, the CIPC may record the resolution in the form of an order. If the person which or who is the subject of the complaint consents to that order, the CIPC may apply to the High Court to have it confirmed as a consent order, in terms of its rules.[24] The court, on application by the CIPC or TRP may impose an administrative fine for a failure to comply with a compliance notice. The fine may not be more than the greater of 10 per cent of the company's turnover for the period during which the company failed to comply with the compliance notice and the maximum prescribed by the Minister; the minimum so prescribed being R1 million.[25]

It is significant that in providing for an administrative fine for non-compliance with the notice, s 175(2) of the Act specifies the factors to be taken into account in the determination of an appropriate administrative fine. These include:

(a) The nature, duration, gravity and extent of the contravention;
(b) Any loss or damage suffered as a result of the contravention;
(c) The behaviour of the respondent;
(d) The market circumstances in which the contravention took place;
(e) The level of profit derived from the contravention;
(f) The degree to which the respondent co-operated with the commission or panel or the court; and
(g) Whether the respondent had previously been found to be in contravention of the Act.

[20] Section 172 of the 2008 Act.
[21] Section 172(1) of the 2008 Act.
[22] Section 171(5) of the 2008 Act.
[23] Section 171(6) of the 2008 Act.
[24] Section 173(1) of the 2008 Act.
[25] Section 175(5) of the 2008 Act.

In summary, the 2008 Act has dispensed with the almost blanket employment by the 1973 Act of criminal sanctions and has replaced this blunt system with numerous targeted sanctions, in particular administrative fines, subject to careful guidance as to the appropriate factors to be taken into account in the imposition of such fines. Further, the fine becomes the ultimate sanction, in that a breach of the applicable provisions of the Act are first visited with a compliance notice which, in turn, provides the commission or the Take Over Panel with an opportunity to ensure the enforcement of the Act, without the necessity of instituting a prosecution with all the analysed attendant difficulties.

A further initiative to promote the objects of decriminalisation can be seen in the four alternatives for addressing complaints regarding alleged contraventions of the Act or for the enforcement of a provision of a right, whether sourced in terms of the Act or in the Company's Memorandum of Incorporation or in terms of its rules.[26]

An aggrieved party can;

(1) Attempt to resolve the dispute, using alternative dispute resolution procedures;
(2) Apply to the Companies Tribunal for adjudication, but only in respect of any matter for which such an application is permitted in the Act;
(3) Apply to the High Court for appropriate relief; or
(4) File a complaint with the commission.

As an alternative to an application to court or the lodging of a compliant to a commission, the complainant may refer the matter to the Companies Tribunal or to an accredited entity for resolution by mediation, conciliation or arbitration.[27] In terms of s 166(3) of the Act, an accredited entity is considered to be a juristic person or an association of persons which meets the criteria presented by the Minister and has been so accredited. The commission may also accredit such a body over which it is given monitoring powers.

(b) Further innovation

There are two further provisions which require comment in this connection. The first concerns an extended power of standing to apply for remedial relief under the Act. An application can be made by any person directly affected by an act of the company, by a person acting on behalf of any person directly so affected who cannot act in his or her own name, persons acting as a member of or in the interest of a group or class of

[26] Section 156 of the 2008 Act.
[27] Section 166(1) of the 2008 Act.

affected persons, an association acting in the interest of its members or persons acting in the public interest with the leave of the court.[28]

In this connection, the Act, by way of an extension of standing has followed the provisions of s 38 of the Constitution[29] which radically extending a restrictive regime of standing provided for in the common law, which, in essence, compelled an applicant to show a personal and direct interest in the case. The *locus classicus* is the decision in *Patz v Greene & Co.*[30]

Secondly, in terms of s 166 of the Act, it is clear that the new legislation envisages the possibility of a process of conciliation, mediation or arbitration to resolve a particular dispute. It appears that the other party must agree to the use of this alternative resolution process and that neither the tribunal nor the accredited entity possesses compulsory jurisdiction in terms of s 166. If the tribunal or an accredited entity to whom a matter has been referred for alternative dispute resolution (ADR) concludes that either party is a not participating in good faith or that there is no reasonable probability of the parties resolving the dispute raised during the process, it issues a certificate in the prescribed form stating that the process has failed.[31]

Assume, however, that the complainant eschews the ADR alternative. In terms of s 156*(b)* of the Act, such a person, seeking to address an alleged contravention of the Act or to enforce rights under the Act or the memorandum or rules, has the option of applying for one of the remedies contained in a menu of adjudication options as set out in this provision. The tribunal, if chosen, is then obliged to conduct proceedings to determine the outcome of the complaint in accordance with natural justice but, as set out in s 180(2), the proceedings are designed to be less formal than those in a court. Provision is, however, made for the parties to participate through a representative if they so choose. At the conclusion of the hearing, the presiding member will issue a decision together with written reasons for that decision.

IV CONCLUSION

The use of criminal law in the context of company law remains an important element in the enforcement of key provisions of the Act. Given the increasing concern for governance and accountability of a company to stakeholders whose interests are inextricably linked to the fortunes of the company, viable enforcement mechanisms are important. Where, for example there is a breach of the duty of loyalty by directors, litigation

[28] Section 157(1) of the 2008 Act.
[29] Act 108 of 1996.
[30] 1907 TS 427 at 433 to 435.
[31] Section 166(2) of the 2008 Act.

which is initiated to hold recalcitrant directors accountable to their legal mandate invariably become extremely costly. An element of public enforcement may then be the only appropriate and viable means of ensuring that key provisions of the Act are not honoured only in the breach. Restitutionary remedies may provide incentives for shareholders to launch civil actions, thereby reducing the need for criminal penalties, but the incentive may be unlikely to consistently trump the problem of cost of litigation.

To be sure, criminal sanctions hold their own problems. A criminal prosecution triggers off the possibility of a range of constitutional challenges by an accused. In turn, this can prolong the trial and cause proceedings to be even more complex. Further, in South Africa there is a paucity of commercial prosecutorial expertise to run complex commercial criminal trials efficiently.

For these reasons, the 2008 Act contains only seven offence sections, although s 214(3) is extremely wide, being central to the enforcement in that it makes it an offence to disregard a compliance notice. It may be argued that s 214 of the Act, which underpins the compliance regime, is, in substance, a substitute for many of the criminal provisions that were contained in the 1973 Act. But the criminal sanction then becomes a mechanism of last resort. However, as noted, the criminal penalty is targeting at key provisions which are designed to promote accountable corporate governance. Table 1 appended to this paper eloquently illustrates the attempt to move from a scatter gun to a laser instrument.

The new established supervisory bodies, the Companies Commission and the Takeover Panel, are vested with key enforcement powers, while the ultimate sanction for non-compliance with their orders remains a criminal penalty. Thus a corporation which breaches an order risks the censure of these supervisory bodies. In this way, the Act seeks to introduce an important element of administrative supervision upon recalcitrant corporations. If the legislative design succeeds the criminal law will be used, as it should be, sparingly and where the prosecution of offenders holds a realistic possibility of success.

TABLE I

South Africa Companies Act
Comparison of Enforcement Provisions

1973 Companies Act	1973 Act Offence	2008 Companies Act
15A(4)	Violation of ministerial order not to disclose information concerning the company	No comparable ministerial power

1973 Companies Act	1973 Act Offence	2008 Companies Act
37(2A)	Failure by director or officer to take reasonable steps to ensure company compliance with requirements to disclose loans by the company to its holding company or sibling subsidiary	No comparable requirement
38(3A)	Company director or officer contravention of prohibition of loans for subscription of company's shares	Directors who approve any such loan without required shareholder approval are personally liable to the company: s 44, read with s 77(3)*(e)*(iv).
46	Failure to comply with registrar's order to change company name	Companies Tribunal will now issue such orders, which may be filed in the High Court as a court order, and enforced accordingly: s 160, read with s 195(8)
49	Failure by company to comply with formal requirements respecting names	Commission is authorised to add the appropriate formal elements to the company's name on registration: s 11(3), read with s 14(2)*(a)*
50(3)	Misuse of company seal, etc by director or officer	Enforced by personal liability: s 32(6) and (7)
50(4)	Failure by company to put its name on things	**An offence: s 32(1) to (5)**
58(2)	Failure by company to comply with registrar's request for amended Articles	Comparable power to request is enforceable through compliance notice system: s 17(5)*(b)*, read with ss 171(1)*(a)* and (7), and 214(3).
67(2)	Failure by company to provide member with a copy of the Memorandum and Articles	**An offence: s 26(1)*(a)* and (6)**
80	Failure by company, director or officer to satisfy filing requirements related to commissions paid on subscription of shares	No comparable filing requirements
81	Failure by company, director or officer to satisfy prospectus requirements relating to discounted shares	No comparable section
91A	Unauthorised actions relating to uncertificated securities	Comparable prohibitions are enforced through personal liability, and may also be enforced through the compliance notice system: s 53, read with s 55.

1973 Companies Act	1973 Act Offence	2008 Companies Act
93(5)	Failure by company, director or officer to satisfy requirements concerning register of allotments of shares	No separate requirements respecting allotments. Company is required to maintain securities register in prescribed form. Failure is enforceable through compliance notice system.
96	Failure by company, director or officer to satisfy formal requirements relating to issuance of shares after subscription	No comparable time limit. Company is required to issue shares upon receipt of consideration for them. Enforceable through compliance notice system, and also through civil court proceedings
98(5)*(b)*	Failure by company to comply with requirements to notify registrar of redemption of preference shares	No comparable filing requirement
102	Failure by company, director or officer to satisfy requirements to notify registrar of court consent to an action by dissenting shareholder concerning variable shares	No comparable filing requirement
112	Failure to comply with any of 5 sections concerning register of members	Company is required to maintain securities register in prescribed form. Failure is enforceable through compliance notice system: s 24(4)*(a)*, read with s 50
113	Failure by company, director or officer to satisfy requirements respecting access to members' register	**An offence for the company only: s 26(1)*(a)* and (6)**
131	Failure by company to comply with 3 sections respecting debentures register	No separate debentures register required. Debentures included in definition of 'securities', and in requirements to maintain securities register in prescribed form. Enforced by compliance notice system. s 50
132	Forgery of securities certificates and impersonation of shareholder for purposes of obtaining securities certificate	No comparable provision. Criminal prohibition of forgery or fraud applies.

1973 Companies Act	1973 Act Offence	2008 Companies Act
139	Failure to comply with requirement to issue notice of refusal to transfer securities	No comparable option to refuse a transfer. Regulations respecting maintenance of securities register should amplify this topic. Enforceable through compliance notice system, and civil courts
140	Failure by company, director or officer to satisfy formal time requirements relating to transfer of shares	No comparable provision respecting time for transfer. Regulations respecting maintenance of securities register should amplify this topic. Enforceable through compliance notice system, and civil courts
141(8) 143 145 145A 146 146A 147 149 153(3) 153(4) 156	Failure to comply with requirements concerning offers of shares for subscription	Comparable provisions are enforceable through compliance system, or through criminal fraud prosecutions.
162(1) 162(2)	Untrue statements in prospectuses	Enforced through liability: ss 104 to 106
164 165 166(2) 168(3) 169(5)*(a)*	Failure by company, director or officer to comply with requirements respecting allotments	Comparable provisions are enforceable through compliance system: ss 107 to 111
170(4)	Failure to comply with requirements respecting registered office	Comparable provisions are enforceable through compliance system: s 23
171(2)	Failure to comply with requirement to list directors' names on company correspondence	No comparable requirement
172(7)	Prohibition on doing business before receiving a certificate to commence business	No provision for such a certificate is made in this Act.
179(5)	Failure by company, director or officer to comply with requirement to hold annual meeting, or with a direction by registrar to convene such a meeting	Requirement to hold meeting is enforceable by court order: s 61(12).
181(6)	Failure by director or officer to convene a meeting when required by shareholders	Comparable provisions enforceable by court order: s 61(2), (3) and (12)

1973 Companies Act	1973 Act Offence	2008 Companies Act
185 186(4) 189(2)*(b)* 189(4)*(a)* 189(7) 192	Failure by company, director or officer to comply with requirements respecting notice of meetings, circulation of resolutions, exercise of proxy rights, adjournment of meetings	Comparable provisions enforceable by compliance notice or civil proceedings in court: s 62
200(5) 200(6)	Failure to satisfy requirement to circulate and file special resolution with the registrar	No comparable filing requirement. Shareholders' right of access to resolutions is generally addressed at s 26.
204	Failure to comply with requirements to keep minute books	Comparable requirements are enforceable through compliance notice system: s 24(3)*(d)*.
206	Company, director or officer failure to comply with requirements to grant access to minute books	**An offence for the company only: s 24(3)*(d)*, read with s 26(1)*(a)* and (6)**
207(2)	Failure to comply with obligation for 'fair reporting' of meetings	No comparable specific obligation
211(6)	Failure by pre-incorporation directors to subscribe shares and sign consent to serve, and for post-incorporation directors to sign consent to serve	There is no comparable requirement for pre-incorporation directors to subscribe shares. The requirement that directors must have consented to serve is enforced by the fact that they become directors only when their consent has been deposited with the company. Without a signed consent, they are not directors. There is no requirement to file consents, but the company must file a notice of every change in director. The regulations could require the filing of the consent as part of that notice. The filing requirements are enforceable through the compliance notice system.
211(7)	Company falsely claiming a person is a director	No comparable provision
213	Acting as director while not having the required qualification shares	The Act is silent on this matter, leaving both the question of qualification shares, and the remedy, to be set out in the MoI.

1973 Companies Act	1973 Act Offence	2008 Companies Act
215(5) 216(5)	Failure by company to keep a register of directors, provide notices of change to the registrar, and provide access to the register	The comparable provisions concerning keeping a register and filing change notices are enforced by compliance notice, **while the access requirements are enforced by an offence provision**. s 24(3)*(b)* and (5), read with s 26.
218(2)	Acting as a director while disqualified	The comparable prohibition is enforceable through a court application to have the offending person declared delinquent or under probation: s 69(2) to (4), read with s 162.
219(5)	Acting as a director in contravention of a court order of delinquency	The comparable prohibition is enforceable by contempt proceedings: s 162.
222(2)*(a)*	Issuing of shares to director without shareholder approval	The comparable provision is enforceable by rendering the directors liable to the company: s 41, read with s 77(3)*(e)*(ii).
226(4)*(b)*	Issuing a loan to a director	The comparable provision is enforceable by rendering the directors liable to the company: s 45, read with s 77(3)*(e)*(ii).
234(4) 237(5)	Failure by director to comply with duty to disclose personal financial interests	The comparable provision is enforceable by rendering the directors liable to the company: s 75, read with s 77(2)*(a)*.
238(2)	Failure by company to provide notice that a director has a personal interest	No comparable provision
239(3)	Failure by company to adequately record in the minutes that a director has a personal interest.	The comparable provision is enforceable through compliance notices. As well, the regulations governing minutes could address this point, bringing the matter within the ambit of s 24: s 73(6) and (7).

1973 Companies Act	1973 Act Offence	2008 Companies Act
242	Failure to comply with other minute-keeping requirements	The comparable provision is enforceable through compliance notices. As well, the regulations governing minutes could address this point, bringing the matter within the ambit of s 24: s 73(6) and (7).
245(3)	Failure of company, director or officer to keep, or sign, attendance register	No comparable obligation
249	Making a false statement	**Offence: s 214**
249(2)	Making a false statement under oath	**Offence: s 215(2)*(e)***
250(1)	Falsification of books or records	**Offence: s 28(3) and s 214(1)*(a)***
251(1)	False statement on other written statements	**Offence: s 214**
252	Failure to comply with obligation to file a court order with registrar	The comparable obligation is enforceable by compliance notice: s 162(3).
253(2)	Failure to comply with demand by registrar relating to share transfers	No comparable power of commission to make such a demand
255	Failure to comply with ministerial demand for information	No comparable power in Minister. **However, generally, it is an offence to hinder the administration of the Act: s 215.**
256(5) 256(6)	Acting contrary to a Minister's notice imposing restrictions on share transfers	No comparable power in Minister
260(4)	Failure to attend when summoned, or otherwise hinder investigation	**Offence: ss 176 to 179, read with s 215(1) and (2)*(d)* to *(g)*.**
268C(3) 268C(6)	Failure to appoint company Secretary	Comparable provision is enforceable through compliance notice system: s 86(1).
268H(2)	Failure to print name of secretary of company documents	No comparable obligation
268I(5)	Failure to file notice of change of company secretary	Comparable obligation is enforceable through compliance notice system: s 85(3).

1973 Companies Act	1973 Act Offence	2008 Companies Act
269(5)	Failure to appoint auditor	Comparable provision is enforceable through compliance notice system: s 86(1).
271	Failure to notify registrar of failure to appoint auditor	No comparable obligation
275(4)	Acting as an auditor while disqualified	Disqualification in terms of professional standing is now regulated through Auditing Profession Act. Disqualification in terms of relationship to company is enforceable through compliance notice system: s 90(2).
276	Failure to notify registrar of changes in auditor	Comparable obligation is enforceable through compliance notice system: s 85(3).
284(4)*(a)*	Failure to comply with obligations respecting accounting records	**Offence to fail to keep proper accounting records with intent to deceive or mislead: s 28(3).**
286(4)*(a)*	Failure to comply with obligations respecting annual financial statements	**Offence to produce false or misleading statements.** Other requirements enforceable through compliance notice: ss 29(6) and 30
287	Issue of incomplete financial statements	**Offence to produce false or misleading statements: s 29(6)**
287A {CLAA}	Production of false or misleading financial reports	**Offence to produce false or misleading statements: s 29(6)**
288*(a)*	Failure to comply with requirements for group financial statements	**Offence to produce false or misleading statements.** Other requirements enforceable through compliance notice: ss 29(6) and 30
291(4)	Failure to exercise right to apply to registrar for an exemption from group reporting requirements	The Act enforces statutory obligations, not optional rights.
295*(a)*	Failure to have AFS disclose loans to directors	**The comparable requirements are enforceable under the general offence provisions relating to misleading financial statements: s 29(6), read with s 30(4) and (5).**

1973 Companies Act	1973 Act Offence	2008 Companies Act
297(9)	Failure by directors to provide relevant information to auditor	The comparable obligation is enforceable by direct application by the auditor to the high court: s 93(1)*(a)* and (2).
298	Circulation of an unsigned AFS	The comparable obligation is enforceable through the compliance notice system: s 30(3)*(c)*.
299(3)	Failure to include a Director's report with the AFS	The comparable obligation is enforceable through the compliance notice system: s 30(3)*(b)*.
300A {CLAA}	Failure by auditor to comply with requirements to attend meetings	No comparable provisions, as regulation and discipline of auditors now falls under Auditing Professions Act
302	Failure to provide copy of AFS as required	**Comparable provisions are enforceable by offence provisions: s 31, read with 24(3)*(c)*, s 26.**
308	Failure to comply with requirements relating to interim or provisions financial reports	**Comparable provisions are enforceable by offence provisions in s 29(6), which applies to all financial statements.**
309	Failure to provide copy of AFS to persons entitled to it	**Comparable provisions are enforceable by offence provisions: s 31, read with s 24(3)*(c)***, s 26.
311(7)	Failure to annex court order of scheme of arrangement to all subsequent copies of memorandum or articles	Comparable requirements are enforceable through the compliance notice system: s 155(7).
312(4)	Failure to provide required information to creditors with respect to proposed scheme of arrangement	Comparable notice requirements are enforceable through creditors' right to apply to court at any time: s 155.
312(5)	Failure by director or debenture holder to provide relevant information with respect to a proposed scheme of arrangement	No comparable obligation

1973 Companies Act	1973 Act Offence	2008 Companies Act
313(3)	Failure by company to file a copy of court order with registrar.	Comparable requirements are enforceable through compliance notice: s 155(7).
333(1) 333(2)	Failure of external company, its officers and directors to register and comply with obligations	Comparable provisions enforced through specific compliance notice, and administrative cease trading order: s 23(6).
356	Failure by company to give required notice of resolution to voluntarily wind up	Procedures are slightly modified, such that the winding-up does not commence until the notice is filed with the commission, and it is the commission who notifies the Master, and the Master publishes a *Gazette* notice: s 80, read with s 357.
357 363 363A(2) 365 414(3) 418 421(8) 425	Matters regarding winding up	Partially preserved
424(3)	Reckless conduct of business	Comparable prohibition enforceable by show-cause notice, and cease trading order: s 22
440D(3)	Failure to attend when summoned by Panel	**Offence: s 215(2)**
440D(4)		**Offence: s 215 (2)**
440I(2)		**Covered by general offence provision for breach of confidence: s 213**
440CC {CLAA}	Confidentiality of matters before SRP	**Covered by general offence provision for breach of confidence: s 213**
440FF {CLAA}	Issuance of financial report that fails to comply with reporting standards	**Offence if false or misleading**. Otherwise enforceable by compliance notice: s 29(6)